Claimants working outside the UK – EAT confirms the correct test

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***Crew Employment Services Camelot v Mr W Gould [2021]* UKEAT/0330/19/VP**

1. The Employment Appeal Tribunal has confirmed the approach where there is a question about the ET's jurisdiction due to the location where the Claimant works, in circumstances where work is undertaken in more than one country.

Facts

2. Mr Gould was the captain of a Superyacht, whose effective owner, Mr Borodin, was a wealthy individual based in the UK.

3. The yacht was mainly based in the Caribbean during winter months and in the UK in summer months. Mr Gould, although British, was resident in the USA although spent most of his time on the yacht. This meant for around 50% of his employment, Mr Gould was in UK waters.

4. Mr Gould was employed by the Respondent although instructions were given by Mr Borodin. His contract expressly stated it was governed by Guernsey law. His salary was paid in Euros, mainly into a US account.

5. Mr Gould was suspended and eventually dismissed for gross misconduct. He brought a claim in the Employment Tribunal. Contrary to the Respondent's arguments (amongst which was the fact it had no UK base and therefore could not be sued in the UK), the ET found that it did have jurisdiction to hear the claim.

The Relevant Law

6. In relation to the question of whether the Respondent could be sued in the Employment Tribunal of England and Wales, the starting point is Brussels I Regulations (Recast) (EU 1215/2012) – known as **Brussels Recast**.

7. Article 21 of Brussels Recast provides:

> "(1) An employer domiciled in the Member State may be sued:
>
> a. in the courts of the Member state in which he is domiciled; or
>
> b. in another Member State:
>
> i. in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
>
> ii. if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engage the employee is or was situated.
>
> (2) An employer not domiciled in a Member State may be sued in accordance with point (b) of paragraph 1."

8. As the Respondent was not domiciled in a Member State (not having an office in the UK), the question was whether Mr Gould *habitually carried out his work* in the UK (para (1)(b)(i)) or, if he worked in more than one country, the question was where the business which engaged him was situated.

9. *Weber v Universal Ogden Services* [2002] ICR 979 dealt with a German national, employed by a Scottish company working on ships and rigs in the Netherlands and Denmark. The ECJ held that when deciding where the employee habitually worked, the Court should look at where he had worked the longest over the entire course of his employment. This would be the test unless the subject matter of the dispute was closely connected to a place of work in a different country, in which case that country would be the appropriate State in which to bring proceedings.

10. For cabin crew, the appropriate State was not just wherever their 'home base' was - *Nogueira and ors v Crewlink Ltd and other cases* [2018] ICR 344. Indeed, the ECJ advised that a broad interpretation should be given to the question of where work was

habitually carried out, in order to give the employee minimal difficulty in enforcing his rights (in line with Recital 18 of Brussels Recast). The ECJ went on to find that the place where the employee habitually carries out his work must be interpreted as '*the place where, or from which, the employee in fact performs the essential part of his duties vis-à-vis his employer*'.

11. The ECJ confirmed that in determining this question in the transport sector the Courts should consider:

    (i) the place from which the employee carries out his transport related tasks,

    (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and

    (iii) the place where his work tools are to be found.

12. Moving to domestic law, and the territorial reach of the ERA 1996, *British Council v Jeffrey* [2019] ICR 929 made clear that if the place of work is not Great Britain, *'then the factors connecting the employment with Great Britain and British employment law will have to be especially strong to overcome the territorial pull of the place of work*'.

13. In *Ravisy v Simmons and Simmons LLP*, UKEAT/0085/18/OO, 30 November 2018 (Unreported), the EAT suggested three categories:

> (a) those in which (at the relevant time or during the relevant period), the claimant worked in Great Britain;
> (b) those in which the claimant worked outside Great Britain; and
> (c) those in which the claimant lived and worked for at least part of the time in Great Britain.

14. In category (a), there is generally jurisdiction. In category (b) the presumption is against jurisdiction unless (as suggested in *Jeffrey*) there are exceptional reasons to link employment to Great Britain above anywhere else. In category (c), the connection to Great Britain does not need to be 'exceptional', just 'sufficiently strong.' i.e. it is a much lower threshold.

15. In this case, the EAT made one tweak to the categories in *Ravisy*, holding that category (c) should be those who lived and/or worked rather than lived and worked.

The Findings of the EAT

16. The first question for the EAT was in relation to how far it could interfere in Tribunal findings on such an issue. Was the question of sufficiency of connection to Great Britain a finding of law (which can be appealed) or of fact (which is much more difficult to appeal)? The EAT found that sufficiency of connection is a question of law, but it does involve an evaluative judgment (of the facts) with which the EAT should be slow to interfere. In those circumstances it would only be appropriate to interfere if the EAT found the Tribunal's '*judgment is wrong or whether it reached its decision having taken into account irrelevant factors or failed to take account of relevant ones'* (para 26).

17. The second question related to the question of whether the Claimant habitually carried out his work in Great Britain. The EAT confirmed that the correct test as applied by the ET is '*the place where or from which the employee in fact performs the essential part of his duties vis-à-vis his employer'.* Crucially, the ET had also found that the Claimant was in the UK longer than in any other jurisdiction, a consideration the EAT found to be directly relevant.

18. Further, the EAT found that it can be relevant to consider where the person giving instructions (in this case, Mr Borodin) is based. The fact that he was not the employer did not make this factor irrelevant. Indeed such a conclusion was in line with the obligation in *Brussels Recast* to interpret its provision broadly. The EAT acknowledged that it is possible to find that there was no habitual place of work, but rejected the argument that such a finding should have been made in this case.

19. The third question concerned the territorial scope of the ERA – i.e. whether the ET had correctly applied the test of sufficiency of connection between the employment and Great Britain. The EAT made the following findings:

    i) It was relevant to look at the absence of sufficiently close links to other jurisdictions;

    ii) The weight to be attached to the fact that the Respondent was not UK based was a matter for the ET. The fact that Guernsey law was expressly stated to govern the contract of employment was relevant but not determinative and it was not inappropriate to describe the connection to Guernsey as 'slight,' especially as the yacht had never been to Guernsey;

iii) Again, it was not inappropriate to take into account that Mr Borodin was based in the UK as the ET did bear in mind that he was not the Respondent. Indeed, what is important is an *'intense consideration of the factual reality of the employment in question'*. Such an assessment may well therefore include looking at the location of the person who has real control of the employment relationship.

20. The EAT therefore dismissed the appeal as the ET had applied the correct test and had not failed to take into account relevant factors, nor did it take into account irrelevant factors.

Comment

21. This case provides a useful summary of the law to date. Fundamentally, for those people who work entirely abroad, it will be exceptional for the ERA to apply. However, the EAT have clarified the chance of the ERA applying to those whose location is not so clear. As long as an individual lives *or* works for part of their employment in Great Britain, the threshold to be protected under the ERA is that there be a 'sufficiently strong' connection with Great Britain. It will assist meeting this threshold if more time is spent in Great Britain than in each of the other jurisdictions in which the employee works.

22. This said, Brussels Recast was key in this case (and in previous authorities) for its principle of generous interpretation. We will have to see how Brexit effects the implementation of such a principle in future cases.

23. Pandemic aside, such questions of jurisdiction are not limited to the small class of employees who work on ships. The above law may apply to those who work in the transport industry, oil and gas industry and indeed any international company where people are moved from country to country.

24. It is significant in this case that the parties had contractually agreed that Guernsey law applied, but that the ET decided this was not a weighty factor in determining whether there was a sufficient connection to Great Britain. This should be a reminder to companies that they may still be liable under UK law even if the contract suggests otherwise.

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