EMPLOYMENT TRIBUNALS

Claimant **Respondent**

A **v** **Conflict Armament Research Ltd**

Heard at: London Central (remotely by CVP) **On:** 9 and 10 January 2025

Before: Employment Judge Wyeth

Appearances:

For the Claimant: In person
For the Respondent: Mr A Crammond (Counsel)

PRELIMINARY HEARING RESERVED JUDGMENT

1. The claimant's breach of contract claim is dismissed upon withdrawal.

2. The claimant was not working in Great Britain whilst engaged by the respondent and the tribunal does not have jurisdiction to hear any of her claims.

3. All her claims are dismissed.

REASONS

Introduction

1. By way of a claim form issued on 8 April 2024 (jointly with another claimant (DM) who has subsequently withdrawn her claim) the claimant brings a claim against the respondent following the termination of her engagement on 31 December 2023. In section 8.1, by way of boxes ticked, the claimant indicated that she is seeking to bring complaints of unfair dismissal and failure to pay notice. The claimant also ticked the box indicating that she is pursuing another type of claim which she has stated to be "Harassment" in the box provided. Notably the claimant has not ticked any of the boxes indicating a claim of discrimination and her form is silent in relation to any basis for alleging harassment.

2. In addition to narrative included on the claim form (at boxes 8.2 and 9.2) the claimant attached four pages of particulars which include a repeat of the material in the claim form itself and are also in narrative form.

3. The matter was listed for a case management preliminary hearing before EJ Anthony on 15 August 2024. By that stage, DM had withdrawn her claim. Despite indicating to the contrary, EJ Anthony's case management summary does not appear to identify in precise terms the claims and issues the claimant is seeking to bring. Instead, EJ Anthony ordered that the claimant provide further information about her claim of harassment by 26 September 2024, which the claimant did by way of a 10-page document headed "Written Submission". Notably the claimant was required to identify the protected characteristic she relied upon for her harassment claim, something it would appear she had not done at the hearing before EJ Anthony. The claimant has since confirmed that her harassment claim relates to her sex. Insofar as the content of the further information departed from what was already contained in the claim form, it was to be treated as an application to amend. EJ Antony listed this matter for a Public Preliminary Hearing to determine the issues identified below including, if relevant, that application.

The issues

4. In accordance with EJ Antony's order the issues to be determined at this Preliminary Hearing were identified as follows:

A. Jurisdiction

4.1. Was the claimant working in Great Britain at the time she was dismissed?

4.2. Does the Tribunal have jurisdiction to hear any of the claims?

B. Employment status

4.3. Was the claimant working under a contract of employment and therefore an employee of the respondent within the meaning of s230(1) Employment Rights Act 1996?

4.4. Further or alternatively, was the claimant a worker within the meaning of s230(3) Employment Rights Act 1996:

4.4.1. Did she work under a contract to perform the work personally; and
4.4.2. Was the respondent something other than a client or customer of the claimant's profession or business?

4.5. Was the claimant an employee or worker within the meaning of s83(2)(a) Equality Act 2010?

4.5.1. Did she work under a contract to perform the work personally; and
4.5.2. Was the respondent something other than a client or customer of the claimant's profession or business?

C. Strike out/Deposit Order

4.6. Should any or all of the claims be struck out pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 on the grounds that they have no reasonable prospect of success?

4.7. Should the claimant be ordered to pay a deposit as a condition of advancing her claims on the grounds that they have little reasonable prospect of success pursuant to rule 39(1) of the Employment Tribunal Rules of Procedure 2013?

D. Harassment Claim

4.8. Whether the allegations relating to harassment set out in the claimant's written submission are within the scope of the claim form as originally pleaded?

4.9. If not, whether the claimant should be permitted to amend her claim.

Procedure

5. It was apparent at the start of this hearing that this was an ambitious agenda and it was unlikely that there would be sufficient time in the two days allocated to deal with matters beyond those identified in A and B above. In any event, depending upon the outcome of the first two matters to be decided (jurisdiction and status), the remaining issues to be considered (C and D above) could be rendered irrelevant. As anticipated there was insufficient time to deal with anything other than the first two heads (jurisdiction and status).

6. Whilst it may not be strictly necessary to identify the precise issues in the claim to address those matters, at the very least it was necessary to identify the relevant heads of claim. Accordingly, I spent the first part of the hearing establishing with the claimant the extent of the claim she was seeking to advance.

7. The claimant confirmed after some discussion that she was withdrawing her breach of contract claim and I explained it would therefore be dismissed upon withdrawal. She accepted that notwithstanding the fact that her contract with the respondent provided for an end date of 31 March 2026, the terms of the contract allowed either side to terminate the contract earlier by giving the other party no less than one month's notice. The claimant also agreed that she had received two months' written notice to terminate from the respondent prior to her contract ending on 31 December 2023 and, thus, there was no breach. The claimant seeks to challenge the fairness of the respondent's decision to terminate and agreed that her claim was one of ordinary unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996 ("ERA") and not a breach of contract claim. The claimant also confirmed that she was seeking to bring a claim of harassment related to sex under s26 of the Equality Act 2010.

