EMPLOYMENT TRIBUNALS

Claimant: Mr A Ljungberg

Respondent: NetApp UK Limited

Heard at: Watford Employment Tribunal via Cloud Video Platform

On: 26 and 27 October 2021

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr S Purnell, Counsel

JUDGMENT

1. The claimant's claim for statutory redundancy pay fails and is dismissed.
2. Any claim for contractual redundancy pay whether brought as a breach of contract or a claim for unauthorised deductions from wages fails and is dismissed.
3. The claimant's claim for notice pay, whether brought as a breach of contract or a claim for unauthorised deductions from wages fails and is dismissed.

REASONS

Introduction

1. This case was listed for a two day open preliminary hearing with the single question to be determined: whether the tribunal has jurisdiction to hear the claimants claims.

2. The claimant represented himself and the respondent was represented by Mr Purnell of counsel. There was an agreed bundle of documents running to more than 400 pages and I had witness statements from the claimant and on behalf of the respondent from Heidi Hamilton-Reed, HR manager for the UK and Ireland, Todd Brown, Vice-president, Worldwide Professional Services and Managed Services, and Patricia Reed, US Immigration Programme Manager.

3. Ms Hamilton-Reed is employed by the respondent. Mr. Brown and Ms Reed are both employees of NetApp Inc in the United States where they are based, and indeed they both gave evidence from their homes, and I am grateful to them for making themselves available given the time difference.

4. The witness statements were taken as read and each of the witnesses were cross-examined. The evidence was completed on day one and I heard submissions on the morning of day two. Mr Purnell provided detailed written submissions and Mr Ljungberg provided oral submissions and an email summarising those submissions in writing. In reaching my judgement I have taken account of all the evidence and the submissions.

The claims

5. Before hearing the evidence, it was necessary to establish precisely what claims were being pursued by the claimant.

6. In Section 8 of the claim form the claimant indicated that he was claiming a redundancy payment and that he was owed notice pay and “other payments”. The reference to other payments was a reference to some employment benefits and related to the claim for notice pay. Thus, in essence the claims before the tribunal are for notice pay and a redundancy payment. The ET1 form does not allow a claimant to differentiate between a claim for a statutory redundancy payment and a contractual redundancy payment. The presumption is that a claimant would set out details of the claim more fully but in this case the claimant has not done that. On the face of it therefore it was unclear whether he was claiming a statutory and/or a contractual redundancy payment and he does not say what his notice period was.

7. The claim for statutory redundancy pay is of course of claim brought under the Employment Rights Act 1996 (“ERA”). Claims for the failure to pay any or any part of the due notice payment and for a contractual redundancy payment maybe put as a claim for unauthorised deductions from wages or for breach of contract. I will refer to this again below.

Law

Claims for redundancy pay

8. To qualify for a redundancy payment a claimant must have been an employee of the respondent within the meaning of s.230 ERA and have two years' qualifying service at, in this case, the effective date of termination of the employment (s.135 and s.145(2)(b) ERA) and have been dismissed by reason of redundancy within the statutory definition of that term which I need not set out here.

9. Any question arising under the ERA as to the right of an employee to a redundancy payment, or the amount of a redundancy payment, may be referred to an employment tribunal (s.163(1) ERA) before the end of the period of six months beginning with the relevant date (again in this case that would be the effective date of termination of the employment).

Claims for unauthorised deductions from wages

10. By virtue of s.23 ERA a worker may present a complaint to an employment tribunal that the employer has made a deduction from his wages which has not been agreed by the employee or which is not a statutory deduction or one provided for by the contract of employment. For these purposes a deduction includes paying less to the worker than is properly payable or paying nothing at all.

11. The complaint must be presented within three months of the unauthorised deduction subject to the jurisdiction of the tribunal to hear a claim presented outside of the normal time limit where the tribunal is satisfied that it was not reasonably practicable for the claimant to present the claim with within the normal time limit and provided that the extra time taken is reasonable.

