Case Number: 2201401/23

EMPLOYMENT TRIBUNALS

Claimant **Respondents**

Mr P Sawczyszyn (1) Heritage Oil & Gas Limited
(2) Heritage Oil (UK) Limited

Heard at: London Central (by CVP) **On**: 2 – 4 October 2023
In chambers: 13 October 2023

Before: Employment Judge Lewis

Representation

For the Claimant: Mr R Moore, Counsel

For the Respondents: Mr Z Sammour, Counsel

RESERVED JUDGMENT

1. The claimant was employed by the 1st respondent.

2. The claims do not fall within the territorial scope of the Employment Rights Act 996 and the Equality Act 2010.

REASONS

Claims and issues

1. The claimant has brought claims for unfair dismissal, age discrimination, holiday pay and underpayment of wages.

2. The issues for the preliminary hearing were agreed at the outset as follows:
   2.1. Do the claims fall within the territorial scope of the Employment Rights Act 1996 and the Equality Act 2010?

2.2. Was the claimant employed by R2 (a UK entity)?
2.3. If not, should any or all of the claims against R2 be struck out and/or dismissed?

3. The claimant says the answer to 2.1 – 2.2 is yes. The respondents say the answer is no.

4. The respondents concede that the employment tribunal has international jurisdiction to hear the claims brought against R1. With regard to 2.3, the parties agreed that if I decide that R1 is the employer and not R2, the claims against R2 should be dismissed and vice versa. If I decide that R1 is the employer and that the claims are within territorial scope, the claims can proceed against R1 notwithstanding that it is not a UK entity.

Fact findings

5. I heard evidence from the claimant and, under a witness order, Anniesa Nicholas. For the respondents, I heard from Elizabeth Holloway, Paul Clayton and Scott Lewis. There was an agreed trial bundle of 1840 pages and an addendum bundle of a further 127 pages. In addition, each Counsel provided written opening and closing submissions.

The Heritage Group

6. Since February 2008, the parent company in the Heritage Group has been Heritage Oil Ltd (formerly PLC). It is based in Jersey. I am told that prior to 2009 and from 2014, it has been named HOIL. In this decision, I will refer to it as Heritage Oil Ltd throughout.

7. There were various subsidiary companies in the Group and the structure has frequently changed over the time of the claimant's employment. The subsidiaries which we were mostly concerned with were the 1st and 2nd respondent. The 2nd respondent, Heritage Oil (UK) Ltd ('HO UK') is a service company. It provides financial and technical support services from London. The 1st respondent is Heritage Oil & Gas Ltd ('HOGL'). It was the first company in the group.

8. The respondents say that there is a Heritage Group strategy rather than individual company strategy, and that the direction for all Heritage Group companies has been decided by the board of Heritage Oil Ltd since 2008. I do not have the evidence to check this assertion, but I am prepared to accept it, as it accords with my general impression in this case of thin boundaries between companies and of the common involvement of the CFO and CEO of Heritage Oil Ltd. There was a level of fluidity, and different companies would be selected as the appropriate – and tax efficient – vehicle for different projects and purposes.

9. HOGL was incorporated in Bahamas in 1992 and in 2010 it was registered by continuation in Mauritius. The only thing that happens in Mauritius is that administration for HOGL finances is carried out by a third party which also

has other clients. HOGL has no independent management structure. It is a vehicle for holding certain licences, certain investments and at one stage, for contracts with some expats. Historically, HOGL was the most appropriate company in the Group to enter contracts as licensee for government-awarded oil contracts. It held a Category 1 Global Business License and it was a well-recognised name within the sector. More recently, specific Heritage subsidiaries have been set up to hold licenses, guaranteed by Heritage Oil Ltd if necessary.

10. Relevant Directors of HOGL included Mr Atherton from 15 March 2010 until 2 March 2018; Mr Sadiq from 2 March 2018 to 30 September 2022 and Mr Oseragbaje from 30 September 2022.

11. HO UK was incorporated in February 2010. Its primary purpose was to act as a service company to Heritage Oil Ltd and the Group. This included the provision of accounting, bookkeeping and financial services; corporate record keeping services; HR services; Insurance services; secretarial and admin services and Geoscience and technical services.

12. When HO UK was initially set up, employees and contractors involved in consolidating the Group's accounts were transferred to it, as opposed to those who were responsible only for a particular entity or geographic area.

13. Under the service agreement, HO UK's expenses were charged to Heritage Oil Ltd at a 12% uplift. In turn, Heritage Oil Ltd would charge out these and associated costs to other Group companies – basically calculated according to HO UK time spent on activities benefiting the relevant company.

14. HO UK was responsible for fulfilling all aspects of the Group accounting and financial reporting function, including financial audits. International local offices would compile their own financial data and report that to HO UK.

15. HO UK was located in an office in London.

Overview

16. The claimant was born, educated and qualified as an accountant in the UK. He has a British passport and driving licence. He was married in the UK. His wife is a British citizen. He owns a property in Hertfordshire.

