EMPLOYMENT TRIBUNALS

Claimant: **Mr S Hemdam**
Respondent: **Healys LLP**

Heard at: **London Central (by video)**

Date: **11 January 2022**

Before: **Tribunal Judge McGrade acting as an Employment Judge (sitting alone)**

Appearances
Claimant: Barklem (of counsel)
Respondent: Ohringer (of counsel)

RESERVED JUDGMENT

1. The claimant's claims of unlawful deduction from wages under the Employment Rights Act 1996 and holiday pay under the Working Time Regulations 1998 are struck out.
2. The claim for breach of contract is not stuck out but is subject to the attached deposit order.

REASONS

Background

1. The claimant presented claims of unlawful deduction from wages, wrongful dismissal, holiday pay under the working Time Regulations, breach of contract and unfair dismissal by ET1 dated 30 April 2021.

2. At a case management preliminary hearing on 1 September 2021, the claim of unfair dismissal was withdrawn. A further preliminary hearing was fixed for today's date to consider the respondent's strike out application, on the basis that:-

    a. the claim was not an employee or worker of the respondent. His contract to provide legal services was/is with Omar Shams Law Firm trading as Healy's Egypt which was a wholly separate entity to the respondent firm.

b. The matters raised by the claimant are not within the tribunal's territorial jurisdiction as the professional services provided by the claimant were outside the jurisdiction, namely in Egypt.

3. The respondent has sought strike out of the claims on the basis that they have no reasonable prospects of success.

Preliminary issues

4. The respondent's counsel requested the claimant disclose his home address, as the address provided on the application was not the claimant's home address. I was provided with an address for the claimant namely Building 4, 231 Degla Maadi, Cairo, Egypt 11728. The claimant's address is amended accordingly.

5. The respondent's counsel explained that he wished the tribunal to make deposit orders, in the event that he was unsuccessful in his primary position that all the claims should be struck out. I allowed the claimant's counsel to take instructions on the claimant's means, in order that I could deal with this.

6. A joint bundle was to be lodged by 5 January 2022. The respondent's solicitors lodged two joint bundles on 5 January 2021. The claimant's solicitors lodged two consecutively numbered bundles on 9 and 10 January 2021, which were intended to replace the second of the joint bundles lodged by the respondent. I shall refer to the bundle lodged on 5 January 2021 as the first bundle and the bundles lodged on 9 and 10 January 2021 as the second bundle.

7. The respondent's counsel objected to the inclusion of a number of the documents within the second bundle, and in particular two witness statements and the exhibits referred to in those statements, as these were lodged late and he had not had sufficient time to take instructions. I refused to allow the two witness statements to be included within the bundle. When fixing today's preliminary hearing, Employment Judge Heath refused to make a direction allowing for witness statements as he considered the application should focus on the contractual documentation. As this is a strikeout application, I consider it is more appropriate to concentrate on the written documentation. I also note the statement of Omar Shams was only provided to the respondent's counsel shortly before midnight on the day before the hearing and therefore he did not have time to read it and take instructions.

The legal principles

Strike out

8. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides as follows:-

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds: -

a. that it is scandalous or vexatious or has no reasonable prospect of success.

b. that the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious.
c. for non-compliance with any of these Rules or with an order of the Tribunal.
d. that it has not been actively pursued.
e. that the Tribunal considers that it is no longer possible to have a fair hearing in respect of a claim or response (or the part to be struck out).

Deposit order

9. Rule 39 of the Employment Tribunal Rules of Procedure 2013 provides as follows:-

(1) Where at a Preliminary Hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit

(3) The Tribunal reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented as set out in Rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides a specific allegation or argument against the paying party for substantially the same reasons given in the deposit order-

(a) The paying party shall be treated as having acted unreasonably pursuing that specific allegation or argument for the purpose of Rule 76 unless the contrary is shown and;
(b) The deposit shall be paid to the other party or if there is more than one to each other party (or the parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order

Respondent's submissions on the identity of the employer

10. The respondent's counsel addressed me on the skeleton argument provided by him. He directed my attention to what he considered to be the two key documents in this

case, namely the employment contract dated 11 February 2019 between Omar Shams t/a Healys Egypt and the Claimant (page 105 first bundle) and the co-operation agreement between Omar Shams t/a Healys Egypt and the respondent dated 10 February 2017 (page 87 first bundle).

11. He submitted the essential issue in this case was the identity of the claimant's employer and who he had contracted to work with. He submitted the written documentation was clear and reflected the reality of the situation. Both parties to the agreement were solicitors and the terms of the contract had been considered and clarified by the parties before they entered into it.

