Case Number: 2201618/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss N Langworthy	**v**	**(1) Angela Mortimer PLC** **(2) Williams Littlejohn Mortimer**

Heard at: London Central (by CVP) **On**: 4 - 5 August 2020

Before: Employment Judge E Burns

For the Claimant: Ms Rumble (counsel)
For the First Respondent: Nina Roberts (counsel)
For the Second Respondent: Jonathan Heard (counsel)

JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant continued to be an employee of the first respondent after October 2018 up until the date of termination of her employment.

2. The tribunal has territorial jurisdiction over the claims against the first and second respondents.

REASONS

CLAIMS AND ISSUES

1. By a claim form presented on 11 March 2020, following a period of early conciliation from 14 January to 14 February 2020, the claimant brought claims of sex harassment and victimisation, sex discrimination, disability discrimination, constructive dismissal and for notice pay and arrears of pay.

2. The claimant commenced employment with the first respondent on 24 August 2016. In October 2018 the claimant moved to work in New York.

3. The claimant says that although she was based in New York from October 2018, this was a continuation of her employment with the first respondent and that her employment relationship with the first respondent was governed by UK law.

4. The second respondent is the CEO of the first respondent and the US company Louisa Robertson Associates LLC (LRA) which the respondents say was the actual employer of the claimant.

5. The issues to be considered at the preliminary hearing were:

   (a) whether the claim against the first respondent should be struck out because it ceased to be the claimant's employer from a date in October 2018 onwards; and

   (b) whether the claim against both respondents should be struck out because the tribunal lacks territorial jurisdiction.

HEARING

6. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way

7. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. Several members of the public attended the hearing.

8. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were only a few minor difficulties which did not distract from the hearing.

9. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

10. The participants were told that was an offence to record the proceedings.

11. The tribunal were provided with written witness statements and heard oral testimony from:

    1. The claimant
    2. The second respondent, referred to in this judgment as Mr Mortimer, the CEO of the first respondent and LRA
    3. Chris Horsley, Strategy Executive
    4. Jo Barnard, Operations Manager for the first respondent from February 2019 onwards
    5. Daisy Page, Divisional Leader for the first respondent
    6. Louisa Robertson, worked in New York for LRA

12. There was an agreed trial bundle with pages numbered 1 to 555 (containing 563 pages). I admitted into evidence some further documents with the agreement of the parties. There was an application by the claimant to add further documents, but it was withdrawn so I did not have to decide it. I read the evidence in the bundle to which I was referred and refer below to the page numbers of the key documents upon which I have relied.

13. I thank the representatives for their skeleton arguments and the authorities provided.

FINDINGS OF FACT

14. I shall first explain my findings of fact. Where there were disputes, I have made my findings on the balance of probabilities.

Corporate Entities Involved

15. The first respondent is a public limited company operating as a recruitment business and recruitment agency. Mr Mortimer is one of its founders.

16. The respondent operates an entrepreneurial business model. It is split into divisions which are effectively separate businesses. Successful divisions have the potential to form subsidiary companies, with their directors taking a 20% equity shareholding stake. The subsidiary companies do not necessarily use the Angela Mortimer name, but are nevertheless part of the Angela Mortimer group. Examples I was told about include Katie Bard, a company based in Birmingham and Progressis a company based in France.

17. Many of the subsidiary companies rely on the parent company, the first respondent, for central services such as HR and IT. There is an intra-company charge back system in place. The bundle included a number of invoices between “Angela Mortimer New York” and the first respondent for the period from October 2018 to June 2020 (517 – 555)

18. The Angela Mortimer Group established a New York office and an Angela Mortimer US brand in 2014. The corporate structure was different to that in the rest of the group. A new Delaware company was set up called Angela Mortimer Ltd LLC. It was owned by a UK company called Mortimer Candland Ltd. The owners of Mortimer Candland Ltd were Mr Mortimer and his business partner Stephen Candland (a New York based recruiter). They owned the UK company on a 50:50 basis.

19. In late 2016, Louisa Robertson, a successful Divisional Leader at the first respondent approached Mr Mortimer with the idea that she moved to New York to help the business grow there whilst maintaining leadership over her London team and continuing with a business in the UK. Mr Mortimer agreed and in May 2017 Ms Robertson moved to the US to work in New York at Angela Mortimer Ltd LLC after obtaining a visa. Her visa was linked to Angela Mortimer Ltd LCC.

20. By this time, the relationship between Mr Mortimer and Mr Candland had begun to sour. In May 2017 a new company was set up called Louisa Robertson Associates LLC ("LRA") which was 100% owned by a UK company called Louisa Robertson Associates Ltd. Mr Mortimer's daughter, Josephine Burne is sole shareholder of the UK parent company and it is therefore separate to the Angela Mortimer group.

