EMPLOYMENT TRIBUNALS

Claimant: Ms B Nishat

Respondent: Mr R Dart

Heard at: London Central (by CVP) **On:16 September and 11 October 2021**

Before: **Employment Judge N Walker**

Representation
Claimant: Ms S Robertson of Counsel
Respondent: Mr E Kemp of Counsel

RESERVED JUDGMENT

The Respondent's application to strike out the Claimant's claims on the basis that the Employment Tribunal has no jurisdiction is refused.

REASONS

1 This Preliminary Hearing was listed to determine the question of whether the Employment Tribunal has territorial jurisdiction to hear the Claimant's complaints of breach of contract and disability discrimination. If the Tribunal has no jurisdiction over some or all of the claims, it follows that the relevant claims should be struck out.

2 The hearing took place by CVP. In accordance with Rule 46 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, the parties and members of the public attending the hearing were able to hear what the Tribunal heard and see any witness as seen by the Tribunal.

Evidence

3 I had a bundle and a supplementary bundle. I heard evidence from the Claimant and from the Respondent. Both parties referred me to authorities, and both submitted written skeleton arguments/submissions.

The issues

4 The issues in the case involved determining the facts in order to assess the extent of the connection with both Great Britain and British employment law and considering whether that connection was sufficiently strong to justify the presumption that parliament had intended the Claimant to have protection under the Equality Act 2010 and her claim for breach of contract.

Facts

5 The fact I found were these. The Claimant is a professional nanny. The Respondent is a wealthy businessman and president of a significant corporation headquartered in the United States which he co-owns with his brother. He lives with his partner. He is domiciled in the Grand Cayman for the purpose of tax. He owns a house in London and in Cayman and he rents a house in Florida from his brother. He also uses an apartment in Toronto that his mother owns. He often stays in hotels or rentals when travelling around the world. In normal times, the Respondent and his partner travel a great deal. His partner, Ms Paavola, who is Finnish, has young children.

6 The Claimant was recruited by the Respondent through an agency in London. The Respondent says he and his partner had a nanny, but she was not a professional nanny. They concluded they required a professional nanny and sought to recruit one in Florida. However, they did not get many options and they had heard that a London agencies such as the Norland nanny agency had a very good reputation for quality. They tried that but failed to get a candidate who was interested. They then tried the agency which introduced the Claimant. The Respondent said it was only by chance that the Claimant ended up being recruited in London. I do not accept that the Claimant was recruited in London by chance. The Respondent and his partner made a deliberate choice to try to recruit through agencies in London, changing from one specialist agency to another one when they failed to get a suitable candidate. The USA is a huge country with a large number of cities and a vastly greater population than the UK. If the Respondent had wanted an American based nanny, he would have been able to search more widely in the US. It is simply not credible to suggest that failing to obtain a nanny in Florida and then using a London agency was somehow happenstance.

7 It is clear that the Respondent and his partner had tried to recruit a Finnish speaking nanny to be based in Florida through the nanny agency that introduced the Claimant, but had no success in that, so the brief to the agency was altered.

8 The initial record of the requirements registered on 12 July 2019 stated:

> *"Position title: Permanent Full-time Finnish speaking Live-in Nanny*
> *Driver: yes, bonus*

state: Florida
country Cologne United States
ideal start date ASAP"…..

and

"Travel with family: Worldwide
Travel per year: 6 - 9 months

and under the heading "Candidates Duties" it recorded:

"This family of four is looking for a Finnish speaking nanny with experience! The children are 15 months old and 8 year old, therefore experience with this age group is crucial. The family is mainly based in Florida but there will be a large amount of worldwide travelling in Europe. Driving is not necessary but would be a bonus. A dynamic and organised career nanny would be the perfect fit for the family!"

9 The job specification was clearly altered as the agency sent a note to the Claimant when she was successful in being appointed, which confirmed that she had been offered the job and set out the specification for it, which email read as follows:

"*To ensure everything is clear and accurate, I will kindly request that you email me to confirm that you do wish to accept the offer of employment under the following conditions:*

Job title: Permanent Full-time Live-in Nanny
Permanent or temporary: permanent
Live in or live out: Live-in
Remuneration: £1200 net per week
Start date: Thursday the 18th of July 2019
Days and hours of employment: six days a week,10:00 AM - 10:00PM
Additional flexible hours per week (e.g. babysitting): agreed in advance with the nanny
Total hours per week: 72 hours
candidates weekly salary: £1200 net per week"

10 The Claimant was interviewed by the Respondent's partner, the children's mother, at a park café and subsequently she went to the Respondent's London house where she met the Respondent himself.

11 The Claimant sent an email to the nanny agency dated 17 July 2019 accepting the offer of employment. She responded to agency's email regarding the terms which I have recited above. The agency email to the Claimant made no mention of worldwide travel or the location of the family in Florida. According to the terms she did receive, the Claimant started working for the Respondent on 18 July 2019.

12 The family were residing at the London home at that time. The Claimant was sent a WhatsApp message by the nanny agency with the address for her to start work the next day. On 22nd July there was an exchange of

WhatsApp messages with Karolina from the nanny agency in which the Claimant commented that she's been placed with a lovely family and explained that she'd worked five full days in London with them.