8. I asked the claimant about the fact that she was seeking to recover as part of any remedy a higher rate of pay than that provided for in her contract. She

initially told me that she considered that she should have secured a larger proportion of the funding that the respondent had secured in respect of the work she was engaged in and consequently felt that she should have been paid more. When I explained that there was no right to fair pay and that the only situation in which a tribunal could involve itself in levels of pay was in relation to an equal pay claim, it was only then that the claimant suggested that she thought this might be gender related. It was agreed that presently her claim did not include any such complaint and I explained that if her existing claim was able to proceed following this hearing, she would need to make an application to amend her claim if she wished to pursue an equal pay claim. That application would need to set out the basis of any such claim including who any male comparator was and why she maintains she had a right to equal pay in accordance with the provisions of the EqA.

9. Accordingly, the claimant's claim as it stands consists of claims under both the ERA and EqA namely, unfair dismissal and harassment related to sex. There are no other claims being pursued.

Evidence

10. I was provided with a witness statement from the claimant consisting of seven pages (containing 26 paragraphs). I also had a witness statement for the claimant's witness, DM, consisting of four pages (although the last page contained only the statement of truth). For the respondent I received a witness statement from Mr James Bevan, the owner of the respondent (consisting of seven pages). I also had before me an agreed electronic bundle consisting of 413 pages. An additional document setting out roles and responsibilities within the respondent was added to that bundle on the second day by agreement.

11. Having taken the morning of the first day to read the statements and relevant material, establish the claims that the claimant was seeking to bring (see the 'Procedure' section above) and to deal with the claimant's application for an anonymity order, I did not start to hear evidence until the afternoon of day one. After an early lunch, I heard evidence from the claimant first and her witness, DM, thereafter. I then heard evidence from Mr Bevan on the morning of day two after dealing briefly with some preliminary case management matters. The claimant had the whole morning to cross examine Mr Bevan. Having started at circa 10.35am, his evidence did not conclude until after 1pm.

12. Oral submissions began in the afternoon of the second day. On behalf of the respondent, Mr Crammond had prepared a written skeleton in relation to the issue of territorial scope which he expanded upon as well as making submissions in relation to the claimant's status. The claimant made oral submissions and Mr Crammond was given a very short right of reply thereafter. There was insufficient time for me to provide an extemporary judgment and reasons. I therefore had to reserve my Judgment.

Findings of fact

13. I make the following findings of fact on the balance of probabilities from the

evidence before me.

14. The respondent is a company that identifies and tracks conventional weapons and ammunition in contemporary armed conflicts. Its purpose is to generate unique evidence on weapon supplies into armed conflicts in order to inform and support effective weapon management and control in areas where conflict exists.

15. According to the evidence of Mr Bevan, which I accept, the respondent has investigation teams that work on the ground in around 25 conflict and terrorism affected "theatres of international concern" including Iraq, Libya, Somalia, Syria and Ukraine. The respondent has around 40 personnel internationally within the organisation. They range from full-time employees to self-employed consultants.

16. It is not in dispute that the respondent is a UK registered company based in London but in accordance with the evidence before me the work that it carried out had no specific connection to the UK as such. Indeed, the research was for the benefit of different NGOs internationally and governments of different jurisdictions where armed conflicts exist or existed. In reality, the respondent coordinated work that was carried out in numerous different jurisdictions for the benefit of various NGOs and governments that contracted with it to undertake the work. It was inevitable that the respondent needed to engage individuals who were required to be based in the areas and work 'in the field' where conflict existed. Likewise and conversely, it was not necessary or necessarily desirable for the respondent to specifically engage individuals in the UK to carry out much of its work given its international reach.

17. The work that the respondent carries out is funded by numerous international bodies namely: the European commission, the European External Action Service, the US State Department Agency, the German Government, the Foreign Office, and a broad spectrum of state governments in relation to specific projects.

18. Notably, the claimant volunteered in evidence that of the 40 or so personnel engaged by the respondent there were only around six individuals working for the respondent based in the UK. A further five or six were Canadian nationals based in Canada. On the claimant's own evidence the remaining personnel were working in around 20 different countries. The claimant referred to personnel being based in Brazil, Brussels, the US, Lithuania, France and Lebanon.

19. The claimant is a Canadian national. Prior to, during, and after her engagement with the respondent she has lived and worked exclusively in Canada. Before joining the respondent, she worked for the intelligent service in Canada in an international security capacity.

