EMPLOYMENT TRIBUNALS

Claimant: **Mr M Reid**

Respondent: **BGC Technology International Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **1 March 2021**

Before: **Employment Judge Moor**

Representation
Claimant: In person
Respondent: Mr C Rajgopaul, counsel

JUDGMENT

It is the judgment of the Tribunal that:

1. **the Tribunal does not have jurisdiction to hear the claims for unfair dismissal and age discrimination;**

2. **the Tribunal has jurisdiction to hear the claim for breach of contract claim; and**

3. **the Claimant was contractually entitled to 12 weeks' notice of termination of his employment.**

REASONS

1. The Claimant brings claims for unfair dismissal (by reason of redundancy or because the Claimant alleges he made protected disclosures), age discrimination, breach of contract (notice pay) and a redundancy payment.

2. At this preliminary hearing the issues to be determined are:

    2.1. whether the tribunal has jurisdiction (power) to hear his statutory claims; and

2.2. whether, in his breach of contract (notice) claim he can rely on section 86 of the Employment Rights Act 1996 ('ERA').

Facts

3. Having heard the evidence of the Claimant, Ms V Machon and Mr M Woolcott, and having read the documents referred to me, I make the following findings of fact.

4. The Claimant started his employment on 24 September 2004 with eSpeed International Limited, which subsequently changed its name to the Respondent. It is registered in Great Britain.

5. The Claimant originally worked at the Respondent's London offices. From 1 January 2006 he moved to work at its Hong Kong offices, initially on secondment for a year extended by another year, but then continuing to work there until his dismissal on 30 April 2020.

6. The contract, signed by the parties, agreed that it would be '*governed by and construed in accordance with English law*'. And they agreed to '*submit to the exclusive jurisdiction of the English Courts as regards any claim or matter arising out of or in connection with this Agreement*'.

7. The Claimant's salary was fixed in pounds sterling but then paid into his Hong Kong bank account in Hong Kong dollars, according to the exchange rate at the time.

8. The Claimant paid tax in Hong Kong. He was enrolled in the Hong Kong mandatory provident fund, a savings scheme.

9. The Claimant did not 'commute' to work. He lived in Hong Kong with his family. His children went to school in Hong Kong. By the time of his dismissal he had lived and worked there for 14 years. He had obtained permanent residence as had his family members. This was to avoid the need to regularly apply for visas.

10. The Respondent paid the Claimant a housing allowance to rent a home in Hong Kong and the benefit of return flights to the UK each year for his family. He kept his house here and rented it out.

11. He also had the benefit of health insurance, the scheme he was enrolled in was different from UK colleagues and particular to those who worked in the Respondent's Asia offices

12. The Claimant was a Quant Developer Lead. He designed pricing models for specific products and supported those products.

13. The Respondent continued to require the Claimant to work in Hong Kong in order that he provided in-person support to colleagues working in Hong Kong. I accept Mr Woolcott's reasons for this: personal interaction helped identify what was required and the work was 'iterative' meaning that there was a 'to and fro' between colleagues in product development, which was assisted by having a developer in each region. I find that the Claimant's remaining work benefited the Respondent globally and was not solely or

even mainly done for the benefit of its London offices. It would not have made sense to locate the Claimant in Hong Kong if that had been the case.

14. As at the date of dismissal, Mr Reid's manager, Mr Chiang was based in Australia – part of the Respondent's Asia-Pac area. Mr Chiang's manager was based in New York. He also had interactions with Mr Woolcott, based in London.

15. The Respondent counted the Claimant in its Asia Pacific head count. He appeared in the relevant organisational chart for the region. Issues in relation to his employment were dealt with through HR in Hong Kong.

16. The Claimant was required to sign compliance with Hong Kong regulatory requirements. (He was not required to sign the equivalent FCA documents.) He received Hong Kong specific training.

17. The contract provided expressly for one month's notice of termination. The Claimant was paid this amount in lieu.

Submissions

18. Mr Rajgopaul provided excellent written submissions which, for the benefit of the Claimant, he explained orally. He made supplementary written submissions in relation to the contract point. In those he contended that the Claimant could not rely on the statutory minimum period of notice set out in section 86 of the ERA. He essentially relied on the Lawson v Serco principles and argued that there is no principled basis for a difference. He referred to dicta in Bleuse v MBT Transport Ltd [2008] ICR 488 EAT at paragraph 55.

