Neutral Citation Number: [2022] EAT 112

Case No: EA-2020-000647-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 August 2022

Before :

JASON COPPEL QC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR SHUHRAT RAJABOV	**Appellant**
- and -	
FOREIGN AND COMMONWEALTH OFFICE	**Respondent**

- -
- -

Shuhrat Rajabov the **Appellant** in person
Claire McCann (instructed by the Government Legal Department) for the **Respondent**

Hearing date: 24 February 2022

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JUDGMENT

SUMMARY

JURISDICTIONAL/TIME POINTS

The appellant, a former employee of the British Embassy in Tajikistan, appealed against rulings of the tribunal that it did not have territorial jurisdiction over his claim for unfair dismissal, because the appellant's employment had a closer connection with Tajikistan, and that the claim was time-barred. The appeal on territorial jurisdiction failed because the tribunal had reached an evaluative judgment which was open to it on that issue. In particular, the fact that the respondent was likely to make a successful claim to diplomatic immunity in the Tajik courts, so that the appellant would have no remedy at all in respect of his dismissal, was not determinative and did not outweigh the various factors which showed a closer connection of his employment with Great Britain.

The appeal on limitation was also dismissed. The tribunal had been entitled to hold that the appellant had not been justified in delaying his claim on account of wishing to have more certainty as to the facts underlying his dismissal. In any event, the tribunal's finding that the claim had not been presented within a reasonable further period could not be criticised.

JASON COPPEL QC, DEPUTY JUDGE OF THE HIGH COURT

The Appeal

1. The appellant brought proceedings following his dismissal on grounds of redundancy from his employment as a Programme Manager and Finance Lead at the British Embassy in Dushanbe, Tajikistan. His claim was dismissed following a preliminary hearing held before Employment Judge Glennie on 20 December 2019. The tribunal held that it did not have territorial jurisdiction to hear the claim, on account of the appellant's employment being more closely connected with Tajikistan than with Great Britain (§28). It was also held that the tribunal lacked jurisdiction to hear the claim because it had been presented late, on 2 March 2019, which was significantly after the time limit for the claim expired on 24 October 2018. The tribunal held both that it was reasonably practicable for the claim to have been presented within time, and that in any event the claim had not been presented within a reasonable further period after expiry of the time limit (§§38-39).

2. The appellant appeals against both of those findings. Following consideration of his Notice of Appeal, he has been permitted to advance only limited grounds of appeal under each head.

Territorial Jurisdiction

3. It is not in dispute that when deciding upon territorial jurisdiction, the tribunal directed itself to the correct legal test, derived from cases such as *Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389. Where an employee works in a foreign country, the key question is whether the employment relationship has a stronger connection with Great Britain than with that (or any other) country (see §27 of the tribunal's reasons). This is a question of law but answering it requires the tribunal to make an evaluative judgment on the basis of the underlying facts and the EAT will not interfere with an evaluative judgment of this kind unless the tribunal took into account matters it should not have taken into account or failed to take into account matters it should have taken into account or made some error or was otherwise

wrong (per Longmore LJ in *Jeffery v British Council* [2019] ICR 929, §136; see also the comments of Peter Jackson LJ, agreeing with Longmore LJ, in §§139-140).

4. In this case, the tribunal noted a number of factors which, in its view, tended to show that the appellant's employment was more closely connected with Tajikistan than with Great Britain (§28). These included that the governing law of the contract was that of Tajikistan, the appellant's residence was in Tajikistan, the appellant had been locally recruited and he was taxed and made social security contributions in Tajikistan. The tribunal then noted two factors which tended in the other direction: that the employer clearly has connections with the UK government and an assertion made by the appellant that he had been told that he would be protected by UK laws relating to whistleblowing should he raise concerns about financial wrongdoing (§30). The tribunal had found that it would not accept that assertion of the appellant, which had not been included in his witness statement and about which he had not been cross-examined (§19). The tribunal decided that even if it were to accept that assertion, it, and the point about connection with the UK government, were "of little weight" and did not outweigh the factors which supported there being a stronger connection with Tajikistan. Therefore, the tribunal did not have territorial jurisdiction to hear the claim (§31).

5. The appellant was granted permission to appeal that finding on the grounds that the tribunal had failed to give sufficient or appropriate consideration to the facts that, on the appellant's case, (a) it was not merely that he would have a less effective remedy in the courts of Tajikistan but would be unable to sue at all, as the respondent would assert diplomatic immunity, and (b) he had been dismissed for whistleblowing after being assured that he would have a remedy in UK law in the event of that happening.

6. The tribunal referred to the former fact in §16 of its reasons. It recorded that the respondent

had failed to take part in two claims brought in the courts of Tajikistan by former employees of the Embassy. It had been provided with evidence that in at least one of these cases the respondent had made a successful claim to diplomatic immunity. It found that it was "not very significant" whether or not, as alleged, the Ambassador had told the appellant that the respondent would ignore any claim that the appellant might bring in the Tajik courts (§16). This alleged statement by the Ambassador was, according to the appellant's evidence to the tribunal, a reference to claiming diplomatic immunity. The likelihood that the appellant would be unable to sue the respondent in the courts of Tajikistan was, therefore, one of the factors which was considered by the tribunal in the course of its ruling upon territorial jurisdiction.