17. The claimant, who was born in 1956, has worked overseas for about 20 years of his working life. Immediately prior to working for any companies in the Heritage Group, the claimant had worked for a different company in Nigeria from July 2007 – August 2009. From November 2009 until July 2011, he provided consultancy services in Uganda to, he would say, HO UK following its incorporation in February 2010 and prior to that, for Heritage Oil Ltd. The claimant was then taken on as an employee, where he initially completed the work in Uganda and was then seconded to Nigeria. The claimant's contract of employment was signed with HOGL. However, the claimant says that in reality, his contract of employment was with HO UK. The respondents say that the claimant's consultancy services were for HOGL and

that he was subsequently taken on as an employee by HOGL. Neither side sought to argue that the claimant was employed by Heritage Oil Ltd (formerly PLC), although I did flag up during the hearing that this was a third possibility given the language of some of the oral and documentary evidence.

18. Throughout his employment by one or other Heritage company (to put it neutrally), the claimant was paid in sterling. No deductions were made for UK tax or national insurance. He was at pains to ensure that his visits to the UK remained below 90 days per annum so he would not incur UK tax. He maintained this even through the Covid period when the Nigeria office closed, working remotely for much of the time from Turkey instead. When negotiating his contract of employment in 2011, and how tax might work in different locations where he might be placed (save for the UK), the claimant commented 'I would NEVER intend to work in the UK anyway'. During the redundancy process in 2022 and discussions of potential alternative positions, the claimant said he had a strong preference not to work in the UK.

The consultancy contract

19. When the claimant completed his job in Nigeria in 2009, he was interested in other international opportunities. A recruitment agency, Robert Half Ltd, told him about the opportunity to work in Uganda. The claimant was interviewed for the consultancy project in London by Dmitri Tsvetkov (CFO), Angelique Tambourine (Financial Controller) and subsequently Paul Atherton, all of Heritage Oil Ltd. The recruitment agency's client agreement was signed off by Ms Tambourine, for and on behalf of HOGL.

20. The Ugandan project was a joint venture with an independent company, Tullow Uganda Ltd. HOGL was the direct parent of HOG U, the local entity which was granted the licence by the Nigerian government. HOGL was used at that time to engage staff whether as independent contractors or employees for local operations. This was to give more stability to the individual, as a local operation may have a short life expectancy. HOGL would then charge their services to the local operation.

21. The claimant was paid through his personal services company which was a UK company. Robert Half Ltd invoiced HOGL for the claimant, and HOGL paid the invoices. No VAT was charged because the claimant was providing services exclusively to Uganda.

22. While working on this project, the claimant was in almost daily contact with Mr Tsvetkov, who was based in London, and Mr Atherton, who was based in Jersey, but who sometimes worked from the London office.

End of consultancy / engagement as an employee

23. HOGL sold its share in the Ugandan joint venture to Tullow Uganda Ltd in around July 2010 and the claimant was involved in the run-off arrangements.

24. Tullow Uganda Ltd explored with the claimant whether he would work directly for them, but Mr Atherton preferred to keep the claimant's services.

After some discussions in London and by email, the claimant was recruited as a full-time employee with effect from 1 August 2011. His contract of employment dated 25 July 2011 is with HOGL, whose registered office is noted as in Mauritius. It is signed by Mr Atherton as 'Director' of HOGL. At that time, Mr Atherton was also Chief Financial Officer ('CFO') of the Heritage Group.

25. It is clear from the email chain that the contract was negotiated with Mr Tsvetkov while the claimant was in Uganda. They primarily used email, with some phone / skype contact. On 25 July 2011, the claimant was in Uganda. The contract was agreed while he was in Uganda. Mr Atherton signed it in London. A scanned copy of the signed agreement was emailed to the claimant on 28 July 2011. The claimant signed it at some point with the date 25 July 2011, but I do not know when that actually was or where he was when he signed.

26. The contract is very clear in identifying the employer and its location. It states that it is made between 'Heritage Oil & Gas Limited, a company incorporated and existing under the laws of Mauritius, having its registered office at [a Mauritius address] and 'Patrick Sawczyszyn, an individual normally residing in Uganda'. The contract is signed by Mr Atherton, 'Director' under the heading 'Heritage Oil & Gas Limited'.

27. Article 2.2 of the contract of employment says 'the principal place of employment' is HOGL's 'office premises in Uganda initially, but will be relocated to other international operations'.

28. Article 24 is headed 'Applicable Law' and says 'This Agreement shall be governed and construed in accordance with the laws of England and Wales'. This clause was included simply because it was the company's standard contract at the time. For the same reason, references to certain other areas of UK employment law such as the opt-out on a 48 hour week were included.

29. The claimant's comment in his email during contract negotiations was 'Despite the company being incorporated and existing under the laws of Mauritius, would not the laws of England and Wales contradict this and made the agreement invalid in certain cases?' Mr Tsvetkov replied 'The laws of England and Wales are standard for an international contract and Mauritius will have no impact on this.' The claimant simply answered, 'OK'. The natural reading of this is that the claimant had no interest in whether the law of England and Wales applied. His main concern was to ensure that nothing undermined the fact that he was seen as based overseas for tax purposes.

30. Under article 6, the claimant was entitled to 10 weeks paid leave (12 if relocated to Nigeria) with up to six rotations per year. Timing of leave must be agreed in advance with the company.

