Neutral Citation Number: [2024] EAT 57

Case No: EA-2022-SCO-000084-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 18 April 2024

Before :

THE HONOURABLE LORD FAIRLEY

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Between :

STENA DRILLING PTE LIMITED	**Appellant**
- and -	
MR TRISTAN SMITH	**Respondent**

- -
- -

Mr Brian Napier K.C. (instructed by Burness Paull LLP) for the **Appellant**
Mr Diarmuid Bunting, of Counsel (by direct access) for the **Respondent**

Hearing dates: 29 February and 2 April 2024

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JUDGMENT

SUMMARY

JURISDICTION; international and territorial jurisdiction; Employment Rights Act, 1996; Equality Act 2010

In considering a challenge to the jurisdiction of the Employment Tribunal to determine claims under the **Employment Rights Act, 2010** ("**ERA**") and the **Equality Act, 2009** ("**EqA**"), the Employment Judge failed to recognise the important distinction between international jurisdiction on the one hand and territorial jurisdiction on the other. Specifically, he erred in law in concluding that, in any claim involving an individual contract of employment, alternative routes to establishing international jurisdiction could be found beyond those in sections 15C and 15D of the amended **Civil Jurisdiction and Judgments Act, 1982.**

The Employment Judge also erred in concluding, on the facts found by him, that territorial jurisdiction could be established by sections 199(7) of the **ERA** and regulation 3 of **The Equality Act 2010 (Work on Ships and Hovercraft) Regulations, 2011**. He had not erred, however, in concluding that territorial jurisdiction in respect of the claim under the **ERA** arose by applying the principles described in **Lawson v. Serco Limited** [2006] ICR 250 and **Ravat v. Halliburton Manufacturing Services Ltd** [2012] ICR 389.

The Judgment of the Tribunal was set aside and the case was remitted to the same Employment Judge to consider of new the issues of international jurisdiction and, if necessary, territorial jurisdiction in relation to the **EqA** claim.

THE HONOURABLE LORD FAIRLEY:

Introduction and procedural history

1. Stena Drilling PTE Limited ("the appellant") appeals against a Judgment of Employment Judge J.M. Hendry issued following a preliminary hearing on 10 June 2022. The respondent to the appeal is Mr Tristan Smith. He was the claimant in the proceedings before the Employment Judge. For ease of reference, I will continue to refer to him as "the claimant" in this appeal.

2. Following his dismissal in October 2021, the claimant made claims against the appellant under the **Employment Rights Act, 1996** ("**ERA**") and the **Equality Act 2010** ("**EqA**"). The appellant challenged the jurisdiction of the tribunal to hear those claims, and a preliminary hearing was fixed on the issue of jurisdiction.

3. A substantial amount of evidence was agreed. In addition to the agreed evidence, the Employment Judge heard witness testimony from the claimant and from an HR advisor from a company called Stena Drilling HR Limited.

4. In a reserved judgment with reasons dated 12 July 2022, the Employment Judge found that the tribunal had jurisdiction to determine both claims.

Summary of facts

5. The appellant is a company incorporated in Singapore where it also has a place of business. It is a subsidiary of Stena AB, a company incorporated in Sweden. The appellant is part of the wider international group of companies ("the Stena Group") which owns and operates vessels used to support drilling from oil and gas wells offshore in deep sea locations throughout the world.

6. Between July 2011 and October 2012, the claimant worked as a seafarer on various vessels operated by the Stena Group. Between 2011 and late 2012 he worked for the appellant under a contract of employment as a Derrickman. At that time, his home address for tax purposes was in Liverpool.

7. In November 2012 the claimant changed his residence for tax purposes to an address in France. At that time, he entered into a new contract of employment with a different company within the Stena Group, Austen Maritime Services PTE Limited ("AMS"). The nature of the

claimant's work did not change when he was employed by AMS. He was continuously employed by AMS between November 2012 and June 2021. In 2013 he was promoted to the position of Assistant Driller. In 2019 he was promoted again to the position of Junior Driller. Throughout the period of his employment with AMS, the claimant was non-resident for the purposes of UK tax.

