Neutral Citation Number: [2024] EAT 77

Case No: EA-2022-001307-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 May 2024

Before:

HIS HONOUR JUDGE BEARD

- -

Between:

MR JUSTIN LAWES

Appellant

- and -

FLEET MARITIME SERVICES (BERMUDA) LTD

Respondent

- -
- -

Mr G Pollitt (instructed by Altralaw) for the **Appellant**
Mr D Reade KC (instructed by Outset Limited) for the **Respondent**

Hearing date: 11 April 2024

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JUDGMENT

SUMMARY

Practice and Procedure, Jurisdictional/Time points

The Employment Judge decided to stay, effectively, a decision as to the territorial reach of the Extension of Jurisdiction Order 1994. The reason was that a decision was better decided by a court the claimant having reserved the right to pursue a contractual claim before the courts for amounts over and above the statutory limit. The claimant appealed arguing that the judge should have reached a conclusion on the claim.

The courts have specific procedural steps for service of proceedings outside the jurisdiction which are not replicated in the 2013 rules. The differences may impact on whether the employment tribunal has jurisdiction to hear such claims under the 1994 Order, but that is decision for another case. The Employment Judge made a case management decision within the definition in rule 1(3) of the Employment Tribunal Rules 2013. The threshold that the decision was certainly wrong in order for an appeal to succeed was not crossed. The Judge's decision, when examined considering the approach set out in **Lycatel Services Ltd v Robin Schneider** [2023] EAT 81, is well within the scope of his discretion to make a case management order staying proceedings.

HIS HONOUR JUDGE BEARD:

PRELIMINARIES

1. This is an appeal arising out of the judgment of Employment Judge Ryan sitting alone following a two-day hearing in October 2022. I shall refer to the Parties as they were below, as Claimant and Respondent. Mr Pollitt represents the Claimant and Mr Reade represents the Respondent; both appeared at the ET hearing.

2. In a reserved preliminary Judgment EJ Ryan concluded that the ET did not have jurisdiction over aspects of the claims made, however he, effectively, stayed a decision on whether the ET had jurisdiction to deal with a complaint of breach of contract made pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. His basis for the stay was that the claimant might be able to establish that a court would accept jurisdiction under international private law. He held that given the hierarchy of courts he would not make a decision which might have the effect of limiting the jurisdiction of the courts in potential claims that the claimant could pursue before the courts.

3. Judge Susan Walker considered this appeal at the sift stage and permitted one ground of appeal to advance to this hearing, that EJ Ryan should not have declined to decide the breach of contract claim.

THE EMPLOYMENT TRIBUNAL DECISION

4. The claimant's claim, subject of this appeal, was for breach of contract and the preliminary hearing was to consider whether the ET had territorial jurisdiction to hear the claim. The judgment reached in respect of the contract claim was:

> *"Subject to the claimant establishing before a court in England & Wales (other than the Employment Tribunal) that such court would accept jurisdiction to hear a breach of contract claim made by him under normal principles of international private law, the Tribunal does not have jurisdiction to hear the claimant's claim of breach of contract".*

5. EJ Ryan, having formulated the question he was to resolve was whether a court in England

and Wales would have jurisdiction to hear the contract claim, found the following relevant facts. That the claimant was employed as a ship's captain on cruise ships and that he was recruited out of Southampton and was "onboarded" (there is no specific definition given to this word) there. The judge found that some HR functions were run from Southampton for UK staff. In the claimant's case this involved some training and PAYE payments; furlough was also operated from Southampton. EJ Ryan found that the respondent, a wholly owned subsidiary of a Panamanian company operating out of the United States of America, is incorporated in Bermuda. The respondent has, since 2008, had its operational headquarters in California (USA), with "onboarding arrangements carried out in Naples (Italy) since 2019. EJ Ryan further found that the contract did not provide for an exclusive jurisdiction, however it did provide that the agreement should be construed according to English law.

EMPLOYMENT TRIBUNAL CONCLUSIONS

6. EJ Ryan came to the following conclusion as to the breach of contract claim:

> *"For all the above reasons I find that the Tribunal does not have jurisdiction in respect of claims made under ERA or EqA nor the Extension Order, subject to a proviso in respect of the Extension order. The proviso is that C may yet establish that a court in England and Wales will accept jurisdiction for a breach of contract claim under the normal principles of international private law. I do not feel that it is appropriate for me to make a judgment at this stage and on the basis of what is before me that would presume to limit the High Court or County Court in England and Wales from accepting jurisdiction in respect of C's claim of breach of contract in respect of notice pay. Given the hierarchy of courts I am not so empowered, but I would consider a judgment at this stage to be trespassing on another court's territory. In the circumstances I do not decline jurisdiction in respect of the holiday pay claim which is argued as a breach of contract but would rather stay that consideration pending the High Court or County Court considering its position with regard to jurisdiction in respect of the other indicated proceedings for breach of contract."*