31. No one ever spoke to the claimant about Mauritian or Ugandan employment law and he was not given any local staff handbook.

32. The claimant continued working as an employee in Uganda on the project run off. At no time did he ever report to anyone in Mauritius.

Secondment to SNRL in Nigeria

33. Once the operations in Uganda were closed, the claimant was seconded as Finance Manager to Shoreline Natural Resources Limited ('SNRL'), which was a newly established joint venture between Heritage Oil Senior (Nigeria) B.V. and Shoreline Power Company Ltd (a local Nigerian company). SNRL had a 45% interest in an Oil Mining Lease ('OML 30').

34. The SNRL Shareholders' Agreement sets out the structure and management of SNRL. Mr Atherton and Philip Blows were appointed as Heritage directors and Kola Karim, Tunde Karin and Ladi Bada as Shoreline Directors. Dr Bada was appointed CEO of SNRL. Mr Atherton was appointed CFO of SNRL and there was to be another senior officer nominated by Heritage. At the time, Mr Atherton was also CFO of Heritage Oil Ltd and the Group.

35. The claimant's job was based in Lagos, Nigeria, where the claimant went to live from March 2013. The claimant remained in this post until he was made redundant in 2022.

36. At the outset, both joint venture partners had provided loans to the SNRL and were naturally both concerned to protect their financial investment. Until Heritage had been repaid in full, bank transfers of $5000 had to be approved by two signatories, one of whom had to be a Heritage Director or officer appointed by Heritage. SNRL was also required to provide the two companies with detailed financial information including an annual business plan and cash flow statement. The claimant's duties were to set up a financial accounting system and to protect Heritage funds.

37. The claimant's line manager on a day-to-day basis was Dr Ladi Bada, SNRL's CEO, who in turn reported to the SNRL board. The claimant also reported to the CEO of the Heritage Group. The claimant was not directly employed by SNRL, he was only a secondee, and a key part of his role was to protect the Heritage investment in SNRL. His work was in many respects for the benefit of the Heritage Group.

38. From 2013 – 2017, he therefore also reported to Mr Atherton, who at that time was Heritage Group CEO, CFO of SNRL and a Director of HOGL. Mr Atherton was based in Jersey. He spent some time in the London office, but was careful not to exceed the 90 day rule.

39. Naeem-Atiq Sadiq took over from Mr Atherton as Group CEO in December 2017 and left mid 2022. Mr Sadiq was employed by Heritage Oil Ltd and seconded to HEOSL, another subsidiary, as its Managing Director. Mr Sadiq was also a Director of SNRL and of HOGL.

40. Mr Sadiq was keen on the claimant having separate lines of communication with Heritage, ie a separate Heritage Group email address

and later, a separate laptop and mobile phone. The claimant had weekly meetings with him, usually on Sunday afternoons in his apartment in Lagos, to discuss how to protect Heritage Oil Ltd' interests as their representative.

41. The claimant was not initially given a secondment letter, but he asked for one in 2019 to resolve some paperwork issues. He drafted the letter which Mrs Holloway signed. The letter, backdated 1 February 2013, is on Heritage Oil Ltd notepaper and starts, 'Following discussions between Heritage Oil Ltd (the Company) and SNRL, we are pleased to confirm your secondment to SNRL effective from 31 March 2013 and this will continue until such time as is otherwise determined.' It goes on to state that his salary will be recharged by the Company to SNRL.

42. In December 2017, Mr Sadiq asked Elizabeth Holloway (the Group Financial Controller) to provide short job descriptions for all full-time and contract staff as he was thinking of a restructure.

43. Mrs Holloway provided the information in January 2018 having spoken to the staff including the claimant. She put the claimant under the sub-heading 'Employees based in Nigeria'. His entry was headed 'Reporting to managing director SNRL and Heritage CEO. Based in SNRL office in Lagos, Nigeria. Heritage employee 100% seconded to SNRL'. The short job description, which the claimant had provided to Mrs Holloway to use, was headed 'Head of Finance & Commerce – SNRL. 100% Nigeria based.' The bullet points of his responsibilities included overall responsibility for the Finance department; strategic leadership and guidance to the department and mentoring to local professionally qualified Nigerian staff; signing off annual budgets for and on behalf of SNRL; protecting the interests of Heritage's investment in SNRL; and has an authorised signatory role within the HEOS organisation.

<u>Covid period</u>

44. On 7 April 2020, the Group evacuated the claimant along with other expats to the UK due to Covid. Initially the claimant worked from home in the UK. However, in order to avoid paying UK taxes, the claimant then mainly worked from Turkey, renting accommodation there, so that he did not exceed 90 days in the UK. Whether in Turkey or the UK, he continued to work remotely for SNRL in Nigeria. When in London, he rarely went into the London office.

45. In September 2020, the claimant returned to work in Nigeria from Turkey, stopping over in the UK for a Covid test. He came to London for a vacation in December 2020, but could not go back to Nigeria because of renewed Covid issues. Apart from a trip back to Nigeria in September 2021 to renew his Nigerian work permit, the claimant had to continue to work remotely from Turkey, keeping to the 90 day rule in respect of visits to the UK.

