EMPLOYMENT TRIBUNALS

Claimant: Ms K Brown

Respondents: Portas Global Limited (R1)
Teckro Limited (R2)
Mr G Hughes (R3)

Heard at: London Central Tribunal (via Cloud Video Platform)

On: 20 June 2024

Before: Employment Judge Brewer

Representation

Claimant: Ms L Simpson, Counsel
Respondent: Mr J Forrester, Solicitor

JUDGMENT

The Employment Tribunal does have international and territorial jurisdiction in relation to claims against the second and third respondents.

REASONS

Introduction

1. This Public Preliminary Hearing was listed to consider the following question: does the Employment Tribunal have international and territorial jurisdiction in relation to claims against the Second and Third Respondents?

2. Legal representatives, witnesses and observers attended by CVP. This was a Public Preliminary Hearing. I heard evidence from Mr Sexton of R2 who, having gained the necessary permission, gave his evidence from the Republic of Ireland. I also heard evidence from the claimant.

3. I received a bundle of documents from the respondents and further documents from the claimant.

4. Each witness provided a written witness statement and was cross examined.

5. I am grateful to both representatives for their submissions.

Issues

6. The sole issue before me was whether the Tribunal has jurisdiction to hear claims by the claimant against R2 and R3 under the Equality Act 2010.

Findings of fact

7. I am mindful that there is a full merits hearing listed in this case and have therefore limited these findings to those strictly necessary to deal with the matter before me. References below are to pages in the bundles.

8. R2 is a company registered in the Republic of Ireland. It has no legal presence in the UK.

9. R3 if the Chief Executive Officer of R2.

10. R1 is a Professional Employer Organisation, essentially a vehicle used to employ persons, in this case, in the UK where the organization they do work for has no legal entity in the UK.

11. R2 is a customer of R1. I infer form the arrangements in this case that under an agreement between R1 and R2, R2 is the source of the claimant's salary and benefits which were managed by and paid through R1.

12. On 15 April 2019 the claimant was offered the role of Chief Marketing Officer "with Teckro" (R1). The claimant was made the offer in a letter from Ri [109]. The offer states expressly that

> "As…Teckro does not have a business entity in the UK, Teckro will engage a PEO (Professional Employer Organisation) in the UK who will act as your legal employer of record."
>
> [110]

13. The claimant accepted the offer on 16 April 2019 [112].

14. There is really no dispute between the parties about what followed.

15. The claimant's employment commenced on 3 May 2019. Her contract of employment is between her and R1. There a three such contracts the first of which is at [159]. The contracts are almost identical in terms save for salary. The claimant is said to be employed as "Chief Marketing Officer" reporting to R3, who is the Chief Executive Officer of R2. The contracts do not contain a 'choice of law' clause, nor do they contain a 'jurisdiction' clause.

16. All of the claimant's pay slips and P60s show R1 as her employer.

17. The claimant was onboarded by and throughout her employment worked for R2. She was managed by and answerable to R2 who, as Mr Sexton put it, had oversight of her work.

18. R2 provided the claimant with workspaces in London.

19. The claimant engaged further staff to work for R2 all of whom were engaged using the same PEO model.

20. The claimant engaged vendors for R2 who were contracted with by and paid by R2.

21. On 23 October 2023 the claimant was sent an email from R1 telling her that she was being made redundant.

22. The claimant argues that in reality she was employed by R2 notwithstanding the written contracts or, alternatively that she falls within s.41 Equality Act 2010, that is to say R2 is the 'principal' in that it provided work to be done by a person employed by and supplied to do that work by another person. In this case that 'other person' would be R1 and that would make the claimant a contract worker for the purposes of this provision.

Law

23. The Equality Act claims are pursued under ss.39, 41 and rely on ss.109 and 110 so far as the acts of R3 are concerned. I need not set out these well-known sections here.

