EMPLOYMENT TRIBUNALS

Claimant: Mr M Raphael

Respondent: (1) Rigicon Inc
(2) Mr Hakan Atay
(3) Mr Ahmet Melih Luleci

Heard at: Manchester Employment Tribunal (by CVP)

On: 14 February 2025

Before: Employment Judge Dunlop

Representation

Claimant: Miss S Dervin (counsel)
Respondents: Mr A M Luleci (Third Respondent and Chief Operating Officer of First Respondent)

JUDGMENT

1. The claimant's claims against Mr Atay and Mr Luleci (the second and third respondents) are struck out. Those individuals will be removed from the proceedings.

2. The Tribunal has jurisdiction to hear the claimant's claims against First Respondent. Those claims are not struck out and will proceed to a final hearing. Case management orders will be sent separately to the parties.

REASONS

Introduction

1. By a claim form presented on 21 December 2023 Mr Raphael (who has been professionally represented throughout these proceedings) brought claims against the three respondents. Against the first respondent (as his former employer) Mr Raphael brought complaints of unfair dismissal, race discrimination and contractual claims in relation to sums allegedly owed for notice and holiday pay. The grounds of claim stated that there were also

complaints of direct race discrimination and harassment against the second respondent, Mr Atay. Although the third respondent, Mr Luleci, was named as a respondent, the Ground of Claim did not identify any specific complaints brought against him.

2. Mr Raphael was previously employed by the first respondent as its Chief Commercial Officer. The third respondent, Mr Luleci, is the Chief Operating Officer of the first respondent. Mr Atay is said to have been a contractor engaged by the first respondent.

3. The claim form identified that all of the respondents were based in New York, and proposed service by email, providing email addresses for each of them. Mr Raphael also provided a postal address for the first respondent in New York. He stated that he had always been based in the UK and worked from his home address, which was also provided.

4. The Grounds of Claim also engaged with the issue of jurisdiction, setting out Mr Raphael's contention that he was entitled to the protection of English employment law and that his claims fell within the jurisdiction of the Employment Tribunal.

5. Response forms were submitted on behalf of the respondents on 10 and 17 February 2024. A joint Response document, prepared by Mr Luleci, denied the complaints on both jurisdictional and substantive grounds.

6. A preliminary hearing took place before Employment Judge Horne on 22 August 2024. Employment Judge Horne determined that there should be a public preliminary hearing (this hearing) to determine the following matters:

    1. To determine whether the employment tribunals in England and Wales have territorial jurisdiction to consider the claim or any part of it;
    2. To decide whether the claim, or any part of it, should be struck out or stayed on the ground that it would be more conveniently tried in New York State;
    3. To consider whether to remove Mr Luleci as a respondent on the ground that the claim form does not bring any claim against him; and
    4. To make further case management orders if the claim is allowed to proceed in England and Wales.

7. Employment Judge Horne also set out an indicative timetable for today's preliminary hearing.

8. By letter dated 4 January 2025 Mr Raphael sought to amend his grounds of claim to articulate a complaint of direct race discrimination against the third respondent, Mr Luleci. It was directed that that application would also be determined at today's hearing.

9. In his skeleton argument, Mr Luleci raised certain points about the alleged lack of merit of Mr Raphael's claim. Many of those points were about the claims against the individual respondents, which fall away in view of the decision I have made about the claims against the individual respondents (see below). Otherwise, however, I should be clear that this hearing was not about whether the claim should be struck out on the basis that it does not

have reasonable prospects of success, and I did not consider those arguments.

The Hearing

10. The hearing started at 11am which was partly to enable the Tribunal to take additional reading time, and partly to ameliorate (albeit not entirely) the impact of the time difference on Mr Luleci, who was attending remotely from New York.

11. In advance of the hearing I was able to review the documents as follows:

    11.1 A 210-page agreed bundle;
    11.2 Documents on the Tribunal file related to Mr Raphael's amendment application;
    11.3 A witness statement prepared by Mr Raphael in relation to the jurisdiction matter;
    11.4 Various 'witness statements' prepared by the respondents in relation to the jurisdiction issue;
    11.5 Skeleton arguments prepared by Miss Dervin and Mr Luleci
    11.6 A bundle of authorities prepared by Miss Dervin.

