



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr K Dunne**

**v**

**(1) Language Link London  
Limited  
(2) Language Link Limited**

**Heard at:** London Central

**On:** 23 October 2020

**Before:** Employment Judge Joffe  
By Cloud Video Platform

## **Representation**

**For the Claimant:** Dr M Arnheim, counsel

**For the Respondent:** Mr N Henry, consultant

## **RESERVED JUDGMENT**

1. The claimant was employed by the second respondent.
2. The Tribunal has no jurisdiction to hear the claimant's claims and they are struck out.

## **REASONS**

**Issues**

1. This was an open preliminary hearing to determine the following issues as defined at a hearing in front of Employment Judge Emma Burns on 17 September 2020:
  - (a) the claimant's application to add a third respondent, if he decided to proceed with it;
  - (b) the identity of the claimant's employer and whether this was the first respondent, the second respondent or a different entity; and
  - (c) whether the claims against all the respondents should be struck out because the tribunal lacks territorial jurisdiction.
2. The substantive claims are claims for automatically unfair dismissal, disability discrimination, breach of contract and holiday pay. The matter has had a complex procedural history and has been case managed by a number of judges. A full merits hearing listed for November 2019 was postponed on the application of the claimant.
3. The application to add a further respondent was withdrawn at the hearing before me.
4. I was provided with a 215 page bundle. Several additional documents were produced during the course of the hearing. These were:
  - the claimant's visa and work permit for the Ukraine;
  - an email dated 22 September 2018 from Joanna Baxter to various individuals including Mrs Curran.
5. I heard evidence from the claimant and, for the respondent, from Mrs Margaret Curran. The organisation of the bundle was poor and relevant documents were difficult to find; some documents were repeated or partial. Mrs Curran's witness statement did not appear to have been drafted to address the issues at the preliminary hearing in particular and referred to page numbers which were not in the bundle before me.

## **Facts**

6. The claimant is a British citizen who currently resides in Liverpool. He has previously worked as a social worker.
7. The first respondent is a company registered in the UK which was founded by Mrs Curran in 1976. The first respondent sets up companies abroad in countries such as Viet Nam, China, Russia and Tashkent. These companies provide English teachers to schools in those countries and sometimes make use of school premises to provide English lessons under the aegis of the local Language Link company. Those companies become self-sufficient. Mrs

Curran's evidence was that a teacher working for a Language Link company in one country would have to apply to a Language Link company in another country if that employee wanted to move from one country to another whilst working for a Language Link entity. That employee would then enter into a new contract with the new company.

8. The first respondent also trains English language teachers in London. The Language Link companies set up abroad will have a director who is from the particular country where the company has been set up.
9. The second respondent is company registered in the Ukraine which was set up by the first respondent to provide English teaching programmes in Ukrainian schools such as the Humanitarium Lyceum and Klovsky Lyceum and ultimately to provide its own classes from the premises of those schools. Mrs Curran was a director of the second respondent as was Ms Oksana Chumak, a Ukrainian national. Ms Chumak also owned a travel agency, UTA. In the Ukrainian document which provides the detail of the second respondent's registration, the 'final beneficiary owner (controller)' is Mr Alphonsus Dominic Kelly. Mr Kelly is Mrs Curran's husband and was also a director of the first respondent. The second respondent ceased operations in June 2019. The first respondent continued to provide what were described as recruitment and consultancy services to the second respondent throughout its active life.
10. In the summer of 2018, it appears that the first respondent was seeking to set up the Ukrainian operation with some degree of haste.
11. In July 2018, the claimant was residing in Kyiv in the Ukraine, staying at a hotel. He was having a relationship with a Ukrainian woman and they had discussed getting married. He said that by July 2018, he had been in the Ukraine for some two months. He retained a rental property in Liverpool but had been spending time in the Ukraine intermittently from 2016 to seek work and also for holidays.
12. The claimant said that he was approached by Joanna Baxter about work as an English teacher via an online blog that he had on an ex-pat Ukraine site of Facebook. He said this was in July 2018. Ms Baxter worked for another Language Link company in Nepal but was asked to come as a consultant to the Ukraine to set up the teaching programme there. The claimant said that Ms Baxter and the claimant met at an internet café in Kyiv in July 2018 and discussed the claimant working as an English teacher.
13. Ms Baxter's email of 22 September 2018 says that she had that day had a telephone interview with the claimant who was 'interested in working with us'. 'He is 55 a lovely guy who is due to get married here and so wants something long term. At the moment he is doing part time work and wants something more permanent.'
14. The claimant said in evidence that he was an international employee of the first respondent and that Ms Baxter told him he could work in any international

place that Language Link directed him to. He said that he could work anywhere internationally at the will of his 'employer in London'.