21. Mr Mortimer set the company up in this way deliberately in order to protect the assets of the Angela Mortimer group from possible litigation by Mr Candland. An agreement was eventually reached between Mr Mortimer and Mr Candland in September 2018. By that time, all trade in the New York Office was being handled by LRA which continued to use the Angela Mortimer US brand. The terms and conditions entered into between LRA and its clients were in the name of LRA.

Claimant's Employment

22. The claimant commenced employment with the first respondent as a Temporary Recruitment Consultant on 24 August 2016. She was sent an offer letter dated 12 July 2016 (75) offering her this role together with various documents including a contract of employment (127 – 136). This is the only contract of employment the claimant was issued.

23. The claimant worked in the Daisy Page Division and reported directly to Daisy Page. She was promoted to a Permanent Recruitment Consultant and Team Leader in December 2017. She hired two team members which she was responsible for managing.

24. Once she became a Team Leader, the claimant became entitled to receive Team Leader Commission of 1% on her team's fee income (subject to a minimum threshold) in addition to her salary and personal commission based on her own fee income generation.

International Mobility Scheme

25. Interested in promoting expansion overseas, the first respondent developed an International Mobility Scheme. It was announced in an email sent to its workforce on 3 July 2017 (page 202 - 206).

26. The scheme document says very little of substance. It begins with an introduction encouraging employees to consider expanding their current business within the Group to new cities, regions or countries. It says that the scheme is open to Senior Executive level employees and above (which included the claimant) and offers support including visa support, travel costs and relocation loan (204).

27. There is a recommendation that employees who are interested should speak with their Divisional Leader / Director in the first instance with a view to preparing a 2 year business plan with a proposal for how they would develop business in a new location (204).

28. It is notable that the the scheme does not address what happens to the employee's employment should they take up an international opportunity. The scheme document is simply silent on this point.

29. There is a very brief reference to employment law in the document. In the section on drafting a business plan, the scheme says "*when drafting your plan also consider varying employment laws that exist in the country of your choice*" (205). I find this to be a reference to the need to understand the impact of local laws on recruitment activity and, hence the business plan, rather than a reference to the employee's own employment.

30. The first respondent sent a subsequent email to its workforce on 9 November 2017 (page 207 - 210), stating that the company was actively seeking an individual for the New York office. The email attached International Mobility Scheme.

31. The email said:

> "*Earlier in the year we announced an International Mobility Scheme that formalised your opportunity to apply to work/take a secondment with a different office within the Angela Mortimer group. Whilst each individual application will be unique, the outline of the scheme is attached again for you now.*
>
> *We are now* ***actively seeking an individual to take an opportunity within our office in New York*** *and would like to open applications to a shortlisting process. This may be in a consultant or leadership capacity. As per the Mobility Scheme document we would expect that you would enter this move with a full business plan which is prepared to demonstrate the value that you and the company will receive from your transfer.*
>
> *The office is growing in New York and as a consultant with prior experience we would be looking for you to support this growth. This opportunity is extremely exciting but will come with a lot of hard work too (sic) to build a business." (207) (original bold emphasis)*

32. The claimant was interested in this opportunity, but not immediately. Her then boyfriend (now fiancé) has dual UK/USA citizenship which made the opportunity particularly attractive. The claimant initially discussed the opportunity with Ms Page and asked whether a move from July 2018 onwards would be acceptable. This was for various reasons, including that the claimant wanted to build a team in London first which she would still manage if she went to New York. The claimant later prepared a business plan (page 213 - 218) based on this proposal.

33. Specifically, the claimant proposed:

    1. That she would go to New York in September / October 2018 for two years to build a team and business there, initially building on some of Ms Robertson's work

2. She would remain part of the Daisy Page Division and be line managed by Ms Page throughout this period
3. She would continue to manage her London team. Her plan outlines a process for doing this including travelling back to the UK once a quarter for this purpose

34. Mr Mortimer was among the people who considered the business plan and approved it.

35. The claimant commenced work in the New York office on 16 October 2018.

Change of Employer – Discussions and Relevant Documentation

36. The claimant was not issued with a new contract of employment or handbook for LRA. The respondents accept this. At the time when she began working in New York the only other person there was Ms Robertson. LRA did not have a standard contract of employment or employee handbook.

37. Ms Robertson gave evidence that although she did not have a written contract of employment with LRA her understanding was that LRS was her employer. She explained that LRA had subsequently employed employees in the US who had been given written contracts of employment.

38. When asked about the terms of employment of the US employees she said that she understood these were in line with US employment law with limited entitlement to holiday and very short notice periods, being what are known as contracts at will. She understood her own terms and conditions to be very different and in line with the employment contact that she had had when she worked in the UK.

