International and territorial jurisdiction – respondents fail to deal 'knockout blow'

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In two appeals this month, the Employment Appeal Tribunal has considered questions of international and territorial jurisdiction.

In *Stena Drilling PTE Limited v Smith* [2024] EAT 57 the Honourable Lord Fairley concluded that the Employment Judge had failed to recognise the important distinction between international jurisdiction on one hand and territorial jurisdiction on the other.

In *TwistDX Limited and Others v Armes and Others* [2024] EAT 45, His Honour Judge Tayler upheld the decision of the Employment Judge not to strike out claims under the Employment Rights Act 1996 against a US corporation and US individuals, as it was arguable that the employment tribunal had international jurisdiction to hear them.

International jurisdiction refers to the question whether a court or tribunal in the United Kingdom (or a part of it) has jurisdiction to hear the case or whether it should be heard in a foreign court. Territorial jurisdiction, or 'territorial scope', asks a different question - whether the case falls within the territorial 'scope' or 'reach' of the legislation that the claimant seeks to sue under (see *Simpson v Intralinks Ltd* [2012] ICR 1343 per Langstaff J at [5-9]). For example, in *Lawson v Serco Limited* [2006] ICR 250 Lord Hoffman held that the right to pursue a claim for unfair dismissal under the Employment Rights Act 1996 is necessarily subject to implied territorial limitations ('it is inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with Great Britain').

In *Stena Drilling PTE Limited v Smith* the claimant brought claims under the Employment Rights Act 1996 and the Equality Act 2010 against a company incorporated and based in Singapore. That company was part of a group of international companies which owned and operated vessels used to support drilling from oil and gas wells offshore in deep sea locations throughout the world.

The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 added new sections 15C and 15D to the Civil Jurisdiction and Judgments Act 1982 ('CJJA'), which replace the grounds of international jurisdiction which formerly applied within the United Kingdom by virtue of the recast Brussels Regulation 1215/2012. In *Stena Drilling PTE Limited v Smith*, the parties accepted that for cases involving individual contracts of employment commenced after 31 December 2020, those sections represent the only route through which international jurisdiction may be established.

In *Stena Drilling PTE Limited v Smith*, the Honourable Lord Fairley concluded that the Employment Judge, having identified no grounds of international jurisdiction under section 15C or 15D of the CJJA that were made out, then misdirected himself that the rules on territorial jurisdiction could confer international jurisdiction.

In addition, although the Employment Judge's conclusions about the non-applicability of sections 15C(2)(a) and (b) CJJA were clear and plainly correct (the employer was not domiciled in the United Kingdom, nor did the employee habitually carry out the employee's work there), the same could not be said in relation to section 15C(2)(c), on which the Employment Judge's reasons were largely silent.

Section 15C(2)(c) is capable of conferring jurisdiction upon the courts for the place in the United Kingdom "where the business which engaged the employee is or was situated (regardless of the domicile of the employer"). The Honourable Lord Fairley considered that authorities on the interpretation of the Rome Convention were potentially relevant, as the language of section 15C(2)(c) was intended to replace that of Article 21(1)(b)(ii) of the Recast Brussels Regulation 2015/2012, which in turn adopted similar, though not identical, wording to Article 6(2)(b) of the 1968 Rome Convention. In *Voorsgeerd v Navimer* [2011] EUECJ C-384/10 the European Court of Justice held that the expression, "the place of business through which the employee was engaged" referred "exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment" (para 52) - the court or tribunal should, therefore, consider only those factors "relating to the procedure for concluding the contract, such as the place of business which published the recruitment notice and that which carried out the recruitment interview, and it must endeavour to determine the real location of that place of business" (para 50). In *Stena Drilling PTE Limited v Smith*, each of the contracts under which the claimant was employed stated that it was entered into in Singapore, but the Employment Judge's findings of fact suggested that Stella Drilling HR Limited, a company incorporated in the United Kingdom, and based in Aberdeen, had played a role in his recruitment. The Honourable Lord Fairley

concluded that further factual inquiry into the precise role placed by that company might lead to a conclusion that Aberdeen was the place where the business that engaged the claimant was situated. For that reason, he remitted the case for further consideration of that point.

