Case Number: 2212618/2024

EMPLOYMENT TRIBUNALS

Claimant: Ms P Borzych

Respondents:
(1) Troubadour Properties Ltd
(2) Troubadour London Ltd
(3) Troubadour Music Hall Ltd
(4) Troubadour Live Music Venue
(5) Mr Giles McNamee

Heard at: London Central Employment Tribunal (By CVP)
On: 1 May 2025

Before: Employment Judge Keogh

Representation:
Claimant: In person
Respondents: Mr P Strelitz (Counsel)

JUDGMENT

The claim is struck out.

REASONS

Procedural background

1. The claim in this matter was presented on 26 February 2024, seeking to bring complaints of unfair dismissal including constructive unfair dismissal, sex discrimination, protected disclosure detriment, and unpaid holiday pay, notice pay, wages and other payments.

2. In its response presented on 3 May 2024 the respondents assert that the claimant was a Director of the first to fourth respondents, but was a self-employed contractor living and working in the USA in a Boston based investment firm known as CTBNL, inc. The fifth respondent is a US citizen.

3. On 31 May 2024 the respondent applied to strike out the claim on the basis that it had no reasonable prospect of success, on the basis that the Tribunal has no jurisdiction to hear the claim, and on the basis that the

claimant was not an employee under section 230 of the Employment Rights Act 1996. Various documents were attached to the application:

(i) Companies House documents of incorporation for the first to fourth respondents and appointments of the fifth respondent and the claimant as statutory directors, which note that both were ordinarily resident in the USA;

(ii) Companies House documents showing the claimant's cessation of directorship of the first to fourth respondents on 18 September 2023.

4. The claimant did not respond to the application but on 31 July 2024 sought a postponement of the hearing listed for 14 August 2024 in order that she could prepare. She indicated at that time that she had been 'diligently reviewing the case materials' and required further time for preparation. The respondents agreed to the postponement, and the matter was postponed.

5. The hearing was relisted for 3 January 2025 before Employment Judge Brown, who listed this hearing to determine whether the claim should be struck out as having no reasonable prospect of success, or alternatively whether deposit orders should be made, both on the grounds that the Tribunal does not have territorial jurisdiction to hear the claims. She further ordered that if the claims were not struck out, then the Tribunal would go on to consider whether the claimant was an employee or a worker under section 230 Employment Rights Act 1996, or employed under section 83 Equality Act 2010, or was an independent contractor of the Respondents, and therefore whether she could bring any of her claims to the Tribunal, or whether they should be struck out.

6. A notice of hearing for today was sent out on 6 January 2025. On 25 January 2025 the claimant emailed the Tribunal seeking 'a significant extension of time' to adequately prepare, and asking for the matter of jurisdiction to be scheduled after 25 April 2025. This did not result in any further order, presumably because the hearing had already been scheduled for 1 May 2025.

7. The claimant did not however comply with the directions set down by Employment Judge Brown for preparation of this matter, which led the respondent to send a number of chasing letters, the last of which was on 7 April 2025. On 10 April 2025 the claimant applied for a postponement of the hearing to October or November 2025, citing ill health in February and March 2025 which had impaired preparation and from which she needed fully to recover, work pressures, caring responsibilities and financial constraints. It is noted no medical evidence was provided with that application.

8. On 22 April 2025 the respondent applied for an unless order in respect of the provision of the claimant's documents and exchange of witness statements.

9. On 30 April 2025 Regional Employment Judge Freer refused the claimant's application to postpone the hearing, and suggested that all matters should be discussed today.

The hearing

10. The claimant at the outset of the hearing stated she would not put an argument forward today, but was not happy about this. When asked why she did not comply with directions, she explained it was a 'resource problem'. Again she cited financial constraints and lack of time to prepare due to her work pressures and caring responsibilities. She did not make any further applications. She had only just received a code to access the documents shared by the respondent (namely the bundle, Skeleton Argument prepared by Ms Ibrahim of Counsel and bundle of authorities) and had not had a chance to look at them.

11. It was discussed and agreed that to ensure fairness the hearing should be adjourned for a short period to allow the claimant to read the documents, albeit she had been given all of them previously, the bundle containing nothing new and the Skeleton Argument having been prepared prior to the hearing in January 2025 (It was conceded the bundle of authorities was prepared just prior to the hearing today by Mr Strelitz, and while Mr Strelitz himself did not have instructions whether the Skeleton Argument had been provided previously, it is confirmed in the application for unless order that the Skeleton Argument was served on the claimant on 26 December 2024).

