EMPLOYMENT TRIBUNALS

Claimant: Mrs A Harahap
Respondent: Observatory Southeast Asia Limited

Heard at: Reading
On: 9 May 2023
Before: Employment Judge Gumbiti-Zimuto

Appearances
For the claimant: In person
For the respondent: Mr S Chang and Dr P Thum

JUDGMENT having been sent to the parties on 9 June 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Reasons for judgment provided at the request of the respondent.

2. I have reached a decision on the jurisdiction points. I have a problem with the employee's status point because I am not happy with the way that the evidence has been provided in respect of that so I have not made a decision on the employee status point. The claimant should have provided a statement for the respondent so the respondent could answer the points that she made. I do not think it is fair to the respondent for me to rely simply on the things that the claimant says in respect of employee status. I am not making a decision on the employee status point today because while the respondent tried to engage with the topic it did not engage with the points that were made by the claimant, and I am of the view that the respondent was at a disadvantage because of that.

3. In respect of the points about jurisdiction, I am satisfied that there is jurisdiction to deal with this case in the employment tribunal in England and Wales.

4. The tribunal has the jurisdiction to deal with the claims made by the claimant but that is subject to the Employment Tribunal Rules 8(2) which provides:

> A claim may be presented in England and Wales if—(a)the respondent, or one of the respondents, resides or carries on business in England and Wales; (b)one or more of the acts or omissions

> complained of took place in England and Wales; (c)the claim relates to a contract under which the work is or has been performed partly in England and Wales; or (d)the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales.

5. The claimant contends that the tribunal can determine the claim by virtue of its connection with Great Britain which is at least partly a connection with England and Wales; **and that the respondents carries on business in England and Wales.** Potentially the Tribunal has the jurisdiction to deal with this claim.

6. There is however still the question of territorial reach or territorial jurisdiction. In the case of Serco v Lawson [2006] UKHL 3 it was decided that prima facie UK legislation is territorial. If an employee or her employment falls outside territorial boundaries of the United Kingdom then she will be unable to enforce the employment rights there. So, it is important for me to determine the question of territorial jurisdiction. In doing that I need to look at each individual statute that is under consideration, in this case the Employment Rights Act 1996 (ERA) and the Equality Act 2010 (EA).

7. The way that the provisions are drafted in both the ERA and the EA has the effect that the same test is applied in respect of the claim about sex discrimination as it is about unfair dismissal claim. In both pieces of legislation the statute is silent on the question of territorial breach.

8. The basic rule is that the ERA applies to employment in Great Britain but there are exceptional circumstances where it may cover working abroad. Where an employee works partly in Great Britain and partly abroad, the question is whether the connection with Great Britain and British employment law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim.

9. Where an employee works and lives wholly abroad, it is more appropriate to ask whether her employment relationship has a much stronger connection with Great Britain and the British employment law than with any other system of law.

10. Expatriate employees who are based abroad, may in exceptional circumstances be entitled to claim unfair dismissal.

11. Two examples are often given: the first is where a person is posted abroad by a British employer for purposes of a business carried on in Britain. The tribunal would have jurisdiction to deal with the case of that person. The second type of expatriate employee would be an employee of a British employer who is operating within a British enclave in a foreign country. They too might be entitled to bring a claim before the employment tribunal. It is important to note that the claimant does not fit into either of these two specific categories which are the ones commonly referred to.

12. The claimant can however come within the employment jurisdiction if she can show that there is a strong connection with Britain and British employment law and that the employee was engaged on terms and conditions which show that the English law and their terms were those which should govern the arrangements. In those circumstances it may be appropriate for the claimant to have the protection of English law.

13. There is no hard and fast rule that says this type of case is always going to be within the jurisdiction or this type of case will always be outside the jurisdiction. What the cases illustrate is a general principle and that general principle as I understand it is that the right to claim unfair dismissal will only exceptionally cover employees working and based abroad and for it to apply, the employment must have stronger connections with Britain and British employment law than any other legal system. The general rule is that the place of employment is decisive but it is not absolute.

14. The final point that I need to address in the circumstances of this case is the question of the contractual choice of law. Although the employment contract may state that a particular type of law is to apply, that is not determinative. It is however a relevant factor to take into account. It is not a decisive factor but is a matter to be taken into account in conjunction with the overall circumstances. The overall circumstances include considering whether the specific contractual term is just a standard contract or whether it is a contract that was specifically negotiated by the parties. So, if somebody is simply signing an agreement which everybody else signs, which nobody gives any particular thought to, that may carry less weight than two people who have thought about a particular provision and then gone and entered into the agreement.

15. What is it about this case that allows me to conclude that there has been shown that territorial jurisdiction is made out. I think first of all I need to very briefly point to some of the procedural history of this case because it has affected how I deal with this case.

16. The claimant's employment commenced on 5 September 2018 and ended on 28 November 2021. On 1 February the claimant started early conciliation which ended on 15 March 2021 and she issued her claim on 13 April 2021.

17. The case came before the tribunal on 11 October 2022 and Employment Judge Hawksworth made a number of orders which included an order that:

> "19. The claimant and the respondent must prepare witness statements for use at the next hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement. The statements only need to deal with the issues to be considered at the next hearing, that is territorial jurisdiction and employment status.
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> …

> 21. A witness statement is a document containing everything relevant the witness can tell the tribunal. Witnesses will not be allowed to add to their statements unless the tribunal agrees."