15. The claimant signed a contract provided by Ms Baxter, at that point unsigned by anyone on behalf of either respondent. The claimant said this occurred in late August 2018 but this is inconsistent with Ms Baxter's September 2018 email and I conclude that the contract was likely to have been signed in late September or early October 2018. Dr Arnheim said in submissions and put to Mrs Curran that Ms Baxter said that the contract would be countersigned by an agent in the Ukraine but the claimant did not give evidence to that effect.
16. The contract is headed with the words 'Language Link' and what I understand to be the logo for the first respondent and the companies related to it. The words 'Language Link Ukraine' appear on each page. The contract says at the outset 'This contract is for the position of English Language Teacher, Language Link Programme, Kiev, Ukraine'. It goes on to say, by way of definition: 'Language Link may be referred to as 'Language Link', the 'company' or the 'School'.'
17. The contract provides a start date of 5 October 2018. Remuneration is set out in Ukrainian currency. There is provision for 'air fare reimbursement' in US dollars. It is said that 'the company' will cover the costs of a work permit, temporary residency expenses and visa costs. There is an accommodation allowance payable in Ukrainian currency.
18. There are then detailed provisions about hours of work and duties. So far as tax is concerned, it is said that 'the company' will 'arrange for the payment of all taxes due on the salary in the Ukraine' and that 'Language Link' will procure necessary work permissions at its own expense.
19. There are restrictive covenants which inter alia prohibit the employee from undertaking other employment during the term of the contract.
20. Clause 16 states:  
**'Living and working in the Ukraine**  
Employees should be aware that, while they are living and working in the Ukraine, they are guests in this country. As such they must scrupulously observe the laws and regulations of the country and show due deference to the culture, customs and traditions of the country and people.'
21. Clause 17 provides: '**NOTE: Any and all agreements made outside the above policy and guidelines must be noted formally, signed, dated and recorded below.** ...Language Link will not take responsibility for agreements made outside of this contract.' [emphasis from the original document]. There are no such further agreements noted in the document.
22. The contract also states: 'This contract between Language Link Ukraine / Language Link affiliated schools, and the Employee is required by Ukrainian

Law. Please note that no salary will be paid until this contract has been signed.'

23. The section of the contract for signatures specified 'LL Representative: M/s Oksana Chumak'. There was provision for 'Employee Signature' and 'Director signature'.
24. In a subsequent section for 'Name and address of Centre', there is recorded 'Language Link Ukraine:  
Besarabska Str. 9/1 - A Office 11Ukraine, Kyiv 01004'
25. There is no signature in the space for 'director signature' but there is a company stamp, which says: 'Language Link London Ltd' and has the first respondent's company registration number. The claimant said that the contract in this form was sent to him.
26. Mrs Curran did not know why Ms Chumak had not signed the contract and why it had been stamped as it had been. She said that at the stage when the contract was formed, Ms Baxter probably did not have a stamp for the second respondent which was just being set up. She said that the contract should have gone back to Ms Baxter or Mr Minnett to be stamped in the Ukraine. The stamp might have been done by her or Mr Kelly; it was not uncommon for the first respondent to stamp a contract in London if the employee wanted to sign the contract in London but it should then be restamped in the country where the individual was teaching.
27. The claimant said that his Ukrainian visa was obtained for him by Richard Kelly, Mrs Curran's son, and paid for by the first respondent. He said this occurred in about September 2018 at the Ukrainian consulate in London. Mr Kelly worked as a project manager for the first respondent. I was provided with a copy of what I was told was the visa and work permit for the claimant. The work permit document was in Ukrainian but the parties agreed that it specified as the place of work the Humanitarium Lyceum ('the Lyceum').
28. The claimant commenced work at the Lyceum as an English teacher on 2 November 2018. He was living at a hotel in Kyiv. There was one other teacher then employed to work in Ukrainian schools, Andrew Minnett, and he was effectively the claimant's line manager. The claimant said that Mr Minnett 'reported to London'. Mrs Curran said that Mr Minnett was employed at that point by the Lyceum. Instructions as to the work to be performed were given by the Ukrainian school's head of English.
29. Some accommodation / housing allowance payments were made to the claimant by the first respondent. Mrs Curran said that this was because there were delays in opening bank accounts for the second respondent.
30. It appeared that some of the claimant's salary was paid to him directly by the Lyceum. The balance was to be paid by his employer. In an email of 7

December 2018 to Mr Minnett, the claimant said: 'I've been paid by Lyceum but not Language Link.'

