EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Jansen	v	Marval Software Limited

Heard at: Bury St Edmunds (Remote via CVP) **On**: 14 December 2023
Before: Employment Judge Hanning

Appearances
For the Claimant: Mr Pacey (Counsel)
For the Respondent: Mr Crawford (Counsel)

JUDGMENT having been sent to the parties on 23 January 2024 and written reasons requested on 29 January 2024 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided.

REASONS

Background

1. The claimant had been engaged by the respondent as its Chief Executive Offer between 1 February 2020 until 8 February 2023 when the engagement was terminated. He says his salary for the month of February 2023 was unpaid nor did he receive notice or any pay in lieu. He therefore brings this claim under the Employment Rights Act 1996 ('ERA') for unfair dismissal and unlawful deduction from wages.

2. Throughout his time with the respondent, the claimant lived in Poland and worked remotely from there or from the Netherlands. Besides asserting reasons why they say they were entitled to terminate his engagement, the respondent also challenged that the territorial scope of the ERA extended to provide any statutory rights to claimant.

3. This preliminary hearing was fixed for determination of that single question and therefore without consideration of e.g. whether the claimant was an employee at all given the terms of engagement. For the purposes of this decision, I have considered the claimant's position on the footing that he was an employee.

4. Both parties were represented by Counsel from whom derived considerable assistance for which I record my thanks.

The Evidence

5. I had the benefit of an agreed bundle of documents which ran to 275 pages and heard evidence from the claimant and from Patrick Lemson, the respondent's Group Financial Controller. There were written statements provided for both of them and both were cross-examined by Counsel.

6. I considered that both witnesses were doing their best to assist the Tribunal, but it was difficult for Mr Lemson to give too much help given that he was not directly involved in the engagement of the claimant. Those who were involved were not, for reasons not explained, called.

The Law

7. Following the repeal of ERA 1996, s 196 in October 1999, the ERA 1996 contains no generally applicable geographical limitation. Save in respect of some particular areas of work, it is silent as to its territorial application.

8. The leading case on territorial jurisdiction is *Lawson v Serco Limited* 2006 ICR 250 HL. This indicates that where a territorial issue arises, the critical question to consider is whether or not Parliament intended the ERA to protect the employee bringing the claim. The question is whether the ERA applies to the particular case 'notwithstanding its foreign elements'.

9. In his judgment, Lord Hoffman gave guidance by reference to 3 examples. These are those who are working in Great Britain, a peripatetic employee and an expatriate employee.

10. The first category, said to be the 'standard' case, will generally be protected unless e.g. the presence in Great Britain is merely casual. Similarly, a peripatetic employee will usually be protected where their base is Great Britain.

11. The case of an expatriate will generally be protected only in exceptional circumstances. To have protection, the employee will need to show that there is a closer connection with Great Britain than with the foreign country notwithstanding that the employee works and/or lives abroad.

12. Therefore, an employee who both lives and works abroad but wishes to bring a claim before a British employment tribunal faces a high hurdle to establish territorial jurisdiction. In *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, [2012] IRLR 315 Lord Hope described such an employee as a 'true expatriate' and held that for true expatriates there must be 'an especially strong connection with Great Britain and British employment law before an exception can be made for them'.

13. The starting point is for such an employee to show that his or her employment relationship has a stronger connection with Great Britain than with the foreign country where the employee works. This comparative exercise was described by Elias LJ in *Bates van Winkelhof v Clyde & Co LLP* [2012] EWCA Civ 1207, [2012] IRLR 992 thus:

> 'In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some

> comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force'.

Findings of Fact

14. The following findings of fact have been reached on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and my assessment of the witness evidence.

15. Only findings of fact I consider to be relevant to the issue to be determined, have been referred to in these reasons. It has not been necessary, and neither would it be proportionate, to determine each and every contentious issue, to record every single event or to refer to every document I read or was taken to. That does not mean it was not considered if it was referenced to in the witness statements/evidence and submissions.

16. The claimant was approached by the respondent in about February 2020 with a view to his being appointed as CEO. At the time, as was the case throughout, the claimant lived in Poland.

17. There were pre-contract discussions which are largely evidenced by contemporaneous emails. As mentioned above, only claimant gave evidence about them as Mr Lemson was not yet with the respondent and those who were involved were not called.

18. On 26 February, Greg Pritchett, the respondent's Chairman, reported internally on the outcome of the discussions with the claimant. He reported that the claimant was to be offered the same salary as the outgoing CEO but that he wanted to be contracted rather than employed through his company in Poland. This, according to Mr Pritchett, was because the claimant wanted to take advantage of lower tax rates.

19. In evidence the claimant denied that was the reason (or the complete reason). He says it was purely administrative as otherwise the respondent would have had to create a payroll company in Poland to pay him. He claimed not to know whether the tax regime was more favourable. He also explained that it was easier to invoice as he could not be an employee in the UK as he did not live there.

20. On balance I do not consider anything turns on this apparent discrepancy. It is perfectly feasible that, at the time, the claimant simply referred to tax as a 'heading' for a more complex set of reasons and/or that Mr Pritchett misunderstood or did not feel the need to expand if he was aware of the full complexity. The real significance in my judgment is that the claimant was insistent that he was to be paid in Poland and not directly from Great Britain.

21. The respondent made a formal offer on 27 February 2020. This identified the proposed salary in sterling and explicitly recorded that employment would be subject to Polish law.

22. The claimant replied on the same day asking for payment in Euros and reimbursement of travel expenses. While travel expenses were agreed, the respondent payment confirmed that payment would be made in sterling.

23. On 12 March 2020 the claimant was sent a draft contract. He immediately rejected on the grounds that referred to him as an employee. An amended version was promptly sent and agreed. This changed the claimant's status to that to the status of a contractor but, as explained above, the question of the claimant's status is not for determination today.