39. The claimant alleges that there were no discussions with her at any time about her changing employer, and that she therefore believed her employment continued under her contract with the first respondent, subject to some changes to the terms and conditions (considered further in paragraphs 40-51 below). The respondents say this is incorrect and that the issue was discussed as part of the visa process described further in paragraphs 67 to 62 below.

Claimant Salary, Benefits and Expenses

40. After approval was given for the that the claimant to move to work in the New York Office, the first respondent and the claimant agreed that her salary in the US would be increased and she would receive private health cover.

41. The salary change was from 31,000 GBP to 71,000 USD. The claimant's salary was later increased to 80,000 USD. The exchange rate in mid-2018 was 1 GBP to 1.3 USD. The claimant therefore had an initial salary

increase of equivalent to approximately 23,000 GBP and ultimately 30,000 GBP.

42. Mr Mortimer was not involved in the salary negotiations. When he later (in or around September 2019) found out about the claimant's salary, he assumed that the claimant must be on a US contract and operating at a level higher than Team Leader. He said in his oral testimony he would have expected a Team Leader in the US to earn in the region of 60,000 USD.

43. The claimant says that the increase was in line with market rates for salaries in New York which were higher than in London and was intended simply to ensure that she came within these. She says the new salary was consistent with the salary range for someone in a team leader role working for the first respondent in New York.

44. I was provided with two versions of a document called the "New Deal" which contains details of the career progression structure within the first respondent. It includes information about salary grades, commission and other benefits. The first version is dated June 2016 and gives salary ranges for the different grades in GBP. The salary range for Team Leaders is shown as being up to £40,000 (88). The second version is dated June 2017 and shows salary ranges for different grades in USD. The salary range for Team Leaders is shown as being up to 80,000 USD (171). The claimant's new salary was therefore within this range.

45. Although it was envisaged that the claimant, when in New York, would receive her salary in US currency into a US bank account, this was not possible until she obtained full visa status. Instead, from 16 October 2018 to the end of December 2018, the respondent converted the US salary into GBP and paid it into the claimant's UK bank account. The claimant started receiving a salary in US currency into her US bank account in January 2018. This was paid fortnightly rather than monthly. She paid US tax on this.

46. The claimant continued to receive the Team Leader Commission Payment based on her UK's team performance throughout the time when she was in the US, This was paid in GBP into her UK bank account monthly, when her team's performance triggered a payment.

47. The first respondent offered its employees a flexible benefit scheme. One of the benefits available under the scheme was private health cover. In order to receive the benefit, employees had to request it once they have completed their probationary period (146). The claimant did not take up this benefit between August 2016 and October 2018. However, when she moved to New York she was understandably keen to have health cover.

48. The private health cover scheme of the first respondent only covered employees based in the UK. Other arrangements had to be made for the claimant. Initially she arranged her own private health cover, with the cost being reimbursed to her by the respondent. From April 2019 onwards,

however, the claimant received cover under a policy arranged for LRA. In fact, she assisted in getting the health cover policy in place. The policy provided cover for "all eligible employees" of LRA, who were named as the claimant and Ms Robertson (334).

49. While she was based in the UK, the claimant received pension contributions into a pension scheme for employees of the first respondent. These stopped in January 2019 when she started to receive her US salary directly into her bank account.

50. The claimant claimed expenses from the first respondent while she was working in New York. These were paid to her in GBP into her UK bank account. For internal accounting purposes the costs of these were then allocated to the UK team or the US team depending on the nature of the expense.

51. The claimant had the same entitlement to paid holiday as UK employees of the first respondent while working in the US. However instead of being limited to having to take UK bank holidays, she was able to take US bank holidays instead.

Visa Application

52. As per the Mobility Scheme, the claimant was provided with assistance by the first respondent in applying for a visa. The first respondent was assisted in the visa process by a legal adviser who prepared paperwork for submission to the US authorities.

53. There was a delay in obtaining a visa for the claimant. The delay was connected to the dispute between Mr Mortimer and Mr Candland. While this dispute was ongoing, it was unclear if the claimant's visa status should be linked to Angela Mortimer Ltd LCC or LRA.

54. Part of the process involved the claimant providing answers to various questions asked by the legal adviser. In her responses she confirmed the following:

    1. Her intended length of stay in the US was 2 years (258)
    2. The first respondent was paying for her trip (259)
    3. Her US contact would be Louisa Robertson of Angela Mortimer plc, of 575 Fifth Avenue, New York (260)
    4. Her present employer was Angela Mortimer plc, 76 Wardour Street, London (260)

55. As a visa had not been granted by the time of the claimant's desired move date, she initially began work in New York on the basis of an ESTA on 16 October 2018.

