



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000294/2023

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Held via Cloud Video Platform (CVP) in Glasgow on 18 October 2023

Employment Judge O'Dempsey

10 **Mr L Folivi**

In Person

Claimant

Golden World Care Service Limited

Respondent

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**Represented by:
Mr T Goldup -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

- 20 1. The claimant's claims do not satisfy rule 8(3) of the Employment Tribunal Rules of Procedure.
2. I declare that the claimant's claim was presented by completing a completed claim form in accordance with the Presidential Practice Direction – Presentation of Claims for England and Wales and that for Scotland by
25 presenting his online form, thus satisfying rule 8(1).
3. I declare that the failure to comply with rule 8(3) does not render the proceedings void.
4. I declare that the claimant's claim form was presented in England and Wales as the respondent carries on business in England and Wales.
- 30 5. As the Scottish offices of the Employment Tribunal are currently seized of the case, I direct that the claimant's application under rule 99 remains outstanding and is to be determined by the President or Vice President;
6. If the claimant's application under rule 99 is dismissed, I ORDER that the claimant's claims in these proceedings are dismissed on the day after the date

on which the determination under 5, dismissing the claimant's application, is sent to the parties.

REASONS

1. The case was listed before me to determine the question of whether the employment tribunals sitting in Scotland may determine the claims brought by the claimant, under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 rules (ETR), as amended. This was phrased as a consideration of whether the Scottish Employment Tribunals have "jurisdiction". However for reasons which I set out below, I consider this to be an incorrect analysis of the task of the tribunal when considering the provisions of rule 8 of the ETR. The correct analysis is to determine whether there has been an irregularity in compliance with the Tribunal's rules.

Findings in fact

2. The following are findings in fact necessary to deal with the question of whether the employment tribunals based in Scotland have jurisdiction by virtue of a connection with Great Britain which is at least in part a connection with Scotland.
3. The claimant entered into an agreement with the respondent after a particular client's relative for whom he was providing care services told him that the respondent was looking for someone to look after that client. The respondent then invited him to their office in Croydon to fill in an application form, and to join the company in January 2022.
4. He was in London where he has family. He had been in London looking for work and had been there for about a month. Before that he was in Scotland. He would go to London to do work for various companies, for example Tesco. He would send applications to companies. Sometimes he would submit applications from Scotland and would come to London for interviews when asked. This time he put his name, address (in Scotland), previous work experience, and education. He was given a job working particular days of the week.

5. The claimant said that work locations were not discussed. Only the first job was discussed with him. He did not appear to be able to convey to me his understanding of where he could be required to work. There was no discussion about the area which the respondent covers. In fact this is the Croydon area of South London. I find that there was discussion in very general terms of where the work was, because there was discussion of the possibility of other clients being taken on by the claimant (albeit specifics were not discussed). It must have been obvious to the claimant, I find, that the respondent was not a nation wide concern.
6. There was a clause (15) in the contract which gave the choice of law as English and Welsh law. There was no discussion about that as one might expect.
7. The claimant questioned the authenticity of the document produced to me, but I have no hesitation in finding that the document was one which was the agreement presented to him, and that it was presented to him at the time of the interview, and not (as he recalled) much later, in June 2023 or any later date.
8. The claimant resides in Scotland. He would go home to Scotland whenever he could. Over the period I am concerned with he would go home almost every month, sometimes almost every week. He said he did not discuss these arrangements with the respondent. However I think he did not remember that part of the conversation correctly as I find that the respondent's manager and he did discuss his arrangements in terms of whether he would be able to get from Scotland to the client on time.
9. The claimant pointed out that it was the tribunal that decided that the case should be dealt with in Scotland, rather than the claimant.
10. The claimant gave that evidence in the absence of documents which the respondent declared were to be produced during the course of the hearing. This is obviously unsatisfactory and I am not prepared to make personally adverse findings concerning his credibility. I find that he did not recall the conversation which he had with the manager correctly.

11. The claimant accepted that when he joined, the client he was working for was the one client in Croydon with whom he had been working previously.
12. I accept the evidence of Priscilla Eytley, the manager of the respondent that the respondent's offices are in Croydon, and that they deal with clients in the Croydon and Lambeth area and not in a wider area.
13. At the meeting the claimant and Ms Eytley filled in the application form and went through the rules and how he was going to look after clients, and the contract. They discussed other matters which are not relevant for the issue I have to determine.
14. She told the claimant that the clients were going to be based in Croydon. The claimant had put his address in Scotland and she asked how he was going to be at the client at 7 am in the morning, coming from Scotland. She said that the claimant said he was going to be in London when he was working with the client, so he would be on time. He would only go to Scotland on the days he was not working.

