EMPLOYMENT TRIBUNALS

Claimant: X

Respondents: Mr I Williams
Ms C Williams

RECORD OF A PRELIMINARY HEARING

Heard at: Cambridge (A) **On:** 18 July 2024, 30 July & 18 September 2024

Before: Employment Judge S Moore (sitting alone)

Appearances
For the Claimant: Ms Shrivastrava, counsel (18 & 30 July 2024)
Mr Brady, counsel (18 September 2024)
For the Respondent: Mr Lennard, legal representative

This has been a remote hearing on the papers to which the parties did not object. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and all matters could be determined in a remote hearing.

RESERVED JUDGMENT

(1) The Employment Tribunal has territorial jurisdiction to determine this claim and the applicable law is English law.

(2) The application to strike out any or all the complaints is dismissed.

(3) The application that the Claimant be ordered to pay a deposit as a condition of continuing any or all the complaints is dismissed.

(4) The issue of whether the Claimant was entitled to work in the UK and/or whether her contract is unenforceable by reason of illegality is to be determined at the Final Hearing.

REASONS

Background

1. The Claimant is a citizen of Nigeria. She was engaged by the Respondents as a domestic worker between 14 November 2022 and 20 March 2023. Her claim is that she worked for the Respondents for 127 days for 19 hours per day and was paid (in Nigerian Nairas) the equivalent of £300 and was generally subjected to poor treatment and abuse. The Claimant further claims that she was sexually harassed by Mr Williams.

2. The Claimant says that on 20 March 2023 she pressed for her outstanding salary to be paid and was told by Ms Williams that she was being sent back to Nigeria and would be paid once in Nigeria. The Claimant says she feared for her safety and escaped from the house during the early morning of 21 March 2023.

3. Early Conciliation took place between 19 June 2023 and 31 July 2023.

4. On 31 August 2023 the Claimant brought a claim alleging complaints of automatic unfair dismissal or constructive dismissal after exercising a statutory right and/or seeking to secure the benefit of a right under the National Minimum Wages Act 1998 (NMWA) (ss. 104(1)(b) & 104A(1)(a) Employment Rights Act 1996 (ERA)), for unlawful deduction of wages (ss. 13 & 23 ERA), for failure to provide a written statement of terms and conditions of employment and itemised payslips (ss. 1 & 8 ERA), for holiday pay (reg 14 of the Working Time Regulations 1998 (WTR)), breach of the WTR (regs 10, 11 & 12), for harassment related to sex/sexual harassment (s.26 Equality Act 2010) (EqA)) and for breach of contract/wrongful dismissal.

5. The Respondents brought a counterclaim for breach of contract.

6. A Preliminary Hearing was listed on 13 March 2024. At that hearing a permanent anonymity order was made under rule 50(3)(b) of the Employment Tribunals Rules of Procedure 2013 that the identity of the Claimant and her address should not be disclosed to the public, a further order was made under rule 50(3)(b) that the future public hearings of the proceedings should be held in private and a restricted reporting order was made under rules 50(1) and 50(3)(d) and pursuant to s. 11 of the Employment Tribunals Act 1996. An order was also made that in any hearing by Cloud Video Platform the Claimant could turn off her camera.

7. The judge also determined that the following issues should be determined at a further Open Preliminary Hearing (OPH):

    1. Whether the Employment Tribunal has territorial jurisdiction to determine the matter, and whether the applicable law is English law.
    2. Whether the Claimant was entitled to work in the UK.
    3. Whether the claims (or any of them) should be struck out as having no reasonable prospect of success or a deposit

order made in respect of any of them on the basis they have little reasonable prospect of success.

8. Orders were made for the parties to prepare and lodge witness statements and a bundle of documents for use at that hearing.