13 There was nothing in writing directly from the Respondent offering the Claimant the post. However, there were negotiations about the contract. By an email dated 22 July 2019 Karolina from the nanny agency sent Jimmy Davis a sample contract. Her email said: "*As requested by BB, please find attached sample contract copy*".

14 As soon as the Claimant started work, the parties were aware of the basic employment terms and acted upon them, including applying a probationary period of one month. The only documentary reference I can find to that probationary period is in the written contract. The Respondent says waited until the Claimant had passed her probationary period before finalising her employment contract, which must be a reference to finalising the terms of the written document recording her contract. A later email dated 1 September 2019 indicates that the Claimant may have worked on the employment contract since it refers to the terms and conditions being completed, and a specific mention of accommodation separate from a family member and safety in Florida. The email also notes: "*As the bank credit is made by Bob, I have not placed Natalie details due to inland revenue and my details to them in regards to tax etc.*" She then asks they can get this signed and agreed before they depart.

15 In fact, although it is clear that all of the key terms were understood and agreed orally, the written employment contract was not signed before they travelled. The written employment contract was signed by the Claimant on 10 September, a few days after she arrived in Florida. The Claimant disputes the accuracy of some terms in the written contract and says that it was produced to her by the Respondent personally at a time when she was busy with the children. She says she was urged to sign it without re reading it. By this stage she had been working for the Respondent for several weeks and they had already travelled to several European locations and then to Florida. I do not need to comment on any dispute over specific terms.

16 The contract states that it meets the requirements of section 1 of the Employment Rights Act 1996 and sets out the information which would be required by that section as well as some other details. There are a number of relent clauses.

16.1 Under the heading "Job Title and Place of Work, it states that the Claimant's "*normal place of work will be London and various oversea locations*".

16.2 Clause 3 refers to the probationary period and states that it was successfully completed, and work reviewed in a meeting on the 18th of August 2019.

16.3 The salary is to be paid by direct credit transfer into a bank or building society nominated by the Claimant. In practice it was paid into the Claimant's account in the UK. She had no overseas accounts.

16.4 There is a reference to accommodation being suitable and separate if overseas. In relation to the children, there is a specific clause at 7.3 stating:

> "*In case of sole charge of the children, assistance must be provided by a Personal Assistant or other person deemed satisfactory by Bibi Nishat for safety in Florida*."

16.5 Clause 12.2 stated: "*You will be expected to work outside the United Kingdom when the Employer and family are outside the UK*."

16.6 Clause 13.2 stated: "*The oversea and Uk accommodation needs to be separate from family and family members unless acceptable to Bibi Nishat."*

16.7 Clause 13.4 stated: "*For any holiday travel starting from oversea, the Employer will pay the expense for Bibi Nishat to travel to the UK. Bibi Nishat will pay for travel expense to return to work with the family. In general, Bibi Nishat and the Employer will split the cost of a round trip flight."*

16.8 Clause 13.5 provided: *"Medical and dental expenses incurred outside the UK by Bibi Nishat while working will be paid by the Employer."*

17 Initially the Claimant travelled with the family to Finland and then returned to London. She says she then travelled to Spain for 4 days, France for 2 days and Austria for 4 days returning on 15 August 2019. After that, she travelled from the UK to Florida. There is some dispute between the parties over exactly how much travel took place at this time. The Respondent says that the Claimant only spent about 11 days working in London before they left for Finland and then they travelled to other places in Europe before going to Florida. He believes the total number days the Claimant spent in London while employed by him was 11 days and during that time he said the Claimant would travel from her home to our residence for work. The Claimant says that she actually had a room in the family house in London, but there is no evidence that she left any property there was sought to recover any property from that home after her employment ended. There is a report on the flights taken by the private plane which shows quite significant travel, but it does not necessarily prove that everybody was on the plane at the time. What is clear is that there was a significant amount of travelling in Europe before the family went to Florida.

18 The parties agree there was a meeting with regard to the Claimant's probation as she had by then completed approximately a month's service. A WhatsApp group conversation between the Claimant, Jim Davis who the Claimant refers to as Head of Security for the Respondent, the Respondent himself and his partner included one dated 16 August 2019 in which the Claimant requested a meeting the next day; "re the contract". As I have noted, the contract says this meeting took place on 18 August. The Claimant says that the Respondent, his partner and one of their staff members, Jim Benson, were present. I understand that meeting took place in London. The Claimant says at the meeting on 18 August, she was given a chance to highlight anything before the contract was signed. In effect she

is saying that some specific terms agreed at that meeting. The Respondent in his witness statement says when her probationary period was completed we finalised the agreement and it was signed on 10 September 2019. At the time of signing, we were both in Florida in the United States.

19 When the Claimant travelled to Florida, she travelled by a mainstream airline. Her prior travel to Finland had been on a private jet with the family. In order to travel to the USA the Claimant had to get an ESTA. This is a certificate under the United States visa waiver programme. It is note worthy that the Claimant could only travel on the ESTA visa waiver if she were not on business, or if the business she was doing was limited to a maximum of 90 days. It is clear that the visa waiver scheme did not allow her to work beyond that stage.