12. The cooperation agreement provided further support for his argument as it demonstrated Omar Shams t/a Healys Egypt and the respondent were two separate parties, who wished to enter into an agreement to collaborate and share clients.

Claimant's submissions on the identity of the employer

13. The claimant's counsel made very detailed oral submissions. He began by outlining that the respondent had not made full disclosure of the documents requested. He submitted that the contract of employment does not reflect the true situation and is a construct. He referred me to **Clark v Harney Westwood & Riegels [2021] IRLR 528** and the importance of considering the true intentions of the parties, which may involve an enquiry as to what happened between them and events subsequent to the signing of the contract. He submitted the purpose of the contract and cooperation agreement was to navigate the regulatory environments in both the UK and Egypt and that the agreements did not reflect the reality of the situation.

14. He submitted that Omar Shams t/a Healys Egypt had not yet been set up and never existed. The cooperation agreement predated the contract of employment by two years. It therefore did not compliment the employment contract in the way the respondent wished to portray it. He submitted it would be necessary for Omar Sham to give evidence to resolve this issue.

15. He referred to the advert (page 265 first bundle) showing the respondent is a full-service law firm and that recruitment for Egypt was made under the UK entity. The email issued to the claimant with the contract came from the UK entity. The employment contract issued was an English style template and was not individually negotiated. He referred to the timing of the documents, and in particular that the cooperation agreement had been entered into in February 2017, the draft contract of employment was issued in June 2018 and signed in February 2019. He submitted the dislocation of dates supported his contention that the documents did not reflect the reality of the parties intention and that the respondent wished to navigate various regulatory requirements.

16. He referred me to the Daily News report dated 12 October 2019 (page 114 second bundle) which described the respondent as opening its first branch in the Middle East. He also referred me to the accountants' letter dated 10 January 2022 (page 266 second bundle) which outlined that personal tax references and tax references for law firms differ. If a separate entity existed, there would be a separate tax reference.

17. He noted that Omar Shams, Marios Pattihis and Dino Skinner were all members of the UK respondent (page 228 second bundle). They closely managed the claimant and

the Egypt desk. He suggested a reference to us at paragraph 3 of the email at page 99 of first bundle referred to Omar Shams and Marios Pattihis. The claimant's email of 1 December 2020 (page159 second bundle) suggests Marios Pattihis was intervening in a supervisory role.

18. The documents at pages 246-248 of the second bundle refer to an investment in the Healys Egypt office being discussed at a management meeting of the respondent.

19. The documents at pages 184, 190 and 191 of the second bundle show the respondent was responsible for payment of salaries for Egyptian staff and other operating expenses. The respondent also lent money to Omar Shams (page 188 second bundle, page 126 first bundle) and £50,000 had been ring fenced by the respondent (page 194 second bundle). The claimant was raising the issue of salary with a UK partner and threatening to sue the respondent (pages 154 and 155 first bundle).

20. The lease for the office in which the claimant worked was in the name of the respondent (page 125 first bundle) and they were dealing with these issues (page 146-9 first bundle).

21. The client care letter (page 135 first bundle) issued by Omar Shams showed a UK email address and the Healy's logo along with details for the Cairo office. The invoices and other documents were in similar terms. The client brochure (page 205 second bundle) describes the respondent as having offices in London, Brighton and Cairo.

22. Many of the administrative arrangements for the claimant, such as creating his email account were done in the UK (page 124 first bundle). The automatic reply placed on the claimant's email account following his dismissal directed the recipient to a partner in the United Kingdom (page 178 second bundle).

23. The website documentation showed the registrant country for the Egyptian website as being in Great Britain. A Google search for Healy's Egypt produces details of both the UK and Egyptian operations.

Respondent's submissions on territorial jurisdiction

24. The respondent's counsel conceded that, were I to refuse the strike out request on the basis that the respondent was not the employer, the claim for breach of contract could proceed to a final hearing, as the respondent is domiciled in the UK and section 15C (2) of the Civil Jurisdiction and Judgements Act 1982 gives this tribunal jurisdiction. I accept that this is the case.

25. The respondent's skeleton argument contained detailed submissions regarding the territorial scope of the Employment Rights Act. He also relied upon **Bleuse v MBT Transport Ltd [2008] ICR 488** as authority for the proposition that claims under the Working Time Regulations 1998 are subject to the same rules on territorial scope, when considering work carried out outside the European Union. He referred to **British Council v Jeffrey [2019] ICR 929** and a summary of the law provided by Underhill LJ. He also outlined a list of the factors that may be relevant in determining this issue.

