EMPLOYMENT TRIBUNALS

Claimant: Mr Robert John Holden

Respondent: World Sailing (UK) Limited

Heard at: London Central (by video) **On:** 22 August 2023

Before: Tribunal Judge A Jack, acting as an Employment Judge

Representation
Claimant: In person
Respondent: Miss Patel, director of finance and operations of the respondent

JUDGMENT having been sent to the parties on 23 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claim and procedural matters

1. The claimant, Mr Holden, has brought a claim for unfair dismissal. His contract came to an end on 17 February 2023. He contacted ACAS on 14 March 2023 who issued a certificate on 28 March 2023. His claim was presented on 23 April 2023.

2. Directions were made on 15 May 2023 for the preparation of the case for hearing, including directions for an agreed bundle and witness statements. Mr Holden prepared a bundle of 113 pages. He asked for the statement he had filed with his ET1 to be treated as his witness statement. He also filed written submissions, which I have also taken into account.

3. Mr Holden is normally based in South Africa. However on the day of the CVP hearing he attended from St Vincents. Oral evidence is permitted from a foreign state only if that state permits: see the Presidential Guidance on Taking Oral Evidence by Video or Telephone from Persons Located Abroad (April 2022). St Vincent and the Grenadines permits evidence to be given from its territory provided that the person giving evidence is a citizen or resident: FCO Guidance on Taking and giving evidence by video link from abroad. Mr Holden is neither, as he agreed. Neither party wanted an adjournment. South Africa, which is where Mr

Holden lives, does not permit oral evidence to be given from its territory, so an adjournment would not have helped matters anyway. Taking account of overriding objective, and in particular the need to avoid delay, so far as compatible with proper consideration of the issues, I decided that the hearing should proceed, although Mr Holden would not be able to give oral evidence.

4. The respondent did not file witness statements or any documents. The respondent sought to add to its evidence orally at the hearing. Mr Holden objected on the basis that evidence had not been filed in time and he should not be taken by surprise at the hearing. In the circumstances, including the respondent's failure to provide evidence in accordance with the directions made, and taking account of the overriding objective, and in particular the need to ensure that the parties are on an equal footing, I did not permit the respondent to add to its written evidence orally. I did however permit the respondent to rely on its ET3 as written evidence.

5. In making the case management decisions outlined above, I also took into account the fact that it was clear that there was a large measure of agreement between the parties regarding the facts. I clarified the extent of that agreement with the parties at the start of the hearing.

6. The parties agreed at the start of the hearing that the main points in dispute between them were:

    6.1 whether Mr Holden's contract was with the respondent, World Sailing (UK) Limited, or with its parent company, World Sailing Ltd, which is an Isle of Man company;

    6.2 whether Mr Holden was an employee or had a contract to provide services.

7. I also identified that there was an important preliminary issue i.e. whether the tribunal has territorial jurisdiction.

Findings of Fact

8. I find (and it is agreed) that at all relevant times the claimant was living in South Africa. The claimant lives permanently in South Africa.

9. The claimant attended a course with ISAF (the international sailing federation) in the UK in 2010. Following this he started to run international courses, initially for the ISAF. The ISAF is now known as World Sailing Limited, which is an Isle of Man company.

10. In December 2018 he started to work under a new contract. He was required to work 17 days a month (i.e. 204 days a year). He was initially paid £38,760 a year and this increased to £45,000 a year in May 2022.

11. I find (and it is agreed) that he worked under an oral and not a written contract.

12. There is a dispute as to who that contract was with.

13. He negotiated his contract with the then Chief Executive Officer of World Sailing (UK) Ltd, whose emails stated that this was a company registered in the UK.

14. The respondent, World Sailing (UK) Ltd, obtained group business travel insurance which covered (among others) all South African based directors, partners and employees contracted by the UK insured company. (p. 73). This policy was understood by both parties to cover Mr Holden, as he was an overseas staff member (p. 105).

15. I find (and it is agreed) that Mr Holden ran courses throughout the world, that the majority of his work was outside of the UK and that he worked at various locations throughout the world.

16. I find that he was usually in the UK for two and a half months in September to November (bundle, p. 12) to attend a training course, although this was disrupted by covid.

17. The claimant referred to himself as a contractor (bundle p. 12).

18. Mr Holden received his instructions from the UK.

19. I find (and it is agreed) that he was paid by the Isle of Man company. He was not paid by the respondent, and was not on the respondent's payroll.

20. I find (and it is agreed) that income tax and national insurance were not deducted from the payments made to him. He did not pay tax or NI in the UK.

21. I find (and it is agreed) that he worked under the relevant contract from 1 December 2018 to 17 February 2023.

The Law

22. When considering whether a contract is a contract of service or a contract for services the starting point is *Ready Mixed Concrete v Minister of Pensions and National Insurance* 1968 1 ALL ER 433, QBD. Factors include: (i) whether the servant agrees to perform his own work and skill in consideration of a wage or other remuneration; (ii) whether the servant agrees that in the performance of that service he will be subject to the other's control; (iii) whether the other provisions of the contract are consistent with being a contract of service.