46. The claimant's visas and work permits were all arranged by SNRL and he was identified in the immigration documents as working for SNRL. In November 2020, the claimant asked Paul Clayton in HR for a letter to prove he was living in Nigeria as he was changing his pension arrangements. Mr

Clayton supplied a letter on Heritage Oil (UK) Limited notepaper saying that the claimant 'is an employee of Heritage Oil & Gas Limited and is currently seconded to a joint venture in Nigeria in the capacity of Head of Finance'. The letter notes that the claimant 'has been residing at [an address in Lagos]'. On 7 May 2021, the claimant asked Mr Clayton to update the letter to that day's date – 'the rest of the contents are fine'. He did not question the statement that he was employed by HOGL.

Pay and benefits

47. The claimant was paid in sterling by HOGL throughout his employment. It was paid from a bank account with Standard Bank Jersey in the name of HOGL. No payment was ever made by HO UK. In terms of Group accounting, the claimant's salary costs were always accounted for as part of HOGL, HOG U and SNRL, but never in HO UK. By contrast, salary costs for HO UK staff were recorded in HO UK. Muna Said, for example, was employed by HO UK and, while seconded to SNRL, remained mainly based in the UK, travelling to Nigeria as required for business trips and meetings. Her salary costs were recorded in HO UK, which charged them on to Heritage Oil Ltd along with other HO UK costs, and Heritage Oil Ltd recouped from SNRL.

48. At no stage did the claimant pay UK tax, and he made positive efforts not to do so. The claimant was aware that being employed by a foreign company to work in a foreign country meant that he was not required to obtain a 'no tax code' from HMRC before becoming exempt from UK tax and he would not be subject to NI deductions for the first 52 weeks of his employment. He arranged matters to achieve this result.

49. The claimant's salary stipulated in his contract was in effect the net amount. SNRL grossed up that figure and paid the necessary tax and social security contributions in Nigeria.

50. On the other hand, employees based in the London office had contracts with HO UK, and HO UK deducted tax and NI as required under British law.

51. The claimant had certain benefits such as life insurance, medical insurance and income protection. The majority of these policies were provided by UK based companies. The dental cover by Cigna was provided by virtue of HO UK's medical plan. This was because HO UK made the insurance arrangements for Group employees and there needed to be a contracting company on the policy. The list of employees benefitting on the policy were not confined to those employed by HO UK.

52. Mrs Holloway managed the finance staff within HO UK. If they wanted holidays, they needed to make a request to Mrs Holloway and gain approval. She kept logs of these holidays as well as sick leave. Mrs Holloway did not manage the claimant's holiday requests. She kept a holiday tracker for all finance managers in the Group so she knew who she could contact when, but this was separate from the approval process. The claimant did sometimes notify or consult over his holiday dates, but this was more in the spirit of consulting with a colleague over whether the timing caused operational

difficulties. Nor did the claimant ever request approval for holidays from Scott Lewis. The claimant did have some discussion with Mr Lewis about accrued holiday and holiday carry over in 2022. This would be relevant to his entitlement under his HOGL contract and at that time, Mr Lewis was the senior Group manager.

HEOSL and Ms Nicholas

53. SNRL worked closely with Heritage Energy Operational Services Ltd ('HEOSL'), which was the designated operator of the OML 30 licence in Nigeria, ie the company which from 2016 actually carried out the mining.

54. The claimant's witness, Anniesa Nicholas, was employed by HO UK as Group Financial Accountant in 2013. Ms Nicholas was seconded from HO UK to HEOSL as General Manager in 2018. She needed to be based in Nigeria. She reported while there to Mr Sadiq, who was CEO of Heritage Oil Ltd at that point. It was a 3-year secondment. As she remained employed by a UK entity (HO UK), Ms Nicholas continued to have UK income tax deducted from her salary until she provided an HMRC 'no tax code' and NI deductions were made for her first 52 weeks of employment in Nigeria.

55. Ms Nicholas's role was to run the HEOSL finance department in Lagos and to ensure it carried out the required financial reporting to SNRL, the Nigerian government and other stakeholders. Her role involved significant interaction with SNRL and the claimant.

56. Ms Nicholas was part of the weekly meetings with Mrs Holloway which I mention below.

57. Ms Nicholas feels that she and the claimant were in comparable positions, each with similar roles in their respective companies, both being senior individuals within the entities they were seconded to represent, but ultimately reporting to the CEO of Heritage Oil Ltd and HO UK. However, Ms Nicholas's position was not exactly the same, because she was explicitly employed and paid by HO UK and was on a time-limited secondment with the intention of returning to the UK afterwards. She had been based in London from 2013 – 2018 before her secondment, and she paid UK tax and NI at that time. For the first year of her secondment, HO UK continued to deduct NI and tax until she obtained a 'no tax code'.

58. As Group Financial Accountant, Ms Nicholas's main job had been consolidated accounting for the whole Group, collecting accounts from all the subsidiaries so the Group knew at the top level what was happening. The claimant had been solely concerned with the accounts of SNRL, and to a lesser extent, HEOSL, in Nigeria. Ms Nicholas confirmed that the weekly meetings with Mrs Holloway were to discuss the Nigerian operations.