24. Both versions of the contract included a clause applying the law of England & Wales but also noting that Polish law might apply. There is no evidence that anyone queried the obvious inconsistency. In my judgment that is because it was not at the forefront of anyone's mind. No one was concerned with how and when they might sue each other but they concerned about putting in place arrangement which was both tax and administratively efficient.

25. In any case, that contractual provision, while permitting the claimant to bring a claim here and to apply the law of the England & Wales does not mean the law of the England & Wales helps him. If the ERA does not apply, then he has no claim.

26. Thereafter the claimant took on the role of the respondent's CEO. The respondent develops and sells service management software. It sells globally and it is clear the claimant's responsibilities extended to the conduct of business much more widely than just Great Britain.

27. He accepted as accurate an Organisation Chart which showed him at the top of a tree where the key management personnel were in the Netherlands and Australia. Omitted from the chart were additional reports from Poland and the Baltic States.

28. I heard and accept however that all profits from the different regions were fed back to the UK company which was the head of the organisation.

29. Throughout his engagement, payment was made by the respondent to companies in Poland and later Bulgaria at the direction of the claimant. As the claimant was a contractor, the respondent deducted no tax or National Insurance in Great Britain.

30. The claimant confirmed he had never lived in Great Britain, and it is common ground that he lived in Poland throughout his engagement and essentially worked remotely. He travelled extensively too albeit he was hampered by the restrictions imposed by the Covid pandemic. His evidence was that he visited Great Britain 4 to 6 times a year for periods of from 1 to 3 days.

31. Mr Lemsom's evidence drawn from the respondent's records confirmed that the claimant made 5 trips in 2022 and only 1 in each of 2021 and 2023. He added that one or two trips might be missing but, allowing for Covid, what he confirmed was, for 2022 at least, pretty consistent with the claimant's evidence.

32. Taking the claimant's case at its highest, it amounts to 18 days per year in Great Britain.

Conclusions

33. The question I have to determine is whether or not on these facts there is a closer connection with Great Britain than with the foreign country notwithstanding that the employee works and/or lives abroad.

34. In my judgment in considering the connection it is appropriate for me to take into a number of material factors. Those I considered to pertinent and my findings in respect of each are:

a) *The amount of time, if any, the employee spends living and/or working in Great Britain versus the foreign country*

This was very little. The claimant lived overseas throughout. The claimant's highest estimate was that he visited Great Britain for work for 18 days a year which (out of 250 working days even though, as a contractor, the claimant had no right to paid annual leave) is about 7%.

b) *The employee's place of domicile and residence status as well as the nationality and citizenship of the employee*

The claimant's nationality and citizenship was not requested but there was no claim to being British and, of course, he was domiciled in Poland

c) *Where and why the employee was recruited*

The process appears to have been largely undertaken remotely, online. Importantly however the location of the claimant was plainly not a factor in the decision.

d) *How long the employee has been and is likely to be an expatriate and what the situation was before and after this status*

Having never lived in the UK the claimant is arguably not an expatriate at all. The practical position however is he has never lived in the UK and has expressed no intention of doing so in the future.

e) *In which country the employee's salary, pension and benefits are paid and in which currency*

The claimant was not paid directly at all. Payment was paid (in sterling) to companies in Poland (and later Bulgaria) and the claimant paid himself from those companies. Substantively then the claimant was paid outside Great Britain.

f) *In which country the employee pays tax*

The claimant paid no tax in Great Britain

g) *The employee's line management structure and administrative support and where those things are based*

This was split. As CEO the claimant reported to the Board which was in Great Britain. However, those reporting to him and administrative support was multi-national (including Great Britain).

h) *The law of the contract, why it was chosen and whether the employee had any influence over its choice*

This was muddled as the contract appears to apply the law of England and Wales as well as that of Poland. I found this was because no real thought was given which is indicative of the fact that, while the claimant had capacity to influence its choice, it was not important to him nor did the respondent place any significance on the applicable law.

i) *Any other representations that were made by the employer about the applicability and protection of British employment law available to the employee*

The respondent made no representations but tellingly the claimant was at pains to explain that, apart from any other reasons, he could not be an employee precisely because he did not live in Great Britain. Given the relevant law, that is wrong of course but it shows that the claimant had no expectation of having any British employment rights (or obligations).

j) *The identity of the employer and the extent of its connection with Great Britain*

I am satisfied on the evidence that the respondent is based in Great Britain and, while having a multinational business, has a very strong connection here.

35. None of the above factor is necessarily more important than any other nor is it is a case of simply counting how many factors weigh one way or the other. I consider the right approach is to step back and view the circumstances as a whole.

36. In *Ravat* Lord Hope held that for those living and working outside the UK there must be 'an especially strong connection with Great Britain and British employment law before an exception can be made for them'.

37. The hurdle for the claimant to overcome is high and I am satisfied he does not do so. There is precious little evidence of any close connection between the claimant, his work and Great Britain.

38. Without disregarding any factor, as the vast majority of his work was done overseas, he was himself insistent on being paid overseas and he explicitly disavowed being a UK employee, the evidence points overwhelmingly to there being a much stronger connection with his overseas location than with Great Britain.

39. For those reasons, I find that the Employment Tribunal has no territorial jurisdiction and the claimant's claims are dismissed.

Delay

40. I apologise to the parties for the delay in the production of these written reasons. Although the request was made promptly, I have had some serious health issues with which to contend, and which regrettably prevented me preparing these more quickly.

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Employment Judge Hanning

Date: …23 April 2024……..

Sent to the parties on: 3 May 2024

For the Tribunal Office

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