12. A small point in the Skeleton Argument was clarified, namely that paragraph 4.3 could be ignored, as it contained an incorrect citation. That paragraph contained the proposition that territorial jurisdiction required a person to fall into one of the three categories of being a worker set out in the case of **Lawson v Serco Ltd** [2006] UKHL 3. Mr Strelitz confirmed that could be ignored for the purpose of the application, but later explained what it was intended to mean (see below in relation to the Law). It was either way agreed for the purpose of the application relating to territorial jurisdiction only that the claimant would be assumed to be an employee of the respondents (which I note put the claimant's case at its highest).

13. It was further clarified by Mr Strelitz that, as the respondents had not received any documents from the claimant, no witness statements had been prepared or exchanged and the hearing should proceed on the evidence currently before the Tribunal.

14. The matter was put off for one hour and fifteen minutes to allow the claimant to prepare.

15. After the adjournment the claimant indicated that she wished to submit a rebuttal document for the Tribunal to consider. It was agreed that this should be sent to the respondent and the Tribunal, but the respondent reserved its position as regards any new evidence contained within it.

16. The document did indeed contain factual evidence from the claimant, and she put it forward as a 'witness statement', even though it was not in that form and was a combination of factual assertions and legal submissions.

17. The document did apply for the matter of jurisdiction to be put off until October or November 2025. When asked to clarify this, the claimant confirmed she was not seeking an adjournment today, she relied on the document as her witness statement, and if the case proceeded then she would want until October or November to prepare for the matter to be heard.

18. I determined that I should first hear the application in relation to strike out and/or deposit orders pertaining to territorial jurisdiction, and if the matter was not struck out on that basis then I would hear further and consider the matter of employment status.

19. In addition to the document presented by the claimant, I considered the Skeleton Argument prepared on behalf of the respondents and heard oral submissions from both parties.

20. The respondent confirmed that its application was under Rule 38(1)(a), but indicated I should also have regard to (1)(b), (c) and (d) (although no specific points were made for strike out under those heads, as opposed to noting the claimant's non-compliance with orders). The respondents' position was that the claimant should not be permitted to provide factual evidence at the last moment during the course of the hearing, having failed to comply with the Tribunal's clear orders, apply for the orders to be amended, or to engage with the respondents. There would be significant prejudice to the respondents if the claimant was permitted to advance factual matters, given that the respondents had not produced witness evidence because the claimant had not, until then, advanced any factual case on the point. It was contended that the burden of proof was on the claimant and that she had failed to advance any matters to prove that there was territorial jurisdiction.

21. The claimant's position, leaving aside for the time being the factual assertions made, was that the respondent's application should be dismissed. She asserted that the respondents' position went beyond mere British ownership and that there should be jurisdiction for employees abroad with 'strong UK ties'. She contended that her work exhibited employment characteristics and denied that she had no personal connection to the UK. She contended that the fifth respondent had association with UK companies and oversight of her UK work, which may

render him liable under the Equality Act 2010. She had multiple directorship of UK companies.

22. In her oral submissions the claimant again made factual assertions about her work, which I leave aside for now. She assured the Tribunal that her requests for case management and postponements were made in good faith; she was a litigant in person and did not understand the matter well, and things took her a long time.

The law

23. Rule 30 of the Employment Tribunal Procedure Rules 2024 provides that the Tribunal may, on its own initiative or on the application of a party, make a case management order (subject to specific circumstances in relation to postponements). A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the order did not have a reasonable opportunity to make representations before it was made.

24. Rule 38 provides:

"(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—
(a) that it is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out)."

25. Guidance on territorial jurisdiction is provided in the decision of the House of Lords in **Lawson**, and in particular the judgment of Lord Hoffman. The case concerned the territorial application of section 94(1) Employment Rights Act 1996, namely the right not to be unfairly dismissed.

26. The starting point is that *"The general principle of construction is … that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world."* (paragraph 6)

27. The question for the Tribunal is one of law, although involving judgment in the application of the law to the facts. It is not an exercise of discretion (paragraph 24).

28. In discussing the standard case, Lord Hoffman considered that *"what Parliament must have intended as the standard, normal or paradigm case of the application of section 94(1) was the employee who was working in Great Britain"* (paragraph 25). The question is whether the employee is working in Great Britain at the time he is dismissed (paragraph 27).