Financial reporting

59. CFOs and Finance Managers of the various Heritage entities would report to more senior individuals within their own entity on a day-to-day basis, but –

after he was appointed - to Mr Lewis on Heritage Group matters which related to those entities. Mr Lewis worked remotely from Switzerland until September 2022, at which point he was based primarily in Lagos. He occasionally travelled to work with Mrs Holloway and the finance team in London. In November 2021, Mr Lewis also became a board member and Director of SNRL, representing the interests of the Heritage Group.

60. As Heritage Group Financial Controller, Mrs Holloway was responsible for collecting, consolidating and reporting on the Group's financial results. She needed to liaise with the accounting and technical teams of the international companies to collect the necessary budgetary and financial information. This included asking questions and seeking follow-up information. She had no line management responsibility for the individuals she liaised with, including the claimant.

61. From 2020, Mrs Holloway reported to Mr Lewis, who was the direct conduit to the Heritage Oil Ltd board. He was the first CFO employed by HO UK. Previously Mrs Holloway had reported to Mr Atherton (Group CFO, then Group CEO) and then Mr Sadiq (Group CEO). Both of them were employed by Heritage Oil Ltd.

62. The claimant managed a finance team of 7 people in SNRL in Nigeria, and was responsible for the day-to-day management of its finance department.

63. During his secondment, the claimant communicated very regularly with Mrs Holloway. This was so that he could provide the financial, tax and operational information she needed for her Group finance reporting. He had to send Mrs Holloway an export of SNRL accounts each quarter, from which she extracted relevant information. There would be emails back and forth while narrative and details were clarified. When Mrs Holloway became an authorised signatory for SNRL bank accounts in 2018, she would generally check with the claimant that the payments were valid. From May 2020, after the start of the pandemic and its impact on the Group, Mrs Holloway held weekly Teams meetings with the claimant and Ms Nicholas in HEOSL to discuss issues relating to the Nigerian operations. Mr Lewis attended the meetings after he joined the company in September 2020 as Group CFO.

64. Mrs Holloway met the claimant face-to-face only on the rare occasions that he came into the London office or she made a business trip to Nigeria.

65. Mrs Holloway has never considered the claimant to be part of her HO UK team. He never had access to the Heritage Group accounting system which is governed by HO UK and located in London. Similarly, Mrs Holloway did not have direct access to SNRL systems - once the SNRL team was set up and in place, SNRL had its own accounting system in its Lagos office.

66. Mr Lewis was never the claimant's day-to-day line manager. However, Mr Lewis was a Director of SNRL as well as Group CFO. As there was no management structure within HOGL, as Group CFO he was ultimately the claimant's line manager. However, he only had dealings with the claimant in relation to SNRL.

Visits to London

67. Throughout his employment, the claimant's visits to London tended to be for annual leave rather than business purposes, although he did come on one occasion to carry out some work in relation to setting up the SNRL accounting system before it was transferred to Nigeria. When in London for annual leave, he occasionally popped into the London office for a meeting, but the evidence suggested this was not very often.

Termination of employment

68. Mr Lewis told the tribunal that the redundancy came about because the board of Heritage Oil Ltd had promised senior lenders of SNRL to hire a CFO. Mr Lewis says that he felt the claimant could still remain in his role as Finance Manager, but that the SNRL board, including Dr Bada, felt that was unnecessary as the new CFO could take on the strategic work and junior team members could take on the financial controller work. The final decision maker was the recently appointed new CEO of the Heritage Group, Mr Oseragbaje. The discussions were held in Nigeria.

69. I was not given much evidence regarding the discussions around possible alternative employment on the claimant's redundancy in May 2022, and I do not want to make findings based on partial evidence. However, several of the respondent's witnesses including Mr Lewis, Mr Clayton and Mrs Holloway said the claimant told them he was not interested in working in the UK. This would not surprise me, as it is consistent with the other evidence regarding where the claimant wanted to live and work. At the very least, in cross-examination the claimant admitted he had stated he had a 'strong preference' not to work in the UK.

70. The dismissal letter dated 14 October 2022 was written on HOGL notepaper and signed by Mr Lewis, CFO, 'for Heritage Oil & Gas Ltd'. Mr Lewis was not employed by or a Director of HOGL. He was employed by HO UK. He wrote the letter to implement the decision made by Mr Oseragbaje (Group CEO and also a Director of HOGL) together with the SNRL board.
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Law

Territorial jurisdiction

71. Underhill LLJ in the Court of Appeal in Jeffery v British Council [2019] ICR 929 usefully summarises the key principles in the case law regarding territorial jurisdiction for claims under the Employment Rights Act 1996 and Equality Act 2010. To paraphrase:

    71.1. Parliament can generally be taken to have intended that an expatriate worker, ie someone who lives and works in a particular foreign country, even if he or she is British and working for a British employer, will be subject to the employment law of the country where they work rather

than the law of Great Britain. Case-law refers to this as 'the territorial pull of the place of work'.

71.2. However, there will be exceptional cases where there are factors connecting the employment to Great Britain and British employment law which pull sufficiently in the opposite direction to justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation.