9. That OPH was initially listed for 10 May 2024 but was subsequently postponed until 18 July 2024.

Open Preliminary Hearing 18 July 2024

10. For the purposes of this hearing the parties lodged a number of bundles running to approximately 400 pages. The Claimant and both Respondents lodged witness statements. Mr Lennard lodged written submissions in support of the Respondents' application to strike out/for a deposit order and Ms Shrivastrava lodged written submissions in response. There were also lengthy, acrimonious email exchanges between the parties into which the Tribunal had been copied.

11. Unfortunately the bundles and witness statements were not made available to the Tribunal prior to the hearing which meant that some reading time was needed before the hearing could start.

12. Since the hearing had been listed to hear the Respondents' applications, the Respondents' witnesses gave evidence first, followed by the Claimant. In this respect it was made clear to the parties that since a strike out and/or deposit order application should not become a mini-trial, the evidence of the witnesses should be confined to that evidence relevant to issues 1 and 2. I also ordered that the Claimant should turn on her camera while she was giving evidence.

13. The evidence was that between May 2017 and October 2020 the Claimant worked in Saudi Arabia before returning to Nigeria. In particular, from about August 2019 until October 2020 she worked for a woman called Nicki.

14. In about September 2022 the Claimant was contacted by Nicki and asked if she wanted to work for Ms Williams in the UK. It transpires that Ms Williams is a relative of Nikki. The Claimant subsequently agreed with Ms Williams to come and work for her as a domestic worker, living in the Respondents' home in the UK. Her duties would be to cook and clean and to look after the Respondents' children.

15. On about 24 October 2022 the Claimant went to the Respondents' house in Lagos to wait for Ms Williams, who arrived a few days later.

16. An application was subsequently made for a UK Domestic Overseas Worker Visa for the Claimant.

17. The visa application contained a Domestic Worker Statement (DWS), apparently signed by both Mr Williams and the Claimant, setting out the

essential details of the Claimant's employment. The employment is said to be for a fixed term from 12/11/2022 until 11/01/2023, the employer is stated to be Mr Williams, the salary is stated to be £9.90 her hour, and DWS provides that the national minimum wage applies. The DWS also states that the courts of England and Wales have jurisdiction to settle any dispute arising out of or in connection with that agreement, which shall be governed and construed in accordance with the law of England and Wales.

18. The visa application also contained what appears to be a contract of employment, again apparently signed by both the Claimant and Mr Williams, employing the Claimant as a domestic worker with effect from 15 October 2021 in Nigeria with pay stated to be 120,000 naira per month. Notably in order to obtain a Domestic Overseas Worker Visa an applicant must show that they have worked for the employer in the same role for at least the last 12 months.

19. However, in the course of cross-examination Mr and Mrs Williams agreed that they had definitely not met the Claimant until September or October 2022. When the October 2021 contract was put to him, Mr Williams admitted that the contract was fictitious. He said it had been completed by the Claimant and Ms Williams, and signed by him, for the purposes of the Claimant's visa application.

20. In the course of the Claimant's cross examination she was taken to what appeared to be her signature on the same fictitious contract. She said she was not agreeing that she had signed it but that she did agree the signature looked like hers.

21. At this point I paused the hearing and took a short adjournment to consider the appropriate course of action.

22. By way of context, although not spelled out as such in the Preliminary Hearing of 13 March 2024, the implication as regards issue 2 (whether the Claimant was entitled to work in the UK), is that if the Claimant was not entitled to work in the UK while she was employed by the Respondents then her employment contract was (at least arguably) not valid and she would not be entitled to bring claims under it.

23. In this respect the Respondent's argument as it appeared from its written strike out application was difficult to understand.

24. It appeared to be alleged that the Claimant had breached the conditions of her visa when she had left the Respondents' house in March 2023 because she had left without notice and because the visa provided that she should have no recourse to public funds. Further the Claimant's visa had lapsed on 8 May 2023 and she was now an overstayer which was an offence under section 24 of the Immigration Act 1971.