20. The claimant was engaged by the respondent as an investigator in its Enhanced Investigation Unit (EIU) from 1 May 2019 under the terms of a consultancy agreement dated 5 April 2019 (the first agreement). She was considered to be a very experienced field operator at the time. In December 2019 the claimant entered a second consultancy agreement upon adopting

the role of senior investigator. In November 2022 the claimant entered a new (third) consultancy agreement with the respondent to reflect the fact that she had agreed to become the Head of the EIU.

21. The EIU was a small specialised unit intended to work with the respondent's field teams to conduct in-depth investigations into the illicit supply of military material to insurgent and terrorist groups. The claimant's work was primarily built on the findings of the field teams. Those teams operated on the ground anywhere in the world where weapon systems or other illegal commodities were being used. Their function was to document and recover information about those systems or commodities which would include looking to identify who manufactured them and how they came to be exported to the area in which they were utilised. That information would be passed by the field teams to the EIU. The claimant's role was to investigate the supply chain and look at the entities involved with that, such as the individuals who had fronted illegal activity and the financial networks that they were linked to.

22. There is no dispute between the parties that the claimant's predominant place of work was in Canada throughout the entire period of engagement.

23. Although the claimant was able to do most of her work remotely from her home in Canada, her role did involve travelling to various international destinations, including Lebanon, Syria, the DRC, Thailand, Spain, France and the US (according to her evidence). Notably the claimant visited the UK no more than five times during the four and a half years she was engaged by the respondent. She attended once a year for some training and also visited the UK in September 2019 along with all the respondent's personnel (from various different international locations) for what was described as a staff 'retreat'. This was, in essence, a conference in which strategy was discussed and developed to assist in ensuring a consistent approach might be adopted as far as possible amongst those engaged by the respondent due to the international nature of the work being carried out. According to the evidence of DM which I accept, 'retreats' took place around once a year and were held in numerous different countries and not in the UK (save for September 2019) with the intention of endeavouring to set organizational culture globally.

24. I accept Mr Bevan's evidence that those benefiting from the services provided by the claimant were based all over the globe, including the Americas, Europe, the Middle East, Asia, and Africa. This is, of course, consistent with the objectives of the respondent's business as outlined above.

25. The claimant referred in evidence to taking direction from Mr Lewis, a UK national based in the UK. Mr Lewis was head of the EIU at that time and therefore it was inevitable that he would coordinate the work that the claimant was expected to engage in under her agreement with the respondent. The fact that Mr Lewis happened to be based in the UK appears to be inconsequential because the claimant also referred to being managed subsequently by two further members of the respondent's personnel, one of which was based in Belgium and the other in the US initially and, latterly, Kenya. Towards the end of her engagement, the claimant took direction from Mr Bevan, who was initially based in London but subsequently moved and operated from Italy.

26. I am satisfied on the evidence before me that in so far as those individuals "managed" the claimant it was limited to coordinating and allocating the work that she was expected to do under each of her agreements with the respondent. I accept Mr Bevan's evidence that the claimant was not managed operationally on a day-to-day basis and the claimant had significant autonomy over the way in which she carried out the work that was expected of her. The claimant was given a very broad mandate in terms of what to investigate, how to investigate and where to investigate. Much of the work she was expected to carry out involved grant-based projects. It was inevitable that the respondent had to retain some control over the deliverability of those projects and that key organisational tasks would require some direction from the respondent. Nevertheless, the claimant, in her own evidence, refers to engaging directly with funders, discussing projects and budgets and performing outreach with them. Contrary to her assertion that this somehow supports her argument that she was employed by the respondent, put in its proper context when taking account of the evidence before me, I find that the relationship she describes with funders is consistent with Mr Bevan's evidence that the claimant had considerable freedom in terms of the work she undertook and the way she went about that work.

27. The claimant refers to being issued with a business card and identification that indicated she was a member of staff with the respondent. No evidence of this was included in the material before me and consequently I find it of little value or assistance. I simply observe that I regard this as neither surprising or exceptional given her contractual relationship with the respondent as a consultant undertaking work for it and the need to travel to various international sites on the respondent's behalf.

28. The claimant was assisted by two individuals, one of whom was the claimant's witness from whom I have heard evidence, DM, a Canadian national engaged under a consultancy agreement (and who also challenges her employment status). The other was based in the UK. I interpose here that DM referred in her evidence to the fact that she was told the respondent uses consultancy agreements to engage people "*due to the complexities of employing individuals across multiple jurisdictions, given that [the respondent's] workforce is dispersed globally*". DM also states in her evidence that upon the termination of her engagement with the respondent (at the same time as the claimant's engagement was terminated) she sought support from the Canadian Employment Insurance program. Following that approach, DM maintains that the Canada Revenue Agency are treating her circumstances as being covered by Canadian employment laws.