71.3. Lord Hoffman in Lawson v Serco Ltd [2006] IRLR 289 identified two particular types of case (apart from peripatetic workers) where an employee worked abroad but there might be sufficient connection: the posted worker exception and the British enclave exception.

71.4. As made clear in Ravat v Halliburton Manufacturing and Services Ltd [2012] IRLR 315, SC and Duncombe v Secretary of State for Children, Schools and Families (No.2) [2011] UKSC 36, SC, those are only examples. What is required in each case 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.

71.5. In the case of a worker who is 'truly expatriate', in the sense that he or she both lives and works abroad (as opposed to eg a 'commuting expatriate' such as in Ravat), 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, eg Duncombe, which involved British employees of government/EU-funded international schools.

72. The Supreme Court in Ravat expressed this as follows: the Lawson examples were 'merely examples of the application of the general principle that, in order for there to be jurisdiction, an employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law…. It will always be a question of fact and degree as to whether the connection between Great Britain and the employment relationship is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them. But it does not follow that the connection that must be shown in the case of those who are not truly expatriate, because they are not both working and living overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of s.94(1) is a question of law, but it is also a question of degree. The fact that a commuter has his home in Great Britain, with all the consequences that flow from this for the terms and conditions of his employment, makes the burden in his case of showing that there was a sufficient connection less onerous. The question of law is whether s.94(1) applies to that particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law are 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.'

73. Mr Ravat lived in the UK. He worked on a job-share 28-days in Libya and 28-days in the UK on a rotational basis. He was retained on normal UK pay, tax and NI. His employer described him as an 'international commuter' as opposed to an expatriate worker who lived as well as worked abroad. He was concerned that his rights under UK employment law might be compromised by the assignment and was given a reassurance as a result that they would not.

74. Where the claimant lived and/or worked for at least part of the time in Great Britain, it is unnecessary to carry out a comparative exercise in which factors pointing towards a connection with Great Britain are compared with factors pointing in favour of another jurisdiction. All that is required is that the tribunal is satisfied that the claimant's connection with Great Britain 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. (Bates van Winkelhof v Clyde & Co LLP and another [2013] ICR 883, CA.)

75. The tribunal to needs to look at a range of factors including the location and operation of the employer; where the claimant has lived and worked; pay and tax arrangements; contract terms. This is not a full list. The focus is usually on the facts at the date of the alleged wrong, but it may sometimes be necessary also to look at the history of the employment relationship to ascertain a true picture of the connection between the employee and Great Britain.

Who was the claimant's employer?

76. Moreover, in employment law, the written contract of employment does not always accurately reflect the terms agreed. The true agreement often has to be gleaned from all the circumstances of the case, of which the written agreement is only part. (Autoclenz Ltd v Belcher [2011] IRLR 820, SC.) Moreover, were the corporate structure of an employer comprises more than one entity, the question as to who is the employer might not be straightforward. The EAT recently summarised the principles governing the identification of an employer in Clark v Harney Westwood & Riegels [2021] IRLR 528 as follows:

'The following principles are relevant to the issue of identifying whether a person, A, is employed by B or C:
a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: Clifford at [7].
b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the rel evant evidence: Clifford at [7].
c. 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: Bearman at [22], Autoclenz at [35].

d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: Bearman at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?
e. In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: Dynasystems at [35].

To that list, I would add this: documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. The primacy of the written agreement, entered into by the parties, would be seriously undermined if hidden or undisclosed material could readily be regarded as evidence of a different intention than that reflected in the agreement. It would be a rare case where a document about which a party has no knowledge could contain persuasive evidence of the intention of that party. Attaching weight to a document drawn up solely by one party without the other's knowledge or agreement could risk concentrating too much weight on the private intentions of that party at the expense of discerning what was actually agreed.'

Conclusions

Issue 2.2: Was the 2nd respondent (HO UK) the claimant's employer?

77. Formally the claimant's contract of employment was explicitly with HOGL and was signed by Mr Atherton as 'Director' of HOGL. The question is whether that represented the reality of the situation.

78. At the time of signing the contract, the claimant addressed his mind to who his employer was. He wanted to make sure that it was a foreign company, as that would help preserve his tax position. He was happy that the contract noted HOGL was located in Mauritius. The most natural reading of his comments on the clause stating the applicable law was England and Wales is that he was concerned this would negate the contract being with a foreign based company. A contract with HO UK would have been the exact opposite, a company located in the UK. The claimant would not have wanted that because it may have jeopardised his tax position. Indeed, he did not even refer to the possibility of HO UK being noted on his contract as his employer at the time of the contract negotiations and the discussion about the law clause.

79. The reality of the situation was that neither party intended UK law to apply to the employment relationship, even though there was a clause saying that it did and giving some details. HOGL was simply using its then standard contract. The claimant's question was not directed at gaining reassurance that UK law applied and gave him employment rights. It was directed at ensuring that the presence of that clause did not invalidate the international nature of the contract. It implicitly asked whether that clause was safe to

leave in. When he received the explanation that it was a standard clause for an international contract, he just said 'OK'. The claimant never at any time asked for reassurance about the application of UK laws to himself.