29. Peripatetic employees, i.e. those who have a base of operation but may travel widely overseas, are considered, for the purpose of the statute, to be employed at the place where their employment is based (Paragraph 29). The Act could therefore apply to peripatetic employees based in Great Britain (paragraph 34).

30. He then discussed that *"The circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation",* but went on to identify exceptions (paragraph 36).

31. Different considerations applied to expatriate employees (paragraph 37):

    "First, I think that it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary."

32. Two examples were given of exceptional circumstances where the Act may apply:

    (i) An employee posted abroad by a British employer for the purpose of a business carried on in Great Britain, not working for a business conducted in a foreign country which belongs to British owners or is a branch of a British business, but as a representative of a business conducted at home (paragraph 38);

    (ii) A British employer operating within what amounts for practical purposes to an extra-territorial British enclave in a foreign country (such as a military base) (paragraph 39).

33. These then are the three categories which are referred to in later cases:

    (i) The paradigm case of an employee working in Great Britain;
    (ii) Peripatetic employees, who work overseas but are based in Great Britain;

(iii) Expatriate employees, for whom there may exceptionally be jurisdiction.

34. Lord Hoffman concluded:

"I have given two examples of cases in which section 94(1) may apply to an expatriate employee: the employee posted abroad to work for a business conducted in Britain and the employee working in a political or social British enclave abroad. I do not say that there may not be others, but I have not been able to think of any and they would have to have equally strong connections with Great Britain and British employment law."

35. In **Duncombe v Secretary of State for Children, Schools and Families** [2011] UKSC 36, Lady Hale confirmed the **Lawson** decision as follows (paragraph 8):

"It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law. There is no hard and fast rule and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples given, for they are merely examples of the application of the general principle."

36. She went on to find that the situation in that case, of employees of the British Government, under contracts governed by English law, and employed in international enclaves, not paying local taxes, would also qualify as an exception in the expatriate category to whom jurisdiction would be afforded.

37. In **Ravat v Halliburton Manufacturing & Services Ltd** [2012] UKSC 1 the high bar set in **Lawson** was confirmed (paragraph 27):

"…the fact that the relationship was 'rooted and forged' in Great Britain because the respondent happened to be British and he was recruited in Great Britain by a British company ought not to be sufficient in itself to take the case out of the general rule. Those factors will never be unimportant, but I agree that the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of sec 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified."

38. The Supreme Court also considered the burden of proof (paragraph 29):

"But it does not follow that the connection that must be shown in the case of

those who are not truly expatriate, because they were not both working and living overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of sec 94(1) is a question of law, but it is also a question of degree. The fact that the commuter has his home in Great Britain, with all the consequences that flow from this for the terms and conditions of his employment, makes the burden in his case of showing that there was a sufficient connection less onerous. Senior counsel for the appellant said that a rigorous standard should be applied, but I would not express the test in those terms. The question of law is whether sec 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain."

39. In short, the burden of proof falls on the claimant to demonstrate that connection where territorial jurisdiction is challenged.

40. In **R. (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs** [2016] EWCA Civ 438 it was confirmed by the Court of Appeal that the same test applies to claims brought under the Equality Act 2010 as to claims under the Employment Rights Act 1996 (paragraph 47).

Conclusions

41. The first question to determine is whether the claimant should be permitted to rely on the factual assertions put forward today in the document sent to the respondent and the Tribunal at 11.50am, and in oral submissions. Under Rule 30 I have discretion to permit the claimant to present such evidence, despite the orders made previously, where it is in the interests of justice to do so.

42. It is clear however that it would not be in the interests of justice to do so in this case. As the respondents point out, the claimant was put on notice of the respondent's position on territorial jurisdiction as early as its Grounds of Response, presented almost exactly a year ago on 3 May 2024. Further detail was then given in the application to strike out dated 31 May 2024. The claimant was then permitted an adjournment of the August 2024 hearing to give her further time to prepare. Eight months after presentation of the response, the position was aired during the hearing before Employment Judge Brown on 3 January 2025, who gave clear directions as to how evidence should be presented, including dates for exchange of documents and exchange of witness statements. It was set out clearly the matters to be determined at this hearing, and the usual matters were included as to the consequences of non-compliance with orders.

43. The claimant has further failed to cooperate with the respondents and respond to their repeated requests to engage to prepare the matter for this hearing. The claimant has not applied for case management orders to be varied, but waited until three weeks before the hearing to apply for an adjournment. There was no response to the respondent's application for an unless order and no attempt to produce anything before the hearing today.