20 The Claimant says she did not apply for the ESTA personally but supplied the information to one of the Respondent's staff members who completed the online form for her. The Claimant says she does not have the password to access the ESTA application and cannot produce the documentation submitted to apply for it as a result. The ESTA visa waiver approval was dated 3 September 2019. It was sent to the Claimant at her personal email and also to a Mr Dayyan Chaudhry. She flew into the US to West Palm Beach in Florida, via Atlanta, on 6 September 2019 with a return ticket which had been provided to her by a member of the Respondent's staff which envisaged a return date of 27 September. The email sending the return ticket came from Christine Arnold and said: "*Return reservation here for customs on Sept 27 to flight out of US*" providing for travel to London via Detroit. There is no requirement for a return ticket for customs, so it is likely that this is in fact meant to refer to passport control where the Claimant would have been asked about her return plans. It was suggested on behalf of the Respondent that the return ticket was cheaper to buy than two singles and, as it was possible to defer the return, this was a more cost-effective option and had no other significance. The Respondent, in his evidence, acknowledged that it may well have been relevant when the Claimant went through passport control.

21 While in Florida, the Claimant stayed in a hotel rather than living with the family in the brother's house. There was it dispute as to how long the Claimant was expected to work and stay in Florida. The Respondent claims he has minimal connections with the UK and has that has been the case since 1997. He acknowledges owning a house in London but envisages he will sell it in a few year's time. The Respondent says that he spoke with the Claimant a few times at his residence in London and wanted to ensure she fully understood the role so that if she accepted it, there would be no ambiguities, particularly around the travelling aspect. He says he made it very clear that her role would be that of a travelling nanny who would accompany the family at various locations around the world whenever they chose. He also says no time did they suggest the Claimant's usual place of work would be London. The Claimant did not request to spend any particular amount of time in London and fully understood the role would involve continuous travel between a variety of different locations. The Respondent also points to the documentation relating to a school place for the older child for the school year starting in September 2019. The Claimant does not dispute being made aware that there would be significant travel but does dispute the suggestion that she would spend lengthy periods of time in

Florida and said she was not aware that the older child was going to school in Florida for the year, or indeed at all.

22 The Respondent says that the contractual earnings were paid in sterling because the Claimant had a UK bank account.

23 The Respondent also says the only reason the contract of employment refers to UK legislation is because it was based on a template provided by the nanny agency. He didn't pay attention to the details at the time because they were not the focus of their discussions. The Respondent is, however, a senior businessman and thus well used to reading contractual documentation.

24 With regard to the place of work, the Respondent says that the employment contract not only identifies London, but he specifically added references to various overseas locations and the Claimant agreed. He also referred to the fact the contract included provision that the Claimant would be expected to work outside of the UK when he and his family were outside the UK because the majority of his time was spent out of the UK and his expectation was the majority of Claimant's work would be carried on outside the UK.

25 The Respondent referred to his partner's older child being enrolled in school in Florida from September 2019 for the school year. Following this, he says in Spring 2020, they intended to spend at least 12 months outside of the U.S., travelling to various places around the world and he says the Claimant was fully aware of his plan. The intention then was to employ tutors who would travel around with them, educating the children. The Respondent says their travel plans were delayed due to the pandemic, but they have not returned to the UK since summer of 2019.

26 The documentation in a supplementary bundle records the enrolment of the older child in school. The documentation shows she was entering for the year 2019 - 2020 and this was confirmation of a place reservation for that academic year. The document had not been signed but there were the Respondent's partner's initials, NP, typed in place of the signature and a date of 28 May 2019. The document recorded total expenses over $27,980 and a deposit due on enrolment of $2000. It recorded that the registration deposit was not refundable under any circumstances. It also provided that once the contract had been submitted the parent becomes liable for the entire year's tuition and fees as liquidated damages (not a penalty) even if the student is withdrawn, absent or involuntary separated. To cancel, the parent would have to send written notice of cancellation by 31 March 2019. If the document were signed after that date, (as it was since the recorded date is in May 2019), it would be too late to cancel. According to the terms of the document, by the date the school contract was signed there was no right of cancellation and the full fees would be due whatever happened.

27 The Claimant disputed the Respondent's argument that the older child was in school and that the commitment to her schooling meant that they were based in Florida. The Claimant said her training as a nanny was sufficient for her to be able to teach the older child who was 8 going on 9. The Respondent insisted the child attended school in Florida regularly and that the Claimant cannot have failed to realise that.

28 The Respondent referred to other clauses in the contract such as clause 13.4 which provided that the cost of the Claimants travel back to the UK would be split between him and the Claimant and clause 13.5 which provided that medical and dental expenses incurred by the Claimant whilst working outside the UK would be borne by him. He said all these clauses were included because of the expectation the Claimant would spend most of her time while working, outside the UK.

29 The Claimant did not return to the UK on 27 September. It is not clear if she intended to, but on that date, she was in a car accident which resulted in emergency surgery on her right shoulder. She was then considered too unwell to work or to fly home. She was advised to stay in Florida until cleared to return to London according to John Henson MD of the Palm Beach Orthopaedic Institute P.A. There is no evidence about what steps were taken to deal with the return ticket the Claimant had been supplied with initially.

30 By an email dated 17 October 2019, a lawyer, Mr Myers, from a law firm called Foster LLP emailed the Claimant stating his firm had been engaged to assist her with applying for her annotated B-1 Personal Employee visa at a U S consular post abroad for her employment with the Respondent. He then requested certain information. On 4 November 2019 the lawyer sent a text or WhatsApp (I am not clear what it was) to the Claimant and Jimmy, explaining that they wanted to emphasise the overstay was a medical emergency and necessity, not merely a medical preference. He then explained the consequences of overstaying the period of 90 days authorised under the ESTA stating that it should permanently disqualify the Claimant from travelling in the future under the ESTA visa waiver programme. He continued explaining:

> "Once she is disqualified from ESTA, she will need to apply the U.S. embassy in London for at least a B-1/B-2 visa for all future travel to the U.S."

