RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr Alexander Kuznetsov**

Respondent: **ING Bank N.V.**

Before: **Employment Judge W A Allen KC**

Heard at: **East London Hearing Centre (in person)**

On: **30 November 2022 and 1 December 2022**

Appearances:

For the Claimant: Did not attend

For the Respondent: Laura Bell, counsel

JUDGMENT

1. The Claimant was not employed by the Respondent, ING Bank N.V., and the claim against the Respondent is dismissed.

2. In any event, the Tribunal lacks jurisdiction to determine this claim.

    a. The Claimant was employed by a Moscow domiciled entity, ING Bank (Eurasia) ZAO and he habitually worked in Moscow.

    b. The claim falls outside of the territorial jurisdiction of the Employment Tribunal and outside the territorial scope of the Employment Rights Act 1996 and the Equality Act 2010.

REASONS

1. This is the third listing of an open preliminary hearing to determine jurisdictional issues relating to the Claimant's claim.

2. The Claimant's application to postpone this hearing was refused which is the subject of a separate order and set of Reasons which sets out the procedural history of this matter relevant to that application.

3. The preliminary issues listed to be determined at this preliminary hearing (if possible) are as follows (with reference to the order of EJ Barrett following a hearing on 9 September 2021):

> The Preliminary Hearing is listed to determine:
>
> 4.1 Whether the tribunal has territorial jurisdiction to consider the Claimant's claims. This will include consideration of whether the Respondent was the Claimant's employer at the material time or (as the Respondent contends) the Claimant was employed by ING Bank (Eurasia) ZAO (Closed Joint Stock Company), a company domiciled in Russia;
>
> 4.2 Whether the Respondent's application for an extension of time for presentation of the ET3 should be granted;
>
> 4.3 Whether the Claimant's claims are time-barred;
>
> 4.4 Further case management directions as required.

4. I had before me:

   (1) a Bundle running to page 666, which had been given to the Claimant on 3 March 2022;

   (2) an Extensive Authorities bundle running to page 961, prepared by the Respondent but including all of the authorities referred to by both parties;

   (3) A Supplemental Correspondence bundle including the material that had been produced following the hearing before me on 1 April 2022. The Claimant would have been in possession of all of this material.

5. I had a witness statement from the Claimant dated 2 August 2021 and another short witness statement from the Claimant dated 14 April 2021; and two witness statements dated 2 August 2021 and 4 October 2021 from Adrian Marsh, UK General Counsel for the London Branch of ING Bank N.V., who attended the tribunal to give evidence. His oral evidence was brief and did not depart from his witness statement evidence.

6. I had a skeleton argument from the Claimant and a skeleton argument from Ms Bell, counsel for the Respondent, who, in light of the Claimant's absence, was careful in her oral submissions not to stray beyond the bounds of the matters set out in written form.

The claim and its history

7. Following a period of early conciliation between 22 August and 26 August 2020 and obtaining an EC certificate in relation to ING Bank N.V. at a Moorgate London address, the Claimant presented an ET1 claim form on 25 September 2020 against ING Bank N.V. (giving the Amsterdam address). The Claimant claimed to have been

employed by ING Bank N.V. between 15 July 2008 and 6 October 2010 as a Senior Sector Analyst.

8. The claims were for: unfair dismissal (possibly constructive dismissal); race discrimination; religion or belief discrimination; arrears of pay (unlawful deduction of wages) and other payments; victimisation; automatic unfair dismissal (and detriment) following protected disclosures (whistleblowing); and automatic unfair dismissal related to blacklisting. The remedy sought included a compensation claim for unfair dismissal; unpaid wages; discrimination (including injury to feelings); stigma damages, reputational damages and damages for career loss; and aggravated and exemplary damages. The Claimant also sought some declarations and damages which are not even potentially within the jurisdiction of the employment tribunal. The Claimant did refer to wrongful dismissal (a breach of contract claim for non-payment of notice pay) but also stated elsewhere in the claim form that he did not wish to bring a breach of contract claim in the tribunal.

9. All of the claims that the Claimant sought to bring before the Employment Tribunal; and which potentially fell within the jurisdiction of the Employment Tribunal, were claims under the Employment Rights Act 1996 and the Equality Act 2010.

