EMPLOYMENT TRIBUNALS

Claimant: **Kamaldeep Bedi**

Respondent: Cullen Grummitt & Roe (UK) Limited

Heard at: **London South Employment Tribunal sitting at Croydon**

On: 2nd February 2022

Before: Employment Judge Apted

Representation

Claimant: Litigant in person
Respondent: Mr MacPhail – counsel – instructed by Blake Morgan LLP

RESERVED JUDGMENT

1. The tribunal does not have jurisdiction to hear the claimant's claims for unfair dismissal, holiday pay, "arrears" of pay and "other payments".

REASONS

Background:

2. On the 18th January 2021 the claimant presented a claim to the Employment Tribunal on form ET/1. That claim was resisted by the respondent on form ET/3 on the 18th February 2021.

3. The claimant made claims for:

   a. Unfair dismissal.
   b. Holiday pay.
   c. Arrears of pay
   d. 'other payments'.

4. Early conciliation occurred. ACAS were notified on the 26th November 2020 and an ACAS certificate issued on the 26th December 2020.

5. On the 23rd August 2021, Employment Judge Wright directed that the claims be listed on the 2nd February 2022 for an open preliminary hearing in order for the tribunal to determine two issues:

    a. if the tribunal has jurisdiction.
    b. To consider the respondent's application for a strike out and or a deposit order.

Additional preliminary issues:

Amendment:

6. At the outset of the hearing, I raised a further preliminary issue with the parties, namely whether the claimant should be allowed to make an application to amend his claim to correctly identify the respondent. The amendment was to amend the name of the respondent from the managing director of the company (Susan Grummitt) to the company itself. The company itself had been identified on the ACAS certificate and they were also named in another section of the form ET/1. Mr MacPhail on behalf of the respondent did not object to the application on that basis. I therefore allowed the application and amendment and Order that the name of the respondent be amended to Cullen Grummitt and Roe (UK) Limited.

Receiving evidence from abroad:

7. This was not an issue that the tribunal raised with the parties during the course of the hearing. The tribunal was aware of the Upper Tribunal's decision in *SSHD v Agbabiaka 2021 UKUT 286 (IAC*). On the face of it, this judgment would apply to Employment Tribunal proceedings as they would likely fall within the definition of a civil or commercial law matter. At paragraph 19, the Upper Tribunal stated:

    "*Whenever the issue arises in a tribunal about the taking of evidence from outside the United Kingdom, the question of whether it would be lawful to do so is a question of law for that country, whether or not that country is a signatory to the Hague Convention … In all cases, therefore, what the Tribunal needs to know is whether it may take such evidence without damaging the United Kingdom's diplomatic relationship with the other country*".

8. The case sets out a process which needs to be undertaken in order for evidence from abroad to be taken.

9. As stated, this claim had been listed for a preliminary hearing before the Upper Tribunal had promulgated its judgment in *Agbabiaka*. Although evidence from abroad had been taken, the purpose of hearing that evidence was in effect to determine if the claim is able to proceed or not. The evidence provided was limited to the issues that needed to be determined and was not concerned with the merits of the claim. At the time of writing, there is no guidance as to how tribunals already seized of matters should proceed. In all of these circumstances, in my judgment, it was in the interests of justice

to have taken the evidence and doing so was compatible with the tribunal's overriding objective under rule 2 of the Employment Tribunals Rules of Procedure 2013, as amended; to ensure the parties are on an equal footing, to deal with cases proportionately, to avoid delay and save expense.

The Facts:

10. The claimant is a civil engineer. The respondent is an engineering consultancy specialising in the design, project management and site supervision of port and harbour engineering projects.

11. The claimant is a Canadian citizen who resides in Canada (when he is not engaged on projects in other parts of the world). He has never resided in the United Kingdom and has never visited.

12. The claimant was first employed in Canada by CGR (Canada) Project Management Limited on the 17th August 2015 until the 30th September 2018, as a Senior Site Engineer. During this period of time, he lived and worked in Canada. CGR (Canada) Project Management Limited are a standalone entity that comes within the CGR group of companies.

13. The claimant was then employed by CGR C.Ltda (Ecuador) on the 16th October 2018 until the 31st October 2019 as an Assistant Resident Engineer. During this period of time the claimant lived and worked in Ecuador. CGR C.Ltda (Ecuador) are also a standalone entity that comes within the CGR group of companies.

14. As that project came to an end, in August 2019 the claimant moved to the Ivory Coast to commence work on a project there. Between August 2019 and the 31st October 2019, the claimant remained employed by CGR C.Ltda (Ecuador).

15. Between the 1st November 2019 and November 2020, the claimant was paid through CGR (UK) Limited. In order to undertake the project in the Ivory Coast, CGR began the process of setting up a local legal entity - CGR Cote d'Ivoire - to perform administrative tasks. Whilst that local entity was established, CGR processed functions – such as travel expenses and payroll through CGR (UK) Ltd. The process of establishing this entity was completed in November 2020. Once completed, the claimant would have entered into a contract with CGR Cote d'Ivoire, as his colleagues did. In the event, the claimant never entered into a contract of employment with CGR Cote d'Ivoire.

