Case Number: 3201154/2017

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EMPLOYMENT TRIBUNALS

Claimant: **Mr Matthew Rowe-Alan**

Respondent: **Hempstead May Limited**

Heard at: **East London Hearing Centre**

On: **12 January 2018**

Before: **Employment Judge Russell**

Representation:

Claimant: Mr C Baran (Counsel)

Respondent: Mrs C Ashiru (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Tribunal does not have territorial jurisdiction to consider any claims arising out of the termination of employment on 13 April 2017. Any claims arising out of the ending of the Claimant's employment with the Respondent on 7 July 2016 are out of time and the Tribunal is not satisfied that this was not reasonably practicable to have presented them within time nor that the Claimant acted within a reasonable period thereafter. The reasons are as follows.

REASONS

1 By a claim form presented to the Tribunal on 14 September 2017 the Claimant brings a complaint of unfair dismissal. He gives us his period of employment with the Respondent 17 July 2013 until 13 April 2017. The Respondent resisted all claims and

took jurisdictional points. The matter was listed for a Preliminary Hearing today and I was given an agreed list of issues.

2 The Issues

(1) Did the Claimant's employment with the Respondent terminate on 7 July 2016 and if so how;

(2) If the Claimant's employment terminated on 7 July 2016 was it reasonably practicable for the Claimant to present his claim within the time limit and if not was it presented within such further period as the Tribunal considers reasonable.

(3) If the Claimant's employment did not terminate on 7 July 2016 did it persist until the Claimant was dismissed by the Respondent on 13 April 2017?

(4) Does the Tribunal have territorial jurisdiction to consider the Claimant's claim for unfair dismissal arising out of any dismissal on 13 April 2017. The Claimant's primary case was the terminations on 13 April 2017 it only being in the alternative that he relied upon a 2016 date. Accordingly I consider the claims in that order.

Findings of Fact

3 The Claimant commenced employment with the Respondent working out of its London office as a photographic retoucher with effect from 17 July 2013. The directors of the Respondent are Mr Jon Hempstead and Mrs India May. In or around 2000 Mr and Mrs May set up a separate company in America Hempstead May incorporated the two bar

legally separate incorporated entities. Whilst Ms May and Mr Hempstead remain UK residents and whilst the Operation Manager Ms Vina Robinson is also London based I am satisfied that for legal and financial purposes the companies was to be associated in practical terms were distinct for legal purposes.

4 In or around February 2015 the Claimant was asked and agreed to undertake a period of work in New York which lasted for approximately one month this was an informal arrangement no written agreement being entered into the Claimant continued to be paid by the Respondent and enjoy the terms and conditions of his employment contract which were as follows.

5 Clause 2 the employment subject to termination as provided below shall be continuous unless either party shall give to the other the notice specified in Clause 8 of the agreement. Remuneration starting at £21,000 per annum as for employment holidays, sickness absence confidentiality also being covered within the contract. The notice provided that the employee was entitled to not less than one month's notice. In early 2016 the Claimant, Mr Hempstead and Ms May discussed the possibility that the Claimant could undertake a role from New York. I do not consider it necessary to resolve whether to which the Claimant or the Respondent who propose the possibility. In any event the Claimant was happy to contemplate the proposal not least as his partner also obtained a position. It is clear from the contemporaneous email exchanges that the Claimant was keen to work in New York once more.

6 On 15 January 2016 Ms May offered the Claimant a full-time senior retouching position working for Hempstead May Inc (USA) with a salary of US$55,000 the Claimant would also be provided with health insurance in the states. The Respondent agreed to obtain a visa for the Claimant and that the visa would determine the length of the contract

he would have to commit to. It is clear on 15 January 2016 that the Claimant was contemplating a long term move in connection with the visa it was agreed that the fixed term period of employment in New York from 28 April 2016 until 1 November 2018. An email sent by the Claimant on 12 April 2016 to Mr Hempstead and Ms May confirmed that initially he had said he could only commit to a year with a view to seeing how it went but he was prepared to honour this commitment to work for the company in New York for at least a year as previously agreed. Despite these misgivings the Claimant decided to proceed with the visa application and one was issued on 6 June 2016 valid for a period of 18 months. Understandably the Claimant was concerned to ensure that the paperwork relating to his move to New York was in order. On 8 June 2016 he referred to informing HMRC that he would not be paying tax as he would not be resident in the UK and that he understood that he needed to send a P85 and P45. He indicated a desire to have his contract job in New York before receiving the P45 in London.