19. The Claimant relied upon the following matters to argue that he maintained especially strong connections to Great Britain and British employment law: the choice of jurisdiction and law clauses in the written contracts; that he was on a rolling secondment rather than a permanent posting; that he had not been moved onto a local contract; that his salary was fixed in British pounds before being converted; that much of his work was for the benefit of the Market Data team in London; that he retained British citizenship and a property here that he rented out short term to allow him to return; that his housing allowance and the benefit of return flights to the UK per annum showed his posting was temporary; that he moved back to Britain as soon as he was made redundant; that he was concerned with FCA regulations in his work; that his work ultimately profited the Respondent, a British registered company. So far as the contract point was concerned, he relied on the choice of law clause and that he had moved back here during the period of notice.

Legal Principles

Claims based on statutory rights

20. There is no express geographical limitation in the Employment Rights Act 1996 ('ERA'), which is the Act under which unfair dismissal and redundancy pay claims are brought; nor under Part V of the Equality Act

2010. But it is well established that some territorial limitation to those claims exists because the UK Parliament does not legislate for all employees worldwide.

21. The general rule is that place of employment is decisive to the question whether the Tribunal has jurisdiction (power) to hear claims. It is only in exceptional circumstances that someone working outside Great Britain can bring a claim based on statutory rights in the Employment Tribunal.

22. In Lawson v Serco Ltd [2006] UKHL 3, [2006] ICR 250 Lord Hoffman held that the circumstances would be unusual for an employee '*who works and is based abroad*' to come within the scope of British labour legislation. Something more was necessary than that the employee worked for an employer based in Great Britain. He observed that expatriate employees, working and based abroad, may in exceptional circumstances be entitled to claim unfair dismissal. He gave two examples: the first an employee posted abroad by a British employer for the purposes of business carried on in Great Britain, like a foreign correspondent on the staff of a British newspaper; and the second, an expatriate employee of a British employer who *'who is operating within what amounts for practical purposes to an extraterritorial British enclave in a foreign country'.* He acknowledged there may be others but that they would have to show, '*equally strong connections with Great Britain and British employment law'.*

23. In Duncombe v Secretary of State for Children, Schools and Families (No 2) [2011] ICR 1312, Lady Hale emphasised, at paragraph 8, that Lord Hoffman's categories in Lawson were but examples of a general principle:

> *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 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.* (my emphasis)

24. This approach was followed in Ravat v Halliburton Manufacturing and Services Ltd [2012] UKSC 1. The Supreme Court confirmed that the right to claim unfair dismissal will only exceptionally cover employees working and based abroad and, for it to apply, the employment must have stronger connections with Great Britain and British employment law than with any other legal system. In that case the court observed that just because a person was British and recruited in Great Britain by a British company was not enough to make the case exceptional. While those factors were relevant the test was:

> *… 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 section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of*

> *the peripatetic employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.*
>
> *The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them. … It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive.* ***The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.****' (paragraphs 26 and 27, my emphasis)*

25. Sometimes, as here, the parties agree a 'choice of jurisdiction' in the contract. The Supreme Court in Ravat confirmed that such clauses are not irrelevant, but nor are they decisive because the parties cannot contract-in to the jurisdiction.

26. In summary therefore:

    26.1. Place of employment is the usual test;

    26.2. To come within an exception to this rule the employee working abroad must show stronger connections with Great Britain and British employment law than any other system of law and, if they are living and working abroad, especially strong connections.

Contractual Claim

27. It is not disputed that the Tribunal has jurisdiction to hear the breach of contract claim. This is because the claim was brought before the end of the transition period and the Recast Brussels Convention still applies. The Respondent is domiciled in Great Britain and, by Article 4, should be sued in relation to a contractual claim here.

28. The question, in the breach of contract claim, is whether the Claimant can rely on the statutory minimum period of notice set out at section 86 of the ERA, in his case not less than 12 weeks (section 86(1)(c)).

29. It was established in Secretary of State for Employment v Wilson [1978] ICR 200 EAT that the intention of Parliament was to incorporate that minimum term of notice into the contract of employment. The EAT held that an employee wishing to enforce that right does so by suing on the contract as statutorily amended, not under the statute itself. Section 91(5) of the ERA supports this approach.