56. The visa issue was resolved in December 2018. The US visa authorities wrote to LRA on 4 December 2018 as follows:

"*Dear Treaty Visa Applicant: Angela Mortimer PLC, 100% GRBR*

Your application for a Treaty Investor (E – 2) status has been approved. Based upon the information you have submitted, we have granted E registration to your firm for five years from the above date.

Please note that an employee being sent to work in the United States is the same nationality as the sending company. For example, firm of U.K. nationality may send only U.K. nationals to work at the American subsidiary or affiliate using E visas. Employees who are not of the same nationality as the enterprise must obtain other types of work visas." (292)

57. Following this the claimant was required to attend a meeting with the US visa authorities in connection with her own visa. She took with her a letter from Mr Mortimer in his capacity as President and CEO of LRA as well as CEO of the first respondent. The letter had been prepared by the first respondent's legal adviser to support an application for an E-2 non-immigrant visa for the claimant. The letter was signed per procurationem (pp) for Mr Mortimer.

58. The letter inaccurately states that the first respondent is the sole parent company of LRA and that LRA is a wholly owned subsidiary of the first respondent. This inaccurate information is repeated in three different places, with the letter explicitly stating that:

"*As the CEO of [the first respondent] I incorporated Louisa Robertson Associates LLC ("LRA") in the state of Delware on May 05, 2017. It is a wholly owned subsidiary of [the first respondent]. 100 shares were issued and these are solely owned by [the first respondent]."* (294)

59. I find that the ownership of LRA was deliberately misrepresented to make LRA appear to be part of the Angela Mortimer group and thereby eligible for Treaty Investor (E – 2) status.

60. Of the claimant's position, the letter states:

- "*We have just been granted E-2 Company Registration status and one of our senior management/executive employees has been placed temporarily at our US office. Louisa Robertson is responsible for the US expansion and it is proposed that [the claimant] will report directly to her in the short-term*." (293)

- *"The intention is for [the first respondent] to transfer [the claimant] over to the US office as soon as possible, in order to hire and manage a team of US consultants."* (294)

- *"[The claimant] is currently employed by the first respondent in London, U.K. where she has been continuously employed since August 2016. She is employed in the role of Team Leader…"* (295)

- *"The claimant reports into a Divisional Leader who, in turn, reports directly to the Managing Director, [Mr] Mortimer."* (295)

- "*The claimant will be employed by [LRA] in New York, U.S.A in the role of Team Leader."* (296)

- "[*The claimant] will report into a divisional leader who, in turn, reports directly to the Managing Director, [Mr] Mortimer*." (296)

- "*In order to fully realize [LRA's] growth potential in the US markets, we believe it is important for one of our managers to be based in the US on a temporary basis. We plan to establish a new team for the US office in addition to the current employees, and [the claimant] will be in charge of hiring those to fill the roles along with her other responsibilities outlined above."* (297)

- *"We currently intend to employ the claimant in the US and continue to pay her through a US salary of $80,000. She will also be entitled to a monthly bonus she reaches her sales target, which is usually around $2,000 per month …. She understands the temporary nature of this position."* (297)

- *"….. I respectfully request that the claimant be issued an E-2 Manager/employee visa so that she may assume this temporary assignment on behalf of both [the first respondent] and [LRA].* "(297)

61. Attached to the letter were two organisation charts. In the first one, for the first respondent, the claimant is shown as reporting to Ms Page (299). In the second one, for LRA, the claimant is shown as reporting to Ms Robertson (298).

62. The claimant was subsequently granted E2 visa status on 14 December 2018.

Landlord Letters

63. I was also referred to two letters. The first was a letter written by the first respondent's then HR Manager, Catherine Fleming. The claimant had asked Ms Fleming for a letter in connection with renting an apartment in New York, saying to her, "*Could you please send me a letter of employment confirming my US salary of $71000 on headed paper and confirm it's in the New York office.*" (285:1)

64. Ms Fleming provided the claimant with a letter dated 10 October 2018 with the Angela Mortimer branding at the top that said:

"*This is to confirm that [the claimant] is a full time employee for Louisa Robertson LLC (part of the Angela Mortimer Group). Her annual salary is $71, 0000*." (287).

The letter shows the name, company number and and address of the first respondent in its footer on the bottom of the page.

65. The claimant says that she did not question the content of the letter as it was written purely for the purpose of appeasing her landlord. I accept her evidence on this point.

66. The claimant again asked for a letter her in connection with renting an apartment in New York on 7 October 2019 (367). Ms Barnard provided her with a letter dated 7 October 2019. The letterhead and footer are in exactly the same format as the earlier letter. The letter says;

"*Please accept this as confirmation that [the claimant] is a full time employee of Angela Mortimer PLC.*

[The claimant's] employment commenced on 24 August 2016 and she is currently based in on our New York Office as a Senior Consultant."