7 On 28 June 2016 Ms May sent the Claimant a letter setting out the terms which applied to his work in New York. It was sent on paper letter headed Hempstead May giving the London address. It started:

> *"We are delighted to extend this offer of employment for the position of in-house photographic retoucher with Hempstead May Inc. Please review the summary of terms and conditions for your anticipated employment with us in our New York office."*

8 The contract details were given as 7 July 2016 to 6 January 2018 the Claimant reported directly to the studio manager in New York. Other terms and conditions of employment that a probation on engaging in other employment which would create a conflict of interest. There would be a renewal review that some point after 6 October 2017

the Claimant would receive $55,000 per annum paid subject to American Social Security deductions. This is a full-time position and the Claimant is entitled to paid holidays and company health care included the clause quote this letter agreement supersedes and replaces any prior agreements representations or understandings (with a written oral implied or otherwise) between you and the company and constitute the complete agreement between you and the company regarding the subject matter set forth herein.

9 It was signed by both the Claimant and Ms May on 1 July 2016. Also signed on that day was an employment agreement entered into between Hempstead May Inc and the Claimant which records the parties desire to offer and accept employment on the terms set out therein. These include a set period or fixed term period from 7 July 2016 until 6 January 2018. The Claimant would provide his services full-time to the business and use his best effort, skills and abilities to promote the interest of the company. The salary of $55,000 per annum is payable subject to US deductions for tax and entitlement to participate in HMI's medical insurance. The Claimant was entitled to five paid sick days and three weeks of paid vocation per annum and reimbursement of business expenses gave undertakings in respect of confidentiality, non competition and solicitation. The clause on termination provided that this was an act will contract the Claimant being entitled to only 14 days written notice. If the contract were terminated before the set expiry date. Clause 10B provides the agreement sets forth the entire and signing of the parties and emerges then supersede any prior or contemporaneous agreements between the parties pertaining to the subject matter hereof. The governing law is stated to be that of New York. The Claimant is assigned on the same day a confidentiality and non disclosure agreement by contrast with the contract and offer later this referred to the provision of services to Hempstead May Inc as an independent contractor nothing in that agreement was to be construed as constituting a contract of employment. As a fact I do

not find that that the Claimant was confused at the time as to his employment status by this erroneous use of words in the non disclosure agreement. It is clearly overridden by the force of the written agreement which he signed indicating that he was indeed an employee of Hempstead May Inc. Whilst the contract was provided at relatively short notice before the Claimant's intended departure date he challenged the extent and wording of Clause 7 with regard to non competition. The Claimant did not raise any other queries at that time.

10 It is clear that the parties did not at any stage in correspondence expressly address what was to happen to the UK contract of employment. The Claimant's evidence is that he understood that upon expiry the fixed term in New York he would return to his old job in London. His case is that the New York arrangement is akin to a secondment or lone period. It is his case that he would not have foregone the benefits of a permanent London employment contract in exchange for the fixed term New York contract. I note however paragraph 7 of his witness statement as a condition of his visa that he had to demonstrate the work in the US was to be temporary.