Claims for breach of contract

12. Claims for breach of contract in the employment tribunal are made under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. These claims are money only claims where the sum was outstanding or arose on termination of the employment. The jurisdiction is limited to awarding a maximum of £25,000 compensation.

13. A breach of contract claim in the Tribunal must be presented within three months beginning with the effective date of termination of the contract giving rise to the claim (Article 7(a) of the 1994 Order). Where a tribunal is satisfied that it was not reasonably practicable for a contract claim to be presented within the normal time limit, it may extend the period for such a claim to be brought

within such further period as it considers reasonable (Article 7(c) of the 1994 Order).

Statutory minimum notice/notice pay

14. An employee who has been continuously employed for one month or more is entitled to receive a minimum period of notice of termination of employment from their employer (s.86 ERA). That notice is one week for the first two years and an additional week for each complete year of service over two years, up to a maximum of 12 weeks after 12 years' service (s.86(1)(c) ERA).

15. If an employer dismisses an employee without giving proper statutory notice, the employee may bring a claim for breach of contract or an unlawful deduction from wages claim (see above).

Reasonably practicable extension of time

16. The burden of proving that it was not reasonably practicable to present a claim in time lies with the claimant (**Porter v Bandridge Ltd** [1978] ICR 943. The case law has provided the following points:

    a. Ignorance of the time limit is not in itself sufficient to warrant an extension of time (**Wall's Meat Co Ltd v Khan** [1979] ICR 52. The ignorance must be reasonable;

    b. The ignorance will not be reasonable if it arises because the claimant failed to make reasonable enquiries (**Wall's Meat** above);

    c. Where a claimant has knowledge of the right to make a claim, it is no excuse that he or she failed to seek advice about enforcing that right (**Reed in Partnership Ltd v Fraine** UKEAT/0520/10).

Territorial Jurisdiction

17. The final legal issue is the territorial scope of claims brought under the ERA. This has been the subject of much discussion over the years and the courts have developed the following guidance:

    a. The question of territorial effect is one of statutory construction. The question is: did Parliament intend the relevant provision of the ERA 1996 to protect the employee in question (**Lawson v Serco** [2006] ICR 250);

    b. The overriding guiding principle is whether the employee's employment has a sufficiently strong connection with Great Britain as to confer statutory protection under the ERA. This is a question of law to be

determined by an evaluation of the underlying facts (**Serco**; **Ravat v Halliburton Manufacturing and Services Ltd** [2012] ICR 389);

c. The relevant question must be assessed as at the time of the relevant act or omission giving rise to the cause of action, (**Serco**)

d. The case of those who not only work but also live outside Great Britain requires an especially strong connection with Great Britain (**Ravat**).

e. Where an employee ordinarily works outside Great Britain the presumption is against jurisdiction unless there is something which puts the case in an exceptional category (**Serco**).

f. As such, where an employee worked and was based abroad, the fact they may have originally been recruited in Great Britain by a British employer will not be sufficient in itself to bring them within the ERA 1996 (**Serco**).

g. An employee's base is where he should be regarded as ordinarily working at the material time, even if he or she spends days, weeks or months working overseas (**Serco**). Indicative factors in determining the employee's base include:

    i. Where the employee is headquartered, or where their travel begins and ends.
    ii. Where the employee has their home.
    iii. Where the employee is paid and in what currency.
    iv. Where the employee pays tax and social security contributions.
    v. Where the employment relationship has been managed from an operational and HR perspective.

Issues

18. The issues in this case are:

a. By whom was the claimant employed at the effective date of termination;

b. Does the tribunal have jurisdiction to hear any of the claimant's claims and that may be determined by considering;

    i. Time limits including whether if any claim was presented outside of the primary time limit, time for presenting the claim should be extended to allow the claim to proceed;
    ii. Territorial jurisdiction.