25. The gist of these submissions appeared to be that the Claimant could not bring claims based on her employment contract because of how that

contract came to be terminated and because of matters post her employment.

26. However the evidence given by Mr and Ms Williams and the Claimant gave rise to a new matter, namely that the Claimant's visa appeared to have been obtained by fraud.

27. After the short adjournment I referred the parties to **Cohen v Sandhu EAT 494/80**, in which the EAT held that while tribunals should not search out illegality, if the point arose during the course of evidence it should be considered. Further it was very important that the matter should be put to both sides so they have the chance to call evidence and make full submissions. It would not be a fair process for someone to be found to be fraudulent without having had the opportunity to refute the allegations.

28. I also pointed out that if the Claimant's visa had been obtained by fraud the enforceability of the employment contract may well depend upon the Claimant's level of culpability/participation in that fraud (**Okedina v Chikale [2019] ICR 1635**, **CA**; **Zarkasi v Anindita [2012] ICR 788, EAT**; **Hounga v Allan [2014] ICR 847, SC**).

29. Ms Shrivastrava was concerned that this point hadn't been part of the Respondents' arguments but had arisen in the course of the hearing and had not been anticipated by the Claimant. The matter was further complicated by the fact the hearing was a remote one and the Claimant was giving evidence through an interpreter.

30. In addition, by this point in the afternoon it was apparent the preliminary hearing could not be completed in one day and would have to be adjourned part-heard.

31. Ms Shivastrava submitted that the resumed preliminary hearing should consider only issues 1 and 3, and not issue 2 which should be left to the Final Hearing. She submitted that the question of the Claimant's level of participation and culpability in what appeared to be the fraudulent visa application couldn't properly be assessed in isolation of the evidence that would be led at the Final Hearing as regards the Claimant's relationship with the Respondents and the level of control and coercion that she says they exerted over her.

32. Mr Lennard submitted the resumed preliminary hearing should address all three issues.

33. In the event I accepted Ms Shivastrava's submissions. I considered that if the Claimant gave evidence in respect of the visa application in isolation from her evidence as regards her employment relationship with the Respondents (and essentially the substance of her claims) there was a significant risk the Tribunal would obtain an incomplete and/or distorted view of the matter to the Claimant's prejudice.

34. The preliminary hearing was therefore re-listed for 30 July 2024 for the purpose of deciding issues 1 and 3 only, leaving issue 2 (and all arguments in respect of illegality) to be addressed at the Final Hearing.

35. At the end of the hearing Ms Shivastrava asked for the Claimant to be released from her oath so that she could discuss the case with her legal advisors. Although the Claimant hadn't completed her evidence (because Mr Lennard hadn't completed his cross-examination) I agreed to that request. There was a significant gap before the resumed hearing and I considered the Claimant's legal representatives would need to speak to the Claimant both about what had happened at the hearing on 18 July 2024 and in preparation for the resumed hearing. I was confident the Claimant's legal advisers would not seek to influence the evidence she would give at the resumed hearing.

Open Preliminary Hearing 30 July 2024

36. At the outset of this hearing Mr Lennard made an application that I revisit my decision that issue 2 should be determined at the Final Hearing. He also made an application to submit further documents. (These applications had been foreshadowed in emails from him of 29 July 2024.)

37. I refused both to revisit my decision in respect of issue 2 and to accept any more documents.

38. As regards issue 2, submissions on the matter had been made at the previous hearing and I had made my decision. I did not consider there was any good reason for departing from that decision. Further such a course of action would plainly have been unfair on the Claimant since her representatives were not expecting to address issue 2 at this hearing.

39. As regards the documents, the parties had been ordered to disclose all documents relevant to the issues in the preliminary hearing by 27 May 2024. It was not appropriate or fair on the Claimant for further documents to be adduced at this stage of the hearing when the Respondents had already given evidence and the Claimant was part-way through being cross-examined.