31 He noted that his firm thought:

> *"Overstaying her current 90 day admission should be avoided if at all possible as it may negatively impact the upcoming B-1 Domestic Servant visa application and raise potentially negative lines of inquiry.*

He explained:

> *"If she has already begun working in the United States, she may be deemed to prematurely have engaged in unlawful U.S. employment. This would be another disqualifying factor under ESTA and issue that may impact and result in the denial of future visa applications*."

For these reasons he was urging arrangements to be made for the Claimant to depart the U.S. before the 90 days on her ESTA was up. The same day, Jimmy Davis of LM corp replied to the lawyer stating: "*Sorry Matthew, that should have read, longer than we thought she'd stay, she has been in the country since 6 September and will leave before she's been in country for 90 days. Thanks, Jimmy".*

32 On 5 November 2019 the Claimant received confirmation that she had an appointment at the London U.S. consular section for an interview with regard to her domestic servant visa which was fixed for 10:00 AM on 9 December 2019.

33 That interview did not take place as before that occurred, by a letter dated 15 November 2019, the Claimant's employment as a Nanny and Governess for the Respondent was terminated with immediate effect. The Claimant was to be paid in lieu of her notice period.

34 In summary, the Claimant had started work with Respondent on 18 July 2019. She had worked in London and travelled with the family around Europe until she left from London to go to the US on 6 September 2019. She had been employed for 49 days, (including days off) in the UK and Europe and for 21 days in the US before her accident. Thereafter she was unable to work or fly and was then dismissed on 15 November after 49 days of sick leave which she had to spend in the US due to her inability to fly.

Submissions

35 The parties acknowledged that the assessment of territorial jurisdiction might be different when considering the contract dispute as opposed to the statutory claim. I have therefore taken the statutory dispute first and dealt with the contract dispute separately.

Statutory Claim

The Respondent's Submissions

36 The Respondent cited various facts in support of the argument that the longest connection the family had was with Florida and that they had very little connection with London and then referred to the legal principles. The Respondent's case was that in Lawson v Serco Limited [2006] ICR 250 Lord Hoffman explained that it be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. He thought there were some who did, and he tried to categorise those employees who might be in such exceptional circumstances that they would fall within the scope of the legislation. He described companies based in Great Britain which carry on business in other countries and employment in those businesses would not attract British law merely on account of British ownership. The fact that the employee also happened to be British or even if the employee was recruited in Britain so the relationship was rooted and forged in the country should not, in itself, be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary. He then described employees posted abroad by the employer for the purpose of a business carried on in Great Britain. Another example was an expatriate employee who was operating within what amounts to an extraterritorial British enclave in a foreign country. He did not exclude other possibilities but could not think of any at the time and emphasised that they would have to have equally strong connections with Great Britain and British employment law.

37 The Respondent also referred to the case of Duncombe v The Secretary of State for Children, Schools and Families (no 2) [2011] ICR 1312 in which Lady Hale articulated the test saying:

> "*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 a mistake to try to 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."*

38 The Respondent also cited from the case of Ravat v Halliburton [2012] ICR 389 in which Lord Hope observed:

> *"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 work is decisive".*

39 Additionally, the Respondent cited from the cases of Powell v OMV Exploration and Production Limited [2014] IRLR 80, from the case of Dhunna v CreditSights Limited [2015] ICR 105, from the case of R (Hotak) v Secretary of State for Foreign and Commonwealth Affairs [2016] IRLR 534 and from Jeffrey v British Council and Green v Sig Trading [2019] ICR 929.

40 The Respondent suggested the list of factors which had been relied upon as relevant could be distilled down to the following:

40.1 Where the employee was recruited,
40.2 where the employer was based,
40.3 where the employee is based,
40.4 where the worker carries out his or her work,
40.5 where the employment relationship was managed from an operational or HR perspective,
40.6 where the employee's line manager was based,

and said it may be reasonable for an employment tribunal to give greater weight to a specifically negotiated choice of law provision than the inclusion of such provisions in an off the shelf contract.

41 In relation to the territorial jurisdiction claim, the Respondent argued that in this case the Claimant was living and working in Florida in the United States and her position was much closer to a true expatriate case than a commuting expatriate which is the situation in Ravat. The Respondent argued that there were insufficiently strong connections between the Claimant's employment and Great Britain and British employment law so as to displace that what would otherwise be the position that the Equality Act has no application to work outside the United Kingdom. The points raised specifically in support of this assertion were:

a) that the Claimant was recruited in the United Kingdom by happenstance because the agencies in Florida did not provide a suitable option,

b) the Respondent was based outside of the United Kingdom,

c) the Claimant spent most of her time living and working outside of the United Kingdom and the longest time in Florida,

d) the Claimant was managed by the Respondent and or his partner in the same location where she carried out her work,

e) the contract was based on a template provided by the nanny agency which is the reason for the references to UK legislation being included, and

f) the Respondent took legal advice in the US before dismissing the Claimant in the US.