24. **The Employment Tribunals Act 1996** contains the following provisions:

> **2 Enactments conferring jurisdiction on employment tribunals**
>
> Employment tribunals shall exercise the jurisdiction conferred on them by or by virtue of this Act or any other Act, whether passed before or after this Act.
>
> 7 Employment tribunal procedure regulations
>
> (1) The Secretary of State may by regulations ("[employment tribunal] procedure regulations") make such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals.
>
> (1) Proceedings before employment tribunals shall be instituted in accordance with employment tribunal procedure regulations.
>
> (2) Employment tribunal procedure regulations may, in particular, include provision—
>
> (a) for determining by which tribunal any proceedings are to be determined

25. The **Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 regulation 13** provides:

> 13.— Application of Schedules 1 to 3
>
> (1) Subject to paragraph (2), Schedule 1 applies to all proceedings before a Tribunal except where separate rules of procedure made under the provisions of any enactment are applicable.

26. **The Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1** ("the Rules") contain the following:

> **Presenting the claim**
>
> 8. (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—
>
> (a) the respondent, or one of the respondents, resides or carries on business in England and Wales;
>
> (b) 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
>
> (d) 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.

27. The decision to make no express provision as to territorial scope in the Equality Act 2010 leaves it to employment tribunals to determine whether the Act applies. This means that when determining whether they have jurisdiction to hear a claim brought under the Act, tribunals will generally be obliged to follow the approach set out by the House of Lords in **Lawson v Serco Ltd** 2006 ICR 250, HL, as interpreted by the Supreme Court in **Duncombe v Secretary of State for Children, Schools and Families (No.2)** 2011 ICR 1312, SC, and **Ravat v Halliburton Manufacturing and Services Ltd** 2012 ICR 389, SC. This is what might be termed the 'close connection' test.

28. In **Bleuse v MBT Transport Ltd and anor** 2008 ICR 488, EAT, Mr Justice Elias, then President of the EAT emphasised that domestic courts must, if possible, construe legislation so as to give effect to EU derived rights in cases where English law is the proper law of the contract. He held that statutory provisions should be construed so as to ensure that directly effective EU rights can be enforced by the English courts. Otherwise, the European principle of effectiveness would not be satisfied in that there would be no effective remedy for a breach of the EU right.

29. Although not addressed by either representative, we should also consider that the Tribunal may have jurisdiction if it can be shown that the claim relates to an individual contract of employment. This potentially engages s.15C of the **Civil Jurisdictions and Judgments Act 1982** (CJJA)

30. S.15C of the CJJA was inserted by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/479) ("the 2019 regulations") with effect from 31 December 2020. It states:

> 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 …
>
> SCHEDULE 4 Paragraph 5
>
> A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, also be sued—
>
> (a) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings…

31. The following commentary is offered by the learned editors of **Harvey on Industrial Relations and Employment Law** Division PIII/ 1. (3) The Civil Jurisdiction and Judgments Act 1982 and the Brussels Regime/(a), who submit that:

> For proceedings commenced in the UK on or after 31 December 2020, the Brussels Regime which had previously determined the appropriate forum as between the UK and a competing EU jurisdiction no longer applies. However, the approach of the Brussels Regime has been re-enacted through domestic legislation: the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982). The result of CJJA 1982 s 15C(2) is that the approach to competing forums (whether the competing forum is an EU member state or any other foreign jurisdiction) remains largely unchanged and a claimant continues to have the choice to bring employment litigation in the UK pursuant to a contract of employment…

32. In **Soleymani v Nifty Gateway LLC** [2023] 1 WLR 436 Popplewell LJ stated at [55]:

"The Explanatory Memorandum [to the 2019 Regulations] says in no fewer than six places that the instrument is intended to 'adopt', 'retain' or 'restate' the protections afforded to consumers (and employees) in the Recast Regulation .. It is clear beyond dispute that the intention expressed in the Explanatory Memorandum was one of restatement and retention in domestic law …"

33. This is relevant because **Regulation (EU) No 1215/2012 of The European Parliament and of the Council of 12 December 2012** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the Recast Brussels Regulation") contains the following :

SECTION 2 Special jurisdiction Article 8 A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

SECTION 5 Jurisdiction over individual contracts of employment

Article 20 1.