SUBMISSIONS

7. Mr Pollitt's point was short: that the judge had failed to reach a decision on matter he was required to decide. He argued that the judge was correct in indicating that he had to decide whether a court would have jurisdiction to hear the breach of contract claim. Despite that clear

self-direction, the judge gave contradictory answer, finding that there was no jurisdiction yet indicating that a court may find that there was such jurisdiction. Mr Pollitt contended that this was "sitting on the fence" and was not a position the Judge was entitled to adopt. Mr Pollitt then argued that a court would be required to consider the Civil Procedure Rules and Practice Direction on service if faced with the facts as found by the judge. He contended that this was argued before the judge and the judge had failed to engage with the arguments. On that basis to put the decision aside so that the courts might consider the question was perverse.

8. Mr Reade's argument was that the judge's decision was, essentially, an exercise in case management. This was because the claimant had reserved his position in respect of breach of contract to pursue this in the courts save for one aspect, holiday pay, which was the claim before the employment tribunal. On this basis the decision of the judge to adjourn the matter allowed the claimant to pursue a matter before the courts "unfettered" by an ET decision on jurisdiction. If such a claim was successfully pursued in the courts the claimant could then return to the employment tribunal to continue the claim with the jurisdiction issue settled.

9. During the course of discussions with counsel the construction to be given to the extension of jurisdiction order was raised. In particular, that the issue of international jurisdiction was subject to very specific rules on service.

THE LAW

10. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 has not been updated to reflect the change in legislation from the Employment Protection (Consolidation) Act 1978 to the Employment Rights Act 1996. Reference to the enabling power for the Order refers to the 1978 Act which was, generally, repealed by the 1996 Act (see schedule 3 of the 1996 Act), however, section 131 is not included within schedule 3. Articles 3 and 4 of the Order provide:

> **3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than**

> **a claim for damages, or for a sum due, in respect of personal injuries) if—**
> **(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
> **(b) the claim is not one to which article 5 applies; and**
> **(c) the claim arises or is outstanding on the termination of the employee's employment.**
>
> **4. Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—**
> **(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
> **(b) the claim is not one to which article 5 applies;**
> **(c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and**
> **(d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.**

Article 5 limits the jurisdiction in respect of specific types of contract terms which are not relevant here. Sections 131(2) of the 1978 Act refers to claims based on a breach of an employment contract, or any other contract connected with employment, sum is due under such a contract and a claim for a sum is pursued through any enactment which relates to the terms or performance of such a contract.

11. Generally, jurisdiction is taken to mean the authority or power of the court to determine a dispute between parties, but in addition the territory over which the legal authority of a court extends. In the case of international jurisdiction, the Civil Procedure Rules deal with this in rule 6.36 relating to service of proceedings out of the jurisdiction with the permission of the court "*if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply*" the practice direction (insofar as is relevant) provides:

> **6) A claim is made in respect of a contract where the contract –**
> **(a) was (i) made within the jurisdiction or (ii) concluded by the acceptance of an offer, which offer was received within the jurisdiction;**
> **(b) was made by or through an agent trading or residing within the jurisdiction or**
> **(c) is governed by the law of England and Wales.**
> **(7) A claim is made in respect of a breach of contract committed, or likely to be committed within the jurisdiction.**

12. This requirement to seek permission to serve outside the jurisdiction is to be contrasted with the ET rules of procedure 2013 which require no permission. Rule 8 deals with presenting (to

be interpreted in accordance with rule 1 as delivery to a tribunal office) a claim and 8(2)(d) requires that the ET "*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*". It should be further noted that, pursuant to rule 15, it is the ET that serves the proceedings when because it is required to "send a copy" of the ET1 form presented by the claimant. Rule 86 provides that documents served by the ET can be sent to a postal or electronic address.

13. I was referred to **Wittenberg v Sunset Personnel Services Ltd & Ors.** [2013] UKEATS/0019/13/JW by the claimant on the basis that it indicated that a contract term as to the law to be applied is an important factor to be considered in this type of case. It appeared to me that this, although mentioned in the judgment, was *obiter dictum*. Nonetheless, given what is said within the practice direction it appears to me correct that, whilst not conclusive, the choice of the law to be applied to a contract must be a relevant and important factor when a court engages in the exercise of deciding whether to permit service outside the jurisdiction and also at the later stage in deciding whether to confirm jurisdiction or not. The claimant also referred me to **Yacht Management Company Ltd v Ms Lindsay Gordon:** [2024] EAT 33 where Lord Fairley appears to make a similar point about the importance of contractual terms to a decision on territorial jurisdiction.