8. In June 2021, the claimant intimated that he would be returning to his residential address in Liverpool. Due to the change in his tax residence status he entered into a new contract of employment with the appellant which commenced on 30 June 2021. At the time when that contract commenced, the claimant was absent from work due to ill health. He undertook no work for the appellant at any time between 30 June 2021 and his dismissal on 7 October 2021.

9. All of the vessels on which the claimant worked were registered in the UK. Following the commencement of his employment with the appellant in 2011 the claimant was briefly assigned to work aboard a vessel operating in UK territorial waters. Following that initial assignment, however, the claimant did not work in UK territorial waters at any time prior to his dismissal in October 2021.

10. The claimant's contracts with the appellant and with AMS each contained a choice of law clause which stated that the contract was to be governed by and construed in accordance with the law of Singapore. Each contract also stated that it was entered into in Singapore.

11. The claimant was paid in sterling. During the periods when he was employed by the appellant, his pay was subject to deductions for UK income tax and National Insurance. No such deductions were made when he was employed by AMS. During the time that he was employed by AMS, the claimant took steps to ensure that he did not become UK tax resident. He did so by spending no more than 90 days per year in the UK, and by setting up a bank account outside the UK.

12. Stena Drilling HR Limited ("SDHR") is a company incorporated in the United Kingdom. It provided HR administration, payroll services, and other services under commercial agreements with the appellant and AMS. It did so from offices in Aberdeen. In terms of those agreements, it assisted with recruitment, engagement and dismissal of employees. When the claimant was offered employment by the appellant in 2011, the offer letter was sent to him at his address in Liverpool and he was asked to confirm his acceptance of that offer in writing

to SDHR in Aberdeen. SDHR was the claimant's point of contact on HR issues with whichever of the Stena Group companies he was working from time to time.

Law

13. Where an issue of jurisdiction arises before an employment tribunal, forum jurisdiction (otherwise known as "international jurisdiction") and the territorial reach of the particular statute(s) founded upon ("territorial jurisdiction") are separate questions and must be considered separately (**Simpson v. Interlinks Ltd** [2012] ICR 1343).

14. **The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations, 2019** added new sections 15C and 15D to the **Civil Jurisdiction and Judgments Act, 1982** ("**CJJA**"). For cases involving individual contracts of employment commenced after 31 December 2020, those sections represent the only route through which international jurisdiction may be established. They replace the grounds of international jurisdiction which formerly applied within the United Kingdom by virtue of the recast Brussels Regulation 1215/2012.

15. Section 15D of the amended **CJJA** is not relevant for the purposes of this appeal. Section 15C(1) and (2) state:

> **15C Jurisdiction in relation to individual contracts of employment**
>
> (1) This section applies in relation to proceedings whose subject-matter is a matter relating to an individual contract of employment.
>
> (2) The employer may be sued by the employee—
>
> (a) where the employer is domiciled in the United Kingdom, in the courts for the part of the United Kingdom in which the employer is domiciled,
>
> (b) in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so (regardless of the domicile of the employer), or
>
> (c) if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom or any one overseas country, in the courts for the place in the United Kingdom where the business which engaged the employee is or was situated (regardless of the domicile of the employer).

16. Subsections (4) to (6) of section 15C are also not relevant to this appeal. Subsection (7) states:

> (7) For the purposes of this section, where an employee enters into an individual contract of employment with an employer who is not domiciled in the United Kingdom, the employer is deemed to be domiciled in the relevant

> part of the United Kingdom if the employer has a branch, agency or other establishment in that part of the United Kingdom and the dispute arose from the operation of that branch, agency or establishment.