10. The narrative particulars of claim ran to 46 paragraphs. It set out that the Claimant was recruited following meetings at ING Bank N.V.'s London office to a job at the Respondent's office based in Moscow and that he moved to Moscow at the Respondent's request and started working at the Moscow office in July 2008. He stated that although he was physically based abroad, almost all sales managers, clients, traders and executives were located in the Netherlands and the UK; and almost all revenues, transactions and commissions were generated in Amsterdam and London. He stated that services and investment recommendations, advisory and consulting were provided primarily to internal and external clients in London and Amsterdam.

11. The Particulars of Claim went on to allege that the Claimant expressed concerns about breaches of regulatory obligations on the part of the Respondent to management and colleagues; and that he was subjected to detriment as a result. He also alleged an act of racial / religious discrimination which was the final act which allegedly forced him to resign – which he claimed was constructive dismissal.

12. In explanation of the fact that his claim form was issued nearly a decade after his resignation, the Claimant relies on a communication from a data protection officer / senior official at the Respondent in July 2020, which the Claimant asserts was confirmation that he had been an employee of ING Bank N.V., the Claimant having hitherto been under the impression that he was employed by ING Bank (Eurasia) ZAO (Closed Stock Company), which was a foreign entity domiciled abroad and outside the jurisdiction of the Employment Tribunal in England. The particulars also allege unlawful removal of shares from the Claimant's account and that the Respondent gave directions to prevent provision of information – which is an additional factor relied upon to excuse the late presentation of the claim form. The Claimant also relies on a visual impairment.

13. The Particulars of Claim go on to set out a detailed account of the impact on the Claimant of the Respondent's alleged detrimental actions.

14. A notice of claim and a notice of hearing were sent by the Tribunal to the Amsterdam address on the claim form. An ET3 was not filed within the time limit of 2 December 2020. The Respondent says that it did not receive the notice of claim and that the address given by the Claimant was for its previous Amsterdam address, which was vacated during a period between November 2019 and January 2020.

15. REJ Taylor held a telephone case management preliminary hearing on 1 March 2021. In the first paragraph of the record of that hearing it states "The claimant was employed by the respondent . . .". It is clear to me that that was not a finding made on a disputed issue – but merely a reflection of the content of the claim. I also find that Mr March, who was representing the Respondent at that hearing, did not make any binding assertion that the Claimant was the Respondent's employee at that hearing (or indeed at any time). To loosely state that the Claimant was 'employed by ING' is not the same as accepting that he was employed by ING Bank N.V. or that he was not employed by ING Bank (Eurasia) ZAO. I do not accept that any assertion made by Mr Marsh has estopped the Respondent from denying that it employed the Claimant.

16. REJ Taylor had the matter listed for a preliminary hearing on territorial jurisdiction and temporal jurisdiction; whether the ET3 should be accepted out of time; and for case management. She also identified the issues which would arise in relation to time limits if the tribunal did have territorial jurisdiction; she directed that the claim form be re-served on the Respondent so that it could file an ET3 out of time and make an application to have it accepted out of time; and she made case management orders for disclosure, evidence, bundles and skeleton arguments in relation to the preliminary issues.

17. On 6 April 2021, the Respondent presented an ET3 accompanied by an application to have it accepted out of time. The ET3 stated that the Claimant had never been employed by the Respondent and that he had been engaged by ING Bank (Eurasia) ZAO (Closed Stock Company) – which they referred to as 'ING Russia' - as an 'Analyst Equity Research' between 16 July 2008 and 6 October 2010 when his employment terminated due to his resignation. The Respondent stated that the claim was outside the territorial jurisdiction of the Employment Tribunal and presented significantly out of time. The Respondent resisted the claims, albeit that it was not in a position to admit or deny most of the factual allegations. The Respondent alleged that there were a number of gaps in the Claimant's particulars of claim.

18. ING Bank (Eurasia) ZAO is a subsidiary of the ING Group. ING Bank (Eurasia) ZAO does not have a branch, agency or other establishment in the UK.

19. The Claimant objected to the Respondent's application to have the ET3 accepted out of time by letter dated 19 March 2021 sent under cover of an email dated 13 April 2021.