44. Permitting the claimant to produce factual evidence at this stage, in a document which is not signed with a statement of truth and has no documentary evidence in support, would obviously prejudice the respondents. The respondents have not produced evidence themselves because the claimant has the burden of proof and, until today, had advanced no positive case on territorial jurisdiction. Permitting the claimant to produce evidence amounts to an ambush for which the respondents are unprepared, and in circumstances where the matter is otherwise ready to proceed to a hearing. It would not place the parties on an even footing, and were it permitted would have at the very least necessitated an adjournment for the respondent to consider those assertions and to respond with its own witness evidence.

45. The claimant has given no good reason why she has failed to prepare properly for the proceedings in the very long time she has had available. No medical evidence has been provided to support her assertion that she has had a period of illness, and in any event she does not contend she is ill now or has been ill for the entire year. If a claimant brings a claim they must pursue it and must comply with orders. The claimant asserting that she is too busy to give it her attention because of other life pressures is wholly insufficient. The claimant has had ample opportunity to present evidence prior to the hearing and has failed to do so.

46. In the circumstances I do not take account of any of the factual assertions made by the claimant which are not common ground between the parties (for example, that she was director of the first and fourth respondents), or included within the claim form.

47. With that starting point, I turn to the claim form. The claimant gives for the respondents' details the address presumably of the Troubadour theatre in London. However at section 2.4 of the form, where it states 'If you worked at a different address from the one you have given at 2.2 please give the full address' she provides an address in Essex County, Massachusetts, which is in the USA. This is the same as the home address given at section 1.5 of the claim form.

48. The documents provided by the respondent attached to the application to strike out confirm that at the time she was a director of the first to fourth respondents the claimant was ordinarily resident in the USA.

49. The starting point then is that the claimant herself states her place of work was in the USA, and this is confirmed by the documentary evidence available.

50. I find based on the evidence before me today, and putting the pleaded case at its highest, that there is no reasonable prospect of the claimant demonstrating that she falls in the paradigm category of an employee working in Great Britain at the time of her dismissal. Her own case and the documentary evidence suggests otherwise.

51. Nor is it suggested by either party that the claimant was a peripatetic employee, i.e. an employee based in Great Britain but posted abroad.

52. The sole question left is whether she falls into the category of expatriate employees for whom there may, exceptionally, be jurisdiction. I find there is no reasonable prospect of the claimant demonstrating this. She was, first, not an expatriate of Great Britain. The claimant is a US citizen and was on her own case residing and ordinarily working in the USA from her home address in Massachusetts. This is not a case where the claimant was based in Great Britain initially and then posted abroad, nor is there any suggestion that she was working in an extra-territorial enclave or in a position working for the British government or similar.

53. While the respondents are companies based in Great Britain, and the claimants work was related to matters in Great Britain, that is not sufficient. It is not enough that the work is 'rooted and forged' in Great Britain, there must be something more (**Ravat**). The place of work is usually decisive, and the claimant has not shown that she falls into any of the usual categories of exceptions which might apply to those employees who are resident abroad and whose work is based abroad (as opposed to the base of the company or companies she was working for). There is nothing in the claim form or properly before the Tribunal which suggests therefore that she would meet the high bar set in **Lawson** as confirmed in **Duncombe** and **Ravat** of a sufficiently strong connection to enable it to be said that it would be appropriate for the claimant to bring claims under the Employment Rights Act 1996 and the Equality Act 2010 in Great Britain.

54. I am therefore satisfied that the threshold in rule 38(1) that there are no reasonable prospects of success is met, in that there are no reasonable prospects of the claimant demonstrating that the Tribunal has jurisdiction to hear her claims. I go on to consider whether strike out is appropriate or there is a less draconian sanction which might be applied. This is a jurisdictional matter. The claimant has been given ample opportunity to demonstrate that the Tribunal does have the necessary jurisdiction and has failed to present any such evidence in a timely manner and in compliance with directions. I do not consider it is in the interests of justice for the matter to proceed further therefore, and the claim is struck out.

55. I do not therefore go on to consider the question of employment status.

56. The claimant requested written reasons for the decision at the hearing.

Employment Judge Keogh

1 May 2025

JUDGMENT SENT TO THE PARTIES ON

7 May 2025

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FOR THE TRIBUNAL OFFICE