30. This issue is the applicability of law to the contract question. It is not about the Employment Tribunal's jurisdiction. The Lawson principles do not therefore necessarily apply.

31. The question is what is the proper construction of the contract. In my judgment, in relation to that question, the parties agreed their choice of law. While they parties cannot contract-in to the jurisdiction, there is no equivalent rule as to choice of law.

32. I do not read paragraph 55 of Bleuse as suggesting differently. Bleuse was a case about jurisdiction not choice of law.

33. Nor am I persuaded by Mr Rajgopaul's reference to the unlawful deduction of wages provisions. If the Claimant had been relying on section 13 and section 23 of the ERA to bring a money claim, he would have been defeated by decision on jurisdiction because that is a statutory claim. The contract claim does not have to be decided in the same way as an unlawful deduction of wages claim.

34. In my judgment there is a principled distinction between the jurisdictional question and, if it is overcome, then the choice of law question. The choice of law question is all about a proper interpretation of what is agreed between the parties. Whereas the jurisdictional question is a matter of judges at common law determining the intention of parliament where it is unexpressed.

35. In a contract claim where there is an issue about which law applies, it seems to me if the parties agreed the law of England should apply that means when construing the contract, I apply English law to that issue, including those laws introduced by Parliament.

36. If a person working in Europe for a British company has a service contract that establishes it is governed by English law, there should be no reason why, like Mr Bleuse, he cannot sue on that contract in the English courts and rely on the English law for how it is construed.

Application of Facts and Law to Issue

Jurisdiction For Statutory Claims

37. In my judgment the Tribunal does not have jurisdiction to hear the unfair dismissal, redundancy and discrimination claims. The Claimant has not shown the stronger connection to Great Britain and British employment law that is required to displace the general principle that place of employment is decisive. Here the place of employment was Hong Kong. In my judgment his employment had a much closer connection to Hong Kong and its laws than of Great Britain. I have taken into account the following factors.

38. The Claimant had been employed for many years in Hong Kong. He lived there. He did not commute. He was not peripatetic. He had gained permanent residence. His home life and family life was in Hong Kong. He was located there to support Hong Kong colleagues. His reporting line was in Asia, supported by HR in Hong Kong. While his work benefited the Respondent globally and in London, it had a closer geographical connection to Hong Kong because of his support function to Hong Kong co-workers.

39. The Claimant's employment had a close connection to the laws of Hong Kong because he paid tax there. The Respondent only required him to sign up to Hong Kong regulatory rules. He was enrolled in the Hong Kong mandatory provident fund.

40. The factors going in the other direction are less weighty.

    40.1. The Claimant's pay was fixed in pounds, but he was actually paid in Hong Kong dollars into a Hong Kong bank account.

    40.2. That he originally went on secondment would suggest a temporary posting from London, but by the time of dismissal on the facts his was a permanent place of employment: supported by his having obtained permanent residence.

    40.3. The benefit of the housing allowance and flights again suggest a link to Britain but they are less weighty factors and merely acknowledge the Claimant's expatriate status.

    40.4. That the Claimant did work with the London office, does not outweigh the business need for him to be located in Hong Kong.

    40.5. The strongest factor is the connection to Great British law established by the choice of law and jurisdiction clauses in the secondment contract. But it seems to me the links to the Hong Kong system established by the factors I have set out above: both factual (the Claimant lived and worked there) and legal (he gained permanent residence, paid tax and signed up to its regulatory systems) together outweigh this factor.

Contractual Notice

41. I have jurisdiction to hear the contract claim. Applying Wilson, a claim as to notice relying on a statutory minimum period of notice is still a contract claim not a claim brought under the ERA. The parties agreed English law should govern the contract and how it is construed. In my view, therefore, the contract must be construed as including the minimum periods of notice provided for under section 86 of the ERA. For an employee with more than 12 years' continuous service the minimum period of notice is 12 weeks.

42. In this case, because the Claimant had worked for the Respondent for more than 12 years, he was contractually entitled to 12 weeks' notice of termination of his employment.

Employment Judge Moor
Date: 9 March 2021