20. The preliminary hearing on territorial jurisdiction was listed before EJ Barrett on 7 September 2021. Both parties had submitted witness statements and skeleton arguments. The hearing took place by CVP. The Claimant attended but could not participate in the hearing due to technical issues. The hearing had to be postponed and it was relisted for 2 days on 31 March and 1 April 2021. The Respondent was

given leave to supply a supplemental witness statement addressing the evidence in the Claimant's witness statement.

21. On 5 October 2021, the Respondent requested further and better particulars of the Claimant's claim. The Claimant responded on 2 November 2021. The Respondent was unhappy with this response and communicated that unhappiness in a letter dated 24 November 2021.

22. On 18 March 2022 the Claimant submitted an application for a stay of the Employment Tribunal proceedings dated 14 January 2022. That application was refused by EJ Goodrich on 24 March 2022.

23. The parties attended (including the Claimant in person) on the morning of 31 March 2022. Unfortunately, the judge assigned to the case called in sick on the morning of 31 March 2022 and no other judge was available. The matter then came before me on 1 April 2022 with only one day available. The Claimant did not attend, citing ill health and the matter was postponed again. The details of the reasoning behind that decision are set out in the record of the hearing on 1 April 2022. I also ordered the Claimant to provide by 27 May 2022 a response to the Respondent's request for further and better particulars which responded to the specific requests made.

24. The Record of that hearing was not sent out until 18 May 2022 and on 20 May 2022, the Claimant applied for an extension of time for compliance with the case management orders. Sensibly, the Respondent did not object and I directed that time for compliance be extended to 15 July 2022.

25. The Claimant's response to the Respondent's request for further and better particulars was sent on 15 July 2022.

26. The matter came before me again on 30 November 2022 and 1 December 2022. On 30 November 2022, I rejected the Claimant's application for a postponement for the reasons set out in the separate order and reasons and I proceeded with the preliminary hearing. I felt able to determine the territorial jurisdiction matter and the question of whether or not the ET3 should be accepted out of time in the absence of the Claimant. I did not consider that it would be possible for me to determine the question of time limits.

Relevant Findings of Fact

27. I have seen a chain of emails from March 2018 between the Claimant (using the name Alex Silver) and a recruitment consultant in which the Claimant sought a job in Moscow working for ING.

28. The Claimant was offered employment by letter from Alexander Pisarqk (General Director ING Bank Eurasia (ZAO)) dated 3 June 2008 which stated: We are pleased to offer you employment with "ING Bank (Eurasia) ZAO" . . . You will report directly to Head of Equity Research, Daniel Salter . . . We offer you monthly remuneration of RUR 350 000, 00 gross".

29. Daniel Salter was employed by ING Bank (Eurasia) ZAO under a contract dated 1 February 2003 and is described by the Claimant in his first further and better particulars of 2 November 2021 at para 116 as 'office manager of the Russian office'.

30. The Claimant was employed by ING Bank (Eurasia) ZAO under a signed contract of employment dated 16 July 2008. The contract which I have seen in Russian and English states at clause 2.3 that it may be terminated by either party in accordance with the applicable legislation of the Russian Federation; at clause 3.4 that the Bank provides the Employee with the social insurance guarantees in accordance with the applicable legislation of the Russian Federation; at clause 5.1 that the income tax and other mandatory payments shall be deducted by the bank from the Employee in accordance with the applicable legislation of the Russian Federation. In clauses 7.4 and 8.1 and 9.2 there is express reference to the labour law of the Russian Federation. Clause 8.2 states "Parties hereto shall endeavour to settle any disputes and differences arising out and pertaining to this agreement through negotiations. In the event the Parties hereto fail to resolve them after discussion the disputes and differences shall be referred to the relevant court in accordance with the applicable legislation of the Russian Federation." Both parties addresses given in the contract are in Moscow.

31. The Claimant's job description states that his overall job purpose is to 'analyse Russian regional telecom and media companies . . .' and a key responsibility is 'Accurate and timely coverage of Russian regional telecom and media companies . . .'.