31. The claimant said that he never met Ms Chumak. He said in evidence that supplies were provided by London at the request of Mr Minnett.
32. The claimant pointed to an email on 4 December 2018 in which Mr Minnett told him to address an enquiry about payments to Mrs Curran and Franz Forrester, an employee of the first respondent, and stated 'Remember again please, write in formal language because these are the senior managers of our company and we should show ourselves in the best light.'
33. On 5 December 2018, the claimant emailed Mrs Curran and Mr Kelly with an enquiry about his wages.
34. The claimant resigned with a month's notice on 14 December 2018 by way of an email to Mr Minnett.
35. On 23 December 2019, Mr Minnett emailed the claimant: 'Don't come back to the Lyceum after Christmas, your employment has been terminated. You have broken the terms of your contract by fraudulently working for another company.' He went on to say that the claimant had left children unsupervised in the classroom and taken unauthorised sick days. He said that in his opinion the claimant's teaching was poor and unprofessional.
36. The claimant said in evidence that he had been approached by HMRC to pay income tax on his earnings in the Ukraine, which he says he has not had, although the documentary evidence suggests that he did receive some payments from the Lyceum.

## Law

### Interpretation of contract

37. In interpreting express terms of a contract, the aim of a court or tribunal is to give effect to the parties' intentions. Words should be interpreted in context, giving them their grammatical and ordinary sense unless some modification is necessary, for example to avoid absurdity or inconsistency.
38. In general extrinsic evidence is not admissible as an aid to interpretation of a written contract, however contracts have to be interpreted in their contexts or factual matrices. A court or tribunal must identify the intentions of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'. It does so by focussing on the meaning of the relevant words in their documentary,

factual and commercial context. Meaning is assessed in the light of (i) the natural and ordinary meaning of the provision, (ii) any other relevant provisions of the contract (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions: Arnold v Britton and ors 2015 AC 1619, SC.

39. If a contract is drafted in a way such that a literal interpretation would lead to a result the parties clearly never intended, a court or tribunal is not required to attribute to the parties an intention which they could not have had: Investors Compensation Scheme v West Bromwich Building Society (No.1) 1998 1 WLR 896, HL.

#### Identity of employer

40. If there is uncertainty as to which of two organisations is a claimant's employer, the correct approach is to start with the written contractual arrangements and consider whether they truly reflected the intention of the parties. It may also be relevant to consider subsequent events to determine whether that position changed over time: Secretary of State for Education and Employment v Bearman [1998] IRLR 431, EAT.

#### Territorial jurisdiction

41. Rule 8(2) of the Employment Tribunals Rules of Procedure 2013 limits the jurisdiction of tribunals in England and Wales to determine a claim presented to case where:
- the respondent, or one of the respondents, 'resides or carries on business' in England and Wales;
  - one or more of the acts or omissions complained of took place in England and Wales
  - the claim relates to a contract under which the work is or has been performed partly in England and Wales; or
  - the tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain, which is at least partly a connection with England and Wales.

42. Additionally, for employment tribunals to have jurisdiction, the statute under which the claim itself is made must have territorial reach.
43. The Employment Rights Act 1996 as currently enacted does not contain any express geographical limitations on unfair dismissal claims. The limits on the ambit of the ERA have been considered in case law.
44. In general the ERA is intended to apply to employees living and working in Great Britain. Employees working and based entirely abroad - expatriate employees - may in exceptional circumstances be entitled to claim unfair dismissal. Two examples of circumstances where such an employee would enjoy unfair dismissal protection given by Lord Hoffman are: An employee posted abroad by a British employer for the purposes of a business carried on in Great Britain — for example, a foreign correspondent on the staff of a British newspaper; an expatriate employee of a British employer 'who is operating within what amounts for practical purposes to an extraterritorial British enclave in a foreign country'. Lawson v Serco Ltd [2006] ICR 250, HL.
45. Where an employee works and lives wholly abroad, it is 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 v Secretary of State for Children, Schools and Families (No.2) [2011] ICR 1312, SC.
46. The leading authorities concern unfair dismissal and other rights under the ERA. The principles in those authorities are applicable to other employment statutes which are silent about their territorial reach, including the Equality Act 2010: Bates van Winkelhof v Clyde and Co LLP and anor [2013] ICR 883, CA.

## Submissions

47. I was provided with skeleton arguments by both parties and heard oral submissions. I have carefully considered the parties' submissions but refer to them below only insofar as is necessary to explain my conclusions.

## Conclusions

### *Credibility of witnesses*

48. I found Mrs Curran to be a perfectly credible and straightforward witness, although she had limited evidence to give about the detail of the claimant's recruitment and subsequent employment.