40. At this point, however, it became apparent that, very unfortunately, the Tribunal Service had failed to book an interpreter for the hearing and that one could not be obtained at short notice.

41. There was some discussion as regards whether Mr Lennard actually needed to ask the Claimant any more questions, given that as regards issue 1 the essential facts (namely the location where the Claimant performed her work) did not appear to be in issue and that as regards issue 3, the authorities are clear that where (as in the present case) there is a crucial core of disputed facts the matter should be determined at a substantive hearing following an evaluation of all the evidence. However Mr Lennard said that there remained relevant matters which he wished to put to the Claimant.

42. There was also some discussion as to whether the hearing could proceed in the absence of an interpreter, since the Claimant volunteered to try to manage without one. However I accepted Mr Lennard's submission that this was not a satisfactory way forward and carried the risk that if the Claimant found she couldn't understand his questions, or articulate her answers, a further adjournment would be needed which would mean Mr Lennard's cross-examination being broken for a second time.

43. In the event, very reluctantly, I felt compelled to adjourn the hearing and listed the resumed hearing for 18 September 2024.

Open Preliminary Hearing 18 September 2024

44. Shortly prior to the start of the hearing I was informed that the interpreter who had been booked some weeks previously to attend the hearing had sent an email to the Tribunal at 8.30pm the evening before to say he would not be attending because of a pay dispute with the agency that had procured his services (The Big Word). In the event an alternative interpreter was found, but he was unable to attend the hearing until 1pm.

45. In view of the unanimous desire to avoid another adjournment, it was agreed that the morning would be used for case management purposes, leaving the afternoon for Mr Lennard to conclude his cross-examination of the Claimant and for submissions in respect of the preliminary matters.

46. That case management discussion, the agreed list of issues and the associated orders are set out in a separate document. It was further agreed that should any amendment to the list of issues and/or orders be required in the light of my findings on the preliminary issues, the matter could be dealt with by the parties or at a further short preliminary hearing if necessary. (In the event, that won't be necessary.)

47. The Claimant's evidence during her resumed cross-examination was that she did not see her visa application or any of the supporting documents (which she says was completed entirely by the Respondents) until her own solicitors shared a copy of the documents with her in May 2024. She further said that she didn't sign anything and that she wasn't shown or asked about the documents comprising the visa application by the Immigration Officer.

48. The Claimant also stated that it had been verbally agreed with Ms Williams that she would be employed by the Respondents in the UK for three years, and that although she knew her visa was only valid for 6 months she understood it would be extended. Although the Claimant's plane ticket shows on its face that her return flight was booked for 12 January 2023, the Claimant said she didn't notice this at the time.

49. The Claimant was also shown evidence of payments made to her in Nigeria in October and early November 2022, totalling approximately 215,000 naira (about £100). The Claimant said these payments were for her to buy food

and prepare the house for the arrival of Ms Williams because Ms Williams didn't trust the chef with the money.

50. Since I do not consider it necessary to make findings of fact in respect of these matters for the purposes of deciding the first and third preliminary issues, it will be a matter for the Tribunal at the Final Hearing to assess the credibility of this evidence in the light of all evidence given at that hearing,

51. At the conclusion of the evidence Mr Lennard and Mr Brady made submissions.

52. I record that Mr Brady made his submissions with the aid of a very full and helpful skeleton argument prepared by Ms Shrivastrava.

Whether the Employment Tribunal has territorial jurisdiction to determine the matter and whether the applicable law is English law.

53. Mr Lennard's argument appeared to be that because the October 2021 contract didn't have an end date and there was no evidence it had been terminated, that contract continued to govern the Claimant's relationship with the Respondents while she was in the UK. The payments to the Claimant before she came to the UK showed she had started to work for the Williams while in Nigeria.