As for the question of territorial jurisdiction, the Employment Judge attempted to apply the principles in *Lawson v Serco Limited* and *Ravat v Halliburton Manufacturing Services Ltd* [2012] ICR 389. In *Stena Drilling PTE Limited v Smith*, all the claimant's employment contracts contained an express choice of Singaporean law. The Honourable Lord Fairley held, at [42], that an express choice of law clause will always be relevant, but the weight to be attributed to such a clause will depend on the extent to which such a clause had any practical consequence upon the issue of the strength of any connection between Great Britain and the employment relationship; the Employment Judge was entitled to consider the reality of how the contract operated, looked at as a whole, and he had concluded that the reality of how the relationship operated was inconsistent with Singaporean law ever having played any real part in the employment relationships, whatever the contracts may have said. There was no error in that. However, The Honourable Lord Fairley found that there was erroneous reliance by the Employment Judge on Article 8(2) of the Rome I Regulation No 593/2008 (which applies only where parties have *not* made an express choice of law) and regulation 3 of the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011.

In *TwistDX Limited and Others v Armes and Others*, which was litigation of longer standing, the claimants relied on the Recast Brussels Regulation 1215/2012 to establish that the employment tribunal had international jurisdiction for the purpose of their claims against the US corporation. They accepted that they could not rely on the Recast Brussels Regulation for the purpose of their claims against the US individuals; instead, they sought to rely on rule 8 of the Employment Tribunal Rules of Procedure 2013. The case had been set down for a preliminary hearing to determine the question of international jurisdiction, but the question had not been determined as a preliminary issue: rather, the respondents had applied to strike out the claims on the ground that the claimants had no reasonable prospect of establishing that the employment tribunal had international jurisdiction. Hence, the claimants only had to show that their case in that regard was arguable.

The parties agreed that for the employment tribunal to have international jurisdiction in relation to the claims against the US corporation, the US corporation had to be the claimants' "employer", or TwistDX (a UK entity) had to be a "branch, agency or establishment" of the US corporation. HHJ Tayler noted, at [27], that the claimants had contracts of employment with TwistDX, so, as a matter of UK law it was hard to see how they could also be employees of

the US corporation. However, because the claims were brought when the Recast Brussels Regulation was in force, it was necessary to consider the EU concept of employment. Having regard to the decisions in *Holterman Ferho Exploitatie BV v von Bullesheim* C-47/14 [2016] IRLR 140 (CJEU), *Bosworth and another v Arcadia Petroleum Limited and others* [2020] ICR 349 (CJEU), *Samengo-Turner and others v J & J Marsh & McLennan* [2007] EWCA Civ 723 and *Petter v EMC Europe Ltd* [2015] EWCA Civ 828, HHJ Tayler decided that the concept of employment for the purpose of the Recast Brussels Regulation could possibly include a situation in which there was no contract between the "employee" and the "employer": at [32]. As for the other possibility, that TwistDX was a "branch, agency or establishment" of the US corporation, the respondents relied on a number of opinions of Advocates General in the European Court of Justice that suggested that a branch, agency or other establishment cannot have separate legal personality or authority to fix matters such as working hours. However, having considered the Court's decisions in *De Bloos v Bouyer* C14-76 [1977] 1 CMLR 60, *Somafar v Saar-Ferngas* [1979] CMLR 490 and *Blanckaert v Trost* [1982] 2 CMLR 1, HHJ Tayler did not accept that those decisions established an absolute prohibition on a branch, agency or other establishment having legal personality: at [37].

As for the claimants' arguments based on rule 8 of the Employment Tribunal Rules of Procedure 2013, the respondents contended that rule 8 is concerned with determining whether proceedings should be brought in England and Wales or Scotland, and pointed to a number of authorities, in particular *Jackson v Ghost* [2003] IRLR 824 and *Financial Times v Bishop* UKEAT014703. However, HHJ noted that a different approach was adopted by Underhill J (President) as he then was in *Pervez v Marquarie Bank Ltd (London Branch)* [2011] ICR 266 when he considered the predecessor rule. He concluded that there was no error of law in the Employment Judge's decision that the claimants' case in this regard was arguable.

These cases reinforce that although the question of international or territorial jurisdiction is a question of law (see, for example, *Serco Ltd v Lawson* at [34]), that question depends on a careful analysis of the facts of each case. That being so, it should not be assumed that disputes about international or territorial jurisdiction will fall within the category of 'obvious and plain cases in which there is no factual dispute' which are suitable for applications for strike out on the basis that there is no reasonable prospect of success. Except in such 'obvious and plain' cases, respondents would be best advised to request that the question is listed as a preliminary issue, to be determined as a matter of substance with full evidence and submissions.

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