11 It is also clear from contemporaneous documents that the fixed term period in the contract was set by reference to the terms of the visa and that it was subject to review. On this point I preferred the case advanced by the Respondent and find that at the time for negotiations in June and up to the signature of the agreement on 1 July 2016 the common intention of the parties was that this would be a long term arrangement. I do not accept that the original agreement for a fixed one year period was the Claimant to have suggested. The conversation about a year the time I consider is as set out in the April email exchange that it was a year with a view to seeing how it went in other words a review to ensure that the arrangement was working. To an extent the London and New York officers worked closely together where one office had capacity it would undertake

work on behalf of the other. In such cases however the office and taking additional work would invoice the other company who held the contract for the work. There was no arrangement where the Claimant's services were paid back or invoiced from HMI to HML it would be discrete pieces of work undertaken not only by the Claimant but also by other employees which was cross charged in this way. Similarly the Claimant stated a management was operated out of New York although Mr Hempstead was kept informed. In the internal email exchange on 27 July 2016 noted that the Claimant was no longer a part of the UK team and suggested that a P45 had been posted. I accept the Claimant's evidence that he did not receive the P45 that however does not mean that it was not posted and I accept that the copy in the bundle was generated at the time.

12 In October 2016 the Claimant contacted Ms Robinson to ask for copies of his UK payslips and P45. I accept this was in connecting with the preparation of his UK tax return. I note it is clear from the internal email exchanges the company has shown within Hampstead May .com email account for those in New York and those in London the email footer from Ms Robinson includes London/New York. In the course of this exchange a response copied to the Claimant included the following:

> *"Matt Rowe-Alan moved to New York from London sometime ago. His last day at Hempstead May Limited was 7 July 2016.*
>
> *He is working now for Hempstead May Inc in New York."*

13 In November 2016 the Claimant's partner transferred her employment to New York also. She had a separate transfer agreement which maintained that her social security insurance and company scheme continued within the UK and that she would remain entitled to holiday leave in accordance with the UK contract. By contrast to the

Claimant's arrangements it made clear that this was not an offer as a contract of employment it was a question of a transfer. Towards the end of 2016 the Claimant was concerned that his working relationship with his colleagues had deteriorated when in the United Kingdom over the Christmas period he contacted Mr Hempstead the two saw each socially and touched briefly on work related matters. I accept Ms Graham Clare's evidence that she was in the garden briefly a part of this conversation. I accept that Mr Hempstead enquired as to whether or not the Claimant wished to return to the London office whereas in the witness statement the Claimant suggested that this would be an early return in cross-examination he simply stated "he asked me if I want to return to London office it seemed to me like an offer of return." There was no greater level of detail in the discussion.

14 The Claimant returned to America and apparently continued to experience difficulties in the working relationship with his colleagues in New York.

15 On 3 and 9 February 2017 he sent emails to Ms May and Mr Hempstead setting out his concerns about his working relationship in New York. On 9 February he asked for a frank and open discussion although he wanted to make it work in New York. In it he describes the chronology of his move to New York as follows:

> *"I have demonstrated four years of loyalty and hard work but initially had you sent me to New York for a month, which led you to suggest the move to New York to increase the capacity here. I want to make it work and I am not purposely doing things to go against that: we both have a lot invested in this."*

16 Later in the email the Claimant asked whether his job was at risk. The emails referring entirely to the Claimant remaining in New York there is no suggestion or

reference to whether or not if that were not practicable he would end his employment altogether or as he now says return to London.

17 On 30 March 2017 Ms May visited the Claimant in the New York office. The Claimant understood that this was to be an appraisal meeting [the meeting was on 27 March]. During the course of their discussions Ms May informed the Claimant that he was being dismissed on grounds that it was not working in New York. The Claimant's evidence is that he asked her if he could return to the London studio and Ms May had said we need to talk to Ms Robinson about that and that there should be a three way meeting. On the Claimant's case Ms May did not state that the HML contract had terminated in July 2016. Equally on the Claimant's case he did not state that he continued to be employed by HML with a right to return to London an email sent by the Claimant on 30 March 2017 referred to the decision to dismiss him from the US office and enquiring when the meeting to discuss terms or options might have take place. In fact a letter was produced the same day and sent to the Claimant by email it was sent on paper headed Hempstead May apparently out of the London office signed by Mr Hempstead showing as company director with the footing of the page showing HempsteadMay.com and what appears to be both the London and New York addressed. It stated:

> *"This letter is to confirm that Hempstead May Inc is officially giving you two weeks notice.*
>
> *Your employment with Hempstead May will officially end on Thursday April 13th 2017."*