80. At the time of signing the contract, the fact that it was between the claimant and HOGL therefore represented the true intention of the parties.

81. The claimant does not seek to argue that the contract was initially with HOGL and was subsequently novated to HO UK. In any event, nothing happened subsequently to change that position.

82. The back-dated secondment letter, which the claimant drafted, stated that the secondment was 'following discussions between Heritage Oil Ltd and SNRL'. It was written on Heritage Oil Ltd letterhead. While this does not state the secondment was from HOGL as his employer, it does not say it is from HO UK either. Since Heritage Oil Ltd was the ultimate parent company and controlled Group operations and which project was undertaken by whom, the secondment letter coming from Heritage Oil Ltd was less inconsistent with the claimant's employer being a subsidiary (HOGL) than had the letter been from HO UK.

83. The letters written for the claimant by Mr Clayton in HR in November 2020 and May 2021 for pension purposes stated that the claimant was an employee of HOGL (and currently seconded to SNRL). The claimant did not tell Mr Clayton that the incorrect employer was noted.

84. The claimant was paid by HOGL throughout his employment. No payment was ever made by HO UK.

85. I do not find the debate about who authorised the claimant's holidays to be sufficiently clear on which to base any important findings.

86. The dismissal letter was written on HOGL notepaper and signed on behalf of HOGL. Although Mr Lewis was himself employed by HO UK, not HOGL, he was also Group CFO and in any event, he was acting as the agent for Mr Oseragbaje, the Group CEO, who was also a Director of HOGL. Even if Mr Oseragbaje took the decision as Group CEO rather than as HOGL Director, that just reflects the close control exercised by the parent company over the whole group. What it does not show is that the claimant was employed by HO UK. HO UK was the service company, and the claimant was not doing work for the service company. Similarly, to the extent that Mr Clayton, an HO UK employee, had an HR role in respect of the claimant, that was because HO UK was the service company. It was not because the claimant was an HO UK employee.

87. The claimant worked closely with Mrs Holloway while at SNRL. But this was because she was the Financial Controller of the Heritage Group and responsible for collating and reporting on the financial results of all companies in the Group. Heritage's investment in Nigeria was particularly large and required a great deal of her time. Under the joint venture shareholder agreement, SNRL was required to provide financial information to Heritage

(as well as Shoreline), so this was part of the claimant's role for SNRL. Mrs Holloway was employed by HO UK.

88. HO UK was the service company to Heritage Oil Ltd and effectively, the Group. She had a team located in London who worked on Heritage Oil Ltd and Group accounts. Ms Nicholas was part of that team until seconded for a fixed 3 year period to HEOSL, and was due to return. The claimant had never been part of that team. He had never had access to the Heritage Group accounting system. His role was exclusively in relation to Ugandan operations, when there, and the Nigerian operations once seconded to SNRL.

89. Regarding the issue of control, in Nigeria, the claimant's line manager for day-to-day matters was Dr Bada, the CEO of SNRL. The claimant was also required to report directly to Mr Atherton, then Mr Sadiq, when they were Heritage Group CFO or CEO. They were also Directors of HOGL at those points in time. Mr Sadiq was requiring the claimant to attend Sunday meetings every week in his own apartment in Lagos. It is hard to say in what capacity Mr Atherton and Mr Sadiq dealt with the claimant, though it is clear that they very much had Group interests in mind. A strong feature of this case is the central control exercised by the parent, Heritage Oil Ltd. HO UK did not exercise any control over the claimant. After he arrived, Mr Lewis, an HO UK employee did have some dealings with the claimant, though only on SNRL matters. He was technically the claimant's ultimate line manager as Group CFO, and HOGL did not have a management structure.

90. I take account of the fact that the claimant has never been to Mauritius or taken instructions from anyone based in Mauritius. But that does not outweigh the other factors.

91. For all these reasons, I find that the claimant's employment was at all times with HOGL. To the extent that there is any evidence at all contrary to that, it would suggest his employment was with Heritage Oil Ltd. However, I think any such indications were more to do with the fact that Heritage Oil Ltd was a closely involved parent company, with its CEO and CFO also holding directorships in other Group companies. I also note that neither the claimant nor the respondent believed that Heritage Oil Ltd was the true employer. In any event, I cannot see any evidence that the claimant was employed at any time by HO UK.

92. In conclusion, the claimant was not employed by Heritage Oil (UK) Limited (the second respondent). He was employed by Heritage Oil & Gas Limited (the first respondent). The claims against the second respondent are therefore dismissed.

<u>Issue 2.1: Do the claims fall within the territorial scope of the Employment Rights Act 1996 and the Equality Act 2010?</u>

93. Although the facts of no two cases are the same, I find that the claimant was 'truly expatriate' in the sense that he both lived and worked abroad at the time of his dismissal. Although as a result of Covid and office closures, he was temporarily unable to work from Nigeria, he was still living and working

outside the UK in Turkey (apart from up to 90 days when he was able to come to the UK, essentially for his 12 weeks annual leave). During the time he cud not get back to Nigeria, he was still working on his Nigerian job, albeit remotely.

