EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000150/2022

Held at Aberdeen on 24 April and 9 June 2023

Employment Judge N M Hosie

Mr C Hunt	**Claimant** **In Person**
Baker Hughes **(International Professional Resources Ltd)**	**Respondent** **Represented by** **Mr A Knight,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the claims are dismissed for want of jurisdiction; and

2. the claims are struck out as having "no reasonable prospect of success", in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

E.T. Z4 (WR)

Introduction

1. Mr Hunt brought claims of unfair dismissal, race discrimination and for unlawful deduction of wages. The claims were denied in their entirety by the respondent and the respondent's solicitor raised preliminary issues.

2. The case called before me by way of a preliminary hearing on 24 April 2023 to consider two preliminary issues:-

   - Whether the Tribunal had jurisdiction to determine any of the claims being pursued by the claimant
   - Whether any of the claims should be struck out as having "no reasonable prospect of success", in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure").

3. The claimant was not represented at the hearing and had no experience of employment tribunals, whereas the respondent was represented by a solicitor. I remained mindful of this throughout the hearing and during my deliberations.

The evidence

4. At the hearing, I heard evidence from the claimant and on behalf of the respondent from Fernando Jose Estrada Hidalgo, "Global Mobility Team".

5. A bundle of documentary productions was also submitted ("P").

6. By and large, the material facts were either agreed or not disputed. However, I am bound to say that I found it difficult to clarify the claims which the claimant wished to advance and the basis for them. Further, in certain respects his

evidence was inconsistent and in my view neither credible nor reliable. It emerged at the hearing that he did not consider himself to be employed by International Professional Resources Ltd ("IRPL") but rather by "Baker Hughes"; he also sought to advance a claim of race discrimination apparently on different grounds; and, somewhat bizarrely, it only emerged in the course of the hearing that, without the respondent's knowledge, he had taken up employment on 9 January 2023 with a third party.

7. By way of contrast, the respondent's witness, Mr Estrada, gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable.

Parties' submissions

8. At the hearing, the respondent's solicitor submitted a "Skeleton Argument", in writing. However, having heard the evidence I directed that this be updated and that the claimant be afforded an opportunity to respond. The parties complied with my direction. The respondent's written Submissions with the claimant's response in dark type is referred to for its terms.

9. Along with his submissions, the respondent's solicitor also submitted a "Bundle of Authorities" ("AB").

10. I was able to consider the parties' submissions and reach a decision on 9 June.

Identity of the claimant's employer

11. The claimant maintained that he had become aware that IPRL, *"was nothing more than a 'cloak' for Baker Hughes to do their dirty work behind".* He claimed that he was employed by "Baker Hughes". This was denied. It was maintained that he was employed by IPRL.

12. On the basis of Mr Estrada's evidence, and the relevant documents, I had no difficulty arriving at the view that the claimant was employed by IPRL.

13. IPRL is a legal entity. Its Certificate of Incorporation was produced (P.143). It is a Company incorporated in the Dubai International Finance Centre ("DIFC") under the laws of the United Arab Emirates. Helpfully, there was also produced a "Structure Chart" which demonstrated the creation of IPRL (P.145). It is part of the Baker Hughes Group of Companies and is ultimately owned (indirectly) by Baker Hughes LLC, a limited liability Company formed in Delaware, USA (P.146).

14. Significantly, the claimant signed a Contract of Employment with IPRL with effect from 4 November 2018 (P.95-99). His employment transferred on that date from Baker Hughes Ltd. He was advised by letter on 7 November 2018 that his new role as an "International Rotator" would be under the employment of IPRL (P.101-102).

15. IPRL has a business address in Dubai. It has no place of business in the UK. It has around 500 employees, 240 of which are "International Rotators" who move permanently to work locations across approximately 90 different countries. As an "International Rotator", therefore, the claimant worked in a number of different countries. These work locations, in several different countries, were detailed in the respondent's submissions at para.5.25.

16. The claimant maintained that Baker Hughes had *"110%"* control of him and that he had, *"zero active interaction"* with Mr Estrada. However, it was abundantly clear that IPRL was his employer. The evidence in this regard

was overwhelming. There was no evidence to suggest that his Contract of Employment was not a true reflection of his relationship with IPRL as an employee. "Baker Hughes" is a group of Companies. IPRL is a subsidiary. The claimant was employed by IPRL. The respondent's submissions in this regard are well-founded.