12. At the outset of the hearing, I discussed with the parties some concerns about the statements provided by the respondents. Mr Luleci had provided a statement and was able to give oral evidence. I was told that some other witnesses who had produced statements (Mr Kal, Mr Izgi, Mr H Luleci) were in Turkey, but were potentially available to join the call to give evidence if needed. I explained that that would not be possible, as Turkey has not given permission for evidence to be given in British Tribunal cases from inside Turkey. I told Mr Luleci that I would have regard to these statements, but the weight that I could attach to them would be limited.

13. Additionally, the respondents' statement bundle included two consolidated or 'joint' statements, one from the Rigicon Inc board and one from "former and current employees" (unnamed). I informed Mr Luleci that I could not take account of these statements at all, as they did not represent the evidence of individual witnesses. Having excluded (or limited the weight to be attached to) much of the respondent's evidence, I think it is right to record that there was much repetition across these documents. Mr Luleci was clearly the key witness for the respondent as to the issues relevant to jurisdiction, and I had the benefit of his evidence, both written and oral. I am confident that the attendance of any additional witnesses would not have changed the decision in this hearing.

14. Having discussed the statements and other housekeeping matters. I heard evidence from Mr Raphael, and then from Mr Luleci. After a break to prepare their submissions, I heard oral submissions from Miss Dervin and Mr Luleci. I reserved the Judgment.

The Issues

15. The issues I had to determine were broadly as set out by Employment Judge Horne, replicated at paragraph 6 above.

Findings of Fact

16. The first respondent makes specialist prosthetic urology equipment, in particular implants used in patients requiring radical surgery for prostate cancer. It is based in the United States, specifically in Ronkonkoma in New York State. Mr Luleci and other senior executives within the company are ethnically Turkish, or Turkish-American. Although there was no detailed evidence given about the corporate structure, I understand that the first respondent is part of a group of companies, which also includes Turkish companies, and some of its executives are based in Turkey. At the time Mr Raphael commenced his employment there was no UK subsidiary. One was later incorporated and Mr Raphael was a director if it at one stage. His own role, however, was always one with a global remit, and he was always employed by the American parent company.

17. Mr Raphael began his employment in November 2020. There had been discussions between Mr Raphael and Mr Luleci about the possibility of Mr Raphael working for the first respondent for some time prior to that. He had strong experience and contacts in the first respondent's market, having previously worked for a competitor.

18. I find that Mr Luleci believed that Mr Raphael could help the first respondent to develop its business globally in areas which it had zero presence, or very limited presence. Britain was not, itself, a huge market, but I accept Mr Raphael's evidence that it was an important one because British-based surgeons were influential in the area, and having a product adopted in Britain would lend credibility to the company and its product. Mr Raphael's role was to encourage surgeons in Britain and beyond to adopt the first respondent's products.

19. I accept that it was Mr Raphael's knowledge, contacts and experience that were the draw for Mr Luleci. The role was not advertised and no other candidates were considered. Essentially, it was a role created for him. As Mr Luleci said, "*We wanted to hire Marcus as a person, not Marcus because he was in the UK. If he was in Bangladesh we would have hired him.*" Whilst I accept Mr Luleci was truthful in saying this, I also find that Mr Raphael's location in the UK and his connections to UK surgeons were part of what made him an attractive proposition for the first respondent. Another individual, based in another country, might have had equally attractive experience and connections, but they would be different experience and connections to those offered by Mr Raphael, which were inextricably linked with the bio-medical environment in Britian.

20. As the employment arrangement was negotiated, it was agreed that Mr Raphael would continue to live in England and that the arrangement would therefore have to be compliant with British legislation as to, for example, tax. I accept that Mr Raphael himself took responsibility for making some of these arrangements, for example contracting with an accountant for a payroll to be set up in the first respondent's name.

21. I find that the first respondent made payment to an English company set up by Mr Raphael, which then made the relevant tax payments and forwarded

the net salary amount to Mr Raphael. This arrangement was approved by HMRC and Mr Raphael set it up with the help of an English accountancy firm he already had connections with. A British pension plan was also set up.