29. The claimant never received payslips from the respondent but instead issued the respondent with invoices headed "contractor invoices". She would do this at the very least monthly if not more regularly. She says she was requested to do this by the respondent. Those invoices contain the claimants Canadian address and her Canadian bank details.

30. Throughout her engagement, the claimant was paid a gross figure in Canadian dollars direct to her Canadian bank account in respect of the monthly consultancy fee invoiced in accordance with the terms of each of the

consecutive consultancy agreements she entered with the respondent. She has never paid UK tax on sums received from the respondent as she was neither resident nor working in the UK. In evidence, she accepted that she was obliged to file a tax return in Canada in respect of this income and liable to pay tax on it to the Canadian authorities. She openly admitted in cross examination that she had failed to do so and described herself as "delinquent" in terms of not filing necessary tax returns and paying the tax due in Canada.

31. It is not in dispute that the respondent provided the claimant with specialist equipment, namely a secure laptop, secure phone and personal protection equipment for use on her field trips. This is not at all surprising given the highly sensitive nature of the work that the respondent and the claimant were engaged in and the importance of maximising secure and safe methods of working globally. I find as fact that the reason for this was the need to protect highly sensitive and confidential information.

32. Likewise I accept Mr Bevan's evidence that the reason the respondent provided the claimant with insurance, despite being considered an independent consultant, was because of the commercial reality of the situation and the fact that it was far harder for individuals to secure a policy to cover war zones in their own right and the respondent was better placed to do this on behalf of those with whom it contracted to undertake work that was inherently dangerous.

33. Again, there was no dispute that the respondent as part of its agreement with the claimant allowed her to claim pay for periods of sickness and holiday despite being regarded as an independent consultant. This was a commercial decision on the part of the respondent to reflect the fact that consultants were expected to operate in the field in very challenging and dangerous environments.

34. The written agreements between the claimant and respondent contain the terms that might be expected to be included in a consultancy agreement. Nevertheless, there is nothing in the evidence before me that suggests that the written terms of each consecutive contract do not reflect the true reality of how the parties intended and were in fact operating with each other.

35. Returning to the inception of the claimant's engagement with the respondent, the claimant has provided in support of her case a copy of the job description advertised as part of the recruitment process (starting at page 262). Notably, that document makes it unequivocally clear that the location of the role could be in "*London, Brussels, Washington DC or Home based*". The salary was described as "*starting it £55,000 or <u>local currency equivalent</u>*" [my emphasis]. It is evident from this that it was anticipated that the role could be recruited to and performed outside of Great Britain and have no connection with Great Britain at all.

36. Before the claimant entered the consultancy agreement, she received a letter dated 1 April 2019 from Mr Lewis, who was head of the EIU at the time, in which he referred to offering the claimant "employment" and a "permanent employment contract" in the position of investigator within the EIU to start on 15 May 2019. He also stated that the proposed terms would be detailed in a

full contract which should be sent to the claimant for review upon conditional acceptance of the offer.

37. I interpose here that Mr Wilson, the respondent's managing director also made reference to the claimant being in full time employment with the respondent in a letter that he sent to the claimant's bank on 1 September 2022 in support of a mortgage application she was making. That letter must have been sent at her request and it is not unreasonable to factor that it may well have been in the claimant's interests to be held out as an employee in those circumstances to secure any loan. I accept Mr Bevan's evidence that it was provided in the spirit of demonstrating that the claimant's arrangement with the respondent was a viable one so as to enable her to rely on it in her effort to secure the mortgage. Given its nature I place little value on the content when determining what the true arrangement was between the claimant and respondent.

38. Following Mr Lewis's letter of 1 April 2019 to the claimant and notwithstanding its content, the claimant entered the First Agreement dated 5 April 2019 (as referred to above). That document was signed by the claimant and Mr Bevan on 5 and 12 April 2019, respectively. Within it the following terms in particular were included:

"Background"

"(C) Nothing in this Agreement is intended to or should be deemed to create a partnership or an employment or worker relationship between the Company and the Consultant or any of her/his employees, agents, substitutes or subcontractors."

Clause 2.4:

"*The Consultant warrants that she/he is entitled to work in the country of operation without any additional approvals and will notify the Company immediately if she/he ceases to be so entitled during the course of the Engagement*".

"Obligation" - clause 3.1:

"*During the Engagement the Consultant shall:*

(b) unless prevented by ill health or accident, devote at least 20 days in each calendar month to the carrying out of the Services together with such additional time if any as may be necessary for their proper performance;"

Clause 3.3:

"*During the Engagement, the Consultant will not (without the prior consent of the Company):*

(a) represent her/himself as having authority to negotiate or conclude or enter into any binding contract on behalf of the Company, any Group Company or their respective customers".