42 The Respondent argued that these factors all indicated a pull away from the Great Britain having any application to the employment relationship. The factors were insufficiently strong and were not capable of conferring territorial jurisdiction on the employment tribunal.

The Claimant's submissions

43 The Claimant referred to the position at the very beginning of the agreement between the parties and said the contract may have been signed in Florida but it is the Claimant's case that in substance the terms were all agreed at the probation meeting in the UK. Before the agreement was signed, they were working under an oral agreement, which was an oral contract made in England.

44 Effectively the Claimant was not an expatriate. She was more of a commuting person - a peripatetic employee- as she moved with the family. There was no concrete evidence of a change of base from the London home to Florida where the family rented a property. In effect, looking at the contract, references to Florida were almost an afterthought because the main point was about travelling through the world.

45 The Respondent made all of the arrangements, booked hotel trips and flights. The Respondent had more documentation but chose not to rely on it. The Respondent had the nanny agency sample contract and notwithstanding the fact that he is an experienced businessman, he suggests he didn't read it thoroughly.

46 The Claimant argued that her contract was agreed at the August probation meeting and the Respondent said he would put it in writing. The Claimant was consistent and credible. The Claimant argued that the Respondent was generally vague and there was no evidence from his partner or the security guards.

47 The visa structure was highly relevant, and it showed that the plans were to return to the UK. When the Claimant was asked when she would be flying

home, she said that the flight might have been a few days earlier or later. It would be wrong too for the case to depend on an accident of where someone was at the point of dismissal. If they were sacked in the wrong place, it can't be the case that that suddenly becomes the law applicable to their employment.

48 While it is true that most of the time they were in Florida, this was largely due to the Claimant's accident. Her account is plainly that she was incapable of flying. After discharge from the hospital, due to the severity of her injuries she was medically unfit for travel. Had it not been for the accident she would have returned home. She was staying in a hotel.

49 While working, the Claimant was classically peripatetic and given her injuries she would have flown home if she could.

50 The Claimant agreed this was a multi-functional assessment and no one fact was decisive, but she submitted that on the fact this was a variation on a peripatetic case and the categories were not straight-jackets.

The Law on the Territorial Jurisdiction claim under the Equality Act

51 The law relating to territorial jurisdiction has developed over time. Initially the legislation specified that it applied to employees who are ordinarily working in Great Britain. This territorial jurisdiction was removed. The case of Lawson v Serco is regarded as the major authority on how to establish whether UK courts have jurisdiction in the light of the absence of any specific territorial clause. I have read the authorities which the parties drew to my attention.

52 However, as the case of Lawson v Serco recognised, not every situation was covered. The case of YKK Europe Limited v Heneghan [2010] IRLR 563 EAT is helpful when dealing with an employee who was not at work at the point of dismissal. In that case, Mrs Justice Cox gave some helpful guidance as follows:

"The starting point for tribunals, in each case, will therefore be into which of the categories identified the particular claimant falls. Lawson now establishes the test to be applied, in each of the three categories of employee identified, and the focus now should be on what was happening as at the date of dismissal rather than at the outset of the relationship. In a standard case, the application of section 94(1) will depend on whether the employee was working in Great Britain at the date of dismissal. For peripatetic employees the most helpful test is to decide where the employee was based at that time. Expatriate employees, who both work and are based abroad, will not normally fall within the scope of section 94(1) but they might do so if they were posted abroad by a British employer, for the purpose of a business carried on in Great Britain, or worked in what was in effect an extra territorial British enclave in a foreign country.

Where the employee is not working at the date of dismissal, for whatever reason, the test to be applied will need to be adapted to meet the different circumstances existing for the particular category of employee, as in the case of Hunt. In these cases, a broader factual inquiry will be required in

order to decide what the true position was when the employee was dismissed."

53 In that case Mr Laddie encouraged the Judge to identify factors relevant for the broader test and she heard subsequent submissions after which the Judge reached some conclusions. First, she noted that the somewhat prescriptive series of questions proposed runs the risk of narrowing the scope of a tribunal's inquiry, or of suggesting the invention of supplementary rules, which Lord Hoffman regarded as incorrect in Lawson. She noted:

> *"The nature and breadth of the inquiry to be conducted would always depend on the particular circumstances of each case, and it is unwise to attempt to define its scope."*

54 However, the Judge did agree certain factors which would in general be relevant in determining the overall picture in absence from work cases though she did not suggest it was an exhaustive list or that all questions will be relevant in all cases. The questions she listed are:

> *"why the employee was absent from work, and the length of his absence before dismissal; where the employee was ordinarily working, or based, and for how long, before his absence from work began; where the employee would have been working at dismissal, if he had not been absent from work; whether there was an active employment relationship between the date of his absence from work and the date of dismissal; from where the contract was being operated at dismissal; and whether the tribunal would have had territorial jurisdiction as of the date on which the Claimant became absent from work".*

Conclusions on Territorial Jurisdiction

55 This is a claim where the facts are distinctly unusual. The Claimant in this case had no established routine. She had only worked for a short time before her accident curtailed her ability to work. She was then dismissed after an absence from work when she was in the United States because she was unable to fly. It is clear that taking a snapshot at the point of her dismissal would be incorrect.