7. That the respondent will or may have diplomatic or state immunity in the courts of the country with which it argued that a claimant's employment had the closest connection, and therefore that the claimant will not have any recourse in respect of the termination of their employment if the tribunal declines territorial jurisdiction, is not a matter of overriding significance which trumps other factors tending against jurisdiction. It is not a factor which intrinsically discloses a close connection with Great Britain. In *Bryant v Foreign and Commonwealth Office* [2003] All ER (D) 104 (May), the EAT rejected a submission made by a British former employee at the British Embassy in Rome that people in her position, who could be met by a claim to diplomatic immunity if they sued in the local courts, should be treated as being in a special category for the purposes of the statutory provisions on territorial jurisdiction of the tribunal (§§26-27). It upheld the tribunal's decision that it did not have territorial jurisdiction. In *Lawson v Serco Ltd* [2006] ICR 250, Lord Hoffmann stated that he had "*no doubt*" that *Bryant* was "*rightly decided*" (§39).

8. More recently, in *Hamam v British Embassy in Cairo* [2020] IRLR 574, the EAT upheld a tribunal decision declining territorial jurisdiction in the case of a locally recruited Egyptian national former employee of the British Embassy in Cairo. Lavender J held that "…*[t]he fact*

that state immunity may prevent a Claimant from suing his or her employer in his or her own country is a relevant factor, but it is certainly not determinative" (§47). He noted that *Bryant* and also *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] ICR 975 were cases in which the claimant had argued that they should be within the territorial jurisdiction of the tribunal because state immunity meant that they could not sue the British government in the courts of their own state and that the argument had not succeeded in either case.

9. Once it is recognised that diplomatic immunity and the likely inability of a claimant to claim against the respondent in the local courts is a relevant but not a determinative factor, the argument in the present case that the tribunal erred in law by giving insufficient weight to this factor must be rejected. The tribunal drew attention to this matter and held it to be not very significant. That finding is not argued to have been perverse and nor could it be. There was a long list of factors, set out in §28, which tended to show a closer connection with Tajikistan than with the UK. It was plainly open to the tribunal to regard those factors in combination as more significant than any factors tending in favour of a closer connection with Great Britain, including the factor of diplomatic or state immunity, insofar that factor was regarded as showing a closer connection with Great Britain. There was no discernible error in the tribunal's approach and no basis upon which the EAT can interfere with its treatment of this factor.

10. As regards the tribunal's treatment of the allegation that the appellant had been assured of protection by UK whistleblowing legislation, the tribunal did not accept that he had been given that assurance (§19). There is no basis on which the EAT can overturn that factual finding. It was not unfair to the appellant, or perverse, to reject an allegation which had not been made by him in his evidence (but only in subsequent submissions) and on which the respondent had not had the opportunity to cross-examine him. Although the tribunal did proceed to weigh the

significance of this factor on the alternative basis that the relevant assurance had been given to the appellant, its decision cannot be overturned on appeal as a result of that alternative reasoning when its primary finding of fact is unimpeachable.

11. In any event, there was no error of law in the tribunal's alternative reasoning, which was to regard this factor as being "*of little weight*" (§30.2). The tribunal noted that an analogy could be drawn with the facts of *Ravat*, where the employee had been assured that he would continue to be protected by UK law during a posting to Libya (§8 of *Ravat*), a factor which proved to be of some significance in establishing that British employment law was the system with which his employment had the closest connection (§33 of *Ravat*). However, the tribunal also noted, correctly, that there were material factual differences between *Ravat* and the present case. In *Ravat*, the claimant had been employed under a contract which was governed by English law and had been assured that this would not change as a result of him working in Libya; whereas the contract of the claimant in the present case was always governed by the law of Tajikistan. That was indeed just one of many differences between *Ravat* and the present case and, notwithstanding *Ravat*, the tribunal was fully entitled to regard the assurance allegedly given to the claimant as being of little weight in comparison with the list of factors showing a closer connection with Tajikistan than with Great Britain.

Time Limits

12. The tribunal further held that it did not have jurisdiction to consider the claim on limitation grounds, applying s. 111(2) of the **Employment Rights Act 1996**:

> *".. an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal -*
> *(a) before the end of the period of three months beginning with the effective date of termination, or*
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before*

the end of that period of three months."

13. The appellant was granted permission to appeal the tribunal's finding that his claim was time-barred on the ground that the tribunal had erred when placing reliance upon an email sent by the appellant to a Mr Sayers of the National Audit Office, who had been looking into the circumstances of the appellant's redundancy. The email was dated 4 September 2019 but was erroneously identified by the tribunal as having been sent on 4 September 2018 (§§37, 38). The significance of this email to the issues in relation to time limits was as follows:

(1) The effective date of termination of the appellant's employment was 30 June 2018.