18 The conclusion of the letter Mr Hempstead indicated that he would be happy to write a letter of recommendation for the Claimant it is in his employment research. I noted

that the termination date 13 April 2017 is consistent with the two weeks notice given by Hempstead May Inc. The Claimant did not respond to suggest either that he had still or had previously understood that he still had a job in London nor did he challenge the period of notice which he had been give. The following however he emailed Ms Robinson asking for amongst other things *"a copy of my former UK contract and job description for my records."* The Claimant did not indicate that he was prepared available or indeed expected to work for HML. A draft reference produced by Mr Hempstead and sent to the Claimant again on generic Hempstead May letterhead referred to him working in the London Studio until July 2016. In this Mr Hempstead identifies himself as the director of the Respondent. The Claimant asked for amendments to the proposed reference to refer to his promotion and also the nine months that he had been working in the New York office. The proposed amendments were made in the course of an email exchange on 9 May 2017 the Claimant wrote I was clearly employed at Hempstead May Inc until April 2017 as confirmed by the termination letter. This was in connection with the termination date set out in the reference. The final reference was given by Mr Hempstead again indicating that he was the director of the Respondent it refers to his work or his employment until July 2016 and goes on to state *"from July 2016 to April 2017 Mr Rowe-Alan was employed at the Hempstead May Inc office in New York with the title of Middle Weight Retoucher."*

19 In the Claimant's claim form particulars of claim which were drafted on his behalf by legal representatives he advanced a case that he had not been provided with a P45 upon his move to New York nor was he provided with a letter of termination. Later still in the pleading the Claimant averse that there was no hints to suggest that the parties treated the subsequent American agreement as terminating the underlying contracts of employment there was no P45 and the Claimant did not resign he was not dismissed or

given notice there was no termination and re-engagement. The October 2016 P45 which the Claimant admits he received is not referred to in the pleading. Also pleaded at paragraph 12 with regard to the meeting on 27 March 2017 *"the Claimant asked if there was any possibility with him coming back to the UK to work."* This is not consistent with his case that he understood that the London contract remained in tact and that he had a right to return. It is pleaded here rather that if the Claimant did go back to London it would be on a possible three month contract in other words a new agreement.

Notes of Evidence

20 Both or all of the witnesses gave evidence in a truthful and credible manner I was impressed by each of them and their ability to make concessions in cross-examination even where unhelpful to their case. I form the view that no witness was seeking to mislead the Tribunal but rather that the confusion in each size evidence was indicative of the lack of precision in the arrangement set out or agreed at the time the Claimant went to New York. The Claimant accepted that there was no use of the word secondment and it was open note that he referred in the context of what he claimed to be assurances of a job in the UK that Mr Hampstead had said the door would always be open for him. This is not I find clear and consistent evidence of an agreement in express or implied that the Claimant could and would continue to be employed under the primary UK contract. It seemed to me that whatever the Claimant's genuine intentions he made assumptions that were not discussed and to no formal agreement was reached. Indeed when put to him that neither Ms May nor Mr Hempstead had offered him a return or promised return the Claimant relied only upon the December 2016 conversation. It may well be that the Claimant was not aware that he was giving up his rights to a job in the UK at the time and that he felt rushed into signing and that he took insufficient legal advice. However it is a fact that he did sign the agreement and I must consider the effect of him doing so. I am

not convinced by Ms Ashiru's reliance upon the complete agreement clause in the American contract. It stated that contract purports to set out the full extent of the agreement between those contracting parties as the Respondent is clearly averring and correctly so that it is a different legal entity it is not a party to that agreement and I do not accept that the entire contract clause therefore does indeed necessarily supersede any prior engagement. Again when asked specifically about the UK contract the Claimant just assumed that it had been suspended to one side. Overall, and having regard to the evidence and in particular the Claimant's reference to his former UK contract and his conduct on termination of the American arrangement I do not accept and do not find that he understood that there was any implied agreement in July 2016 that he would automatically be entitled to return to London or that his UK contract would persist.