Findings of fact

19. I make the following findings of fact.

20. The claimant commenced employment with the respondent on 4 September 2000.

21. During 2014 there were discussions about the claimant moving to work in the USA. To put the matter neutrally, the claimant would be working at the respondent's parent company NetApp Inc.

22. As part of the, what I will term relocation, in October 2014 arrangements were made by the claimant to obtain rented accommodation in the USA and NetApp Inc filed a relocation authorisation with its corporate relocation agent on behalf of the claimant.

23. On 20 November 2014 NetApp Inc filed a non-immigrant petition with Homeland Security on form L-1A. If granted, this immigration status allows the successful petitioner to work in the USA for up to three years.

24. Although the claimant owned a house in the UK, between 3 and 25 December 2014 he lived in temporary accommodation in the UK pending his move to the USA.

25. The claimant travelled to the USA on 25 December 2014. He never returned to live in the UK.

26. The respondent continued to pay the claimant his salary until the end of January 2015. The last pay slip issued to the claimant by the respondent was dated 27 January 2015. Thereafter the claimant's pay was processed by NetApp Inc. This is discussed further below.

27. The respondent issued the claimant's P45 indicating that his employment terminated on 28 February 2015. The P45 was sent to the address which the respondent held for the claimant and although the claimant was no longer living there, this was his correspondence address as far as the respondent was concerned. The claimant sold that house in the spring of 2015.

28. On 21 October 2015 NetApp Inc applied to Homeland Security for a Green Card for the claimant. That application was approved in October 2016.

29. On 24 October 2020 the claimant was notified by NetApp Inc of the immediate termination of his employment.

30. The claimant contacted ACAS to commence early conciliation on 3 April 2021 and his early conciliation certificate was issued on 6 April 2021.

31. The claimant presented his claim to the tribunal on 6 April 2021.

Discussion and conclusions

32. The first and perhaps simplest matters to deal with relate to time limits.

33. The claimant's claims for notice pay and/or contractual redundancy pay, whether expressed as breaches of contract or unauthorised deductions from wages, were presented significantly out of time. That is true irrespective of which company employed the claimant at the effective date of termination of his employment.

34. The claimant made no application for time to be extended. The claimant is an educated and intelligent man with access to legal advice and he made no suggestion as to why it was not reasonably practicable for claims under the ERA to be brought within the primary time limit set out in the ERA, nor, in the case of a breach of contract claim, in the 1994 Order. In relation to the latter, the claimant gave no evidence and made no submissions as to why it would be reasonable to extend time.

35. That being the case I conclude that the tribunal does not have jurisdiction to hear the claimants claim in respect of notice pay or, if this is being pursued, contractual redundancy pay.

36. That leaves the remaining claim for statutory redundancy pay and that does require a determination of who the claimant's employer was at the effective date of termination of the employment.

37. The respondent asserts that in the autumn of 2014 the claimant agreed with NetApp Inc to relocate his role from the UK to the USA. The claimant does not really take issue with that fact. What the claimant says is that the relocation was a temporary assignment, it was not, he says, his intention that his employment with the respondent end and he take up in effect new employment in the USA.

38. in support of his argument the claimant refers to the fact that for a few months after he moved to the USA, he continued to undertake some of the work he was doing for the respondent, and he continued to be the manager to whom a number of the respondent's staff continued to report. However, the claimant does accept that towards the end of 2015 all of that ceased. He also points out that the process seemed somewhat lacking.