54. Further Mr Williams, who was the other party to the Claimant's contract, although a British citizen, was resident in Nigeria and came and went to the UK. There was also evidence that the Claimant didn't have a UK bank account and had been paid about 280,000 naira into her Nigerian bank account on 4 December 2022, after she came to the UK. Further, the Claimant now had no right to be in the UK, she was an overstayer. Accordingly, on the basis of the principle of *forum non conveniens* the English courts should decline jurisdiction and the matter should be dealt with in the Nigerian courts.

Territorial Jurisdiction

55. The test of territorial jurisdiction in respect of employment legislation is set out **Lawson v Serco [2006] 1 ALL ER 823 (HL)** as subsequently interpreted in **Ravat v Halliburton Manufacturing Services Ltd [2012] IRLR 315 (UKSC)**.

56. In **Ravat** the SC held at [29] that the overriding "question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain".

57. While **Lawson** and **Ravat** were decided in the context of the ERA, the same principles apply to other employment statutes and regulations which are

silent as to territorial jurisdiction, such as the EqA and the WTR (**R(Hottak) v Secretary of State [2016] 1 WLR 3791 (CA)**).

58. Notably the EAT in **Ravisy v Simmons & Simmons LLP (UKEAT/0085/18)** identified three broad categories of cases, the first category being cases in which at the relevant time, or during the relevant period, the claimant worked in Great Britain, where the English courts would have territorial jurisdiction (see [22], [50] & [51]).

59. That is plainly the case here.

60. Further, I reject the submission that the Claimant's working arrangement in the UK was a continuation of the October 2021 contract and that for this reason the Employment Tribunal does not have territorial jurisdiction.

61. First, the October 2021 contract was a sham and is of no assistance. It is common ground the Claimant did not meet the Williams until September or October 2022.

62. Secondly, and in any event the Claimant's engagement with the Williams was a specific, separate agreement for her to do domestic work at their home in the UK as set out in the DWS – which, moreover, specifically provides that the courts of England and Wales have jurisdiction over any dispute arising from the agreement (and that the law of England and Wales applies). Even if, as she alleges, the Claimant didn't agree or see the DWS, it is plainly the case that she reached a specific agreement with the Williams in respect of the work she would do for them in the UK and that the DWS reflects the Williams' intention and expectation as regards jurisdiction (and choice of law) in the event of any dispute arising out of that work.

63. Further, and in any event, it is irrefutable that the present dispute arises out of work the Claimant did for the Respondents while living at their home in the UK and therefore that the case falls within the first category of cases described in **Ravisy v Simmons & Simmons LLP**, as set out above at paragraph 58.

64. As regards, the claim for breach of contract and the Respondents' counterclaim, jurisdiction is conferred on the Employment Tribunal by the Extension of Jurisdiction (England and Wales) Order 1994 which provides that a claim for breach of contract may be brought if the courts in England and Wales would have jurisdiction to hear the claim. In England and Wales that question of jurisdiction would be resolved by part 6 of the Civil Procedure Rules (CPR) and I am satisfied the English courts would have jurisdiction under CPR Pt 6. The Respondents both had a presence in England for the purpose of effecting service within the jurisdiction and indeed the ET1 was submitted to their home address in the UK. Even if Mr Williams works in Nigeria (although I heard little evidence on this), it is plain he has a family home in Nigeria, that his children go to school in England, and that he spends time here (see **Relfo v Varsani [2009] EWHC 2297**).

65. While it is true that even if there is presence for the purposes of service within the jurisdiction a stay can be granted on the basis of *forum non conveniens*, namely that in the interests of the parties and of doing justice it would be more appropriate for the claim to be heard in a foreign jurisdiction, I am satisfied that the Nigerian courts would not be a more appropriate forum in this case. The key point is that all the work giving rise to the dispute was conducted by the Claimant for the Respondents at their home in England. Yet a further consideration is that the principle of *forum non conveniens* only applies to the contract claim and counterclaim, and I consider it is plainly in the interests of the parties and the ends of justice that all of the Claimant's complaints, and the counterclaim, are heard together in the same tribunal (see **Crofts v Cathay Pacific Airways [2005] IRLR 624**).