67. Ms Barnard says that the letter is incorrect and that she just used a template. I do not find this explanation convincing. The claimant was in a unique position and so no template for the specific wording shown above would have existed.

Claimant's Line Management / Appraisal

68. Throughout the time that the claimant spent in the US she remained part of the Daisy Page division of the first respondent. Initially, her line management continued as it had done so previously, and she reported to Ms Page. She and Ms Robertson liaised over holidays and their presence in the office in New York however. This was not a case of the claimant seeking approval of her leave arrangements from Ms Robertson. It was sensible to liaise as there were only two of them in the office initially.

69. The situation changed when Ms Page went off on maternity leave in February 2019. For reasons which are not relevant to the case, no cover was put in place for Ms Page.

70. Ms Barnard joined the first respondent in February 2019. In April 2019, she identified that the claimant did not have a line manager because Ms Page was on maternity leave. She suggested that Ms Robertson should step in and take over the respondent's review process in Ms Page's absence on maternity leave. The claimant and Ms Robertson agreed this was sensible, but as Ms Page had conducted a four month review just before she went off on leave, the next review was not due until June/July 2019 (306 - 307). I find this was put forward as a pragmatic solution to Ms Page's absence and did not signify a formal change in line management arrangements. I note there is a dispute between the parties as to whether a June/July review took place or not, but I do not need to resolve it for the purposes of this preliminary issue.

71. Although the claimant had some initial success in New York, she was not meeting the financial projections in her original business plan. Ms Page and the claimant worked together on a new 6 month business plan in July 2019 even though Ms Page was off on maternity leave at the time.

72. As part of the discussions around the business plan, it was agreed that Ms Robertson should become involved in the plan and that the claimant and Ms Robertson should meet monthly to review her figures. I find that this suggestion arose both because Ms Robertson had knowledge of the local market and because she was working and available to support the claimant. Ms Page felt that she could not provide the support needed while she was off on on maternity leave even using KIT days. This again was a pragmatic solution to Ms Page's absence and did not signify a formal change in line management arrangements.

73. The claimant's two teams remained in the Daisy Page division throughout the time the claimant worked in New York. Up until Ms Page went off on maternity leave the claimant continued to attend the monthly division board meetings that took place. These ceased to happen when she went off so that after a while, Mr Mortimer became involved. Based on his oral testimony, he conducted only one division board in September, he before met with the claimant in New York in October. Mr Mortimer was not responsible for sending the invitations to the meeting. I find that the only reason the claimant did not attend the September divisional board meeting was because she was not invited to attend it.

74. I note that Ms Page was consulted about matters involving the claimant at the time of the end of the claimant's employment, demonstrating that Ms Page was at that time, still considered to be her line manager.

Claimant's Team Management

75. The claimant continued as the Team Leader for the team based in the UK throughout the time she worked in the US. There is a dispute between the parties as to how well she was fulfilling this role. The respondents argue that she was neglecting this duty, which she denies. I make no finding on this point. I do find, however, that this responsibility was not removed from her at any point while she was working in New York. It was suggested to her by Mr Mortimer in an email dated 30 October 2019 that her time would be better spent with her team in London rather than in New York, thereby acknowledging that she continued to have this responsibility (395).

76. For internal accounting purposes the claimant's New York team and UK teams were given different budget lines. Twenty five percent of the claimant's salary was allocated to the UK team's costs (488).

Claimant's Client Base

77. When moving to New York the claimant's aim was to build up a new US client base. She identified as an area of interest the possibility of working

with companies that had a US and UK presence and noted that some of her existing clients were in this position.

78. The claimant appears to have handed over most of her UK client contacts to the UK team, although she retained a number of candidates as her own. While she was based in the US she did place a candidate in the UK.

Grievance Process and Sick Pay

79. Following the meeting with Mr Mortimer and a subsequent exchange of emails and correspondence, in October 2019, the claimant instructed solicitors to raise a formal grievance on her behalf. The grievance was dated 3 December 2019 and was address to the Chairman of the Board of the first respondent (410 - 411).

80. The grievance was about Mr Mortimer. Most of the details are not relevant for the purposes of the preliminary issue. One of the claimant's complaints, however, was that Mr Mortimer had written to the claimant saying:

"*Your current "employment report", who pay your salary at local rates is Angela Mortimer NY. Your local employment rights are one week' notice. Your contract, relied on by your lawyers, is with Angela Mortimer Plc, UK, but the rights you have under that contract are only available in the UK. There is no contract which agrees to pay you US rates, but give you UK protection*." (403 – 404)

81. The claimant's lawyers asserted in response that the claimant's employment was covered by English law for various reasons including that her UK employment contract was still in place (405).