16. In March 2020, as a result of the coronavirus pandemic, the claimant firstly relocated to the capital city of the Ivory Coast and then subsequently managed to obtain a flight to Canada. As he was being paid through CGR (UK) Ltd, he agreed to be placed on the UK government's Coronavirus Job Retention Scheme between the 20th April 2020 until his dismissal on the 6th November 2020.

The Law:

17. *Section 196 Employment Rights Act 1996* used to exclude employees who ordinarily worked outside Great Britain from the right to claim unfair

dismissal. However, it was repealed by the *Employment Relations Act 1999* and not replaced.

18. A general formula has emerged from the case law for determining the circumstances in which an employee who works wholly or partly outside Great Britain can claim unfair dismissal under *section 94(1) Employment Rights Act* or, by extension, other rights under the Act.

19. The basic rule is that the *Employment Rights Act* only applies to employment in Great Britain. However, in exceptional circumstances it may cover working abroad.

20. The leading authorities are now: *Lawson v Serco Limited and two other cases 2006 ICR 250 HL* and *Duncombe v Secretary of State for Children, Schools and Families (No.2) 2011 ICR 1312, SC.* I have also considered *Ravat v Halliburton Manufacturing and Services Ltd 2012 ICR 389 SC* and *Dhunna v CreditSights Ltd 2014 EWCA Civ 1238*.

21. Where an employee works and lives wholly abroad, it will be more appropriate to ask whether his or her employment relationship has *"…much stronger connections both with Great Britain and with British employment law than with any other system of law…"* (as per Baroness Hale in the *Duncombe* case above). The headnote in the Dhuna case (above) reads as follows:

    "…proof of such connection was not established by making a comparison of the relevant merits of British and any competing system of employment law; that, in establishing a sufficient connection, what counted was whether or not the employee was working in Great Britain at the time of his dismissal, rather than what was contemplated when the employment contract was made, and the fact that the claimant had been engaged under an English contract of employment by a company incorporated in England and Wales was not a compelling factor…"

22. It will be necessary to show that the employee is exceptional, as there would ordinarily be a greater connection to the country where the employee lives and works.

23. Insofar as the extension of this principle to other rights is concerned, the leading authority is *Bleuse v MBT Transport Ltd and another 2008 ICR 488, EAT*. In that case, the Employment Appeal Tribunal held that there was no reason why a different test should apply to a claim of unlawful deduction from wages.

24. By analogy therefore, I consider that I am bound by the same principles when I consider other claims where the jurisdictional reach is not provided.

The hearing:

25. The hearing was listed via the Cloud Video Platform. I attended the hearing from a hearing room at the tribunal centre. All other parties joined the hearing via CVP, including the claimant, who joined from Canada. Given the continued pandemic I was satisfied that it was in the public interest for the hearing to be conducted in this way. Despite some initial difficulties, all

parties were able to hear and see each other clearly and I was satisfied that all parties were able to fully participate in the proceedings. I ensured that the claimant, given the time difference, was able to engage in the proceedings effectively. He confirmed that he was.

26. In preparation for the hearing, I was in receipt of the following documents:

    a. Amended Hearing Bundle version 3 – 134 indexed and paginated pdf pages.
    b. Respondent witness statement dated the 28th January 2022.
    c. Claimant's witness statement dated the 28th January 2022.
    d. Updated Schedule of Loss (x2).
    e. Respondent skeleton argument dated the 1st February 2022.
    f. Dhunna v CreditSights Ltd 2014 EWCA Civ 1238.

27. All parties confirmed they were in receipt of these documents.

28. During the course of the hearing, I therefore heard sworn oral evidence from Dr Susan Grummitt on behalf of the respondent, which I noted in my record of proceedings. I also heard sworn oral evidence from the claimant, which I also noted in my record of proceedings. I then heard submissions from Mr McPhail on behalf of the respondent and submissions from the claimant, which I also noted in my record of proceedings.

29. At the conclusion of the hearing, I explained to all parties that I would provide a reserved judgment, which I now do.

30. In reaching my decision, I have taken into consideration all of the evidence in the round. I have only referred to those pieces of evidence necessary to explain my decision. The fact that I do not refer to a piece of evidence does not mean that it has not been considered.

Findings of Fact:

Canada 'project':

31. During this period of time, the claimant had entered into a contract of employment with a company 'registered' in Canada. He lived and worked in Canada. CGR (Canada) Project Management Ltd are a stand-alone company. His contract states that he would be paid in Canadian dollars. The only possible connection to the United Kingdom is that one of the Directors of that company (and signatory to the employment contract) is S.E. Grummitt. There is no other connection to Great Britain. I therefore find that during this period of time, the claimant does not have "much stronger" connections with Great Britain and British employment law than with any other system of law.

Ecuador 'project':

32. During this period of time, the claimant entered into a contract of employment with CGR C.Ltda (Ecuador). He lived and worked in Ecuador. He was paid in US dollars and the contract of employment refers to him being bound by a "Labour Code". I find this to mean the employment law of another country, other than Great Britain. Similarly, the only connection to

Great Britain is that the signatory to the contract of employment is the 'President' – Susan Grummitt, who is described as the 'Employer'. There is no other connection to Great Britain. I therefore find that during this period of time, the claimant does not have "much stronger" connections with Great Britain and British employment law than with any other system of law.