Jurisdiction

"Appropriate Forum"

17. While this was a novel issue for me and a complicated one, at that, I was satisfied, with reference, in particular, to ***Simpson v. Intralinks Ltd*** [2002] ICR 1343 (AB1-16), that the respondent's submissions in this regard (paras. 6.3-6.18) were well-founded. These are as follows:-

"*6.3 The claimant's claim was brought in 2022 – after the end of the transition period following the UK's departure from the EU.*

*6.4 The question of whether a UK court or tribunal has jurisdiction to hear a claim brought after the end of the transition period is determined by the terms of section 15C of the Civil Jurisdiction and Judgments Act 1982 (**"CJJA"**) (which was inserted by the Civil Jurisdiction and Judgments) (Amendment) (EU Exit) Regulations S 2019 SI 2019/479 with effect from 31 December 2020) (AB 20/21).*

6.5 Section 15C of the CJJA contains the rules regarding jurisdiction over individual contracts of employment and provides that an employer may be sued by the employee:

6.5.1 in the courts for the part of the UK in which the employer is domiciled (where the employer is domiciled in the UK);

6.5.2 in the courts for the place in the UK where or from where the employee habitually works or last worked (regardless of the domicile of the employer);

6.5.3 in the courts of the place in the UK where the business which engaged the employee is or was situated; or

6.5.4 in any jurisdiction if, after the dispute has arisen, the parties have reached an agreement that proceedings will be started in a place other than as provided by the foregoing.

6.6 In this case, the respondent (IPRL) is an entity based in the DIFC with a place of business in the DIFC – it is not domiciled in the UK.

6.7 The claimant does not habitually work in the UK. In the case of Weber v. Universal Ogden Services 2002 ICR 979, ECJ (AB 22-45) which concerned the meaning of "habitually worked" in the context of the Brussels Regulations regime which governed jurisdictional matters prior to the UK leaving the EU, the place where an individual "habitually worked" was defined as the place where the employee performed the essential part of their duties vis-à-vis the employer.

6.8 The claimant is employed to work internationally around the world for the respondent. The claimant has only worked a total of 34 days in the UK since his employment with the respondent commenced on 7 November 2018. 20 of these days were in the Aberdeen workshop following an accident whilst he was living in Germany and a period of enforced leave, to support his return to work. The remaining 14 were working from home remotely supporting overseas projects and global initiatives. It is submitted that additional time spent answering sporadic emails and telephone calls during periods when he is scheduled to be off work (and free to travel where he chooses) but happens to be in the UK (on approximately 30 days per year on average between June 2020 and July 2022) does not lead to the claimant habitually working in the UK for the purposes of the CJJA.

6.9 The claimant's last period of employment in the UK was in October 2021 (during which time he was working remotely from home supporting international projects). Since then, he has worked in Buenos Aires, Argentina; Dubai, United Arab Emirates; Ploieşti, Romania; Port-Gentil, Gabon; and Pointe-Noire, Congo. The claimant has spent more time working in the following countries during his employment with the respondent than he has in the UK: Ghana (68 days), Dubai (84 days), Germany (139 days), China (198 days), Mozambique (38 days), Brazil (58 days), Romania (105 days) and Argentina (58 days). Accordingly, the claimant cannot be said to have habitually worked in the UK. Given the nature of the claimant's employment, it may be that he cannot be regarded as having a habitual place of work at all (see Koelzsch v. Grand Duchy of Luxembourg [2012] ICR 112 at para 43 (AB 58)). If he does, then it is certainly not the UK.

6.10 Similarly, the claimant was not engaged by a business situated in the UK. The business which engaged the claimant was situated in the DIFC.

6.11 Section 15C(7) CJJA provides that where an employee enters into a contract of employment with an employer who is not domiciled in the UK but the dispute arose from the operation of a "branch, agency or establishment" of the employer that is in the UK, the employer is deemed to be domiciled in the relevant part of the UK. This provision mirrors the wording which previously applied under Article 20(2) of

*Recast Brussels Regulation: Regulation (EU) 1215/2012 (**"Brussels II"**) before the UK left the EU.*

6.12 In Mahamdia v. Peoples Democratic Republic of Algeria [2013] ICR 1 (at para 48) (AB 103), the CJEU interpreted "branch, agency or other establishment" as meaning: a centre of operations which has the appearance of permanency as an extension of the parent body and which has a management and is materially equipped to negotiate business with third parties so that they do not have to deal directly with the parent body.

6.13 Importantly, the branch, agency or other establishment must have the authority to negotiate business on behalf of the foreign parent company. It is not enough if it is merely a subsidiary carrying out certain local operations for the parent company (Olsen v. Gearbulk Services Ltd [2015] IRLR 818) (AB 107-115).

6.14 Whilst some HR administration was carried out on behalf of the respondent by employees of the Baker Hughes Group who were based in the UK, these employees were merely carrying out administrative functions for the respondent. This does not amount to the respondent having a branch, agency or establishment in the UK.

6.15 In the event the Tribunal was to hold that the respondent had a branch, agency or establishment in the UK (which is denied), the dispute did not arise out of the operation of such. The claimant's complaint is centered on his belief that the terms and conditions of his employment with the respondent are not as favourable as the terms which apply to other nationals who were engaged by the respondent after 2017. The claimant's terms were not determined by anyone based within the UK.