82. The claimant was absent from work at this time having become unwell. She had emergency surgery for acute appendicitis on 31 October 2019. Subsequently she was signed off with anxiety, depression, panic disorder and PTSD, alleged to have been caused by the interaction with Mr Mortimer (412).

83. Ms Barnard wrote to the claimant in response to the grievance on 10 December 2019 saying the following:

"Dear [claimant]

I write to acknowledge receipt of your written grievance which was emailed to Angela and myself on 3 December 2019 via Laura Clark of Wilkin Chapman. We note that this method is not as per the Grievance Procedure in your employment handbook.

However I wanted to reassure you that the Company takes grievances very seriously; and the matters your solicitor has raised will be fully investigated, in accordance with its Grievance Procedure. As you will understand, it is the Company's decision whom it chooses to appoint to

investigate your grievance in this instance Chris Horsley have (sic) been appointed. I will attend in a note taking capacity as an independent witness

….

in the meantime please note as per your UK contract of employment we will apply Statutory Sick Pay regarding your absence from work and I will investigate any outstanding Statutory Sick Pay mentioned in your grievance.

Best wishes
Jo Barnard
Operations Manager - Angela Mortimer plc" (416)

84. Ms Barnard also wrote to the the claimant's solicitor. In an email dated 24 December 2020, responding to a request from the claimant's solicitors request about the claimant's entitlement to sick pay, Ms Barnard said:

"*Dear Laura,*

Thank you for your attached letter dated 20 December 2019. I have gained clarity following discussion with payroll department;

It is my understanding that [the claimant] was aware that she would be paid fortnightly when she went on to the US payroll and this was discussed in advance of this being applied.

As per point 10 of the claimant's contract of employment SSP is applied when a member of staff is unable to attend work any payment above this is discretionary. The company applied full pay for the initial two weeks of absence." (426)

85. Ms Barnard did not sign off either of these written communications on behalf of LRA, nor did she say anything about the claimant not being entitled to SSP, but being paid it purely as a gesture of goodwill. The claimant was paid SSP until the date her employment terminated.

86. Mr Horsely investigated the claimant's grievance and prepared an investigation report. Of relevance to the preliminary issue is how he described the claimant's employment in the report. This was as "*a Team Leader and employee of Angela Mortimer PLC (the Company) working at LRA in New York*." He investigated the grievance in accordance with the procedure contained in the Employee Handbook of the first respondent.

87. Notwithstanding this, Mr Horsely insisted in his oral testimony that the claimant was not employed by the first respondent, but was employed by LRA. He sought to explain the language used by saying that he made a mistake because he used a template. He also said that at the time he prepared the report, he hoped the grievance could be satisfactorily resolved and so he did not want to appear to take sides on the disputed employment issue.

88. I did not find his explanation convincing. As the claimant's position was unique, there cannot have been a template. In addition, if Mr Horsely felt there was a dispute about the claimant's employer, the sensible action to have taken would have been to record this in the report and provide an explanation as to why the grievance was being conducted under the first respondent's grievance procedure.

89. The claimant was not happy about the outcome of the grievance and appealed against it. The first respondent appointed an external investigator to consider the appeal. He described himself in correspondence as a consultant and barrister, which I took to mean he was qualified under English and Welsh law. He treated the grievance as a grievance against the first respondent's decision and in doing so he treated Mr Horsely as having reached his decision on the grievance on behalf of the first respondent. As part of the grievance appeal, the consultant considered whether there had been a breach of the first respondent's grievance procedure at the first stage of the process, so must have been content that the procedure applied to the claimant.

Resignation

90. The claimant resigned while arrangements for the grievance appeal were being made. She submitted a letter of resignation on 7 February 2020 addressed to "Jo Barnard, Angela Mortimer PLC." Her letter made no reference to employment with LRA. (457)

91. In an email acknowledging the letter of resignation, Mr Horsely, signing off as Strategy and Development Executive of the first respondent (not on behalf of LRA), said:

"*I acknowledge receipt of your email and letter terminating your contract on Friday 7 February 2020*."

He added:

"*Following from your letter, we will process the leaver documents from the date 7th February 2020 and terminate other benefits accordingly in the US.*" (462)

92. A P45 was subsequently issued by the first respondent confirmation the termination of the claimant's employment with the first respondent on 7 February 2020 (459).

93. The first respondent decided to continue with the grievance appeal, however. Mr Horsely wrote to the consultant on 9 February 2020 saying:

"*At this point I am of the mind that we should continue with the Grievance appeal with yourself even though I believe we no longer have a contractual obligation to to so."* (467)

The implication is that prior to her resignation, Mr Horsely believed the first respondent did have a legal obligation to consider the claimant's grievance.