56 I have asked myself the questions identified in the HKK case.

why the employee was absent from work

57 The employee was absent from work because she had been in a car accident.

the length of her absence before dismissal

58 Her absence before dismissal was approximately 49 days.

where the employee was ordinarily working, or based, and for how long, before her absence from work began

59 While in the USA, she worked for 21 days before her accident, or 20 of you exclude the date of the accident). It is impossible to say where she was

ordinarily working or based, or indeed for how long. No pattern had been established. On the Respondents own evidence, his partner's daughter had been enrolled in school starting in September 2019, but it was his intention to remove her from school in the spring of 2020, which would have been before the full school year had been completed. Thereafter he intended to travel around Europe using tutors to educate her.

60 It is not possible to assume that on the basis of the evidence about the school the Claimant would have remained in Florida and have been there at the date of her dismissal. The Claimant travelled to Florida on the basis of an airline ticket which had a return on 27 September 2019. She had a visa which was usually for visitors and allowed minimal working time. The U.S. attorneys emails and messages show a real concern that there might be serious consequences if she was thought to have been working prematurely without the correct visa when they applied for the Domestic Servant visa. Until a new visa was obtained, she had a limit of 90 days. The Respondent is a senior, and experienced, businessmen. He would be familiar with U.S. travel requirements. The staff who worked for him regularly would also be aware of the need for visas. One of his staff applied for the ESTA for the Claimant.

61 The return airline ticket was sent to the Claimant with an email saying it was for customs, but it is my view that that was actually a reference to passport control who check immigration status. I do not accept that the intention was to buy a cheaper ticket as a return ticket. Rather the contemporaneous email suggests it was to be able to establish that the Claimant was leaving the country within a reasonable period of time as otherwise the questions which would have been raised by the staff at the US immigration might have resulted in her being refused entry.

62 Importantly, because the Claimant had no right word to work in the U.S. for more than a short period of time and should in fact have had a work visa in advance, it would be wholly wrong to assume that her base was Florida.

63 No one has suggested the Claimant had a base in Finland, France or Spain being the other countries she had visited with the Respondent and his family at the outset of her employment. If Florida could not be her base because she did not have the ability to work there for any reasonable length of time, the only location with which she did have any significant connection was London.

> *whether there was an active employment relationship between the date of his absence from work and the date of dismissal; from where the contract was being operated at dismissal;*

64 There was an employment relationship between the date of absence from work and the date of dismissal, but I have np evidence about what happened during that time other than the indication that the parties initially tried to sort out practical arrangements such as the Claimants visa status.

> *and whether the tribunal would have had territorial jurisdiction as of the date on which the Claimant became absent from work".*

65 The Claimant went absent from work on 27 September which was the date she was originally due to fly back to the UK from the US. The Claimant says on that date she was travelling to collect the youngest child from the Respondent's partner's previous partner. No one indicated what happened to the original return ticket or how long the Claimant might have been expected to remain in Florida at that time. The Respondent pointed out that the older child was at school in Florida but that was not a permanent arrangement as the Respondent himself says that the Claimant's accommodation in Florida was temporary, (she was staying in a hotel) and it was his intention to leave Florida around the spring of 2020 to travel to various places around the world.

66 The UK would have had jurisdiction on 27 September 2019 when the Claimant went sick, unless there was another location with a more suitable nexus. The only other location which might have been a suitable forum was Florida. The connection which the Claimant's employment had with Florida was the fact that the written employment contract was signed there, she had worked there for 21 days there at that stage. However, until 10 September, the parties had been working on the basis of an oral agreement which had been reached in London. They had acted on that oral agreement, as the Claimant was paid in accordance with the oral agreement. They applied a one month probationary period in accordance with the oral agreement which clearly was based on the terms of the standard form contract which the nanny agency supplied. They had discussed additional terms at a probationary meeting on 18 August in London. The terms of the contract document signed in Florida were supposed to have embodied the terms of the oral contract which had previously been discussed and agreed.

67 The written contract has numerous references to English law and specifies "*your normal place of work will be London and various oversea locations*". By specifying London, it makes it clear that London was to be a major location for the Claimant. There is no doubt that the parties discussed extensive travel abroad. The terms of the contract that refer to Florida or oversea locations are such that they do nothing more than indicate there would be extensive travel. They do not detract from the original message that the Claimant's normal place of work will be London together with the overseas locations which the family went to, to she was expected to travel with them.

68 The Claimant was hired in London. The Claimant was paid in sterling into a UK bank account. She had no other way of taking payment. She had not worked long enough for the Respondent to have any arrangements put in place to pay tax in the United States and indeed would have had no idea what tax she might have been liable for in that location.

69 The Claimant's work was managed by the Respondent and his partner and with input from his team, which seemed to travel with him. It is difficult to assess what in practice would have happened given the fact that COVID prevented most people from travelling in anything like the manner they would have done in the past. While the Respondent says he is likely to sell his London property in the next few years, he has

owned it since 1997. In the circumstances the Claimant's managers were at least as peripatetic and she was intended to be.

70 Certainly, it cannot have been the intention of the parties that the Claimant would be based in Florida when she did not have the right to work there and no steps had been put in place to get her visa until after her accident when she did not leave the country as originally envisaged.

71 Given those circumstances, as at the date when the Claimant went sick, the UK would have had territorial jurisdiction.