32. The Claimant received a staff loan for 1 600 000 roubles from ING Bank (Eurasia) ZAO on 24 March 2009.

33. The Claimant was a Russian citizen and Russian passport holder at the time when he entered into employment with ING Bank (Eurasia) ZAO. I have also seen a British passport for the Claimant issued by the former IPS for the period 30 April 2011 to 30 April 2021 which states that he is a British Citizen; and another newer British passport issued by HMPO (which has replaced IPS) in which the dates are all redacted. I have seen an email from the Claimant dated 13 June 2008 in which he refers to losing his potential chance to gain a British passport in a couple of years if he returns to Russia to take care of his parents. On the basis of this evidence, I conclude that the Claimant was not a British citizen when he entered into employment with ING Bank (Eurasia) ZAO. In any event, his nationality at the time is only one factor to take into account.

34. The Claimant had a address in Moscow when he was working for ING Bank (Eurasia) ZAO. He gives a Moscow address in his employment contract.

35. The Claimant has had a number of addresses in the UK. On 27 April 2007 he purchased a property in Grays, Essex. On 24 April 2009 the Claimant took out a 1 year fixed term assured shorthold tenancy of a property in Ilford which was extended for 6 months in April 2010. On 16 October 2009 in a property related email, the Claimant referred to himself as being 'on vacation/personal business' in the UK. On or about 23 December 2009 the Claimant, giving an address in London E3 appears to have purchased a property 'Flat 150 Bacton'. I have seen a number of utility bills and bank statements and service charge bills in the Claimant's name for the property

in London E3; and the Flat 150 Bacton address which cover the period during and after his employment with ING Bank (Eurasia) ZAO.

36. In his submissions, the Claimant contend that 'it follows' from the fact of his residence in the UK during the time of his employment that he was working for the Respondent's UK branch in London. I do not agree that 'it follows' and whilst the Claimant clearly had an interest in London properties, he was also residing in Moscow during the period of his employment and indeed as noted above, his Particulars of Claim state that he moved to Moscow at the Respondent's request and started working at the Moscow office in July 2008.

37. I accepted the Claimant's evidence that his work has a global nature to it and I accepted that some of his work involved interacting with clients and markets in the UK. I did not accept the submission that key decisions in relation to the Claimant were made by the Respondent's UK office. This was not borne out by the documentary evidence. The Claimant's line manager, Daniel Salter, was also a Moscow based ING Bank (Eurasia) ZAO employee. The Claimant has asserted that he was registered with the UK Financial Conduct Authority (FCA) at the relevant time. I do not have any evidence of this but I have no reason to doubt the Claimant's assertion. I have not seen any requirement that the Claimant be registered with the FCA as part of his role.

38. After his employment ended, on 2 March 2012, the Claimant brought a claim against ING Bank Eurasia in the Russian Courts under the Russian Federation Labour Code and relying on the terms of the contract of 16 July 2008. In the claim he gives a Moscow residential address. That claim was dismissed, following a hearing which the Claimant did not attend. It was noted in the Judgment dated 5 June 2012 that the claim had been brought out of time. The Russian Court did not decline territorial jurisdiction. A subsequent repeat claim to the same court was also rejected on 14 May 2014.

39. In 2019 / 2020 the Claimant engaged in lengthy email correspondence with Mr Marsh in which the Claimant sought to argue that he had been employed with ING Bank (Eurasia) ZAO, the Claimant's ultimate argument being that he was therefore still entitled to ING shares.

Applicable law

ET3 out of time

40. Rules 16, 18 and 20 of the 2013 ET Rules state:

> **16 Response**
>
> (1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.
>
> (2) A response form may include the response of more than one respondent if they are responding to a single claim and either they all resist the claim on the same grounds or they do not resist the claim.

(3) A response form may include the response to more than one claim if the claims are based on the same set of facts and either the respondent resists all of the claims on the same grounds or the respondent does not resist the claims.

18 Rejection: form presented late

(1) A response shall be rejected by the Tribunal if it is received outside the time limit in rule 16 (or any extension of that limit granted within the original limit) unless an application for extension has already been made under rule 20 or the response includes or is accompanied by such an application (in which case the response shall not be rejected pending the outcome of the application).

(2) The response shall be returned to the respondent together with a notice of rejection explaining that the response has been presented late. The notice shall explain how the respondent can apply for an extension of time and how to apply for a reconsideration.

20 Applications for extension of time for presenting response

(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.