LAW

Identifying the Employer

94. At the heart of any employment relationship heart is a contract of employment.

95. For any contract to have been formed, there are a number of essential components: an intention to create legal relations; offer; acceptance; consideration and sufficient certainly as to the terms.

96. There is no legal requirement for an employment contract to be in writing. It therefore follows that there is no requirement for a contract to be signed by both parties to be binding. Contracts of employment can be formed, varied and terminated through express agreement, whether in writing or orally. They can also be formed and varied through conduct. Acceptance of a new or varied contract can be implied where an employee has been issued with a contract and works under it, even though they do not sign and return it.

97. The test as to whether a contract has been formed, varied or terminated is objective. The tribunal must have regard to what a reasonable observer would think. That is not to say that the subjective states of the minds of the parties involved are entirely irrelevant. They are part of the overall factual matrix that needs to be considered.

98. Where there is no written document, it will be necessary to examine the course of dealings between the parties, their oral exchanges and conduct to determine whether a contract of employment is in existence. This can also include what happened after the said contract came into existence (*Maggs (t/a BM Builders) v Marsh* [2006] EWCA Civ 1058).

99. Although one person can have two jobs with separate employers at the same time, case law affirms that an employee cannot usually be employed by two employers at the same time on the same work (*Patel v Specsavers Optical Group Ltd* UKEAT/0286/18).

100. That said, it is possible for an employee to have a contract of employment with one employer, but to be seconded to work for a different employer. In addition, employees transferred to an overseas branch or subsidiary are sometimes paid under two contracts (referred to as dual contracts), one with the employing company in the host country and the other with a subsidiary outside both the UK and the host country. This is normally done for tax reasons.

Territorial Jurisdiction

101. The test for establishing territorial jurisdiction is the same under the Employment Rights Act 1996 and the Equality Act 2010 (R (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWCA Civ 438).

102. Following the judgment of Lord Hoffman in *Lawson v Serco* [2006] IRLR 289 the relevant approach requires an analysis of the factual matrix. This will include looking at the contract, and how the contract was being operated in practice and as a whole. Lord Hoffman gave guidance as to what sort of employee would be "within the legislative grasp" of the Employment Rights Act by reference to three examples:

- The standard case (working in Great Britain);
- Peripatetic employees; and
- Ex-patriate employees.

103. In *Ravat v Halliburton Manufacturing and Services Ltd* [2012] IRLR 315, the Supreme Court held that the *Lawson v Serco* categories could be subsumed within a single question or overriding principle:

"*The question of fact is whether the connection between the circumstances of the employment in Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain*".

104. In *Bates Van Winklehoff v Clyde & Co LLP [2012] EWCA Civ 1207*, *[2012] IRLR 992*, the Court of Appeal held that a claimant could pursue her discrimination claims despite spending most of her time working on secondment abroad, as she had a sufficiently strong connection with Great Britain and British employment law. It said that in a case where the claimant lives and/or works for at least part of the time in Great Britain all that was required was that the tribunal should satisfy itself, that the connection between the claimant and the UK was '*sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim*' (paragraph 98).

105. In *Ravisy v Simmons & Simmons LLP* UKEAT/0085/18, the Employment Appeal Tribunal, concluded that the application of *Ravat*, *Lawson v Serco* and *Bates van Winkelhof* led to three broad categories of cases:

- Type (a): cases in which (at the relevant time or during the relevant period), the claimant worked in Great Britain. These cases would have territorial jurisdiction.
    - Type (b): cases in which the claimant worked outside Great Britain. In these cases, the presumption is against jurisdiction unless there is something which puts the case in an exceptional category, such that the employment has much stronger connections both with Great Britain and British employment law than with any other system of law. The tribunal and EAT stated that this is a question of

fact and degree. A non-exhaustive range of factors could be relevant.

- Type (c): cases in which the claimant lived and worked for at least part of the time in Great Britain. These cases do not have to be "truly exceptional" for territorial jurisdiction to be established; and the comparative exercise called for in a type (b) case is not required. There merely needs to be a sufficiently strong connection with Great Britain and British law.

106. The factual matrix that the tribunal needs to consider potentially includes the following factors:

1. where the employee was recruited
2. where the employer is registered
3. where the employee was based
4. where the work was carried out
5. where the employee lived and whether he or she has a home in Great Britain
6. any choice of law and jurisdiction said to have been made by the parties
7. what was said to the employee about their entitlements
8. from where the employment relationship has been managed, from an HR perspective and from an operational perspective
9. where does the employee get paid and in what currency
10. any pension scheme and/or other benefits the employee receives
11. the tax and social security arrangements in place

ANALYSIS AND CONCLUSIONS

Identity of Employer

107. I find, as a matter of fact, that the claimant continued to be employed by the first respondent throughout the period that she worked in New York. I find that she was effectively seconded to work for LRA while she was in New York.