22. A written employment contract was entered into. Initially, this gave Mr Raphael the title of "Managing Director, VP Europe". A later amended contract changed the title to "Managing Director, SVP Global." The contract was silent as to Mr Raphael's place of work. It stipulated his salary in pounds sterling. It stated that he was entitled to 30 days' vacation each year. Mr Raphael states that that is an enhanced amount compared to what would be usual in the US,and was designed to reflect English employment law. Mr Luleci agrees that it is enhanced, but says this reflects the value Rigicon places on its employees and that other managers in the US enjoyed this benefit. I have not found it necessary to resolve that dispute.

23. The key clause in the contract for the purposes of this hearing is clause 22. It states:

    APPLICABLE LAW. This Contract shall be governed by the laws of the state of New York.

    The contract was electronically signed by Mr Luleci and Mr Raphael on 16 November 2020. As noted above, an amended version was signed by both parties in late January 2022. The amended version contained an identical clause 22.

24. Mr Raphael gave evidence about the work he was doing during his employment with the first respondent and how he spent his time. Much of this was agreed, although Mr Luleci generally suggested that Mr Raphael spent more time on international work and less time on UK work than was the case on Mr Raphael's account. To the extent that there was a dispute, I preferred the evidence of Mr Raphael. He gave evidence in a careful and precise way, and was ready to make concessions and accept points that appeared to be against him. Obviously, he is the person who had the clearest visibility about the work he was doing and, as I find he was both honest and accurate as witness, there is no reason to reject the account he gives. Mr Luleci made sweeping statements about Mr Raphael having a global remit, but was either unwilling or unable to explain the details of what he meant by this, and what Mr Raphael's working life involved.

25. I made the following findings.
    25.1 Mr Raphael spent 60-70% of his working time at his desk at home in England. He spent much of that time on internal and external calls and conference calls, both with people in the UK and abroad. Aside from that he would be planning and preparing for different meetings and events.
    25.2 Mr Raphael also had a role in directly supporting surgeons who were undertaking procedures using the first respondent's prosthetics. This might involve being on a video call linked to the surgery, or actually travelling to the hospital to be present when the surgery was taking place. He travelled to support operations in Britain (including in

Scotland as well as England), but also in France, Spain, Italy and the Middle East.

25.3 Aside from travelling to support surgical operations, Mr Raphael travelled for business meetings and conferences. This involved some regular travel to New York (once or twice per year) and Istanbul, as well as other locations. In 2020 and 2021 travel was mainly limited to the UK due to covid, his foreign travel increased from late 2021.

25.4 When Mr Raphael travelled for business his trips would usually last 2-4 days. He would start from his home and return there, usually flying in and out of Manchester Airport, or sometimes Heathrow, depending on his destination. Whilst some trips might have lasted a little longer, he never worked for extended periods in any other country.

26. Mr Raphael's employment ended when he was dismissed on 6 September 2023.

Legal Principles, discussion and conclusions

27. So far as Mr Luleci was concerned, the choice of law clause in Mr Raphael's contract means that his employment rights are governed exclusively by New York State law, and the only court with jurisdiction to determine a claim would be a court in New York State.

28. That is not correct. (It may help Mr Luleci to understand why it cannot be correct by considering that if it was correct, it would be open to UK businesses to evade the protections of UK employment law simply by putting a similar choice of law clause in their own contracts.)

29. Miss Dervin, in her skeleton argument, recognises that the position is more complicated, and that the Tribunal must consider the territorial scope of the legislation it is being asked to apply, the applicable law related to the employment contract, and the appropriate forum for the claim (or international jurisdiciton). It is also important, as she notes, to carefully separate the position in respect of the different types of claims being brought, and the different respondents.

30. I agree that it is necessary to consider the separate complaints and the separate respondents, and to separate the concepts of territorial jurisdiction, international jurisdiction, and applicable law.

31. I note as a preliminary point that Mr Raphael's employment contract was entered into on 16 November 2020, and the applicable law is therefore determined by the Rome I regulation. Article 66 of the UK-EU Withdrawal Agreement provides for Rome I to continue to apply in respect of contracts concluded before the end of the transition period on 31 December 2020. That includes this contract.