49. I found the claimant a somewhat evasive and unhelpful witness. In answer to factual questions, he frequently did not address the question asked but sought to repeat evidence and assertions he considered were helpful to his case. I was also concerned about his veracity, given his insistence that he had not been paid at all for his work at the Lyceum, which was contradicted by the documentary evidence that he had been paid at least some money by the Lyceum itself.

*Issue: the identity of the claimant's employer and whether this was the first respondent, the second respondent or a different entity*

50. Neither company is expressly referred to in the contract itself. The employer appears to be intended to be 'Language Link Ukraine' which is not itself the name of a legal person. A Ukrainian address is given for the 'Centre'.
51. I conclude that it cannot have been the intention of the parties that the claimant should have a contract with and be employed by an entity which had no legal personality. Such a contract would be meaningless. Looking at the document itself and the factual matrix, who was it intended that the claimant should be employed by? Who did the parties mean by 'Language Link Ukraine'?
52. I looked carefully at the terms of the contract and the factual matrix. In doing so, I rejected the claimant's evidence that Ms Baxter had told him that he could be deployed to other countries by the London-based Language Link entity. This evidence is inconsistent with evidence which I accepted from Mrs Curran about how employees of one Language Link company would have to apply to another Language Link company for a new contract if they wished to move country. It is also inconsistent with the express terms of the contract which concern employment in the Ukraine only.
53. Looking at the contract as a whole, I concluded that the intention of the parties was that the claimant should be employed by the legal entity which was responsible for the provision of Language Link services in the Ukraine and which was based at the address for the Centre which was provided in the contract, which was, a matter of fact, the second respondent.
54. The fact that, as a matter of context, substantial assistance was being provided to the second respondent, which was in the process of being set up, by the first respondent, did not alter the intention of the parties that the claimant be employed by the Ukrainian entity.
55. The fact that, after the claimant signed the contract, it was stamped by the first respondent, does not change that analysis. The first respondent was in effect acting as the second respondent's agent in a number of respects including recruitment, obtaining of visas for employees and payment of the claimant's housing allowance.

*Issue:* whether the claims against all the respondents should be struck out because the tribunal lacks territorial jurisdiction.

56. I concluded that the claimant was a true expatriate employee during his employment by the second respondent. He was based in Kyiv and worked there. He was not required under the contract to and did not as a matter of fact work elsewhere.
57. Has he shown a stronger connection to Great Britain and British employment law than to another jurisdiction and its law? I conclude he has not, bearing in mind the following factors:
- he was recruited in the Ukraine;
  - his contract provided for him to be paid in Ukrainian currency and pay Ukrainian taxes;
  - He worked for a Ukrainian school, managed wholly independently of the first or second respondent, which could in no way be said to be an outpost or aspect of a business carried on in Great Britain;
  - His contract indicated that it was required by Ukrainian law. It also obliged him to comply with Ukrainian law and customs;
  - The claimant was not living and working in a British enclave abroad. He was living in a Ukrainian hotel and working in a Ukrainian school.
58. These factors were not outweighed by the factors relied on by the claimant: the fact that there was some direction and management of his employment by employees of the first respondent based in London, the fact that his visa was organised by employees of the first respondent in London, the fact that the employment contract was stamped by the first respondent in London, the fact that some housing allowance payments were made by the first respondent.
59. If I am wrong about the first issue and the claimant was employed by the first respondent, my conclusion on the issue of territorial jurisdiction is unaltered. The factors I have set out at paragraph 57 establish that there was not a sufficiently strong connection with Great Britain and British employment law, even if the claimant was also employed by a British company.

*Submission to the jurisdiction*

60. It was argued on behalf of the claimant that there had been delay by the respondents in contesting the issue of whether the Tribunal had jurisdiction to hear the claimant's claims and that the respondents had therefore, possibly inadvertently, submitted to the Tribunal's jurisdiction.

61. This submission was misconceived. The question before me was not what was the appropriate choice of forum for the enforcement of rights by the claimant but whether those rights were conferred on him by statute at all. The former question might have been susceptible to an argument that there had been submission to the jurisdiction. The latter question, which related to the territorial reach of the relevant statutes, was not susceptible to such an argument. If the Employment Rights Act 1996 and the Equality Act 2010 did not confer any rights on the claimant in relation his employment by the first and/or second respondents, it would not be open to a tribunal to find the claimant had such rights, even if the respondents had failed to take the point at an early stage.

### **Conclusion**

62. For the reasons set out above, there is no jurisdiction to hear the claimant's claims and they are struck out.

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Employment Judge Joffe  
19/11/2020  
London Central Region

Sent to the parties on:  
19<sup>th</sup> Nov 2020

For the Tribunals Office