41. The overriding objective set out in Rule 2 states:

2 Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Correct Employer

42. The statutory definition of 'employer' in the ERA 1996 s 230(4) is 'the person by whom the employee or worker is (or where the employment has ceased, was) employed'.

43. In *Clark v Harney Westwood & Riegels* UKEAT/0018/20, the EAT gave the following guidance:

> *52. In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is employed by B or C, emerge from those authorities:*
>
> *a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law:* Clifford *at [7].*
>
> *b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence:* Clifford *at [7].*
>
> *c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties:* Bearman *at [22],* Autoclenz *at [35].*
>
> *d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how:* Bearman *at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer? In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed:* Dynasystems *at [35].*
>
> *53. To that list, I would add this: documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. The primacy of the written agreement, entered into by the parties, would be seriously undermined if hidden or undisclosed material could readily be regarded as evidence of a different intention than that reflected in the agreement. It would be a rare case where a document about which a party has no knowledge could contain persuasive evidence of the intention of that party. Attaching weight to a document drawn up solely by one party without the other's knowledge or agreement could risk concentrating too much weight on the private intentions of that party at the expense of discerning what was actually agreed.'*

Territorial Jurisdiction

44. Employment Tribunals can only exercise their jurisdiction over those who are defined as being within certain territorial boundaries. I need to determine whether the English Employment Tribunal is an appropriate forum and, if so, what law applies and whether the Employment Rights Act 1996 and the Equality Act 2010 apply to this claim.

45. Rule 8(2) of the 2013 ET Rules states:

> 8 Presenting the claim
>
> . . .
>
> (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.

46. The ET1 was issued on 25 September 2020. This date may be significant in that it is prior to 11pm GMT on 31 December 2020 when the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 SI 2019/479 revoked the Recast Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (No.1215/2012) and its predecessors as they applied in the UK.

47. The Recast Brussels Regulation is concerned with which courts should hear a claim. Articles 20, 21, 23 and 63 state:

Article 20

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 21

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled; or
(b) in another Member State:
(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

Article 23

The provisions of this Section may be departed from only by an agreement:
(1) which is entered into after the dispute has arisen; or
(2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

Article 63

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat;
(b) central administration; or

(c) principal place of business.

2. For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

48. My reading of those provisions is that:

    a. if the Claimant was employed by ING Bank (Eurasia) ZAO, which is domiciled in Russia, he could bring a case against ING Bank (Eurasia) ZAO before:

        (i) a UK tribunal if:

            1. ING BANK (EURASIA) ZAO has a branch, agency or other establishment in the UK;
            2. The Claimant's work was habitually carried out in the UK or if the last place that his work was carried out was in the UK;

    b. if the Claimant was employed by the Respondent, the Respondent is domiciled in the Netherlands and therefore the Claimant could bring a claim against the Respondent:

        (i) in the Netherlands (whether or not his work was habitually carried out in the Netherlands); or

        (ii) in the UK (if his work was habitually carried out in the UK or if the last place that his work was carried out was in the UK).

49. Where an employee worked in a number of different countries, the place where he or she 'habitually' worked within the meaning of Article 21(1)(b) means the place where he or she performed the essential part of his or her duties vis-à-vis the employer, which is in principle the place where he or she worked the longest on the employer's business over the course of the employment.

50. Exclusive jurisdiction clauses are of little relevance to forum where the Recast Brussels Regulations apply in an employment context, given the operation of Article 23.

51. The next question is whether the Employment Rights Act 1996 and the Equality Act 2010[1] apply to this employment. The principles to be applied are set out in *Lawson v Serco* [2006] UKHL 3; *Duncombe v Secretary of State for Children, Schools and Families (No.2)* [2011] ICR 1312, SC; *Ravat v Halliburton* [2012] UKSC 1; and *Bates van Winkelhof v Clyde and Co LLP and anor* [2013 ICR 883, CA.

[1] *In R (on the application of Hottak and anor) v Secretary of State for Foreign and Commonwealth Affairs and anor* [2016] ICR 975, CA, the Court of Appeal endorsed a straightforward application of the principles set down by the House of Lords in Lawson to EqA cases.