17. On the separate issue of territorial jurisdiction, in **Lawson v. Serco Limited** [2006] ICR 250, Lord Hoffmann noted that the right to pursue a claim for unfair dismissal under the **ERA** is necessarily subject to implied territorial limitations. Four different scenarios were envisaged. First, if the work is conducted in Great Britain, the primary factor is the location of work of the claimant and jurisdiction will usually be established. Secondly, in the case of those such as airline pilots who perform work in multiple jurisdictions ("peripatetic employees"), a material question is whether the employee can be said to be "based" in Great Britain. Thirdly, for those employees who commute from Great Britain to perform work in a fixed place abroad ("partial expatriates"), it is necessary to show a sufficient connection with Great Britain and British employment law to displace the expectation that any claim against their employer would have to be pursued in the jurisdiction where the work is performed. Finally, for those working and living outside Great Britain ("expatriates") it will only be in exceptional cases that a tribunal has jurisdiction over a claim in Great Britain. The employee in such a case would have to show an overwhelmingly closer connection with Great Britain and British employment law than with the jurisdiction in which they live and work.

18. Whilst the general rule, therefore, is that the place of employment is decisive, exceptions can be made where the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that Parliament must have intended the right to claim unfair dismissal under the **ERA** should apply to the employee in question (**Ravat v. Halliburton Manufacturing Services Ltd** [2012] ICR 389 at para 28 per Lord Hope).

19. Determination of the implied limits of territorial jurisdiction requires an analysis of the entire factual matrix. This includes looking at how the contract was being operated in practice and as a whole (**Todd v. Midland Airways Limited** [1978] ICR 959). A choice of law clause can be a relevant factor (**Ravat; Green v. SIG Trading Ltd** [2019] ICR 929). The four **Lawson** scenarios are useful but they are not exhaustive. As the Supreme Court stressed in **Ravat**, resolution of the issue of territorial jurisdiction depends upon a careful analysis of the facts of each case, rather than simply deciding whether a given employee fits within categories created by previous case law.

20. The same general test for territorial jurisdiction over claims under the **ERA** usually applies also to claims under the **EqA** (**R. (Hottack and another) v. Secretary of State for Foreign and Commonwealth Affairs and another** [2016] ICR 975).

21. **The Equality Act 2010 (Work on Ships and Hovercraft) Regulations, 2011** ("**the 2011 Regulations**") extends the territorial jurisdiction of the **EqA** to certain seafarers working wholly or partly in Great Britain (including UK waters adjacent to Great Britain) provided that certain other conditions are met. Section 199(7) of the **ERA** contains similar provisions in relation to claims of unfair dismissal brought by mariners. Those who do not meet the requirements of those specific legislative provisions may still rely, in the alternative, upon the general principles of territorial reach described out in **Lawson** and **Ravat** (**Diggins v. Condor Marine Crewing Services Limited** [2010] ICR 213).

The Tribunal's reasons

22. At paragraph 2 of his reasons, the Employment Judge began by directing himself that "[t]he preliminary issue the Tribunal had to consider was whether or not the Tribunal had territorial jurisdiction to consider the two claims."

23. At paragraph 65, he referred to **Simpson v. Interlinks Ltd** [2012] ICR 1343 as an authority which considered "the various routes the claimant might take to try to establish jurisdiction". At paragraph 66, he noted that jurisdiction "could be determined" by section 15C of the amended **CJJA**.

24. At paragraph 67, the Judge considered but rejected the applicability of sections 15C(2)(a) and (b) of the **CJJA.** At paragraphs 68 to 70, he also rejected a submission for the claimant that SDHR should be considered as an "agency" of the appellant from the operation of which the dispute arose in terms of section 15C(7).

25. He then considered the question of the applicable law of the contract (paras 71 to 75) before turning to look at the issue of territorial jurisdiction in claims of unfair dismissal under section 199(7) of the **ERA** and / or **Lawson / Serco** (paras 76 to 90) and in claims under the **EqA** under regulation 3 of the **2011 Regulations** (paras 91 to 95). Having done so, he concluded that the Tribunal had jurisdiction to determine both claims.