32. The position under Rome I is that an employment contract is governed by the law chosen by the parties i.e., in this case, by the law of New York State. However, even where the choice of law has been agreed, the regulation provides that the employee may not be deprived of the protection of provisions which cannot be derogated from by agreement under national

law, provided that the national law in question is that which would have been applicable if there had been no choice of law.

33. Under Article 8(2) Rome I, in the absence of a choice of law clause the contract shall be governed by the law of the country from which the employee habitually performs his work (assuming that can be identified on the facts of the case). For reasons which may be inferred from my findings of fact, and which I set out more fully below, I am satisfied that Mr Raphael habitually performed his work in England. This means that, irrespective of the choice of law clause, he is entitled under Rome I principles to exercise the non-derogable employment rights afforded to him by English law. Specifically, in this case, the rights created by the Employment Rights Act 1996 (ERA) and the Equality Act 2010 (EqA). Whether the territorial scope of those Acts is applicable to Mr Raphael is the question I will turn to next.

Territorial Jurisdiction under Employment Rights Act 1996 (ERA)

34. Amongst other things, ERA protects employees against unfair dismissal. Mr Raphael relies on it in bringing his unfair dismissal complaint in this case. S203 ERA contains restrictions on "contracting out" which mean that it is not open to employers and employees to agree that the protections contained in the act will not apply to a particular employment. The Act is (now) silent as to its territorial scope but the courts have developed a jurisprudence around when an employment relationship will have sufficient connection to the jurisdiction for the protections of the Act to be engaged.

35. Section 204(1) ERA provides "For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not." This reflects the position under the Rome I regulations, as I have set out above. It means that a choice of law clause, such as the one in Mr Raphael's contract, does not prevent an employee from relying on the protections provided by the Act.

36. The House of Lords in **Lawson v Serco Ltd [2006] ICR 250** famously identified three categories of worker who may be able to establish territorial jurisdiction under the Act. First, those whose place of work was in Great Britain. Secondly, in cases involving peripatetic employees, it would be necessary to identify the employee's base. If the employee was based in Great Britain, there would be sufficient connection. Thirdly, there may be cases of expatriate employees whose employment nevertheless has stronger connections with Great Britian and British employment law than any other system of law.

37. Through later cases (**Duncombe v Secretary of State for Children, Schools and Families (No 2) [2011] ICR 1312** and **Ravat v Halliburton Manufacturing and Services Ltd [2012] ICR 389**) it has come to be understood that these categories are not exhaustive, but are examples of a general principle. The principle, as expressed by Baroness Hale in **Dunscombe** is that "*the employment must have stronger connections both with Great Britian and with British employment law than with any other system of law*" (para 8).

38. This type of case can be difficult, and the factors involved can be finely balanced (a state of affairs which is only added to by the evolving nature of remote working). However, in my view the present case is *not* a difficult case.

39. Mr Raphael and Mr Luleci agree that the first respondent wanted Mr Raphael's services to expand into new global markets. There is a dispute between them as to whether cracking the UK market was a necessary strategic lynchpin (on Mr Raphael's case) or whether it was just another (smallish) market which happened to be where Mr Raphael lived (on the respondent's case). If I had to, I would accept Mr Raphael's evidence as I found his account to be more credible and compelling that Mr Luleci's. However, I am satisfied that I don't have to go that far.

40. Even on the undisputed facts, I conclude that Mr Raphael was working in the Great Britain. He did most of his work from his desk in his study in Cheshire and another significant chunk of his time was spent travelling within Great Britain (specifically to a number of hospitals in England and Scotland). When he travelled internationally, as very many executive employees do, it was for short periods to a variety of locations, starting and ending as his home. He falls within the first **Lawson** category.

41. It may well have been possible for Mr Raphael to do his job, or some version of it, from New York, or from Istanbul, or from Bangladesh or from anywhere else. But he did not, and the first respondent did not require this. He was based in England. The first respondent's recognition of this is evident in the fact that he was paid in pounds sterling and provided with a British pension, and the fact that both parties accepted the obligation to pay British employment taxes in a way which was compliant with British law and regulations (the mechanism through which this was achieved is immaterial).