18. The claimant did not comply with that order and as a result, there was no evidence before me from the claimant addressing the two points. I allowed the claimant to give evidence to set out her position on the territorial jurisdiction points and also to deal with the question of the employment status point. While I am satisfied that there is really little or no dispute between he parties as to what the factual circumstances were in relation to the territorial jurisdiction point, I think that there are very real disputes between them as to what in fact happened during the course of their relationship and because of the failure of the claimant to provide a statement for the respondent, I am of the view that the respondent has been disadvantaged.

19. I have considered whether or not in those circumstances I ought to disregard the evidence which has been given by the claimant in this case and simply make a decision based on the evidence which has been provided by the respondent. I do not think that is an appropriate way to proceed because although not presented with a witness statement about which they could consider a response before the hearing I am not satisfied that the respondent has been significantly disadvantaged in respect of the territorial jurisdiction issue.

20. On the employment status point, because of the serious nature of the dispute and there are a number of disputed facts in the evidence which has been given by the claimant, and the evidence which has been given by the respondents, I did not consider that it was appropriate for me to reach a conclusion on the question of whether or not the claimant was an employee or not. That would have been potentially unfair to the respondent if I had found that the claimant was an employee.

21. I did not have the same difficulty with the jurisdiction point because, as I have said, I found that there was really very little real dispute between the parties in respect of the matters that I have to take into account.

22. Firstly, both parties agree that the claimant works wholly outside of the United Kingdom. The claimant works from home and her home is in Indonesia. Secondly, the claimant says, and it is not demurred, that she did not pay tax in the United Kingdom or in Indonesia. There is no dispute about that.

23. There is one area where there is a dispute between the parties but I am not able to resolve that dispute one or the other on the information before. That dispute of fact is whether the Indonesian courts would be in a position to deal with the dispute which has arisen between the parties. The claimant says that it would not; the respondent does not say "oh yes it would", but rather what the respondent says is "we don't know if that is right". It does not put forward any positive position. The claimant is not an expert in Indonesian law. My approach to that issue has been essentially

to put it to one side and treat the matters as though there is no evidence one way or the other as to the status of Indonesian courts in respect of this employment dispute.

24. In the contract which was entered into between the parties it refers to the claimant as a consultant and not employee. Both parties agree that was what was agreed. Clause 14 of the agreement says that this agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation including non-contractual disputes or claims shall be governed by and construed in accordance with the law of England and Wales. Clause 15 states:

> "The Courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation including non-contractual disputes or claims"

It is clear and unequivocal that the parties contracted to resolve any dispute between them in a court in England or Wales.

25. Is that sufficient connection? The principles from case law that I summarised at the beginning of my judgment makes clear that it is not decisive but it is a factor. So, the first factor which suggests that the claimant's case can be brought before the courts in England and Wales is the contractual agreement.

26. The respondent is a British company. It was incorporated on 28 April 2017 and has an address in Oxfordshire.

27. The work that the claimant did for the respondent was done whilst she was based in Indonesia. The nature of that work is working is editing what was described as "like an online magazine". The online magazine was to have a worldwide audience with the focus on Southeast Asia. People working for the respondent were based in countries around the world. There were employees, I was told, in Thailand, Malaysia and Cambodia. The claimant could do her work from anywhere, she works from Indonesia because that is where she lives with her family.

28. The claimant herself is a British citizen; that in itself is of little significance as it is not her nationality that creates a connection with British employment law. However, taken together with the fact that the respondent is a British company and the agreement has being entered into in the terms that I have stated, it is of some significance.

29. I also note that the claimant does not pay tax in the UK or in Indonesia. There is a neutrality in that the effect of which is that I am unable to say that there is a greater level of connection with Indonesia other than her physical presence there than there is with Great Britain.

30. The fact that the claimant works on an online space in my view is a matter of some significance, the effect of that is that realistically the claimant could do her work anywhere in the world and because she can do her work anywhere in the world. She chooses to do it from her home in Indonesia.

31. The combined effect of the fact that the parties agreed clauses 14 and 15 of the contract in the terms that they did (giving status to English law and given English courts to resolve any dispute arising from the contract); the absence of evidence of a stronger connection with any other jurisdiction; the fact that the claimant's work could be carried out from the UK or anywhere else the world but was in fact carried out from her home which at the time was in Indonesia, are all factors that I take into account in coming to my conclusion that the employment tribunal has jurisdiction to consider the claimant complaints. So, for those reasons I am satisfied that the employment tribunal has jurisdiction to consider the claim of unfair dismissal and also the claim under the Equality Act 2010.

32. In respect of the employment status point, the claimant says she is an employee: The claimant says that there was holiday pay accepted; the claimant says that there was sick pay. The respondent says none of that is right. The claimant says that there was a studio which was fitted out by the respondent from which she carried out her Podcasts; the respondent disagrees with that. There is no supporting evidence from any party to assist me in resolving that dispute and that in a significant part, in my view, is down to the failure of the claimant to present a witness statement so that the respondent could know the case that she was wanting to present and therefore deal with the points that she raises, all of which I am sure to the extent that they are wrong, the respondent would have had some opportunity of dealing with. So, for that reason, I am not going to make a determination as to the question whether or not the claimant was an employee of the respondent and I leave that open to be decided on another occasion. The only question that I need to determine is whether that should be at the final hearing or alternatively at a further preliminary hearing to determine the question of employment but bear in mind the fact that people travelling in order to attend this tribunal hearing and the extra costs that will be incurred if a further preliminary hearing is listed my view is that I should put the matter over to be determined at the full merits hearing.

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Employment Judge Gumbiti-Zimuto
Date: 26 July 2023
Sent to the parties on: 27 July 2023
GDJ
For the Tribunal Office