Submissions

Appellant

26. Mr Napier's primary submission was that the Employment Judge had erred in failing to follow the correct approach to issues of jurisdiction described in **Simpson v. Interlinks Limited** [2012] ICR 1343. In particular, he had failed to recognise the distinction between international jurisdiction on the one hand and territorial jurisdiction on the other. Those concepts required to be considered separately. If none of the alternative grounds of international jurisdiction under section 15C and 15D of the **CJJA** was made out, the only course open to the tribunal was to dismiss the claims. The Judge had erred, however, in concluding that there were alternative routes to establishing international jurisdiction beyond those provided by the amended **CJJA**. Specifically, he had misdirected himself that the rules on territorial jurisdiction were capable of conferring international jurisdiction as an alternative route or routes to those in sections 15C and 15D of the amended **CJJA**.

27. On the findings in fact made, the appellant was not domiciled in the UK, nor did the claimant habitually work in the UK (para 67). Accordingly, neither of the routes to international jurisdiction provided by section 15C(2)(a) or (b) could apply. The Judge had also correctly rejected an argument that SDHR was an "agent" of the appellant for the purposes of section 15C(7). No other route to international jurisdiction under section 15C or 15D was apparent from the factual findings or reasons. Accordingly, the claims should have been dismissed.

28. Alternatively, if the claims did not fall to be dismissed for want of international jurisdiction, the Judge had also erred in his conclusions as to territorial jurisdiction. In relation to the **EqA** claim, he appeared to have relied erroneously upon regulation 3 of the **2011 Regulations** by failing to recognise that, on the findings in fact made by him, the claimant plainly did not work "wholly or partly within Great Britain". In relation to the **ERA** claim, he had mis-applied section 199(7) **ERA** by considering where the claimant might have been asked to work rather than at the issue of where he did work. Finally, in considering **Lawson / Serco**, he had erroneously concluded that the parties had made no express choice of law. He had thus ignored a relevant factor in considering whether the connection between the employment relationship and Great Britain was sufficiently strong.

Claimant

29. Mr Bunting accepted that international / forum jurisdiction could only be established under the amended **CJJA**. He also accepted that, on the facts found by the Judge, he appeared to have concluded that neither of sub-sections 15C(2)(a) or (b) could apply. Mr Bunting submitted, however, that it was implicit in the Judge's reasons that he must have concluded that that sub-section 15(2)(c) applied. Although the Judge did not expressly mention such a conclusion, if he had not found international jurisdiction to have been established, he would not have required to go on to consider territorial jurisdiction at all. Section 15C(2)(c) referred to the place "where the business which engaged the employee was situated". On the facts found, that was the place where SDHR was situated, which was Aberdeen.

30. Alternatively, if the Judge's reasons on international jurisdiction were inadequate, the case should be remitted to the same tribunal on the issue of international jurisdiction, or to a differently constituted tribunal to re-hear the preliminary issue of new.

31. In relation to territorial jurisdiction, Mr Bunting submitted that the Judge had correctly applied **Lawson** / **Ravat**, as well as section 199(7) **ERA** and regulation 3 of the **2011 Regulations**. In relation to the **EqA** claim, a route to territorial jurisdiction could, in any event, be found through Regulation 4.

Analysis, decision and disposal

32. The Judge's characterisation of the issue before him at paragraph 2 of his reasons suggests that he did not appreciate the important distinction between international and territorial jurisdiction and did not appreciate that those issues required to be considered separately. Further, although he referred to **Simpson v. Interlinks**, he appears wrongly to have interpreted that case as authority for the proposition that, in any claim involving an individual contract of employment, alternative routes to establishing international jurisdiction might exist beyond those provided in sections 15C and 15D of the **CJJA**. Specifically, he misdirected himself that the rules on territorial jurisdiction could confer international jurisdiction. I therefore agree with Mr Napier that the conclusion that the tribunal had jurisdiction to determine the claims was based on a material error of law and must be set aside. That then raises the issue of whether the claims should simply be dismissed for want of international jurisdiction or, alternatively, remitted back for further consideration of that point.