72 I have considered the factors emphasised by the Respondent, but I cannot agree that they show the connection suggested.

i that the Claimant was recruited in the United Kingdom by happenstance because the agencies in Florida did not provide a suitable option.

73 There was little or no evidence to suggest that the Respondent recruited the Claimant in the United Kingdom because the agencies in Florida did not provide a suitable option. There is no documentary evidence showing any effort to recruit through Florida whereas the Respondent and his partner made a deliberate choice to recruit in the UK and moved to a second UK agency when the first UK agency was unable to assist them.

ii the Respondent was based outside of the United Kingdom,

74 The Respondent's base for tax purposes was Grand Cayman. The initial steps to recruit the Claimant been taken by his partner and according to the Claimant's email, the reason that the Respondent appeared on the contract rather than his partner was that the Respondent was actually financing her work and sending the money to her. While the Respondent ended up spending time in Florida, he did not own the property he occupied there. It was rented from his brother, whereas the property in London belonged to him.

iii the Claimant spent most of her time living and working outside of the United Kingdom and the longest time in Florida,

75 There was nothing to indicate the Claimant had any expectation of spending most of her time living and working in Florida. The mere fact that she expected to spend considerable time travelling does not mean that she lost the base in London to which she had initially been introduced. The contract which the Respondent had signed stated "*your normal place of work will be London and various oversea locations*". The Claimant worked in Florida for only 21 days up to and including the date of her accident. The remaining time in Florida was spent there as a result of her accident, rather than by design since she had a return ticket provided by the Respondent and limited right to work in the United States.

iv the Claimant was managed by the Respondent and or his partner in the same location where she carried out her work,

76 The Claimant was managed by the Respondent and his partner initially in London and then in Europe followed by a period of time in Florida and it was clear from the Respondent's evidence that he expected that from the spring of 2020 he and his family would travel again in Europe.

v the contract was based on a template provided by the nanny agency which is the reason for the references to UK legislation being included

77 The contract was based on a template provided by the nanny agency. He was a senior businessman with considerable experience, so the Respondent would have been well able to recognise the implications of the document he was entering into even if he was not familiar with details such as statutory sick pay in the UK. He had clearly read the contract. Some clauses such as the location of work were amended. The Respondent referred to having amended the contract to add "and various oversea locations" in the place of work clause to augment the reference to London. The Respondent did not however amend it to stipulate that the Claimant's base was Florida.

vi the Respondent took legal advice in the US before dismissing the Claimant in the US.

78 The relevance of taking advice in the USA before dismissing the Claimant appears to be negligible. The location of the advice was simply the location where the Respondent was at the time. He had already been in contact with immigration lawyers in the US regarding the Claimant.

79 In summary, the only jurisdiction with which the Claimant did have some degree of connection was Great Britain. Given the peripatetic nature of her work, and the short time for which she was employed before she became too unwell to work and then was dismissed, the greatest connection was where she was recruited, where the parties agreed was the place the primary place of her work in her contract of employment, and where she was paid.

Contract Claim – Submissions

Respondent's submissions

80 The Respondents submits that the correct approach to jurisdiction in respect of contract claims as to ask whether a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine the claim pursuant to Section 392) of the Employment Tribunals Act 1996 and article 3(a) Extension of Jurisdiction England and Wales Order 1994. The Respondent submits that that jurisdiction depends on effective service under part 6 of the CPR. The Respondent rejected the suggestion that rule 8 of the Tribunal Rules could influence the situation and argued there was no effective service within the CPR.

81 The Respondent was out of the jurisdiction when the employment tribunal claim was filed on 9 April 2020. The Respondent had not given in writing to the Claimant the business address within the jurisdiction of a solicitor at which he might be served. No one had notified the Claimant in writing that a solicitor was instructed to accept service. The Respondent had no usual or last known residence within the jurisdiction. The Respondent had not been in London since 6 September 2019 when he flew to Florida. There is no evidence of the Respondent's partner or children going to school in London or any of his family members having business interests or work in the United Kingdom: rather his work was where his business was headquartered in the United States and he had an L1 visa for the United States.

82 The Respondent argued that the Claimant did not habitually carry out to work from United Kingdom and her work was where the children were located. The Respondent argued that the Claimant would have had to seek and obtain permission for service out of the jurisdiction in accordance with CPR and had not shown that her claim provided a ground that would be available to her on which basis a court in England Wales would have granted such permission.

83 Additionally the Respondent argued that the contract on which the claim was founded was signed on 10 September in Florida. Any oral contract that might have existed before that time did not contain clause 13.5, which was the relevant clause for the purposes of the claim being advanced.

84 For all these reasons the Claimant could not show that the Tribunal had jurisdiction and the contract claim should be struck out.

Claimant's submissions

85 The Claimant argued that the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 are a complete statutory code for all claims in the Tribunal and that includes claims coming under the Employment Tribunals (Extension of Jurisdiction) England Wales Order 1996. The Claimant referred to article 6 of the Extension of Jurisdiction Order, which provides that a contract claim may be brought before an employment tribunal by presenting a claim to a tribunal. The Claimant relied on rule 8 of the ET Rules of procedure and the Presidential Practice Direction 2020 (and the 2018 practice directions in similar terms) being all that needs to be satisfied.