The law

15. The following provisions of the ETR are relevant:

Rule 6

6. *A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—*
- (a) *waiving or varying the requirement;*
- (b) *striking out the claim or the response, in whole or in part, in accordance with rule 37;*
- (c) *barring or restricting a party's participation in the proceedings;*

(d) *awarding costs in accordance with rules 74 to 84.*

Rule 8

8.—

5 (1) *A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.*

(2) *A claim may be presented in England and Wales if—*

the respondent, or one of the respondents, resides or carries on business in England and Wales;

10 (a) *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*

15 (c) *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.*

(3) *A claim may be presented in Scotland if—*

the respondent, or one of the respondents, resides or carries on business in Scotland;

20 (a) *one or more of the acts or omissions complained of took place in Scotland;*

(b) *the claim relates to a contract under which the work is or has been performed partly in Scotland; or*

25 (c) *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 Scotland.*

Rule 99

99.—

5 (1) *The President (England and Wales) or a Regional Employment Judge may at any time, on their own initiative or on the application of a party, with the consent of the President (Scotland), transfer to a tribunal office in Scotland any proceedings started in England and Wales which could (in accordance with rule 8(3)) have been started in Scotland and which in that person’s opinion would more conveniently be determined there.*

10 (2) *The President (Scotland) or the Vice President may at any time, on their own initiative or on the application of a party, with the consent of the President (England and Wales), transfer to a tribunal office in England and Wales any proceedings started in Scotland which could (in accordance with rule 8(2)) have been started in England and*
15 *Wales and in that person’s opinion would more conveniently be determined there.*

16. The jurisdictional provisions of the Equality Act 2010, s 120 and of the Employment Rights Act 1996, s 24, are not set out in full but I referred to them. The definition of “Employment Tribunal” in rule 1 ETR is also relevant, as this
20 determines that “Tribunal” or “Employment Tribunal” “means an employment tribunal established in accordance with regulation 4, and in relation to any proceedings means the Tribunal responsible for the proceedings in question, whether performing administrative or judicial functions”.

17. In ***Jackson v Ghost Ltd [2003] IRLR 824***, His Honour Judge Peter Clark
25 held that the then equivalent rule to r 8(2) and (3)) ‘merely determines where, if the tribunal has jurisdiction, the case should be heard [ie in England/Wales or in Scotland]’ (at [79]). The tribunal rules do not determine **whether** a tribunal has jurisdiction over a particular claim in the first place.

18. The rules on territorial jurisdiction of substantive rights vary from statute to statute and it is to the terms of those statutes, not the tribunal rules, that regard will need to be had to decide whether the tribunal has jurisdiction.
19. **Jackson** was followed in **Financial Times Ltd v Bishop** EAT/0147/03. His Honour Judge Burke QC, agreeing with the decision in Jackson, noted that s 7 of the ETA 1996, which enabled the Secretary of State to make provision in the regulations for determining by which tribunal any proceedings are to be heard, did not anywhere empower him by regulation 'to expand or contract or define the extent of rights provided by the ERA' (para 49). Both cases refused to follow the EAT in **Lawson v Serco** to the effect that reg 11(5)(a) provided the only territorial restriction to claims under the ERA 1996 following the repeal of s 196 of that Act. In Lawson later courts did not support that part of the judgment of the EAT.
20. It seems to me therefore that the wording of rule 8 does not require me to dismiss proceedings should I determine that there is no territorial jurisdiction. Such an interpretation would, in my view, run wholly counter to the overriding objective under rule 2.
21. I note that the question of jurisdiction is not whether there is statutory jurisdiction which would arise by connection with Great Britain but whether that connection is at least in part a connection with Scotland. Thus statutory jurisdiction could be established without this form of connection being established. It would exist under the statute but the Employment Tribunal in Scotland as a result of the procedure rules would not be able to deal with the claim (a defect in proceedings which as I set out below does not render the proceedings void of itself).

Discussion

22. It is plain to me that no part of the connection with Great Britain giving rise to jurisdiction under either of the relevant statutes is a connection with Scotland. If consideration of the place of residence of the claimant were a relevant consideration in the circumstances of a person living in Great Britain, then that would satisfy the requirement of rule 8(3) in the case of someone residing in

Scotland. However the place of residence of the claimant is only a factor in determining territorial jurisdiction where the person is working outside Great Britain.