26. The contract made clear the claimant's place of work was in Egypt. He was to be paid in Egyptian pounds. The governing law of the contract was Egyptian law and the courts of South Cairo had exclusive jurisdiction to settle any dispute.

Claimant's submissions on territorial jurisdiction

27. The claimant's counsel pointed to four issues, which he submitted were exceptional factors giving this tribunal territorial jurisdiction. Firstly, that the respondent is an entrepreneurial firm and that the claimant was recruited to expand the respondent's Middle Eastern operation. Secondly, the management structure showed the claimant was managed by the London office and integrated into the UK operation. Thirdly, that his recruitment was carried out by the respondent and his contract drafted in an English style and not individually negotiated. Fourthly, that payment was made from the UK entity.

Discussion and conclusions

28. I accept that, when dealing with this strike out application, I have to establish whether the ground relied upon for striking out has been established. If so, I then have to decide whether to exercise my discretion to strike out the claim **HM Prison Service v Dolby [2003] IRLR 694**, and **Hassan v Tesco Stores Ltd UKEAT/0098/16**.

29. In **Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1126** the Court of Appeal said that "It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute."

30. In relation to the identity of the employer, the Supreme Court in **Autoclenz Ltd v Belcher [2011] IRLR 820** addressed the issue of considering all the circumstances of the case when considering the terms of a written agreement:

> 35. …the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem…'

31. This issue was also considered by the EAT in **Clark v Harney Westwood & Riegels [2021] IRLR 528**:

> 52…Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties"

32. **Lawson v Serco [2006] IRLR 289** and **Ravat v Haliburton Manufacturing and Services Ltd [2012] IRLR 315** both set out general principles on which an individual living and/or working abroad may fall within the territorial scope of Employment Rights Act 1996. This requires an examination of the strength of connections with Great Britain. Underhill LJ summarised the law in relation to the territorial scope of the Employment Rights Act 1996 in **British Council v Jeffrey [2019] ICR 929** as follows:

> 2…In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.
>
> (6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what Ravat was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/European Union-funded international schools considered in Duncombe.

The claimant's contract

33. The terms of the employment contract, particularly when viewed against the cooperation agreement between the respondent and Omar Shams, point very strongly in the direction of Omar Shams being the employer. However, it is the claimant's position that this documentation does not reflect the true intentions of the parties, being drafted in this way in order to navigate regulatory requirements in the UK and Egypt. There are also a number of factors which suggest the respondent had a substantial input into the manner in which the claimant carried out his work and exercised a degree of control. I cannot therefore be satisfied that the claim that the respondent was the employer has no reasonable prospects of success.

34. However, given the terms of the employment contract and the cooperation agreement, I am satisfied it is appropriate to impose a deposit order on the basis that the claims have little reasonable prospect of success. The claimant's counsel indicated the claimant is in receipt of no income and is being supported by his extended family. The respondent's counsel submitted that a deposit order of £50 per complaint would be appropriate. I accept this.

Territorial jurisdiction

35. The contract of employment lists a number of factors which suggest a very strong connection with Egypt. The address given for the claimant is in Cairo. The place of work is Cairo. He is to be paid in Egyptian pounds. Termination of the contract is in accordance with Egyptian labour law. The governing law is Egyptian law and the courts of South Cairo have exclusive jurisdiction to resolve the dispute. Although I was referred to a letter in the bundle from the respondent to UKVI advising the claimant had been invited to attend training in London, his counsel accepted that he had no instructions to indicate the claimant had ever come to the United Kingdom for training or work purposes.

36. Although the documentary evidence suggests that the respondent had some involvement in the recruitment of the claimant and an element of control may have been exercised from the United Kingdom, this is against a background in which the claimant worked exclusively in Egypt.

37. Given the strength of the connection with Egypt and the absence of any strong countervailing factors, I am satisfied the claimant's arguments that his claims under the Employment Rights Act and Working Time Regulations fall within the territorial scope of the legislation have no reasonable prospects of success. Given that this is an issue that goes to jurisdiction, I consider it is appropriate to exercise my discretion and dismiss the claims for unlawful deduction from wages under the Employment Rights Act 1996 and holiday pay under the Working Time Regulations 1998.

Tribunal Judge McGrade

Date 4 February 2022

JUDGEMENT SENT TO THE PARTIES ON
04/02/2022

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