



# EMPLOYMENT TRIBUNALS

## Claimant

Anthony Li

v

## Respondent

Hamad & Hu Limited

**Heard at:** Watford (by CVP)

**On:** 28 February 2022

**Before:** Employment Judge de Silva QC

## Appearances

**For the Claimant:** In person

**For the Respondent:** Peter Lawrence, Consultant

**JUDGMENT** having been sent to the parties on 13 March 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Procedural History

1. In his Claim Form, the Claimant makes claims for unpaid wages for July and August 2019. He also ticked the box for unfair dismissal but that claim is not pursued and the Claimant did not have the requisite continuity of employment to bring such a claim. In the Response, the claim was denied. The Respondent asserted that the Claimant was not an employee but acted as company secretary in the capacity of an external supplier of services or a consultant.

### The Issues

2. At the preliminary hearing on 3 September 2020, the issues for the preliminary hearing were identified as follows:
  - 2.1 Does the Tribunal have jurisdiction to hear the claim if the Claimant's work was carried out abroad?
  - 2.2 Was the Claimant an employee or worker under the definition in s.230 of the Employment Rights Act 1996 whilst carrying out work for the Respondent?
3. Orders were made for a preliminary hearing to hear those issues on 3 June

2021. At the preliminary hearing on 3 June 2021, it transpired the Respondent had not complied with those orders, In particular in relation to full disclosure, witness statements and a statement of legal arguments. Unless orders were made in the terms of those orders and the matter relisted.

4. When the hearing came before me today it appeared on the face of it that the Respondent had still not complied with those orders. However, as Mr Lawrence explained, there was no disclosure to give and no witnesses were intended to be called. As for legal submissions, he intended to rely on a document filed prior to the first preliminary hearing setting out the legal arguments.
5. The Claimant did not assert, when asked, that any document was missing or should be disclosed. While, as Mr Lawrence accepted, the Respondent should have informed the Tribunal that no further steps would be taken, I am satisfied that there was no material breach of the orders of September 2020 or in particular June 2021 which would justify striking out, when the Respondent was not seeking to rely on documentary evidence or a witness statement and the Claimant did not assert that there were documents that should have been disclosed.
6. By agreement, a new issue was before the Tribunal today as follows: was the Claimant entitled to work under Tier 4 Student Visa first, on the basis that his hours were in excess of 20 hours per week; secondly, on the basis that he was company secretary. In effect, this was an illegality defence. This matter had been addressed in the Claimant's evidence and it was proportionate to hear it today.
7. This was a remote hearing by CVP. I heard from the Claimant at the hearing. He gave evidence-in-chief in the form of a 17-page witness statement. He was cross-examined by Mr Lawrence and was asked questions by the Tribunal. He gave clarifying evidence following questioning which was in the nature of re-examination.
8. I was referred to a bundle of documents prepared by the Claimant running to 109 pages. Both parties made closing submissions orally.

### **Findings of Fact**

9. I make the following findings of fact. The Respondent is a company with a registered office in Cambridge which is in the business of private education, among other things providing premium academic development and admissions consultancy services for Chinese students, in order to expand their higher education opportunities.
10. It has organised study trips for Chinese students enhancing their higher education opportunities and all-round experiences. It also specialises in teaching Chinese students English, helping them to experience British culture and settle in the UK, regardless of their background and English language

level.

11. The Claimant was at all material times a PhD student on a Tier 4 Student Visa. One of the restrictions stated on his visa authorisation was that he should not work more than 24 hours during termtime.
12. He was interviewed for the role at the Respondent in Cambridge on 13 February 2019. At this meeting, he said that he would work outside term time between July and August 2019 when he expected to have less workload from the university and more time for the Respondent. This was between years 1 and 2 of his studies.
13. In the term, the Claimant had lectures and also supervisor meetings. Although supervisor meetings could take place outside termtime by arrangement, they primarily took place within termtime. He was given accommodation during termtime.
14. The Claimant has never been to the Respondent's registered office and was not able to say whether anyone worked there. There is no reference in the evidence to employees working from there or the Claimant speaking to any such employees. Therefore, I find that no employees worked there.
15. On 25 July 2019, the Claimant was notified that he had been appointed as company secretary. A contract of employment was sent in draft to the Claimant on 10 August 2019, i.e. during the course of his engagement. It was suggested to the Claimant in cross-examination that this was not intended to confer employment status and was sent either on poor advice or by mistake. However, there was no evidence that this was the case. As the Claimant observed, this point was made for the first time only in 2021 in the course of the proceedings.
16. The contract referred in draft to the Claimant being based at 20 Station Road, Cambridge, the registered office of the Respondent. It further stated: "As we may reasonably determine you will be required to work outside the UK for a period or period exceeding one month according to business purposes".
17. The Claimant's duties included such matters as booking meetings at the Business Centre in Cambridge, managing email confirmations about this, assisting in the management of recruiting interviews, recruiting potential candidates, presenting ideas for the Respondent's programmes for candidates and arranging visa applications and business trips for successful candidates.
18. He also proof-read and sent offer letters. He was involved in correspondence for a potential PR partnership and liaised with the respondent's legal advisors. He liaised with the Chinese students and their parents who were, in effect, the customers of the Respondent.
19. It was not clear from the written witness statement where the Claimant was when he carried out duties on behalf of the Respondent. He explained in evidence that the summer term ended in June 2019. He did not have accommodation in Cambridge after this. He accepted that a significant part of his duties was carried out when in Shanghai or in Hong Kong. There was also

a trip to Tokyo which he went to from Shanghai.