Clause 4.4:

"*The Consultant agrees that she/he is responsible for all tax liabilities arising in connection with any payments made under this Agreement*"

Clause 7.1:

"*Nothing in this agreement shall prevent the Consultant from being engaged, concerned or having any financial interest in any capacity in any other business, trade, profession or occupation during the Engagement…*"

Clause 14.1:

"*The relationship of the Consultant to the Company will be that of independent contractor and nothing in this agreement shall render her/him an employee, worker, agent or partner of the Company and the Consultant shall not hold her/himself out as such.*"

Clause 14.2:

"*This agreement constitutes a contract for the provision of services and not a contract of employment…*"

"Governing Law and Jurisdiction" - clause 18.1:

"*This Agreement should be governed by and construed in accordance with English law and the parties submit to the exclusive jurisdiction of the High Court of Justice in England, except that a party may seek an interim injunction or urgent relief in any court of competent jurisdiction.*"

39. A similar agreement was entered and signed by the same individuals in December 2019 reflecting the fact that the claimant was to take on the role of senior investigator.

40. It is clear from any objective reading of that First Agreement (and the second) that the claimant was to be regarded as self-employed and working in business on her own account. Clause 6.1 made provision for the claimant to provide a substitute to undertake the work although that did not happen during the period of her engagement. There is no evidence that the claimant sought to query or challenge the content of the First Agreement despite it being abundantly clear from the wording that she was engaging with the respondent as a consultant and in no sense whatsoever was she being regarded as an employee or worker of the respondent.

41. More significantly, the claimant had not just one but two further opportunities to set the position straight if she considered the arrangement not to be a true reflection of her relationship with the respondent and what she intended. There can be no doubt that she was providing very specialist skills and knowledge to the respondent which in turn put her in a relatively strong position in terms of the commercial relationship between her and the respondent and her bargaining position in the labour market. Indeed, the

respondent was clearly keen to secure her services as a senior investigator when she entered the second consultancy agreement in December 2019 and latterly when she entered the third consultancy agreement as Head of EIU in November 2022.

42. It is true that the third consultancy agreement entered on 29 November 2022 referred to the fact that the claimant was to be "*employed as Head of Enhanced Investigations*" in paragraph (3) of the recitals at the start of that Agreement. Nevertheless, in the next section headed "Background" it went on to state unequivocally that "*Nothing in this agreement is intended to or should be deem to create a partnership or an employment or worker relationship between the Company and the Consultant or any of their employees, agents or subcontractors*."

43. Again, that third consultancy agreement contained very similar terms to the First Agreement the claimant signed in 2019 (and the second agreement thereafter). Again, on any objective reading, the intention of the parties was expressed to be that the claimant was working in business on her own account and was in no sense to be regarded as an employee or worker of the respondent.

44. For completeness, I note that clause 18.1 of the third consultancy agreement contained a provision identical to the one in the 2019 agreement under the heading Governing Law and Jurisdiction.

45. All of the above applied throughout the period of the claimant's engagement with the respondent until her contract was terminated on 31 December 2023. Although under clause 2.5 of the third agreement the engagement was intended to be for a fixed term up to 31 March 2026, that clause allowed either party to terminate by giving at least one month's notice to the other. The respondent did in fact give the claimant two months' notice to terminate by way of a letter dated 31 October 2023. Broadly, the reason given by the respondent for terminating the contract was because it said that its primary source of funding was due to end on 31 December 2023, it would no longer be viable to maintain the EIU and it intended to disband it. It is not necessary for me to make any findings as to the correctness or not of that reason. Suffice it to say that the claimant's engagement ended on 31 December 2023 and she now seeks to bring complaints of ordinary unfair dismissal under the ERA and harassment related to sex under the EqA (as identified above).

The Law

46. Below I set out in brief terms the law that is material to the issues I am required to determine on the basis of the facts I have found to be relevant in this case.

Territorial Reach

47. As explained in the seminal case of Lawson v Serco Ltd and two other cases [2006] ICR 250, HL, the United Kingdom "rarely purports to legislate for the whole world" and UK legislation is on the face of it territorial. As such, territorial boundaries apply to employment rights. If an employee or their

employment falls outside of the boundaries, they will be unable to enforce those rights. Neither the ERA or EqA expressly states the territorial application of the rights they contain. It is a matter for tribunals and courts to determine the limits that apply. There is a substantial amount of case law from which a general formula has emerged for determining the circumstances in which an employee who works wholly or partly outside of Great Britain can claim under those Acts. The general rule is that those Acts only apply to employment in Great Britain. However, in exceptional circumstances the legislation may also cover working abroad.

48. The three principal authorities that provide the most comprehensive guidance in relation to how the law applies in these circumstances are Lawson (above); 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. There are of course a number of other authorities but these are the leading cases that need mentioning in this short summary of the law.