6.16 Finally, there has been no agreement between the parties that proceedings may be pursued in the UK. The respondent has resisted the jurisdiction of the Tribunal from the outset of the proceedings.

6.17 On the above facts, there is no basis upon which the jurisdiction of the UK Employment Tribunal over the claimant under the CJJA can be founded.

6.18 The absence of jurisdiction against the respondent means that the claims against it must be dismissed by the Tribunal."

Territorial jurisdiction

18. Although I have decided to dismiss the claim for want of jurisdiction, for the sake of completeness I address the other jurisdictional point relating to the "territorial scope" of the applicable statues (also known as "territorial jurisdiction").

19. In support of his submissions in this regard, (paras. 6.24-6.48) the respondent's solicitor referred to the following cases:-

Serco v. Lawson [2006] ICR 250
Ravat v. Halliburton Manufacturing & Services Ltd [2012] IRLR 315
Duncombe v. Secretary of State for Children etc. [2011] ICR 1312
David Powell v. OMV Exploration & Production Ltd UKEAT/0131/13
R (Hottak) v. Secretary of State for Foreign & Commonwealth Affairs [2016] EWCA Civ 438
Simpson v. Merrick (formerly t/a WA Merrick & Co. Solicitors) EAT0490/09.

20. Territorial boundaries apply to employment rights. As the House of Lords put it in ***Lawson***, "UK legislation is *prima facie* territorial. The United Kingdom rarely purports to legislate for the whole world".

21. S.196 of the Employment Rights Act 1996 used to exclude employees who ordinarily worked outside Great Britain from the right to claim unfair dismissal and from other protections in the Act. However, that section was repealed in the Employment Relations Act 1999 and was not replaced. S.94 of the Employment Rights Act provides that an employee has the right not to be unfairly dismissed by his employer; the Equality Act 2010 gives protection against unlawful discrimination. Both these statutes are silent with regard to its territorial scope.

22. The test for a Tribunal charged with the task of determining the territorial scope of an unfair dismissal claim was set out by Lord Hope in ***Ravat*** at paras 27-29 of the Supreme Court Judgment. He said this at para 27 *"…. The general rule is that place of employment is decisive"; at para 28 he recognised*

that there may be exceptions to this; and, at para 29 he set out the test to be applied: -

" The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree…. The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain".

23. In terms of ***R (Hottak)***, the same test applies to discrimination claims.

24. I had to carry out a balancing exercise, therefore, in the present case, by considering the factors which pointed towards a connection with Great Britain and those which pointed towards a connection elsewhere. What is required is a comparison and evaluation of the strength of competing connections. I had to decide, as Lord Hope put it in ***Ravat***: "*Whether the connection was sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the Tribunal to deal with the claim.*"

25. I was also mindful of what Mr Justice Langstaff said at para. 51 in ***Powell***:-

"*The starting point which must not be forgotten when applying the substantial connection test is that the statute will have no application to work outside the United Kingdom. Parliament would not have intended that unless there was a sufficiently strong connection. 'Sufficiently' has to be understood as sufficient to displace that which would otherwise be the position.*"

26. As the respondent's solicitor submitted, there were only a few factors which provide any connection between the claimant's employment and Great Britain: -

- He lives in the UK through his own choice.
- He spent a total of 34 days working in the UK during a period of approximately 4½ years. However, for much of that time he was

engaged in work undertaken remotely for projects based outside the UK.

- From time to time, he answered e-mails and calls whilst on scheduled time off but for the most part these related to projects outside the UK.
- He received certain communications during his employment from employees based in the UK who assist with global mobility matters.

27. On the other hand, there were many factors pointing towards a connection outwith Great Britain. These were detailed by the respondent's solicitor in his submissions at para. 6.42, which I summarise as follows:-

- He is no longer a UK employee working in the UK and his UK terms and conditions of employment no longer applied. His contract of employment is governed by and subject to the exclusive jurisdiction of the DIFC. He subsequently agreed an amendment to his contract where it would be governed by the laws of Texas, USA and subject to the exclusive jurisdiction of the Courts of Texas, USA.
- Those involved in his recruitment process were based outside of the UK.
- Since his commenced his employment with the respondent, the vast majority of his work has been undertaken outside of the UK in a variety of countries (Ghana - 68 days; Dubai – 84 days; Germany – 139 days; China – 198 days; Mozambique – 38 days; Brazil – 58 days; Romania – 105 days; and Argentina – 58 days).
- He has only worked in the UK for 34 days since November 2018, the last period of which was in October 2021 and only 20 of those days were specifically related to the Group's UK business (he was given work in the Aberdeen workshop to aid his return from his accident in May 2020).
- He was at all times employed by the respondent, a Company incorporated in Dubai.