86 The Extension of Jurisdiction Order provides no other hoops for a contract claim to go through. Article 6 is not qualified in any way. Rule 8(2)(d) addresses jurisdiction through the "connection" test, which the Claimant argued was essentially the Ravat test, but in any event a substantive test, not a procedural one. If a complaint is presented to the Tribunal in accordance with the Rules of Procedure, that is sufficient procedurally.

87 The Claimant argued that the Respondent's submissions with regard to the CPR rules were misplaced. If the Respondent was correct, all contract claims, including those provided for in rules 23 to 25, not just

those with an arguable foreign element, would have to be served in accordance with the CPR. That could not be correct.

88 The Claimant argued that the Rules of Procedure were intra vires insofar as Parliament had approved them. The provision should be read as a whole.

89 The Employment Tribunals Act 1996 sets up the power to confer further jurisdiction on employment tribunals to consider a contract claim. It had to be a claim that was known in law in England and Wales or Scotland. The power did not turn on any territorial aspect and no distinction was made with between cases with or without a foreign element.

90 The Claimant referred to the case of Crofts & Others v Cathay Pacific [2005] EWCA Civ 599.

The Law on Contract claims

91 Rule 8(2) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 is titled "Presenting a Claim" and provides;

(2) *a claim may be presented in England and Wales if-*

(a) the respondent, or one of the respondents, resides or carries on business in England and Wales;

(b) one or more of the acts or omissions complained of took place in England and Wales;

(c) the claim relates to a contract under which the work is or has been performed partly in England and Wales, or

(d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales.

Conclusion on Contract Jurisdiction

93 The applicable law on contract jurisdiction in the employment tribunal is uncertain. I have taken some account of an employment seminar paper produced in 2017 by Matrix Chambers entitled Employment Litigation Involving Employees who work abroad and/or foreign employers" and written by Thomas Linden QC, James Laddie QC, Mathew Purchase, Claire Darwin and Darryl Hutcheon, all of those chambers.

94 The paper explains that broadly speaking the relevant national law is the domestic law which the courts or tribunals of a given country apply to determine whether they have jurisdiction. In the courts, this refers to the CPR rules about service, the doctrine of forum non convenience and the rules about enforcement of jurisdiction or arbitration clauses etc. It states in the Employment Tribunals it refers to the Rules which deal with the jurisdiction of tribunals including Rule 8 of Schedule 1 to the Employment Tribunals (Constitutional & Rules of Procedure) Regulations 2013, "the ET Rules".

95 As regards rule 8 of the ET Rules, the paper indicates the effect of the provision is unclear, particularly since the scope for the application of national law was reduced when the Brussels II regulation came into effect. There are two views. On one view, Rule 8 merely seeks to identify when claims should be presented in England and Wales as opposed to Scotland, assuming that the courts and tribunals of the United Kingdom have jurisdiction by operation of Brussels II. On another view, however, where Brussels II is not engaged and/or does not require a particular answer, Rule 8 may supplement it.

96 Thus the paper suggests that if the employer is not domiciled in any Member State and the Limb B test is not satisfied in relation to any member state either because the employee does not habitually working or from the EU, or was not engaged by business in EU, the Brussels II regulation would arguably not be infringed if the tribunal were to accept jurisdiction applying national law in the form of rule 8.

97 The question then appears to come back to the question of whether such an employee would have employment rights under UK legislation given, they assume, the lack of connection between their employment and this jurisdiction. That is not the situation in this case.

98 The parties' submissions in this case reflect the uncertainty over the legal position with each side arguing for the interpretation that most suits their case. In short, the Respondent argues that I should treat this claim as if it were a High Court claim and apply the rules on service in the CPR. On such a basis the Respondent argues there are no grounds for service out of the jurisdiction. The Claimant on the other hand argues that I should simply read Rule 8, and that entitles the tribunal to consider the claim.

100 The members of Matrix Chambers consider that the position is unclear but note that where you have an employee and employer who do not claim any link to another country within the scope of Brussels II, (as is the case here), Brussels II may not be infringed if the tribunal were to accept jurisdiction applying national law in the form of rule 8.

101 Having read Rule 8(2) carefully it appears to me that it is designed to set out specific rules where the employment tribunal will have jurisdiction. In this case the Respondent argues that his residence in England or Wales is merely a house which he owns, but rarely visits. It is not clear that any of the acts or omissions complained of took place in England and Wales, although the Respondent was due to remit the monies owed to the Claimant to her in England and the effect of the breach of contract complained of (assuming there was one) is that the money was not so remitted to her. However, the Claimant's claim does relate to a contract under which the work has been performed partly in England Wales since she worked for a period of time in the Respondent's home in London. There is, as I have explained above, a connection with Great Britain, and I have come to the conclusion that on the territorial jurisdiction question, the connection with Great Britain is the strongest territorial connection that exists between the parties and thus gives this tribunal jurisdiction.

102 It is my conclusion that Rule 8 is sufficiently clear that in this case, it should stand alone in terms of giving this tribunal jurisdiction to consider the contract claim. I bear in mind the fact that there will in any event be a claim under the Equality Act before this tribunal and it would be practically a better option for both parties if all matters of dispute between them relating to their relationship over the period between September and November 2019 should be litigated together.

103 For those reasons, it is my view that the employment tribunal does have jurisdiction over the Claimant's contract claim and I refuse the Respondent's application to strike out the claim.

Employment Judge N Walker

15 October 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

15/10/2021..

FOR EMPLOYMENT TRIBUNALS