(2) As a result of him invoking the ACAS conciliation mechanism, on 12 August 2018, the time limit for presenting his claim expired on 24 October 2018.

(3) The claim was not presented until 2 March 2019 (§33).

(4) The claimant's reason for not acting sooner was that he was not sufficiently sure of his ground and was making enquiries with the respondent in order to seek to confirm his suspicions that he had been dismissed as a result of drawing attention to financial wrongdoing (§35).

(5) The email of 4 September 2019 alleged to Mr Sayers, with reference to other emails on the same chain, that the appellant's redundancy was "*not coincidence, but the direct conseqquence of my cooperation with the counterfraaud teaam [sic]*".

(6) The other emails on the same chain included emails from the appellant of 20 February 2019 in which he alleged that his redundancy had "*the aim to stop my cooperation with the counter fraud team*", and of 9 August 2018 in which he described his redundancy as "*strange (rashed [sic] and with multiple violations of my rights), unplanned .., [and] unexplained*" and drew a "*direct link*" between the "*sudden, strange redundancy procedure*" and what he characterised as a cessation of contact with him of the counter-fraud team in the Department for International Development (DfID) with whom he had been working and to whom he says he had provided evidence of financial wrongdoing.

(7) The tribunal regarded the email of 4 September 2019 as significant because – having wrongly identified it as having been sent on 4 September 2018 – it provided evidence that the appellant was sufficiently aware, and sufficiently sure, of the nature of his complaint that he could be expected to present it before the expiry of the time limit on 24 October 2018. In §38 the tribunal said this: "*I cannot see how he could reasonably have reached the view that, having notified ACAS of the dispute, and having put the essentials of his claim to the Respondent in his email of 4 September 2018, he should then hold back from commencing proceedings until he was even more certain of the position*".

14. It is clear, and is accepted by the respondent, that the tribunal fell into error in its reliance upon the email of 4 September 2019. However, that error was not, in my judgment, a material error for the following reasons.

15. First, the tribunal had ample reason to doubt the factual basis for the appellant's contention that he had insufficient information about the circumstances of his dismissal to enable him to present a claim within time (that is, by 24 October 2018). As I have explained, the email of 4 September 2019 was at the top of a chain of emails which included an email of 9 August 2018 in which the appellant complained about his dismissal, of multiple violations of his rights and made the connection between his dismissal and his work with the DfID counter-fraud team. This email contained the essentials of his claim as much as did the email of 4 September 2019 and taken together with the referral to ACAS demonstrated that the appellant was well aware at that stage of the basis of his eventual claim. The respondent's counsel's records of the tribunal hearing show, and I accept, that the appellant was in fact cross-examined about the email of 9 August 2018, and not about the email of 4 September 2019. It was put to him that by 9 August 2018 he had already made the link between his alleged whistleblowing and his dismissal; he responded to the effect that his doubts about the true reasons for his dismissal

were indeed reducing by that date. The tribunal noted that exchange in §23 of its reasons but incorrectly attributed it to the email of 4 September 2019 (wrongly dated as 4 September 2018). The tribunal also noted in that paragraph the appellant's admission that he had suspected at the time of his dismissal (30 June 2018) that "*whistleblowing was the issue*".

16. Second, the tribunal was rightly sceptical of the legal proposition that not being sure of the merits of a claim was a sufficient impediment as to make presentation of the claim within time not reasonably practicable. It cited the well-known dictum of Brandon LJ in *Wall's Meat Company Limited v Khan* [1979] ICR 52, 60 whereby "*the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters*" may be a sufficient impediment making it not reasonably practicable to present a complaint within the period of three months but only "*if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable*" (§36 of the tribunal's reasons). It then held in §38 that if the appellant did believe that he should not present his claim prior to the expiry of the time limit but should wait until he was "*even more certain of its merits*" that that belief was not reasonable. That conclusion was, in my judgment, unassailable, notwithstanding the reliance placed by the tribunal on the email of 4 September 2019. It would be a substantial, and unacceptable, dilution of the strictness of the three-month time limit if a claimant's doubts about whether a claim, the basis for which is known to them, would be well-founded were sufficient to make it not reasonably practicable for a claim to be presented within time.

17. Third, and in any event, the tribunal concluded that even if had not been reasonably practicable to present the claim by 24 October 2018, the claim had not been presented within a reasonable period thereafter. The claim was presented on 2 March 2019, more than four months after that, and more than a month after the claimant had received answers to some of the questions he had put to the respondent, on 31 January 2019. The tribunal held that a

reasonable further period would not be "not more than around one week" after 31 January 2019 given the amount of time which had already passed and the degree of certainty about his position which the appellant had already expressed. There is no basis for challenging that judgment of the tribunal and indeed the appellant was not given permission to appeal wide enough to enable him to do so.

18. I therefore reject the challenge to the tribunal's ruling on limitation and I dismiss the appeal.