Applicable Law

66. As regards the applicable law, Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome 1) provides the relevant legal framework (by way of EU retained law).

67. Article 8 pertains to "individual employment contracts".

68. Article 8(1) provides that an individual employment contract is governed by the law chosen by the parties, save that such a choice of law may not deprive the employee of the protection afforded to him by provisions that cannot be derogated from.

69. Article 8(2) provides that if the law has not been chosen by the parties, the contract is governed by the law of the country in which (inter alia) the employee habitually carries out his work unless, pursuant to Article 8(4) it appears from the circumstances as a whole that the contract is more closely connected with another country.

70. First, for the purposes of Article 8(1), it is apparent from the DWS that English law was chosen to be the applicable law. At the very least, to the extent the Claimant was unaware of the contents of the DWS (as she alleges), the Respondents chose English law to be the applicable law.

71. Secondly, and in any event, for the purposes of Article 8(2) the Claimant habitually carried out her work in performance of the contract in England, and the contract is not more closely connected with Nigeria or any other country.

72. Moreover, and in any event, Article 9 provides that nothing in Rome 1 restricts the application of the overriding mandatory provisions of the law of the forum, and the statutes under which the Claimant's complaints are brought are indeed overriding mandatory provisions (see ss. 203 & 204 ERA, reg 35 WTR, s.49 National Minimum Wages Act 1998, s.144 EqA, and **Uber v Aslam [2021] UKSC 5** at [79]).

73. Accordingly I am entirely satisfied the Employment Tribunal has territorial jurisdiction to determine this claim and that the applicable law is English law.

Application for strike out or for a deposit order (rules 37 and 39 Employment Tribunal Rules of Procedure 2013)

74. The application to strike out was made on the basis the complaints have no reasonable prospect of success and in the alternative an application for a deposit order made on the basis the complaints have little reasonable prospect of success.

75. The authorities are clear that strike out on the grounds that a complaint has no reasonable prospect of success pursuant to rule 37(1)(a) is rarely appropriate where there are factual issues in dispute; where there is a crucial core of disputed facts this should be determined at a hearing following the evaluation of the evidence. Applications that involve a prolonged or extensive study of documents and the assessment of disputed evidence that depends on the credibility of the witnesses should not be brought under the strike out rules and must be determined at a full hearing. In discrimination cases, particular caution must be exercised and only in the clearest case should there be a strike out; (**Cox v Adecco [2021] ICR 1307**; **QDOS Consulting Ltd v Swanson UKEAT/0495/11**; **Kwele-Siakam v Cooperative Group Ltd UKEAT/0039/17**; **Simpson v Air Business Ltd EAT 0009/19**).

76. While the test for making a deposit order on the basis the complaints (or any of them) have little reasonable prospect of success pursuant to rule 39(1) is less rigorous than for a strike out, there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim; if there is a core factual conflict this should be properly resolved at a full merits hearing where evidence is heard and tested (**Hemdan v Ishmail & Megraby UKEAT/0021/16/DM**).

77. Here all the complaints plainly depend on a core of disputed facts as regards the Claimant's working conditions, her pay, and the circumstances in which and the reasons why she left the Respondents' home in the early hours of 21 March 2023. Further, contrary to the submissions of Mr Lennard, the factual allegations forming the basis of the complaints of harassment related to sex and/or for sexual harassment are plainly capable of amounting to either or both, and whether the allegations are true or not and/or whether in the circumstances they amounted to harassment related to sex/sexual harassment are questions which need to be determined by hearing evidence at a final hearing.

78. Accordingly, I reject the application to strike out and the application for a deposit order.

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Employment Judge S Moore

Date: 20 September 2024

Sent to the parties on:

1 October 2024

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For the Tribunal:

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