52. The place of employment is usually decisive (*Ravat*, para 28). The basic rule is that the Employment Rights Act and the Equality Act only apply to employment in Great Britain. However, in exceptional circumstances they may cover working abroad. As summarised by the Court of Appeal in *Bates van Winkelhof*:

    a. where an employee works partly in Great Britain and partly abroad, the question is whether the connection with Great Britain and British employment law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim — (*Ravat*)

    b. where an employee works and lives wholly abroad, it will be more appropriate to ask whether his or her employment relationship has much stronger connections both with Great Britain and with British employment law than with any other system of law (*Duncombe*).

53. Employees working exclusively overseas will only rarely be able to overcome 'the territorial pull of the place of work' (*Bates van Winkelhof*). For true expatriates there must be 'an especially strong connection with Great Britain and British employment law before an exception can be made for them' (*Ravat,* para 28). The starting point is for such an employee to show that his or her employment relationship has a stronger connection with Great Britain than with the foreign country where the employee works (*Ravat* para 27).

54. This comparative exercise was described by Elias LJ in *Bates van Winkelhof*: 'In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force'. The true expatriate must show an overwhelmingly closer connection with Britain and with British employment law than with any other system of law (Supreme Court in *Duncombe*). The threshold is a high one, and higher than the onus on the partial expatriate who need only show a 'sufficient connection' with Great Britain. In carrying out the comparative exercise the court will be obliged to take into account all of the relevant circumstances. Lord Hoffmann in *Lawson* (para 37) considered that more would be needed for an expatriate employee than being able to show that they are British, recruited in Britain and working abroad for a British employer.

55. Section 204 Employment Rights Act 1996 states:

    204.— Law governing employment.

    (1) For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not.

    However in *Duncombe* the Supreme Court had expressly taken into account the existence of an English choice of law clause when considering the ‘sufficient connection’ issue.

56. If I find that the Employment Tribunal is the appropriate forum, but that the Claimant has no right to bring claim under the Employment Rights Act and the Equality Act,

the Claimant invites me to consider the principle set out in *Bleuse v MBT Transport Ltd* [2008] IRLR 264. The effect of the *Bleuse* principle is that:

(1) Where the proper law of the contract is English law: and

(2) the claimant has a sufficient connection with the EU (most obviously, living and working in the EU); then,

(3) a modification is required to the ordinary principles of interpretation of the implied (*Bleuse*) or express (*MoD v Wallis* [2011] EWCA Civ 231) territorial limits on jurisdiction both in respect of British legislation enacted to implement EU directives but also legislation with an entirely domestic genesis, where that legislation is the vehicle by which an EU right is vindicated in Great Britain; to

(4) ensure that the claimant has an effective remedy for potential breach of an EU law (now retained EU law) right (*Bleuse*).

57. The principle is limited to work conducted inside the EU (*Wittenberg v Sunset Personnel Services Ltd* UKEATS/0019/13).

ECHR considerations

58. In *British Council v Jeffery and another case* [2019] ICR 929, the Court of Appeal rejected the contention that Article 10 of the European Convention on Human Rights – which guarantees the right to freedom of expression ‘without interference by public authority and regardless of frontiers’ (our stress) – should be interpreted to ensure that workers are entitled to protection under the protected disclosure (whistleblowing) provisions in the Employment Rights Act wherever the disclosure or breach of rights happens to occur.

Conclusions

ET3 out of time

59. I accepted the evidence of Mr Marsh that the reason that the Respondent did not submit an ET3 in time is that the claim form was sent by the tribunal to an old address of the Respondent in Amsterdam. I accepted Mr Marsh’s evidence that the 3rd party websites showing the former address simply contained out of date, no longer accurate information. By the time the notice of claim would have been received at the old Amsterdam address, the Respondent had long since vacated the premises, where were then redeveloped. It is certainly arguable that the Respondent could have set up postal forwarding services to avoid this problem – but in any event they are not infallible. I have taken into account the Claimant’s submissions as to the delay occasioned by this issue and the impact on his right to a fair hearing but given that a decade has already passed since the bulk of the matters referred to in the ET1, I find that the Claimant was not unduly disadvantaged by a delay of a few months in the filing of the ET3. On balance, it is proportionate and in accordance with the overriding objective to permit the Respondent to file its ET3 out of time and the ET3 is accepted.