108. The claimant was not notified that her existing contract of employment was being brought to an end or issued with a new contract of employment. By itself this would not be determinative, but in this case, there is a significant amount of evidence pointing to the contract continuing.

109. I note that the claimant continued on the UK payroll, albeit alongside being on the US payroll. A P45 was issued at the end of her employment confirming her termination date for UK employment purposes. This is very significant in my judgment.

110. The use of the US payroll does not undermine this. It made practical sense for the claimant to be paid a US salary into a US bank account by a US payroll provider to ensure that appropriate local taxes were deducted. The identify of her employer and its location did not change her obligation to pay US taxes.

111. It was not legally necessary for the claimant to have moved to a new contract of employment in order for her have benefited from the generous increase in salary she obtained when she moved to New York or to receive private health insurance cover. I find that these were agreed variations to her existing contract of employment. She continued to enjoy the same amount of holiday, albeit that the dates of the bank holidays were very sensibly adjusted to take into account days when businesses in the US were shut.

112. One possible inconsistency is that the claimant's pension contributions stopped. This did not occur, however, when she moved to New York as it would have done if she had changed employer at this point, but when the payroll arrangements changed. I find that it was caused by the change in payroll arrangements and not any change of employer.

113. The International Mobility Scheme does not say have anything that leads me to a different view. The reference to employment law being different in different countries is made in the context of the preparation of a business plan and the impact on the work of a recruitment agent rather than being a reference to the impact on the position of the employee seeking a position overseas. I note that the email advertising the New York opportunity specifically uses the term secondment.

114. I find that the respondent's description of the claimant's position in the grievance report reflected its true understanding of her position. This is why it believed it was legally obliged to investigate her grievance under the first respondent's grievance procedure. All of the correspondence with the claimant about her grievance was either sent in the name of the first respondent or from someone signing off with the first respondent's name in their title. This was also true of the acknowledgement of the claimant's resignation and explains why the first respondent paid the claimant SSP.

115. The letters that the respondent wrote for the claimant's US landlords are of very little assistance as they completely contradict each other. I have not therefore relied on them in reaching my decision. Similarly, I give no weight to the contents of the letter written for the benefit of the US immigration authorities. It is entirely inaccurate in the way it describes LRA and its ownership and therefore, in my judgment, is not a document upon which the tribunal can place any reliance.

116. Finally, I have given no weight to the relative positions of Ms Robertson or the local US employees recruited by LRA when compared to the claimant because they were in very different positions to the claimant. I note that Ms Robertson was much more senior than the claimant and that the US company is named after her. It would not be safe to assume that the claimant's arrangements mirrored those in place for Ms Robertson and in fact, I have found otherwise.

Territorial Jurisdiction

117. Having found the claimant was employed by the first respondent, it does not automatically follow that the tribunal has territorial jurisdiction. In this case, however, I find that it does.

118. The claimant's contract of employment, which I have found continued in force, does not contain a clause dealing with territorial jurisdiction. It is silent on the point. It is, however, unsurprisingly, drafted to comply with UK employment law and features several clauses that reflect this such as the reference to continuous service, the Working Time Regulations, statutory sick pay and the Public Interest Disclosure Act 1998 by way of examples. This denotes a strong connection with British employment law.

119. Although she was based primarily in the US, the claimant continued to be line managed by Ms Page who was based in the UK. She continued to be part of Ms Page's division. Although Ms Robertson had some later involvement in the claimant's management, this arose because Ms Page was on maternity leave. The ongoing line management relationship denotes a strong connection with Great Britain.

120. My conclusion is reinforced when the grievance process is considered. As noted above, when the claimant became unhappy at work, her grievance was considered under the first respondent's grievance procedure. The procedure reflects the requirements of the ACAS code. This points to a strong connection with Great Britain and British employment law. This was further emphasised when the first respondent appointed a consultant based in the UK and qualified under UK law to consider the grievance appeal.

121. Of greatest significance however, in my judgment, is the fact that the claimant continued to manage a team based the UK and be paid commission based on their performance. This is why twenty five per cent of her salary was allocated to the UK team for accounting purposes, to reflect her line management responsibilities for the team. She also travelled back to the UK for this purpose. She was therefore carrying out duties in Great Britain during the time that she was resident and working in New York.

122. In my judgment, this latter fact causes this case to fall into a *Ravisy* type (c) category. Even if this is not correct, and the claimant's circumstances are in the *Ravisy* type (b) category, taking into account the factors I have described above, I judge there to be a sufficiently strong connection with both Great Britain and British employment law for territorial jurisdiction to be established in this case.

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Employment Judge E Burns
5 October 2020

Sent to the parties on:

05/10/2020

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For the Tribunals Office