42. The only factors which point away from a connection with Britain are the fact that the employer was a US corporation, and the choice of law clause. Those are entirely insufficient, in my judgment, to displace the 'on the ground' reality that Mr Raphael was working in Great Britian. It may have been possible, as Mr Luleci emphasises, for this job to have been done from another country. The reality, however, is that that is not what happened. It had to be done from somewhere, and that somewhere was Britain, specifically England.

43. The reasoning that I have elaborate here also supports the conclusion, expressed at paragraph 33 above, that Mr Raphael was "habitually" working in Great Britian, for the purposes of Article 8(2) Rome I. I take note of the case of **Gagliardi v Evolution Capital Management LCC [2023] ICR 1377** (cited by Miss Dervin in her skeleton argument) in this regard. Again, however, I find that the facts of that case were much more borderline than the facts I am presented with today.

44. The complaints Mr Raphael brings under ERA are all directed against the first respondent, as his employer. It is unnecessary to consider the position of the second and third respondent in relation to ERA.

Territorial Jurisdiction under Equality Act 2010 (EqA)

45. Essentially the same principles apply as discussed above. For the reasons I have already explained, I am satisfied that Mr Raphael is entitled to pursue Equality Act claims against the first respondent, as his employer.

46. However, that is not quite the end of the story. Mr Raphael also seeks to bring complaints under the EqA against Mr Atay (the second respondent) and Mr Luleci (the third respondent). Although both are named as respondents on the claim form, he accepts that the complaint against Mr Luleci can only proceed if he is permitted to amend his claim form to properly articulate such a complaint.

47. In a case where there were no complications arising from territorial jurisdiction, the EqA allows a claimant to claim both against his employer (usually a company) and against the individual co-workers who are responsible for the alleged acts of discrimination. The mechanism by which liability can attach to both parties is set out in Part 8 of the Act.

48. In her skeleton argument, Miss Dervin very properly drew my attention to the case of **Bamieh v Foreign and Commonwealth Office and others [2020] ICR 465**. That is a Court of Appeal decision concerning the ability to bring complaints against individual respondents where the parties worked abroad. Although it concerned detriment complaints under ERA, it is equally applicable to complaints under EqA. In that case, Ms Bamieh (an employee working on an international mission) brought claims under section 48(1A) of the ERA 1996 against her employer (the UK government) and individual colleagues (who were also working overseas). The Court of Appeal (in allowing the respondents' appeal) held that Ms Bamieh had failed to establish a sufficient connection between the common engagement of herself and her co-workers, and British employment law. The key issue was not commonality of employer, but commonality in the conduct of the individuals' roles – in respect of which there needed to be a closer connection to British employment law compared with foreign law.

49. Whilst Miss Dervin did not formally abandon the claims against the second and third respondent, she accepted that **Bamieh** presented a significant hurdle to her client. That was a difficulty to which she could not offer any convincing answer. Again, it seems to me that the facts giving rise to the appellate authority were nuanced and difficult, but the decision in this case is much more straightforward. Mr Atay has no discernable connection to Great Britian at all. If he is employed by the first respondent (and that is far from clear) then that employment also has no connection Britian. Mr Luleci has common employment with Mr Raphael as both are employed by the first respondent. The first respondent, however, is an American company. Its only connection to Great Britian is through Mr Raphael, but he was an 'outlier' in terms of the business as a whole. Mr Luleci has no connection with Britain – it was agreed in evidence that he never travelled to Britian for work purposes in part due to visa restrictions which would make such travel difficult for him. There is no sufficient common connection to Britian or British employment law to make an EqA claim against Mr Luleci sustainable.

50. In those circumstances the claims against Mr Atay and Mr Luleci must be struck out. I do not give permission to amend the claim to articulate the

complaint against Mr Luleci, because doing so would not address the more fundamental problem of jurisdiction.

The contract claim

51. Mr Raphael accepts that the applicable law in determining his breach of contract claim is the law of New York State. He also asserts (and this would appear to be correct) that the contractual dispute raises factual issues only – whether he was paid for three months' notice or only two, and whether he was paid for outstanding holiday pay on termination. Mr Raphael's position is that the resolution of those issues would not depend on which law applies, and I don't understand Mr Luleci to dispute that.