Ivory Coast 'project' – August 2019 – 31st October 2019:

33. During this period of time, the claimant remained employed by CGR C.Ltda (Ecuador). I find that he remained bound by all of the terms of that contract of employment. The only difference is that the claimant was now residing in the Ivory Coast.

34. Also during this period of time, there is a dispute between the parties over who the claimant 'reported' to. The claimant's evidence was that he reported to Dr Grummitt and that he only reported to a man called Peter Biemond in relation to technical matters. So far as the claimant was concerned, Dr Grummitt was the person who he would correspond with and who would "direct" the projects. The respondent's position was that the claimant would report to Mr Biemond. Mr Biemond was a Dutch national who lived and worked in the Netherlands.

35. In my judgment, the issue of who the claimant reported to is of limited assistance. I find that during this period, the claimant was working and living in the Ivory Coast. Even if he were "reporting" to Dr Grummitt, I do not find that to be a sufficient basis upon which it could be said that during this period of time, the claimant had much stronger connections with Great Britain and British employment law than with any other system of law.

Ivory Coast 'project' – 1st November 2019 – March 2020:

36. As I have set out above, during this period of time the claimant was paid through CGR (UK) Limited. He remained living and working in the Ivory Coast. The agreed bundle contains the claimant's pay slip from March 2020 (page 94). This confirms that the claimant was being paid through CGR (UK) Limited and that his 'Department' was "Ivory Coast". This payslip confirms the claimant did not pay any UK tax or make any national insurance contributions. Although the currency in which the claimant was paid is not itemised, Dr Grummitt gave evidence (which I accept), that he was paid in US dollars. Although the claimant was paid by a UK company, I therefore find that he was paid in US dollars, that he did not pay any tax or social security contributions in the UK, and also that he was not a member of a UK based pension or health care scheme. I find that paying the claimant through CGR (UK) Limited was the simplest and most convenient way of administering his salary and other administrative tasks during this period of time whilst the separate legal entity was established in the Ivory Coast.

37. I therefore find that the simple fact that he was paid through a UK company does not mean that during this period of time the claimant has much stronger connections with Great Britain and British employment law than with any other system of law.

April 2020 – November 2020:

38. As a result of the coronavirus pandemic and as the claimant was being paid through a UK company, the claimant was placed within the UK Government's coronavirus job retention scheme during this period. There is a letter within the agreed bundle dated the 18th April 2020 (page 57) confirming this, which is signed by the claimant on the 20th April 2020. This letter states that the claimant "…will still be employed by…" CGR (UK) Ltd and that his "…contract of employment will be temporarily varied…" if he agrees to be placed on furlough. There is a further letter dated the 5th June 2020 extending his furlough (page 60). As stated, the claimant agreed and there are payslips within the agreed bundle confirming his furlough pay (pages 87-93). The claimant points to this letter as proof that he was therefore employed by CGR (UK) Ltd, a British company with an office in Kingston upon Thames. However, as stated above, the claimant was not resident in the UK. He had managed to return to Canada from the Ivory Coast. The payslips within the agreed bundle confirm receipt of his furlough pay and that no tax or national insurance deductions were made. Again, the payslips do not state the currency in which he was paid, but I find having accepted the evidence of Dr Grummitt, that this was in US dollars.

39. In my judgment, the variation to the contract of employment, is a variation of his existing contract to the extent that he agrees to be placed upon furlough. It is not a new contract of employment. Even if I am wrong about that, I find that the fact that he is employed by a UK based company does not by itself mean that during this period of time, the claimant has "much stronger" connections with Great Britain and British employment law than with any other system of law.

Termination – 6th November 2020:

40. On the 6th November 2020, the respondent terminated the claimant's employment. Their letter confirms that he was entitled to 3 months' notice and that he would be paid three months net salary of 9,000 per month US dollars in lieu of notice. The same letter confirms that he would be paid any accrued but untaken holiday pay. The claimant's November payslip appears at page 86 of the agreed bundle and confirms receipt of his salary, back pay, pay in lieu of notice and holiday pay. This also confirms that no tax or national insurance deductions were made. I therefore find that on the 6th November 2020, the claimant was paid his notice pay and holiday pay.

Conclusions:

41. I therefore find that the claimant does not have much stronger connections with Great Britain and British employment law than with any other system of law. Insofar as the claimant's claim for unfair dismissal is concerned, I therefore find that the tribunal does not have jurisdiction to hear this claim. For the same reason, I find that the tribunal does not have jurisdiction to hear other claims under the Employment Rights Act and by analogy any other claims for which the jurisdictional reach is not identified. I therefore find that for these reasons the tribunal does not have jurisdiction to hear the claimant's other claims for holiday pay, "arrears of pay" and "other payments".

42. Having concluded that the tribunal does not have jurisdiction to hear any of the claimant's claims, there is no need to consider the respondent's application for a strike out and or a deposit order.

Employment Judge **Apted**

Date: 22nd February 2022