FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President

Lord Marnoch

Lady Cosgrove

[2005CSIH5]

XA150/03

OPINION OF THE COURT

delivered by LORD MARNOCH

in

APPEAL TO THE COURT OF SESSION

under

Section 37(1) of the Employment Tribunals Act 1996

by

PRESCRIPTION PRICING AUTHORITY

Appellant;

against

DR JOHN JOHNSTON FERGUSON

Respondent:

against

An Order and Judgment of the Employment Appeal Tribunal dated 27 November 2003

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Act: Truscott, Q.C.; Brodies (Appellant)

Alt: Allan; Dundas & Wilson (Respondent)

13 January 2005

[1] The short point raised in this appeal concerns the meaning of Regulation 11(5)(b) of the Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001.

[2] Regulation 11(5) determines the competency of registering an application with the Central Office of the Employment Tribunals (Scotland). It is convenient to set out its full terms:

> "(5) The rules contained in Schedules 1, 2 and 3 shall apply in proceedings to which they relate where -
>
> (a) the respondent or one of the respondents resides or carries on business
>
> in Scotland;
>
> (b) the proceedings relate to a contract of employment the place of
>
> execution or performance of which is in Scotland; or
>
> (c) the proceedings are to determine a question which has been referred to
>
> the tribunal by a sheriff in Scotland."

[3] In the present case the respondent's application was based on sub-paragraph (b).

[4] So far as the facts of the matter are concerned, there is no dispute but that the respondent's contract with the appellants was executed - in the sense of being signed - in England, and that Clause 4 of that contract provided that the respondent's "normal place of work" would be at Bridge House, Newcastle. As it happens, the respondent commuted at weekends to and from his family home in Edinburgh, but the only work he did in Scotland comprised the occasional delivery of a lecture or address at a conference. This was regarded by both the tribunal and the Employment Appeal Tribunal as bringing him within sub-paragraph (b), the reasoning being that *any* connection with Scotland was sufficient.

[5] Before us Mr. Allan, Advocate, for the respondent, sought to uphold that approach. In that connection he pointed out the advantages of a simple test such as would avoid the need to conduct preliminary enquiries regarding the competency of applications. He also placed some reliance on rule 21 of Schedule 1 to the Regulations which enables proceedings to be transferred, where appropriate, to the Office of the Employment Appeal Tribunals (England and Wales). He suggested that the words "the place of" might govern only the word "execution" in sub-paragraph (b), but submitted, in any event, that there was no scope for importing into the sub-paragraph qualifying words such as "normal", "habitual" or "principal", as was contended for by Mr. Truscott, Q.C., for the Appellant.

[6] While, however, we see the attraction of these submissions, we find ourselves in the end quite unable to construe the sub-paragraph in question as conferring jurisdiction however remote may be the connection of the contract with Scotland. On the contrary, in our opinion the ordinary meaning of the words is to the effect contended for by Mr. Truscott, namely that,

leaving aside the matter of execution, the place of performance of the contract should be wholly or, at least, substantially in Scotland. In the present case that is clearly not the position.

[7] In the course of the debate Mr. Truscott sought to draw some analogy with the jurisdiction rules contained in Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 and Article 5 of the Brussels Convention. In our opinion, however, no help is to be derived from these sources when it is realised, as Mr. Truscott later made clear to us, that the history of the wording of Regulation 11(5) goes back through various statutory instruments to at least 1965. In that situation, it is far more likely, we think, that Regulation 11(5)(a) and (b), at least, were, in their original formulation, a reflection of what was then the common law in Scotland regarding jurisdiction in contractual matters. That included jurisdiction *ratione contractus* - as to which see generally Duncan and Dykes, *Principles of Civil Jurisdiction* pps. 48 *et. seq.* In this connection it is, perhaps, instructive to note that the comparable rule for jurisdiction in England and Wales was at the relevant time Regulation 11(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 which is in the following terms:

> "(5) The rules contained in Schedules 1, 2 and 3 shall apply in proceedings to which they relate where -
>
> (a) the respondent or one of the respondents resides or carries on business
>
> in England and Wales;
>
> (b) had the remedy been by way of action in the County Court, the cause
>
> of action would have arisen wholly or partly in England and Wales; or
>
> (c) the proceedings are to determine a question which has been referred to
>
> the tribunal by a court in England and Wales."

The wording of that rule, also, we were told, goes back to at least 1965.

[8] In conclusion, while we have referred to both sets of regulations as conferring a form of "jurisdiction" we are very conscious that there is no jurisdictional distinction between an Industrial Tribunal sitting in Scotland and an Industrial Tribunal sitting in England and that in consequence, as it was put by the Appeal Tribunal in *Odeco (U.K.) Inc.* v. *Peacham* 1979 I.C.R. 823 at p. 825H,

> "the division which produces the problem in this case is not a true jurisdictional division at all; it is simply a division of the administrative structure into English and Scottish for administrative convenience".

That is not to say, however, that, particularly in an age when the outcome of an application can be influenced by the choice of forum as between Scotland and England (see e.g. Section 2 (5) of the Equal Pay Act 1970 as most recently amended), it may not be desirable for there to be some meaningful connection between the forum and the subject-matter of the application. However that may be, for the reasons given above our decision is that this appeal must be allowed and the respondent's application, in consequence, dismissed.