52. Mr Luleci's position is that if New York State law applies then the case must be brought in the courts of New York State. Again (and perhaps counter-intuitively) that is simply not the case. Courts in the UK (and in other jurisdictions) can hear cases where the law of the contract is the law of a another jurisdiction, and can apply that law in order to determine the case. The choice of law does not determine which courts have a jurisdiction to hear the case.

53. Miss Dervin's skeleton arguments set out the position has to the Employment Tribunal's jurisdiction to hear the contract claim as follows:

> 16. The Tribunal's jurisdiction to hear certain breach of contract claims is conferred by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. There are no express provisions contained therein regarding territorial scope.
>
> 17. However, by Article 3(a) and Article 4(a) proceedings for breach of contract may be brought if: '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'. In other words, the Tribunal's jurisdiction over breach of contract claims mirrors the jurisdiction of the civil courts.
>
> 18. In England and Wales, the question of jurisdiction over a contract claim is resolved by reference to CPR Part 6 (albeit the Claimant did not need to comply with that Part when submitting his Tribunal claim).
>
> 19. In cases where the prospective defendant is a foreign company, the key question is whether the defendant can be validly served with proceedings. It is accepted that the First Respondent is a foreign company (i.e. neither registered nor incorporated in England and Wales) and probably could not be validly served within the jurisdiction.
>
> 20. However, that is not fatal, because Part 6 goes on to provide that the courts of England and Wales may have jurisdiction over the claim, if service can be effected out of the jurisdiction. Pursuant to CPR r.6.33(2):
>
> > 'The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has the power to determine under sections 15A to section 15E of the [the Civil Jurisdiction and Judgments Act 1982] and […] the defendant is an employer and a party to a contract of employment within section 15C(1) of the 1982 Act'.

21. For reasons further expanded upon below under the heading 'Appropriate Forum', it is submitted that a court of England and Wales would have territorial jurisdiction to determine the Claimant's contract claim because he meets the gateway under section 15C(2)(b) the Civil Jurisdiction and Judgments Act 1982. Thus, the First Respondent could be validly served under CPR Part 6.

22. To summarise, because a civil court in England and Wales would have jurisdiction to hear the Claimant's breach of contract claim, it is submitted that the Tribunal also has jurisdiction pursuant to the 1994 Order.

54. I agree with Miss Dervin's analysis and I am satisfied that there is jurisdiction to hear the contract claim.

Appropriate forum – statutory and contractual claims

55. The Civil Jurisdiction and Judgments Act 1982 (as amended by the Civil Jurisdiction and Judgments (Amendment)(EU Exit) Regulations 2019), referred to in paragraphs 20-21 of the excerpt above, governs the issue of appropriate forum, in circumstances where the British courts have jurisdiction, but may share this with one or more foreign jurisdictions. The legislation makes specific provision for employment disputes at section 15C, which provides (amongst other circumstances) that an employer may be sued by an employee 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).

56. I have already found that Mr Raphael habitually carried out his work in England. Therefore, he is entitled to sue his employer in England regardless of the fact that the employer is a US corporation.

57. There is no suggestion that Mr Raphael has already brought claims in New York, or anywhere else, and nothing else that would prevent the Employment Tribunal in Manchester being considered to be the appropriate forum for all of the claims that remain in this case.

Conclusion

58. For the reasons I have explained I am satisfied that Mr Raphael can proceed with his claims against the first respondent, but not against the individual respondents. The case will now proceed to a final hearing.

59. I wish to finally acknowledge my gratitude to Miss Dervin for her submissions, and particularly her skeleton argument. It is not easy to determine complicated legal questions when only one side has the benefit of legal representation. Without meaning any disrespect to Mr Luleci, he was unable to articulate the legal principles and arguments in the way that a specialist professional would have done. Miss Dervin not only put forward her own client's case persuasively, but also discharged her duty to assist the Tribunal by providing a thorough and neutral account of the applicable legal principles, and drawing proper attention to points which went against her client's position.

Employment Judge Dunlop
Date: 27 February 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
17 March 2025

FOR EMPLOYMENT TRIBUNALS