94. Looked at in context, the claimant had lived and worked abroad in Uganda and Nigeria at least since 2009. His return trips to the UK were essentially for annual leave. Although he occasionally attended the London office while in the UK for a meeting about his Ugandan / Nigerian work, the evidence did not suggest he did this very often. Attending the odd meeting in the UK, when present anyway on annual leave, does not constitute working in the UK. This was very intentional too. The claimant lived and worked abroad and restricted his time in the UK because he did not want to incur UK tax and NI. At the time of signing his contract, he said he 'NEVER' intended to work in the UK. When 11 years later he was discussing alternative employment at the stage of being made redundant, he still 'strongly preferred' (at the very least) not to come back to the UK.

95. As 'truly expatriate', there have to be specially strong factors connecting the employment with Great Britain and British employment law, and I do not consider these to be present.

96. I considered the fact that his contract contained a clause stating the law of England and Wales applied and made reference to other areas of UK employment law. I also considered that this was not in there by mistake and both parties were aware of its presence. However, the clause was there only because it was in the respondent's contract. It was not the subject of negotiation. There is nothing to indicate the claimant wanted it to be there. He never asked whether he would be protected by UK employment law. His reference to the clause was only to express an anxiety that its presence would negate the status of the contract as an international contract which, in turn, preserved his tax status.

97. I considered the fact that the claimant is British and that he did own a house in the UK and that he did return for annual leave for up to 90 days/year. However, I did not think this denoted any specially strong factor connecting his employment with Great Britain. He did not systematically work from the London office. He was not employed by a British based company. He did not pay British taxes. People do own properties overseas or retain them when they move overseas.

98. I would say that the claimant's connection with Nigeria, on the other hand, was much stronger. His job was there. He had lived there for many years. He was seconded to a Nigerian based joint venture concerning the extraction of Nigerian oil. He was 100% based in Nigeria. Nigerian taxes were paid on his behalf. At the time of dismissal, he was still working remotely on his Nigerian job because of temporary office closures arising from Covid, and had taken steps to preserve his work permit status for when he could go back.

99. Even if the claimant was only partially expatriate, I would still find that the connection between Great Britain and British employment law was not

sufficiently strong to overcome the general rule that the place of employment is decisive.

100. The claimant holds a UK passport, has a British wife and has retained a property in Hertfordshire. But throughout his employment with HOGL, he has lived and worked abroad, first in Uganda and then in Nigeria. When he was unable to work in Nigeria during the closure of the Lagos office because of Covid he worked remotely primarily from Turkey, limiting the time he was in the UK. The claimant came to the UK for his holidays and for occasional work discussions during his holiday entitlement. He was careful to stay below 90 days/year which would incur tax liability. He did not often go into the London office.

101. At the time of his dismissal, the claimant was employed, on his own intentions, by a company based in Mauritius. He was seconded to a joint venture located in Nigeria. He had been managing a locally based team. He had been living in an apartment in Nigeria and when he was unable to go back for a temporary period because of Covid and office closure, he spent most of his time in Turkey, keeping below the 90 days in the UK, and working remotely on his Nigerian job. When providing his brief job description for the new CEO, Mr Sadiq, in 2018, the claimant was described as‘100% Nigeria based’.

102. When negotiating his contract of employment in 2011, and how tax might work in different locations where he might be placed (save for the UK), the claimant commented ‘I would NEVER intend to work in the UK anyway’. Even when facing redundancy, the claimant said – at the very least – that he strongly preferred not to work in the UK.

103. The claimant’s duties were both for the benefit of SNRL and for the Heritage Group. Heritage Oil Ltd was based in Jersey. The claimant did not carry out any duties for HO UK. He was dealing only with the Nigerian entities and their accounts. He did not deal with Group accounts or HO UK accounts. While at SNRL, the claimant reported to Dr Bada in Nigeria on a day-to-day basis and to Mr Atherton (based in Jersey) and Mr Sadiq (based in Nigeria). He liaised closely with Mrs Holloway and latterly Mr Lewis, who were London based, but that still concerned the affairs of SNRL and sometimes HEOSL, the Nigerian based entities.

104. The claimant was paid in sterling, but he arranged his affairs so that he would never have to pay UK tax and NI. Although some of his non-pay benefits were organised by HO UK as policy holder, this was for the entire Group and not of any particular significance.

105. The decision to terminate the claimant’s employment was taken in Nigeria.

106. The claimant’s contract of employment was originally negotiated while the claimant was in Nigeria, by Mr Tsvetkov who was in London, and it was signed by Mr Atherton when he was in London from Jersey. There seem to have been a few discussions with the claimant in London when the Ugandan consultancy was coming to an end and prior to the offer of employment.

However, I do not find this outweighs the weight of the other factors which have no connection with Great Britain.

107. The factors showing any connection with Great Britain are very slim. I do not need to rely on the absence of 'especially strong' factors. I find that the connection between Great Britain and British employment law was simply not sufficiently strong for it to have territorial jurisdiction over the claims.

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Employment Judge Lewis

Dated: 13/10/2023

Judgment and Reasons sent to the parties on:

16/10/2023

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For the Tribunal Office