33. Mr Napier argued that no other route to international jurisdiction was possible on the factual findings. But for the involvement of SDHR, I would have agreed with that submission. The difficulty, however, is that whilst the Judge's conclusions about the non-applicability of sections 15C(2)(a) and 15C(2)(b) of the **CJJA** are clear and are plainly correct, the same cannot be said in relation to section 15C(2)(c), on which his reasons are largely silent.

34. Section 15C(2)(c) of the **CJJA** is capable of conferring jurisdiction upon the courts for the place in the United Kingdom "where the business which engaged the employee is or was situated (regardless of the domicile of the employer)". The language of section 15C(2)(c) is intended to replace that of Article 21(1)(b)(ii) of the recast Brussels Regulation, 1215/2012 (**Gagliardi v. Evolution Capital Management Limited** [2023] ICR 1377). Article 21 referred to "the courts for the place where the business which engaged the employee is or was situated". That wording is, in turn, similar – though not identical – to Article 6(2)(b) of the 1968 Rome Convention which refers to "the law of the country where the place of business through which the employee was engaged is situated". Authorities on the interpretation of the Rome Convention are, however, potentially relevant when considering similarly worded provisions of the Brussels Regulation (**Powell v. OMV Exploration & Production Limited** [2014] ICR 63 at paragraphs 39 and 40).

35. In **Voogsgeerd v. Navimer** [2011] EUECJ C-384/10, the European Court of Justice considered the meaning of the expression "the place of business through which the employee was engaged" in the Rome Convention and held that the expression referred "exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment" (para 52). The court or tribunal should, therefore, consider only those factors "relating to the procedure for concluding the contract, such as the place of business which published the recruitment notice and that which carried out the recruitment interview, and it must endeavour to determine the real location of that place of business" (para 50).

36. Each of the contracts under which the claimant was employed stated that it was entered into in Singapore. It appears, however, from a finding in fact made by the Judge at paragraph 11 that the offer of employment made to the claimant by the appellant in 2011 was sent to the claimant at his home address in Liverpool, and that the claimant was asked to confirm his acceptance of that offer in writing to SDHR in Aberdeen. There are no equivalent factual findings as to how or where the contract between the claimant and AMS or the final contract

between the claimant and the appellant came to be concluded. At paragraph 23, however, the Judge made a finding that:

> "The claimant's point of contact and relationship with any of the Stena Group companies…was managed through [SDHR]"

and, at paragraph 70, he made specific reference, albeit in general terms, to the role played by SDHR in recruitment.

37. These findings all raise the possibility – I put in no higher – that further factual inquiry into the precise role played by SDHR might lead to a conclusion that Aberdeen was the place where the business that engaged the claimant was situated. On the material before me, however, it is not possible to say what conclusion should be reached about that question and thus about the possible applicability of section 15C(2)(c) of the **CJJA**. It follows that a remit is necessary for consideration to be given to the precise role in the process of employment of the claimant played by SDHR. In its submissions for this appeal, the appellant also very fairly concedes that an argument about whether or not SDHR constituted a "branch" or "establishment" for the purposes of section 15C(7) was not previously considered by the tribunal and remains to be advanced.

38. Since I am not prepared to accept Mr Napier's primary position that the claims should be dismissed at this stage for want of international jurisdiction, it is necessary for me also to consider his alternative arguments in relation to territorial jurisdiction.

39. In relation to section 199(7) **ERA**, I agree with Mr Napier that the Judge erred in looking at where the claimant *might* have been asked to work under his contract rather than at the statutory test of whether, under his contract of employment, he did "not work wholly outside Great Britain". I agree with Mr Napier that section 199(7) requires consideration of the reality of the relationship rather than upon what may hypothetically have happened. The only potential route to territorial jurisdiction over the **ERA** claim, therefore, is through **Lawson** / **Ravat**.