39. The claimant says that he was ignorant of the fact that his P45 was issued because it was sent, he says to an address he no longer used. On the other hand, Mr Purnell on behalf of the respondent argues that the issuing of the P45 is clear evidence that the claimant's employment with the respondent terminated on the date set out in the P45. Of course, it is trite law that's an employee's employment cannot effectively be terminated unless the employee knows. So that for example if an employee is dismissed by letter following a disciplinary hearing the dismissal does not take effect until the employee has read the letter dismissing him or has had a reasonable opportunity to do so. In this case the respondent sent the P45 to the address they had for the employee on record as he had not advised the respondent that he had a different address. The issuing of the P45 is evidence that it was the intention of the respondent to terminate the claimant's employment with them. it is a moot point whether that was sufficient to effectively terminate the employment given that the claimant did not receive the P45. However, on balance my conclusion is that given that the P45 was sent to the address which the claimant had notified the respondent was his correspondence address, and given that notwithstanding he was no longer living there he had not advised the respondent of that fact, the sending of the P45 was sufficient notice to the claimant that his employment with the respondent had terminated 28 February 2015 [113].

40. However, if I am wrong about that it is my judgement that in any event based on all the evidence I heard, the claimant clearly understood that his employment was going to go forward with NetApp Inc, that is to say they were going to be his employer. And even if that is wrong, it will have been plain to the claimant during 2015 that he was in fact employed by NetApp Inc.

41. That fact is apparent for a number of reasons.

42. First, on 20 November 2014 lawyers acting on behalf of NetApp Inc. wrote to the claimant sending him copies of the non-immigrant petition filed on his behalf with Homeland Security [73]. Those documents included information about the employer of the person in respect of whom the petition was being made, in this case of course the claimant. The documentation was completed by the lawyer and signed off by Patricia Reed on behalf of NetApp Inc. The employer is clearly stated to be NetApp Inc and at no point in the claimant's evidence did he say that he raised any query about that.

43. Second, I accept the evidence of Patricia Reed that the application for a green card was initiated by the claimant. That application requires that the applicant be employed in the USA and the forms clearly indicate that the employer is NetApp Inc.

44. Third, from February 2015 NetApp Inc paid the claimant his salary, deducted state and federal taxes and provided the claimant with a range of NetApp Inc employee benefits. At no point did the claimant suggest that he was not entitled to those benefits because he was not employed by NetApp Inc but was employed by the respondent. Those benefits included:

    a. Medical, Dental and Vision insurance coverage [305].
    b. An employment-related Flexible Spending Account [161].
    c. Participation in NetApp Inc's 401(k) defined-contribution pension plan, only available to US employees [305].
    d. Life and Accidental Death and Dismemberment Insurance [305].
    e. Long-term disability insurance [305].
    f. Participation in the Employee Stock Purchase Plan [305].
    g. A further medical benefits scheme [305].
    h. An imputed income scheme for domestic partners [305].

45. For those reasons I agree with the respondent that the claimant's employment with the respondent terminated on 28 February 2015 and thereafter he was employed in the USA by NetApp Inc until his employment with them terminated on 24 October 2020.

46. That leaves the question of whether the claimant can bring himself within the scope of the ERA. In order to determine that we need to consider the factors identified in **Serco**.

    a. At the date of termination of his employment by NetApp Inc the claimant's employment had no connection with the Great Britiain and certainly not, an "especially strong" connection that expatriate workers who are based abroad must prove in order to establish jurisdiction. It is irrelevant that NetApp Inc recruited the claimant from the UK. The claimant did not show that as a Net App Inc employee he had a much stronger connection with Great Britain and with British employment law than with any other system of law.

    b. He was paid by NetApp Inc in the USA, in US dollars, and paid state and federal tax and made social security contributions in the USA, and not in the UK.

    c. He received employment-related benefits to which only US employees of NetApp Inc are entitled.

    d. He made contributions to a US pension scheme.

e. Notwithstanding that he travelled for work, his base was and remained California from December 2014. This was where he travelled from and to.

f. For all purposes his employment relationship was with NetApp Inc. He was not on the respondent's systems, and he had no employment relationship with the respondent after he moved to the USA save for some brief overlap during part of 2015.

g. His home was and remains in California. He has property there. He has no property in the UK.

47. For those reasons all of the claimant's claims fail and are dismissed.

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Employment Judge Brewer

Date: 27 October 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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