In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 21

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled;

or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so;

or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending

34. The principles to be applied to interpretation of the Brussels Regulation were considered in **Petter v EMC Europe Ltd** [2015] IRLR 847.

35. The Court of Appeal considered the threshold test, the autonomous definition of employment and emphasised the importance of taking a broad view of the scope of the specialist employment jurisdiction provisions within the Regulation. The following extracts from the decision of Moore-Bick LJ are of assistance:

[12] The proper approach to the judge's decision

It was common ground before the judge and before us that a claimant will establish that the court has jurisdiction if he can show 'a good arguable case' to that effect. In the present case that means a good arguable case that the court has jurisdiction under Section 5 of the Regulation. For these purposes it is accepted that 'a good arguable case' means 'having much the better of the argument' or 'a much better argument than the defendant' on the basis of the material before the court. In the present case the facts were not significantly in issue and the question therefore ultimately turned on the meaning of the words 'employee', 'employer' and 'contract of employment' in Section 5 of the Regulation. …

[17] In **WPP Holdings Italy SRL v Benatti** [2006] EWHC 1641 (Comm), [2007] 1 All ER (Comm) 208 Field J identified three characteristics of a contract of employment for the purposes of Section 5 of the Regulation. They were: (i) the provision of services by one party over a period of time for which remuneration is paid; (ii) control and direction over the provision of the services by the counterparty; and (iii) integration to some extent of the provider of the services within the organisational framework of the counterparty. Those indicia were derived from such authority as existed on the distinction between contracts of employment and contracts for the provision of services. In my view they are helpful, but it is of equal importance to have regard to the judge's exhortation to bear in mind that the underlying policy of Section 5 is to protect employees because they are considered from a socio-economic point of view to be the weaker parties to the contract. This has recently been reaffirmed by the Court of Justice in Mahamdia v Algeria, at paragraphs 46 and 60.

> [18] Mr Bloch [for EMC] accepted that the expressions 'employer' and 'employee' might have to be construed more broadly than they would be in domestic law, but he submitted that there was nothing to suggest that they should be construed so broadly as to encompass a situation in which there was no contractual relationship between the parties of the kind envisaged in WPP v Benatti. In my view, however, there is no reason to make what is no more than an assumption based on domestic law views of what is required for the relationship of employer and employee to exist. When seeking to interpret European legislation it is important to ascertain the purpose which it is designed to achieve, since that is likely to provide a surer guide to its meaning than a close scrutiny of the words used. In the present case the purpose of Section 5 is identified in recitals 18 and 19, which state as follows:
>
> > '18. In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules. …
>
> [19] These two recitals make it clear that even a principle as important as party autonomy is required to give way to prescriptive rules in favour of the protection of employees as the weaker parties in disputes relating to contracts of employment. In those circumstances it is necessary to interpret the whole of Section 5 in a way that will most effectively afford employees the degree of protection which those who framed the Regulation intended them to receive. That is most likely to be achieved by looking at the substance of the relationship rather than the legal structure within which it sits."

36. In **Samengo Turner v J&H Marsh & McLennan (Services) Ltd** [2008] ICR 18 the Court of Appeal adopted a broad interpretation of the concept of "employer" within the Regulation, holding that companies which were not in fact the individuals' employers should be treated as such.

37. So far as the threshold test set out in **Petter v EMC Europe Ltd** (above) further guidance on ‘good arguable case’ has been provided in the case of **Brownlie v Four Seasons Holdings International** [2017] UKSC 80 approved in **Goldman Sachs International v Novo Banco** [2018] UKSC 34.

38. In **Brownlie**, at para. 7 Lord Sumption explained the test in three limbs:

    (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;

    (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but

    (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.