23. There is a right under the Employment Rights Act 1996 (ERA) not to be unfairly dismissed: s. 94(1) ERA.

24. The basic rule is that the ERA only applies to employment in Great Britain. However in exceptional circumstances it may cover working abroad.

25. Lord Hoffmann delivered the leading judgment in the case of *Lawson v Serco Ltd and two other cases* 2006 ICR 250, HL. He divided employees into three categories for the purpose of establishing whether an employment tribunal has territorial jurisdiction to hear a claim of unfair dismissal under S.94(1):

in the standard case, the question will depend on whether the employee was working in Great Britain at the time of dismissal.

in the case of peripatetic employees who, owing to the nature of their work, do not perform services in one territory, the employee's base — the place at which he or she started and ended assignments — should be treated as his or her place of employment. The question then is whether the base was in Great Britain at the time of dismissal.

employees working and based abroad may in exceptional circumstances be entitled to claim unfair dismissal. Lord Hoffmann gave two examples of circumstances where such an employee would enjoy unfair dismissal protection. The first was of an employee posted abroad by a British employer for the purposes of a business carried on in Great Britain. The second was of an expatriate employee of a British employer 'who is operating within what amounts for practical purposes to an extraterritorial British enclave in a foreign country'. Lord Hoffmann accepted that there may be other qualifying situations but stated that in order to come within the scope of S.94(1), employees would need to show 'equally strong connections with Great Britain and British employment law'.

26. Mr Holden referred to *Ravat v Halliburton Manufacturing & Services Ltd* [2012] I.C.R. 389, which is also relevant. A British employment tribunal had jurisdiction to hear the unfair dismissal claim of a British citizen, resident in Great Britain, who had been employed by a company based in Britain but who had worked overseas. The question of whether the employment relationship in such a case had a sufficiently strong connection with Britain to overcome the general rule that the place of employment was decisive as to which law applied was a question of fact and degree.

Conclusions

27. There is a dispute between the parties as to which entity Mr Holden's oral contract was with. On balance, I consider that it was with the respondent, World Sailing (UK) Ltd, rather than the Isle of Man company, World Sailing Ltd. The negotiations with Mr Holden were with the then Chief Executive Officer of World Sailing (UK) Ltd, whose emails stated that this was a company registered in the UK. This is, I consider, a more significant factor than which entity paid Mr Holden.

28. There is a dispute between the parties as to whether Mr Holden's contract was a contract of service or a contract for services. On balance, I consider that it was a contract for service i.e. a contract of employment. Mr Holden agreed to work 17 days a month in return for remuneration. He worked to instructions from the UK. There was no evidence that his contract permitted him to subcontract, arranging and paying for someone else to perform the relevant services. The claimant referred to himself as a contractor. But the label applied by the parties to the relationship is a relevant factor, not determinative. Similarly, the fact that Mr Holden did not receive annual leave, and did not pay tax and national insurance, although relevant is not – I consider – as significant as the fact that he worked 17

days a month in return for remuneration, and worked to instructions from the UK.

29. Turing to the question of territorial jurisdiction, the basic rule is that the ERA only applies to employment in Great Britain.

30. Mr Holden was not working in Great Britain at the time of his dismissal. On 17 February 2023 he was in South Africa. So he does not fall within Lord Hoffmann's first category: he was not working in GB at the time of dismissal.

31. Mr Holden's base was in South Africa, not Great Britain. He lived in South Africa throughout the relevant period. He travelled from South Africa and back there when he provided courses throughout the world. So he does not fall within Lord Hoffmann's second category: his base was not in GB at the time of dismissal.

32. Lord Hoffmann's categories are not fixed and are not to be applied rigidly as though fixed rules or a statute. The key question when considering Lord Hoffmann's third category is whether Mr Holden has a sufficiently strong connection with Great Britain and British employment law to overcome the ordinary or basic rule that the ERA applies only to employment in Great Britain. Mr Holden did ordinarily attend courses in the United Kingdom each year (although this was disrupted by covid). His employer was a company registered in the UK, and he received his instructions from the UK. However when he was engaged he was already in South Africa. He was not posted abroad from the UK. He worked throughout the world, and the vast majority of his work was outside of Great Britain. My conclusion is that, taking account of all of the factors outlined above, he did not have a sufficiently strong connection with Great Britain and British employment law to overcome the ordinary or basic rule that the ERA applies only to employment in Great Britain.

33. The tribunal therefore lacks jurisdiction and the claim for unfair dismissal is struck out.

Employment Judge Andrew Jack

15 October 2023

REASONS SENT TO THE PARTIES ON

17/10/2023

FOR THE TRIBUNAL OFFICE