49. When extracting and summarising the principles to be applied from those cases it is difficult to do better than to quote in full the summary provided by Underhill LJ at paragraph 2 in Jeffrey v British Council [2019] IRLR123:

"*The question of the territorial reach of British employment legislation has notoriously given rise to problems in recent years and has produced a plethora of reported cases, including one decision of the House of Lords and two of the Supreme Court – Lawson v Serco Ltd [2006] UKHL 3, [2006] ICR 250 ; Duncombe v Secretary of State for Children, Schools and Families (no. 2) [2011] UKSC 36, [2011] ICR 1312 ; and Ravat v Halliburton Manufacturing & Services Ltd [2012] UKSC 1, [2012] ICR 389 . The effect of those decisions has been fairly recently reviewed in this Court in Bates van Winkelhof v Clyde & Co LLP [2012] EWCA Civ 1207, [2013] ICR 883 , and Dhunna v CreditSights Ltd [2014] EWCA Civ 1238, [2015] ICR 105 . It will not be necessary in these appeals, and would indeed be likely to be positively unhelpful, to attempt a further comprehensive survey of that well-travelled ground. The position as now established by the case-law can be sufficiently summarised for the purpose of the cases before us as follows:*

(1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999 . Since then the Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94 (1) of the Act); nor is there any such provision in the Equality Act 2010.

(2) The House of Lords held in Lawson that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the Act in the cases where an employee works overseas.

(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker – that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer – will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case-law as "the territorial pull of the place of work". (This does not apply to peripatetic workers, to whom it can be inferred that

Parliament intended the Act to apply if they are based in Great Britain.)

(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".

(5) In Lawson Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a "British enclave" abroad. But the decisions of the Supreme Court in Duncombe and Ravat made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.

(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what Ravat was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/EU-funded international schools considered in Duncombe.

(7) The same principles have been held by this Court to apply to the territorial reach of the 2010 Act: see R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWCA Civ 438, [2016] ICR 975 .

I emphasise that this is not intended as a comprehensive summary of the effect of the decided cases. I am simply setting the background for the issues that arise in these appeals."

50. In addition to the reference to R (Hottak) in the extract above, the Court of Appeal in Bates van Winkelhof also confirmed that the Lawson principles apply to other employment statues that are silent on their span of territory jurisdiction, including the EqA.

51. On the agreed facts in this case the focus is on the law relating to an expatriate worker given that the claimant accepts that she lived and worked in Canada for the entirety of her engagement with the respondent. In Lawson, Lord Hoffman held that the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of the ERA. He considered it “very unlikely“ that someone working abroad would be covered unless they were working for an employer based in Great Britain but noted that that by itself would not be enough to distinguish a case from the general rule that the place of employment is decisive. The need for exceptional circumstances to exist to displace that general rule was emphasised by the Supreme Court in both Duncombe and Ravat. In Ravat it was stressed that a truly expatriate employee would need to show an

"*especially strong connection with Great Britain and British employment law*". Indeed there must not only be a stronger connection, but a much stronger connection, both with Great Britain and British employment law than with any other system of law to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain (and by extension claims under the EqA – see the Court of Appeal decisions in Duncombe and R (Hottak)).

Employment status

'Employee'

52. Section 230(1) ERA defines 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. Section 230(2) provides that a *contract of employment* means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'. However, no further definition of 'contract of service' or 'contract of apprenticeship' is provided in the ERA.

53. The definitions of 'employee' and 'contract of employment' used in the ERA are replicated in other relevant employment legislation: see Reg 2 of the Agency Workers Regulations 2010 SI 2010/93 and Reg 2(1) of the Maternity and Parental Leave etc Regulations 1999 SI 1999/3312.

54. In Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, QBD, MacKenna J stated:

55. '*A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*'

56. Despite the age and somewhat outdated language of Ready Mixed Concrete, the continuing relevance of this passage was confirmed by the Supreme Court in Autoclenz Ltd v Belcher and ors [2011] ICR 1157, SC, where Lord Clarke called it the 'the classic description of a contract of employment'. In essence, the Ready Mixed Concrete formulation of the multiple test can be boiled down to three questions:

57. did the worker agree to provide his or her own work and skill in return for remuneration?

58. did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee?

59. were the other provisions of the contract consistent with its being a contract of service?

60. Following the Ready Mixed Concrete decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements: 1) Personal performance; 2) Mutuality of obligation; and 3) Control.

61. In Nethermere (St Neots) Ltd v Gardiner and anor [1984] ICR 612, CA, Stephenson LJ said 'there must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service'. He doubted this could be reduced any lower than Mackenna J's test set out in Ready Mixed Concrete, taken together with a further passage from later in that judgment: 'There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill'.

62. For a contract to exist at all, the parties must be under some obligation towards each other. For a contract of employment to exist, there must be an 'irreducible minimum' of obligation on each side (Nethermere (St Neots) Ltd, and Carmichael and anor v National Power plc [1999] ICR 1226, HL. This will usually be expressed as an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered. In essence, mutuality of obligation is the first of the three conditions for a contract of service identified in Ready Mixed Concrete: 'the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master'. This is often described as a 'wage/work bargain'.