14. I have reminded myself of the decision of Eady P. given in **Lycatel Services Ltd v Robin Schneider** [2023] EAT 81. An employment tribunal in deciding whether to stay proceedings in a claim over which it had jurisdiction but where the same issues were to be resolved before the High Court has to take into account all the relevant circumstances. Those circumstances will include, amongst other matters, the complexity of the issues and the appropriateness of the procedures. It is by taking that approach the employment tribunal can reach a conclusion as to which forum a claim could be most conveniently and appropriately be tried.

15. The Employment Tribunal Rules 2013 rule 1(3) provides that:

> **(3) An order or other decision of the Tribunal is either—**
> **(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or**
> **(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—**
> **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or**
> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue).**

DISCUSSION AND CONCLUSIONS

16. I was left with the impression that much of the argument advanced by Mr Pollitt on behalf of the claimant was, essentially, that the claimant would be successful in establishing such jurisdiction before the courts; this is particularly apparent from the case law he cited. However, the real issue for this tribunal is whether the judge was entitled to avoid, at least for the time being, dealing with that contractual dispute. It is not a decision as to what the resulting judgment would be.

17. The first step in coming to a conclusion on that issue is to ask what category of decision, precisely, the judge made. It appears to me that this was a decision that fell within rule 1(3)(a) rather than (3)(b). There is no determination of the issue by the Employment Judge and although he was, in one sense, delaying decision in order to follow a determination by the courts, he was not determining the issue. As this was a case management decision, I would have to be convinced that the Judge was certainly wrong.

18. I have to consider the overriding objective as part of this exercise. In my judgment it is incumbent upon a tribunal to decide the issues before it for which it has jurisdiction unless there is good reason not to do so. When the decision to stay a claim is made after evidence has been heard this may appear surprising. It would obviously be better, if there is to be a stay, for this to take place as part of case management in preparation for a substantive hearing. Such an approach would be more in keeping with the overriding objective. In most cases it would be inappropriate to leave a matter undecided after there had been a substantive hearing where

evidence had been heard. In particular, in a case where there is only a reservation for the purpose of court proceedings, it would, generally, be better for all matters to be concluded by the tribunal.

19. However, against this, the test set out in **Lycatel** (above) is also pertinent in the circumstances of this case. There is in the courts, a procedural protection of two stages. In contrast before the employment tribunal service is immediate. That two-stage process is important in the courts because it is the initial decision on whether the circumstances exist to grant jurisdiction. It has the appearance of a discretionary decision. This raises the question, on the construction of the Extension of Jurisdiction Order as to whether the employment tribunal would have jurisdiction over such a claim, or whether a decision of the court on service would be necessary first so before having the "jurisdiction to hear and determine" a claim. That is a matter which I do not intend to determine as the employment tribunal has not decided whether it did or did not have jurisdiction on the facts. However, it does point to a level of complexity absent from the general run of cases. On that basis, if there were extant court proceedings as to jurisdiction, it appears to me that the most appropriate and convenient forum for the decision would be the courts.

20. There is one other aspect that was raised in argument. That is that the decision to stay was made in the absence of submissions. As a case management decision, the reconsideration provisions in the 2013 rules do not apply as rule 70 refers only to judgments. However, the judge specifically left the door open to the parties to raise arguments before the employment tribunal. It appears to me that such an invitation was within the scope of rule 29 which provides that at any stage of the proceedings a judge may make a case management order and may vary, suspend or set aside an earlier case management order, in particular, where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

21. In this case there was a case management decision that I cannot say was certainly wrong. The

Judge used the shorthand of the hierarchy of the courts to describe the reason for the stay. That would encompass those matters which I have set out about the differences in procedure.

22. It appears to me that the employment judge's decision could be said to fall into two elements, firstly the territorial nature of the claim and secondly the hierarchy of the courts. In a case where proceedings in the courts had not yet commenced and a claimant's position was simply reserved it would not be appropriate for the judge to fail to decide the issue before the tribunal. It would be insufficient to rely solely upon the hierarchy of the courts as a reason to avoid exercising jurisdiction in such circumstances However, this is a case which involves territorial jurisdiction and, as can be seen above, quite important distinguishing features in respect of service of proceedings between the process adopted by the courts and that under the employment tribunal rules. It is on that basis I consider that the judgment of the employment judge should be upheld, and the appeal dismissed.