- In terms of his contract of employment he reported to Mr Rohrsen who lives and works in Germany.
- He is paid in US Dollars from a US bank account.
- His sole responsibility for tax has been to account for any tax which has fallen due in the countries where he worked and for taxes which are due in the country or countries where he chooses to live. Between 4 November 2018 and 25 June 2020, the claimant relocated to Germany with the specific intention of avoiding UK taxes. He has now returned to the UK.
- His recent application for long-term disability payments was facilitated by individuals based in Houston, Texas and his "Solutions Complaint" has been addressed by individuals based outside of the UK.

28. The factors pointing to jurisdiction in Great Britain were tenuous and were significantly outweighed by the factors pointing to other systems of law. The evidence in that regard was overwhelming.

29. The Tribunal does not have jurisdiction, therefore, to consider his unfair dismissal and race discrimination claims.

Reasonable prospect of success ?

30. Although there is no need to do so, having decided that the claims should be dismissed in their entirety, for the sake of completeness I address the application by the respondent's solicitor to strike out all the claims on the basis that they have "no reasonable prospect of success" in terms of Rule 37(1)(a) in Schedule 1 the Employment Tribunal Rules of Procedure.

31. I found favour with the submissions by the respondent's solicitor in this regard which are to be found at paras. 7.1-7.25.

Unfair dismissal

32. As I recorded above, the respondent was not aware until the hearing that the claimant had secured alternative employment elsewhere.

33. I am satisfied that the respondent's submission that the claimant's decision to do so frustrated his employment contract with the respondent, "*such that it terminated automatically by operation of the law*".

34. The onus is on the claimant to establish in the first instance that he was dismissed. He cannot do so. Accordingly, the unfair dismissal claim has no reasonable prospect of success and it is struck out in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure.

Race discrimination

35. The claimant submitted further and better particulars of his claim (P.59-68). As the respondent's submitted, "*The basis for his race discrimination claim appears to be that he was treated less favourably than other UK nationals who were hired on different terms.*"

36. However, these comparators have the same protected characteristic and he cannot establish, therefore, that he was treated less favourably because of his race.

37. His claim for race discrimination, therefore, has no reasonable prospect of success and is struck out.

38. In reaching this decision on strike out, I was mindful of the relevant case law which makes it clear that strike out is a draconian measure and that as

discrimination claims are "fact-sensitive" they should only be struck out in *"in the most obvious and clearest cases"* (***Anyanwu v. Southbank Students' Union & Others*** [2001] ICR 391, HL, for example). I am satisfied that this was one such case.

39. As the respondent's solicitor also recorded in his submissions, the claimant's position appeared to change during the hearing in that he indicated that the comparators were not UK nationals. However, such a claim is wholly lacking in specification and it would be necessary for the claimant to apply for leave to amend. Having regard to the guidance in ***Selkent Bus Co. Ltd v. Moore*** [1996] IRLR 661, I would not be minded to grant any application to amend, primarily for the reasons detailed in the respondent's submissions at para. 7.19. This would be an entirely new claim; the claimant has had ample opportunity to articulate such a claim; it is out of time; the balance of prejudice favours the respondent; and in any event such a claim would not be well-founded for, as I understand it, the claimant is the highest paid of his comparators.

Arrears of pay/unlawful deduction of wages

40. As I recorded above, I had some difficulty identifying the claims which the claimant wished to advance and the bases for them. Although by no means certain, it would appear that the claimant also wished to advance a claim for arrears of pay.

41. However, as the respondent's solicitor submitted, the claimant has not set out a legal basis for such a claim. He does not seek to found upon a breach of his contract but rather alleges that his contract was on less favourable terms than UK employees had with the respondent prior to 2017.

42. He cannot establish, therefore, that the arrears of pay which he seeks were "properly payable" which is a requirement in terms of s.13(3) of the 1996 Act.

43. This claim also has no reasonable prospect of success and is struck out.

44. Further, and in any event, the reasons I have given above for deciding that the UK Employment Tribunal is not an appropriate forum and nor does the Tribunal have "territorial jurisdiction", are equally apposite to any such claim. Accordingly, even if a valid claim was being advanced, the Tribunal would have no jurisdiction to hear it.

45. Finally, I wish to record that while I remained mindful throughout that the claimant was unrepresented and has no experience of Employment Tribunal proceedings, it would be remiss of me not to convey my thanks to the respondent's solicitor for the manner in which he has conducted this case, for his extensive researches and his comprehensive written submissions, with reference to a number of relevant authorities, which, by and large, I considered to be well-founded.

Employment Judge: N M Hosie
Date of Judgement: 19 June 2023
Date sent to Parties: 19 June 2023