20. There was a meeting in Birmingham but he could not recall the date of this, its purpose or who was present. He said that it had been agreed at the meeting in February 2019 that he would work in Shanghai, it being discussed that this would enable him to save money on accommodation.

## The Relevant Law

### Territorial Jurisdiction

21. First, I deal with territorial jurisdiction. There is no express limitation in the Employment Rights Act 1996 on territorial scope. The leading case is **Lawson v Serco** [2006] IRLR 289. It is an unfair dismissal case that sets out principles regarding implied limits to territoriality which have been taken to apply generally to the provisions within the Employment Rights Act.
22. In identifying the territorial scope of a Tribunal's jurisdiction, the primary factor is the location of the work of the Claimant. If the work is conducted in Great Britain, jurisdiction will usually be established. There may be many situations in which a worker works abroad. For example, peripatetic employees who move around; partial expatriates and true expatriates, including those who work in British enclaves abroad. The broad question will be whether the employee can be said to be based in and therefore operating from Great Britain. If they are, there will generally be jurisdiction.
23. In each of these scenarios, the determination of the implied limits of territorial jurisdiction will not be dependent simply on classifying whether the employee lives, works or is based but on analysis of the entire factual matrix. This will include looking how the contract was being operated in practice and as a whole, rather than simply looking at the place of work in the contract of employment - see for example, **Lawson** paragraphs 26 and 27.
24. In each case, it will be a question of fact and degree as to whether the connection with Great Britain is sufficiently strong to overcome the general rule that the place of employment is decisive, as stated by Lord Hope in the case of **Ravat v Halliburton** [2012] IRLR 315 at paragraph 28.
25. The leading case of **Lawson** referred to above was referred to in the Respondent's submissions, and as stated above, applies to claims under the Employment Rights Act.
26. At the hearing the Claimant candidly accepted that he was not aware of these authorities and, when asked, said that had not turned his mind to the issue of how territorial jurisdiction was to be established. This is no criticism whatsoever of him and I note that he is not legally qualified and not legally represented. He was not in a position to respond to the Respondent's submission this was the correct approach. However, based on the submissions of the parties, I determine this is the correct approach in this

case and I have approached the case on that basis.

### Employment/Worker Status

27. Secondly, I deal with the law relating to employment/worker status. I did not hear directly from the parties on the law relating to employment/worker status but there are authorities at the highest level on these issues. The factors include whether the employee/worker has a right of substitution, see for example, *Pimlico Plumbers v Smith* [2018] UKSC 29. Another factor is the degree of control, see for example, the factors set out by the Supreme Court in the case of *Aslan v Uber* [2021] UKSC 5.

### Conclusions

28. I deal first with the question of the Tribunal's territorial jurisdiction.

29. The focus as set out above is on where the Claimant is based and where he operated from and whether this was within Great Britain. Also relevant is the question of whether the connection with Great Britain was sufficiently strong to overcome the general rule that the place of employment is decisive. I conclude that the following factors are key here:

- a. The overwhelming majority if not all of the Claimant's work was done when he was abroad. There was just one meeting that he referred to in Birmingham that took place in the UK and, as set out above, he could not recall the purpose of this, when it was or who was present. He indicated there might be some work done in the United Kingdom but it is not accepted that this was the case given in the relevant period he did not have accommodation in this jurisdiction and, as he himself said, the agreement was for him to work in Shanghai;
- b. The work concerned Chinese students and the customers were the students and their parents. His activities were not limited to activities in Great Britain and the counterparties he was speaking to were not always in Great Britain;
- c. As for the company, it was registered within Great Britain but it cannot in any practical sense be said to have been operating from here;
- d. The Claimant had never been to the registered offices. He did not know if anyone worked there and, as set out above, I find that nobody was working there;
- e. As set out above based on *Lawson*, the terms of the contract of employment are not determinative. The contract here referred to being based in Cambridge but also referred to him being able to be required to work abroad, and he was so required in practice;
- f. The Claimant dealt with the Respondent from abroad and was managed by Ms Ho from there and she knew that he was in Shanghai.

30. For these reasons I find that he did his work abroad. He was not based in the UK and the connection to Great Britain is not sufficiently strong to overcome the general rule that place of employment is decisive. I do not think the Claimant's right to work in the China is relevant to the question of connection to Great Britain. This is a matter of the law in China and the rules are not before me. In any event, they cannot materially assist in conferring jurisdiction on the Tribunal in Great Britain.
31. Although that ultimately determines the Claimant's claim before the Tribunal, I go on to consider briefly the other two issues. Had it been relevant I would have found that he did work as an employee. He provided his services personally; he was unable to substitute someone else and he was told what to do by the employer through Ms Ho. He was not simply acting as a consultant and did not have the freedom that would normally be conferred by someone on someone who was not an employee and there appears to have been no right to substitution.
32. As for the T4 Student Visa rules, I would not have found the contract to be void for illegality. The work was outside termtime. Termtime was meaningful to him, it was when his lectures took place and when he was given almost all of his supervision.
33. I have not found the alleged rules underlying the Respondent's submission that he was not permitted to work as company secretary and the relevant rules have not been put before me. As I have found above, his duties go well beyond the sort of duties which would be expected of company secretary (such as duties related to administration of the company); for example, he was carrying out commercial activities on behalf of the Respondent including dealing with providers and customers externally.
34. Nonetheless, for the reasons that I have found, and the Tribunal does not have jurisdiction to hear his claim on the grounds of territorial jurisdiction.

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Employment Judge de Silva QC

Date: 18 July 2022

Sent to the parties on

22 July 2022

For the Tribunal office