23. The place of residence of the person bringing the claim is not one of the factors I would need to consider. This is a matter of fundamental principle, but can also be illustrated by analogy with section 15C of the CJA 1982. In matters relating to an individual employment contract, an employee may sue the employer in one of three places:
- a. Where the employer is domiciled in the UK, in the courts for the part of the UK where the employer is domiciled (section 15C(1)(2)(a)).
 - b. In the courts for the place in the UK where the employee habitually carried out their work or last did so (regardless of the domicile of the employer) (section 15C(1)(2)(b)).
 - c. Where the employee did not habitually work in one part of the UK or any one overseas country, in the courts for the place in the UK where the business which engaged the employee is or was situated (regardless of the domicile of the employer) (section 15C(1)(2)(c)).
24. The underlying principles relating to territorial jurisdiction in the case of statutory torts/delicts also point to the same result:
- a. The country where the tort takes place is the country of jurisdiction; and
 - b. The country of the involuntary party to the litigation is the country of jurisdiction.
25. Hence I consider that there was no part of the test that would establish, in the case of someone living in Great Britain, a connection with Scotland.
26. Looking at other aspects of tests which establish connection with Great Britain, the claimant was not recruited in Scotland. No work was done in Scotland. The work was done in Croydon. So far as it can be said to be practically relevant in a case where an employee is simply presented with a

contract selecting a particular country's law, the law of England and Wales was chosen in the contract.

27. If the Scottish Tribunal had no territorial jurisdiction over the claims, this does not put an end to whether the Tribunal has powers (in limited and specified ways) to deal with the proceedings in which those claims are brought.

What is the true state of affairs?

28. The fact that the case appears to have been deemed to have been presented in Scotland appears to me to have been no choice of the claimant. When the case was presented it was not assigned a case office. The claimant clearly gave an English address for the address of the employer. The fact that the claimant had a Scottish address and the respondent had an English one was noted on the primary vetting form by the tribunal. However the claimant was only told of a minor error in the EC reference. The claim was treated as presented as at the date on which the rectified form was presented (which was done by email), because it included grounds which were not previously presented. The case file shows that the administration was raising the question of whether the office should be changed because the wrong office had become seized of the case. It noted that the England and Wales office was unassigned and that the claimant's ET1 stated that his workplace was in England and Wales.

29. In its case management agenda the respondent applied for the case to be transferred to the London South Region of England and Wales. This was an application for the Tribunal to exercise its powers under rule 99(2) of the Employment Tribunal Rules of Procedure (the 'ET Rules') to transfer these proceedings to England and Wales, and particularly the London (South) Employment Tribunal. The respondent noted in its application "We note that the ET1 that was served on the Respondent states that the Tribunal office is 'unassigned', so it may be that when the ET1 was initially processed that the appropriate jurisdiction for these proceedings was to be referred for judicial consideration." This appears to me to have been a wholly pragmatic way of viewing the situation.

30. By the hearing before me this application had been withdrawn by the respondent.
31. The claimant, when asked for comments on whether the tribunal has jurisdiction, made an alternative application that the proceedings should be transferred to England and Wales. Thus there remains an application for transfer. This can only be determined by the President or Vice President.
32. The respondent made the written submission in correspondence that the tribunal only has power to transfer proceedings if it has jurisdiction to hear the claim contained in the proceedings. This would of course be true if no tribunal had jurisdiction to hear the claims for reasons other than territorial jurisdiction under rule 8(3), but I do not agree with the broad submission that was made and I consider that it arises out of a misunderstanding of what the tribunal has to determine under rule 8(3).
33. The jurisdiction of the tribunals is not conferred by the rules but by statute. The rules could not detract from the jurisdiction conferred by the statute (as noted in **Bishop**) and must be taken to be doing something else (as noted in **Jackson**).
34. In this respect the jurisdiction of the Tribunal is conferred by sections 1-3 of the Employment Tribunals Act 1996. That Act in particular creates jurisdiction according to the rights created in the (prior or subsequent) Acts cited in the claim. Section 2 creates jurisdiction by reference in this case to sections 24 of the Employment Rights Act 1996 and section 120 of the Equality Act 2010. Neither of these distinguish between the jurisdiction of tribunals sitting in Scotland or in England and Wales. Certain differences are noted in section 3 of the Employment Tribunals Act 1996 between England and Wales on the one hand and Scotland on the other, but they relate to the law relating to contract and permit **further** jurisdiction to be granted to tribunals by the appropriate minister (which may be a different one for Scotland as opposed to England and Wales).
35. The question of whether a claim may be started in England and Wales or Scotland therefore appears to me a procedural requirement and the relevance

of territorial jurisdiction as between England and Wales on the one hand and Scotland on the other, relates simply to the question of where the rules require a claim to be considered to have been started. Absence of territorial jurisdiction in this sense does not indicate that there is no jurisdiction in the Tribunal to determine the claim. It is simply that there may be territorial jurisdiction in another part of the United Kingdom (or no jurisdiction for some non-territorial reason).

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36. The only judicial decision on the question of jurisdiction appears to have been the ticking of a box on the ET1 rejection referral form of the tribunal saying that there was no jurisdiction. It is not clear that this related to the question of territorial jurisdiction and seems rather to have been to do with the absence of any grounds provided at that stage. This was a judicial act but (a) was never communicated to the claimant, (b) the case was accepted after the correction of an unrelated minor error, (c) the evidence of the parties had not been taken into account.