40. On the Judge's application of the **Lawson** / **Ravat** principles, the only challenge taken by Mr Napier was that the Judge had erred in concluding that there had been no express choice of Singaporean law. The basis for that submission is paragraphs 72 and 75 of the Judge's reasons which state:

> "72. The documentation…covering...the claimant's recruitment and then his transfer to AMS and back and also his promotion seems consistently to refer to being governed by the law of Singapore. There were no indications that the claimant did not accept this or that any assurances were given that UK employment law would apply as happened in **Ravat**. I am somewhat hesitant on the limited evidence before me to conclude that the claimant made any real informed choice of law. I suspect that like many people he never turned his mind to consider the matter. In the event I could not say that any choice had been made. The Tribunal also needs to consider Article 8(2) and the country the contract is most closely connected to…
>
> 75. I concluded in the absence of Singaporean law appearing in reality to have any role in he expected interaction between employer and employee that the employment contract could be said to be more closely connected with the UK."

41. The Judge clearly recognised that the claimant's various employment contracts all contained an express choice of Singaporean law. He refers to that choice at paragraphs 4.5.1, 4.6.1, 4.7.1 and 4.11.1 of his findings in fact. That being so, it is difficult to understand his reference to Article 8(2) of the Rome I Regulation No 593/2008, which applies only where parties have *not* made an express choice of law. The suggestion that it is necessary to consider the country to which the contract is most closely connected may also be a reference to Article 8(4). Again, however, that applies only where the parties have not made an express choice of applicable law. On the face of matters, therefore, there is force in the argument that there were errors of law in the Judge's interpretation and application of Article 8 of the Rome I Regulation. The observation by the Judge that he could not say that any choice of law had been made is plainly at odds with his findings in fact. Having regard to his findings about the contractual terms, the Judge's apparent reliance upon Articles 8(2) and 8(4) was also erroneous.

42. As is plain from paragraph 75 of his reasons, however, the context in which those observations were made by the Judge was an appropriate consideration by him of whether the employment contract could be said to be more closely connected with Great Britain. Whilst an express choice of law clause will always be relevant, the weight attributed to such a clause in applying **Lawson** / **Ravat** will inevitably depend upon the extent to which such a clause had any practical consequence upon the issue of the strength of any connection between Great Britain and the employment relationship. In considering that question, the Judge was entitled to consider the reality of how the contract operated, looked at as a whole. Notwithstanding the way in which he expressed himself, it is clear that the Judge ultimately did just that. He concluded that the reality of how the relationship operated was inconsistent with Singaporean

law ever having played any real part in the employment relationships, whatever the contracts may have said. I do not, therefore, accept that the Judge erred in his consideration of **Lawson** and **Ravat** in any way that was ultimately material to his conclusion on territorial reach in relation to the **ERA** claim.

43. In relation to regulation 3 of the **2011 Regulations**, the Judge's conclusions and reasons (paragraphs 91-95) are difficult to understand, save to the extent that he clearly found (at paragraph 93) that the claimant did not work wholly or partly in the UK. That conclusion was inconsistent with any part of regulation 3 of the **2011 Regulations** being engaged. No argument was advanced before him about the possible applicability of regulation 4. If therefore, as appears to be the case, the Judge concluded that territorial jurisdiction over the **EqA** claim arose from regulation 3 of the **2011 Regulations**, that was also an error of law.

44. I will therefore set aside the Judgment of 12 July 2022 and remit the case for consideration of the issues of:

    a) international jurisdiction; and, if necessary,
    b) territorial jurisdiction over the **EqA** claim.

    Having considered **Sinclair Roche and Temperley v. Heard** [2004] IRLR 763, I see no reason why the same Employment Judge could not properly consider these issues. In the event that international jurisdiction is found to have been established, the conclusion and reasons on territorial jurisdiction over the **ERA** claim will remain unaffected.

45. In considering the issue of international jurisdiction, the Judge is likely to require to hear further evidence as to the role played by SDHR in the recruitment / engagement of the claimant. If the issue of territorial jurisdiction over the **EqA** claim requires to be determined, he will require to bear in mind what was said in **R. (Hottack and another) v. Secretary of State for Foreign and Commonwealth Affairs**.