63. Even where a worker is subject to a large degree of control as to how the work is done, an absence of mutuality of obligation will nonetheless act as a bar to employee status (Cheng Yuen v Royal Hong Kong Golf Club [1998] ICR 131, PC).

64. A wide range of other factors may also be taken into account and these can serve to supplant the presumption of employee status that arises when the irreducible minimum is present.

65. In Hall (Inspector of Taxes) v Lorimer [1994] ICR 218, CA, the Court of Appeal cautioned against using a checklist approach in which the court runs through a list of factors and ticks off those pointing one way and those pointing the other and then totals up the ticks on each side to reach a decision. In so doing, it upheld the decision of Mummery J in the High Court, who stated that 'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation.'

66. The Supreme Court in Autoclenz Ltd v Belcher and ors [2011] ICR 1157, SC,

definitively accepted the premise that employment contracts are an exception to ordinary contractual principles regarding the ability of courts to look behind the written terms of a signed contract where there is a mistake or the contract is a sham. The Supreme Court held that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'. Accordingly it is necessary to consider whether a written agreement reflects the reality of what was agreed.

'Worker'

67. Section 230(3) ERA defines a 'worker' as an individual who has entered into or works under (or, where the employment has ceased, worked under): a contract of employment; or any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

68. Accordingly, the following factors are necessary for an individual to fall within the definition of 'worker' under s230(3)(b):

69. there must be a contract, whether express or implied, and, if express, whether written or oral;

70. that contract must provide for the individual to carry out personal services; and

71. those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

72. Notwithstanding its absence in the statutory definition, the weight of authority also suggests that some degree of mutuality of obligation is also a requirement for limb (b) worker status to arise. Whether this is a freestanding requirement or merely an aspect of one or more of the three elements of the statutory definition listed above is perhaps a moot point.

73. The main focus in worker status cases tends to be on the second and third factors (personal service and whether an individual is in business on their own account).

74. I am mindful of the much publicised appellate decisions regarding worker status, namely *Pimlico Plumbers Ltd and anor v Smith* [2018] ICR 1511, SC and *Uber BV and ors v Aslam and ors* [2019] ICR 845, CA.

75. Care must be taken, however, when considering the extent to which the existing authorities hold precedent value. Cases of this kind are extremely fact-sensitive. Whilst these decisions are instructive, each of them is of limited relevance precisely because they too are entirely dependent on their

own specific factual matrix. An error of law could easily arise if these cases are slavishly applied without proper analysis of the particular facts applicable where worker status is in issue.

76. In relation to the ***Uber*** case, the Court of Appeal held that in deciding whether a claimant is a worker as defined under s230, the fact that he or she signed a document will be relevant, but not conclusive, evidence of the true position where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a 'realistic and worldly-wise', 'sensible and robust' approach to the determination of worker status.

Applying the Law to the Facts

77. I am in no doubt that the claimant does not come within the scope and territorial reach of the ERA or the EqA. In accordance with the observations of Lord Hoffman in ***Lawson***, given that claimant lives, works and is based abroad in Canada the circumstances have to be unusual for her to be found to come within the scope of those two relevant Acts.

78. Putting aside the question of whether or not the claimant could be said to be an employee or worker as defined by the relevant provisions of the ERA and EqA, I am satisfied that even if the claimant met those definitions she still falls outside the territorial scope of those Acts. It is not enough for the claimant to show that she worked for a company based in Great Britain. It is abundantly clear from the evidence and my findings of fact that although the respondent is a company registered in Great Britain, it nevertheless carries out almost all of its business in other countries for the benefit of governments of other states and non-government organisations in other jurisdictions.

79. On the facts, the claimant cannot be said to show an especially strong connection with Great Britain and British employment law. She is a Canadian national, living in Canada, working in Canada, being paid in Canadian dollars, subject to the Canadian tax regime. Even if the claimant could be said to be managed by other senior individuals within the respondent company it is significant that at least two out of the three individuals the claimant identified as having to report in to at various stages of her engagement with the respondent were both living and working wholly outside the UK jurisdiction: one in Belgium the other in the United States and then subsequently Kenya. The fact that Mr Lewis happened to be based in the UK was entirely incidental to the arrangement involving the claimant's engagement with the respondent. That of itself does not come close to creating a sufficient link to Great Britain. The work that the claimant carried out (in so far as it was not being carried out in the field and, thus, other jurisdictions) was almost exclusively carried out in Canada. The claimant did not undertake any work in the UK. At most she undertook some sporadic training here in the UK no more than once a year. Notably the claimant attended retreats far more regularly outside of the UK jurisdiction and only once did she attend the UK for that purpose.