The correct employer

60. The Claimant was not employed by the Respondent. He was employed by ING Bank (Eurasia) ZAO. This is what is stated in the offer letter and the contract signed by the Claimant. The Claimant wished to return to Moscow for honourable family reasons. He sought and obtained a job based in Moscow. He was a Russian citizen with a Russian passport and was able to give a Moscow address. ING Bank (Eurasia) ZAO also has a Moscow address. The Claimant's line manager was Daniel Salter, who was also based in Moscow and employed by ING Bank (Eurasia) ZAO. The employment contract was subject to Russian labour law. The Claimant was paid in Roubles and his principal work according to his job description was the analysis of Russian regional telecom and media companies. The Claimant had brought litigation in Russia against ING Bank (Eurasia) ZAO and he was arguing in 2019/2020 that ING Bank (Eurasia) ZAO was his employer. The Claimant habitually worked in Russia, albeit with some international clients including clients in the UK.

61. As the Respondent, ING Bank N.V., is not the Claimant's employer, this claim cannot be brought against it and this claim should be dismissed.

Territorial Jurisdiction

62. Notwithstanding the conclusion above as to the proper employer, I have gone on to consider the questions of appropriate forum, and applicable law / territorial reach and the *Bleuse* principle.

Factual conclusions

63. Repeating the conclusions above, the Claimant's habitual place of work was Russia. It was not the UK. He has had various interests in property in the UK but it is clear from his emails (and his claim form) that during his employment, he was visiting the UK from time to time whilst based in Moscow. He was applying for British citizenship (which he obtained at a point after the start of his employment which is not clear from the information before me). He had been recruited in London to work in Moscow. He did some work in Great Britain and / or with clients based in Great Britain. He was not working in Great Britain at the time of his (alleged) (constructive) dismissal.

Forum

64. As I have found that:

    a. ING BANK (EURASIA) ZAO does not have a branch, agency or other establishment in the UK;

    b. the Claimant's habitual place of work was Russia and that his habitual place of work was not the UK and that the last place where he worked was not the UK,

- if (as I have found) the Claimant is employed by ING (Eurasia) ZAO, the Recast Brussels Regulation does not give him the ability to bring a claim against ING (Eurasia) ZAO in the UK;

- even if (contrary to my finding above) he had been employed by the Respondent, the Recast Brussels Regulation would only give him the ability to pursue the

Respondent in the Netherlands, not in the UK, because the Respondent is domiciled in the Netherlands.

65. Therefore the Employment Tribunal is not the appropriate forum.

Territorial Reach of the Employment Rights Act and the Equality Act

66. The Claimant was employed in Russia. He was not employed in Great Britain (or the UK). He was not working in Great Britain at the time of dismissal.

67. I find that the Claimant was working abroad in Moscow. The Claimant's employment relationship at the time of his (alleged) (constructive) dismissal did not have stronger connections both with Great Britain and British employment law than with any other system of law. It had strong connections with Russian and Russian employment law – a system of law that the Claimant attempted to use after his employment ended.

68. Even if (generously) he is regarded as a peripatetic employee who did not perform services in one territory, his base was in Moscow. He was applying for British citizenship (which he obtained at a point which is not clear from the information before me). He has interests in property in the UK. He had been recruited in London to work in Moscow. He did some work in Great Britain and / or with clients in Great Britain. However, the connection with Great Britain and British employment law is not sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the Employment Tribunal to deal with the claim given that the job to which he had been recruited for was based in Moscow (which is something that he had sought out). His habitual place of work was Russia; he was paid in Roubles; and his principal work according to his job description was the analysis of Russian regional telecom and media companies.

Bleuse

69. On my findings of fact, the Claimant's work was carried out outside the EU and therefore following the EAT in *Wittenberg v Sunset Personnel Services Ltd* UKEATS/0019/13, the *Bleuse* principle does not apply.

70. It follows that the territorial reach of the Employment Rights Act and the Equality Act do not cover the Claimant's claim.

71. The Tribunal lacks jurisdiction to hear the Claimant's claim – whether brought against the Respondent or (in theory) against ING Bank (Eurasia) ZAO.

Employment Judge Allen KC

22 February 2023