37. The judge who expressed the view that there was no jurisdiction appears to have expressed no view on whether there was territorial jurisdiction. The judge who then accepted the claim, does not appear to have considered the question of territorial jurisdiction.

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38. The true circumstances of the case having been brought to my attention, I reconsider the first of those decisions on my own initiative in the way described below. I do so on the basis that (a) at that stage in the proceedings there appears to have been no consideration of the question of whether the claim should be deemed as presented under rule 8(2); (b) there was no consideration of whether the case should have been referred for a decision under rule 99 (c) there was no consideration of the facts that might indicate (as I have now done on evidence) which part of the UK should be considered as the place where this online form was presented, so as to enable a decision to be made in that case and appropriate consequential action (such as transfer of proceedings) to be made.

39. It is in the interests of justice to vary the step taken under rule 8(3) by the tribunal order in the way I do below as it seems to me that an irregularity has occurred under the tribunal procedure rules.

40. The claim satisfies rule 8(1), which provides that a claim shall be started by presenting a completed claim form in accordance with any practice direction made under regulation 11 of the rules. The same website address link is given in both the England and Wales Practice Direction and that issued in Scotland. Thus when the claimant completed the online application all the elements over which the claimant had control were satisfied, and complied with rule 8(1).

41. Once the form is filled out and submitted the claimant has no choice over which jurisdiction the form is considered to have been presented in. Rules 8(2) and 8(3) then deal with where the claim which has been started has been presented. The rules are clear that irregularities under rule 8(2) and 8(3) do not of themselves render void the proceedings or any step taken in the proceedings. The only relevant failure which would have that effect would be if rule 8(1) had not been satisfied. That failure under rule 6 to comply may arise, in my view, either from the action of a party or the action (administrative or judicial) of the Tribunal. I interpret rule 6 in this way in order to give effect to the overriding objective.

42. I take the view that the lack of territorial jurisdiction in Scotland under rule 8(3) in a claim which has been started by presenting a claim form in accordance with the Practice Directions of both countries (which give the same online claim portal regardless of which country the claimant desires their case to be determined in) simply means that the proceedings may require to be considered under rule 8(2). The rules plainly envisage a situation in which a step has been taken in proceedings (e.g. starting the claim under rule 8(1)) but rule 8(3) is not complied with because Scotland has no territorial jurisdiction under the rules. In those circumstances there are proceedings containing claims over which the Employment Tribunal in Scotland has no jurisdiction for the purposes of rule 8(3). That is an irregularity that can be waived under rule 6(a), and in my view it would further the overriding objective

for it to be waived so that the question of whether the proceedings should be transferred to England and Wales (with the relevant consent) can be considered. This appears to me to be the action which appears just in the circumstances that I have described.

5 43. I do not agree with the contention by the respondent that if there is no territorial jurisdiction for the purposes of rule 8(3) that there is no jurisdiction to transfer the proceedings. I take the view that this is precisely one of the situations in which the Tribunal has power to transfer, and that decision is to be taken by the specified judges. The jurisdiction issue relates to claims, the transfer
10 issue relates to proceedings containing claims. Specific jurisdiction is conferred under rule 99.

44. An employment judge sitting in Scotland is able to make the determination that the claim is to be considered as having been presented in England and Wales under rule 8(2) (and direct that consequential administrative steps be
15 taken). However in this case, given the stage to which it has progress and as the effect of reconsideration would be to deem the claims to have been presented in England and Wales, I have to have regard to the existence of rule 99. This limits the judges who can transfer proceedings and I do not consider that it would fall within my powers to make an order which in effect
20 circumvents rule 99. I cannot make the consequential order that the proceedings be transferred to England and Wales.

45. On the basis of the findings of fact I have made, I decide that the provisions of rule 8(2) are clearly satisfied, and that the claims were presented under rule 8(1).

25 **Conclusion**

46. As I have heard all the relevant evidence on the question of territorial jurisdiction under rule 8(3) and under rule 8(2), I have taken the opportunity to make orders which only come into effect should the proceedings not be transferred under rule 99. This is to ensure administrative simplicity.

47. If the President or Vice President in Scotland takes the view that the proceedings could not more conveniently be determined in England and Wales (or if the President (England and Wales) does not consent), then I have ordered that the claims within the claimant's proceedings are dismissed the day after the day on which the decision relating to the claimant's application under rule 99 is dismissed.
48. If the proceedings are transferred my order concerning the claims does not come into effect.
49. As there is an application by the claimant for transfer of the proceedings to England and Wales, I direct that the case be referred to the President or the Vice President for consideration under rule 99.

Employment Judge: D O'Dempsey
Date of Judgment: 08 November 2023
Entered in register: 15 November 2023
and copied to parties

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