80. As a UK company carrying on business in numerous other jurisdictions, it is not at all surprising that the respondent retained some control over the deliverability of the work required to be done on behalf of the numerous

international agencies funding such work. That would require some direction to be given to the claimant from individuals working for the respondent. Likewise it is not in the slightest bit surprising that the work that the claimant was undertaking was stored on the respondent's server in the UK and was undertaken on equipment provided by the respondent. This was inevitable to ensure the work done and the information being stored remained secure. Again the fact that the claimant was assisted by individuals, one of whom happened to be in the UK is not sufficient to create an 'especially strong connection' with Great Britain. On the claimant's own case there were numerous individuals within the respondent personnel all of whom worked collaboratively with one another who were based in circa 20 different countries.

81. It is also significant that the claimant's witness, DM, gave evidence that the Canadian Revenue Agency were treating her circumstances as being covered by Canadian employment laws. Far from seeking to distinguish her circumstances from those of the claimant, both the claimant and DM were asserting that their 'employment status' positions were one of the same. I also regarded it to be significant that she was told that the use of consultancy agreements was to avoid the complexities of employing individuals across multiple jurisdictions given that the respondent's workforce is dispersed globally. That appears to be a recognition of the fact that many of the individuals who are engaged by the respondent would not have any connection to the UK or Great Britain. It is inevitable however that some form of contractual commitment is required to reflect their engagement with the respondent.

82. I have taken into account the existence of an English choice of law clause in the contract between the respondent and the claimant (clause 18) and its relevance in the overall consideration of the territoriality test. I do not consider that clause to be decisive and certainly not enough to create a sufficiently strong connection to exist between the claimant, the work she carried out for the respondent, and the UK or Great Britain. That clause was part of a standard form UK consultancy agreement used by the parties precisely because of the difficulty of sourcing a contract that reflected the practical reality that the claimant was working on international projects whilst domiciled and operating almost exclusively in Canada. The existence of this clause in itself fell vastly short of demonstrating a sufficiently strong connection to the UK in this case when looking at all of the circumstances holistically.

83. For these reasons, the claimant's claims cannot proceed and must be dismissed. As such it is not strictly necessary for me to determine the employment status issue but having heard the evidence and reached applicable findings of fact I also have no hesitation in finding that the claimant was self-employed and in business on her own account. The fact that she negotiated a commercial arrangement whereby she secured agreement from the respondent to grant her certain benefits that an employee would receive does not persuade me that she was operating as anything other than a self-employed contractor. On the contrary, it demonstrates the extent of the claimant's strength in the commercial relationship with the respondent and the value of her particular knowledge, skill and experience in this discrete field of operation.

84. The claimant presents as a highly intelligent and articulate individual. I have no doubt that the claimant fully understood and appreciated the commercial arrangement that existed between her and the respondent and that it suited her to be engaged as a self-employed consultant, not least because of the autonomous way in which she was able to operate, the ability to undertake other work for other clients if desired, and the financial advantages of being self-employed. Indeed, it is notable that the claimant has paid no tax at all on the income that she has received from the respondent.

85. As I have found from the evidence above, the claimant acted almost autonomously in the way she carried out the work she was contracted to undertake for the respondent. She negotiated changes in her working arrangement with the respondent and entered three separate consultancy agreements at various times reflecting the demand for her services by the respondent and the bargain reached between them. If the claimant had any doubt that the contracts did not properly reflect the intended relationship agreed between them then she had numerous opportunities to insist upon the matter being regularised accordingly. This is not an ***Autoclenz*** or ***Uber*** type situation in which each of those contracts did not reflect the true position. Both parties knew and understood that the relationship was that of a company engaging the services of a highly skilled, highly experienced ex-intelligence service operative in a self-employed consultancy capacity. The claimant only ever took strategic direction from the respondent and was not managed by anyone in the day-to-day sense. The claimant was free to undertake other work for other clients. The fact that she did not do so did not mean that she was unable to do so. In that regard there was an absence of control of the kind that would exist in both an employee or worker type relationship. Need it be said, in addition, the pay and tax arrangements (invoicing, being paid gross in her domestic currency and no tax deducted at source) were such that this pointed towards self-employed consultancy services. For all these reasons, the claimant was neither an employee or a worker for the purposes of the ERA or the EqA.

86. The claimant's circumstances fall outside of the territorial scope of the legislation. The claimant was not working in Great Britain at the time she was dismissed. Accordingly, the tribunal does not have jurisdiction to hear any of her claims and her claims are dismissed. Matters of strike out/deposit orders and any amendment to her claim regarding harassment related to sex fall away given the above conclusion and are no longer relevant. The further case management preliminary hearing listed for 20 May 2025 is no longer required and is cancelled.

Employment Judge Wyeth
Date: 28 March 2025.

Judgment sent to the parties on

.....10 April 2025.....
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For the Tribunal office