Discussion and conclusions

39. There are three questions identified in relation to cases with an international element in **Simpson v Intralinks** [2012] ICR 1343:

    39.1. does the tribunal have international jurisdiction,

    39.2. should the case be in the tribunal or in some other court; and

    39.3. does the claim fall within the territorial scope of the legislation?

40. Dealing with the question of international jurisdiction and in effect whether this Tribunal is the appropriate forum, at this stage the claimant merely needs to show a good arguable case.

41. It is not in dispute that the First Respondent was based in the UK and the claimant had a contract called a contract of employment that entity.

42. As to the potential argument that this was not litigation brought pursuant to a contract of employment, there are a number of points which it seemed to me suggest that there is such a good arguable case:

    42.1. the appropriate approach is to consider the substance of the relationship rather than the legal structure in which it sits (per **Petter**),

    42.2. the claimant was offered employment by R2, was therefore recruited directly by and onboarded by R2,

    42.3. based on the Claimant's evidence, she was subject to continued management by R2 in general and specifically R3,

    42.4. the claimant says she was subject to control by R2 and R3,

    42.5. R2 provided the claimant's working spaces,

    42.6. it appears that in no sense whatsoever did the claimant provide personal service to R1, her obligations were al to R2.

43. On that basis it seems to me that there is a good arguable case with plausible evidence based on the claimant's version of the necessary degree of subordination (per **Holterman**). It does not matter for present purposes whether this is disputed.

44. As to the argument that R2 and R3 were not the claimant's employer, I accept that, following **Samengo-Turner,** there should be a degree of elasticity in the definition of employer for the purposes of the Brussels Regulation (and therefore s.15C CJJA) in particular where that leads to the litigation taken place in one jurisdiction. In that case as this the English forum (employment tribunal rather than court) does have the closest connection with the dispute. It is desirable for certainty and to avoid multiplicity of proceedings that the litigation takes place in the Employment Tribunal of England and Wales.

45. There is a good arguable case that as the Chief Executive Officer, R3 exercised control over R2 and that in turn R2 was in all senses in control of the claimant's employment, not least because of what was obviously the financial relationship between R2 and R1, that is that the only reason for the contract between R1 and the claimant was that R2 facilitated that financially for its own purposes but that on the face of it R1 was no more than a payroll agency for R2.

46. I accept that, generally speaking, it is unlikely that an agency worker will be regarded as the 'employee' of the end user of his or her services, even under the extended definition in S.83(2) of the Equality Act 2010. More commonly, the end user has a contractual relationship with the agency or employment business which supplies the worker, and that agency or employment business in turn has a contractual relationship with the worker. In some cases, agency workers have sought to argue that a contract of employment should be *implied* between them and the end user of their services but the scope for such implication is severely restricted. In **James v London Borough of Greenwich** 2007 ICR 577, EAT, the EAT set out guidance that tightly defined the circumstances in which a tribunal may infer an implied contract.

47. However, in the present case I do not have to determine whether the claimant was an employee of R2. The claimant vehemently contends she was, and I am not in a position to say that a Tribunal applying the above law may not do so, but as I say, that may be an issue for the final hearing.

48. Perhaps more importantly, given the claim under s.41 of the Equality Act 2010 an arguable case that the tripartite arrangements between R1, R2 and the claimant fell under that section, given that the relationship as set out by the parties took place almost entirely in the UK and taking account of the other factors I have referred to above, I agree with the claimant's submissions that given the EU derived rights in question, and given the obviously sufficiently strong connection to the UK, in this case there is no reason why R2 and R3 should not be subject to the jurisdiction of the Employment Tribunal in England and Wales.

49. For those reasons I find that that that the Employment Tribunal of England & Wales has international and territorial jurisdiction conferred on it to determine the claims against R2 and R3.

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Employment Judge Brewer

Date: 20 June 2024

JUDGMENT SENT TO THE PARTIES ON

27 June 2024

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