21 During the currency of the time in New York the Claimant did not seek to rely upon for example his UK entitlements to holiday leave. Nor did the Claimant assert his right to the UK period of notice or indeed a right to return upon dismissal. Whilst considering variation and contract at the time to which the variation took place I took into account the Claimant's subsequent conduct when assessing credibility as to what he genuinely understood to have been the position at the time. I do not accept that he was somehow beguiled into a misunderstanding by the Respondent's use of American terms such as fired on spot or termination at will. I did not have great regard to the provision of the P45 as it seems to me that was largely undertaken for tax purposes of more weight was the fact that there was no arrangement by which the Claimant's salary in New York was charged back to the Respondent and indeed such workers was undertaken by the Claimant in New York on behalf of the Respondent who was subject to separate invoicing in respect of that work not only by him but the same arrangement applied to his other American colleagues. This is not I find consistent with the understanding that there was a

secondment or loan arrangement.

22 As for Ms Robinson's evidence whilst I agree with Mr Barron's submission that there was certainly a lack of precision that the very least in the paperwork I do not accept that this so great overall as to have created the ambiguity and confusion which he suggests. The contract of employment agreement between the Claimant and HMI was clear and the non disclosure agreement and it is in felicitous use independent contractor added nothing to the case. As for the absence of any express resignation all dismissal letter or indeed notice of termination from either side I took into account the context as it applied in July 2016. On balance I preferred Ms Ashiru's submissions that there was indeed a mutual variation of the contract by which the Claimant and the Respondent each weighed the requirement or entitlement for the giving and receiving of notice. In essence a new agreement having been reached whereby the Claimant would move seamlessly from work in the UK to work in the United States no period technically of notice so practically no period of notice would be worked this is a technicality which did not agreed to the parties. It is clear that the Claimant did agree to move to New York and given the extent to which the terms of the New York agreement essentially overrode the UK agreement. I am not satisfied that the latter persisted. In essence I prefer the Respondent's case that there was a mutual termination. The dismissal therefore occurred in July 2016. In any event on the Claimant's case even if dismissal occurred on 13 April 2017 at that date the Claimant was not working in Great Britain but in the United States. He had been doing so since July 2016 he was paid in dollars he paid US taxes and insurances he was managed from the United States and enjoyed terms and conditions in relation to holiday and sickness set by reference to American law.

23 Apply the judgment in the Court of Appeal in *Credit Suisse Ltd v Donna [2014] EWCA civ 1238* when working in New York the Claimant was working for the purposes of

the separate legal New York business and I am not satisfied that the Claimant has shown that he had sufficiently strong connections to the United Kingdom and certainly not the much stronger connections with Great Britain and British employment law than with any other system of law as required by *Duncombe & Others Secretary of State for Child Care Schools and Families (No2) [2011] IRLR 840 Supreme Court*. In reaching this conclusion it is not relevant for the Tribunal to compare the merits of the employment legislation available in Great Britain and that in the jurisdiction while the Claimant was working at the time of his dismissal. It may well be that the Claimant gave up valuable employment rights in moving to New York that was his choice even if he made a mistaken decision through a lack of understanding. It follows therefore that even if I had accepted that the UK employment contract persisted in its varied form as Mr Barron submits. I would not have found the sufficiently strong connection to apply in any event. For the sake of completeness having found that there was termination by mutual agreement I consider in the alternative if there had been dismissal in July 2016 whether or not it would have been reasonable practicable to extend time I do not consider that it would in all the circumstances of the case and given the period of time which had elapsed. I take into account that it would have to be the unfairness of that dismissal in 2016 with which the claim to the Tribunal was concerned and so far as I have found where the parties agreed that the Claimant would move to New York it seems to me that there was no fairness to him at the time. Whilst I have a degree of sympathy for the Claimant that the much hoped for future upon moving to New York has not worked out to be as rosy as he would have liked. I do accept what indeed was his own categorisation that he had been naïve. The claim fails and is dismissed.

Employment Judge Russell

9 March 2018