Tribunal was right not to strike out claims brought against a US company and US-based individuals

In a recent case, the EAT has upheld a decision of an Employment Judge not to strike out Employment Tribunal claims brought against a US company and US-based individuals. In both cases, the claims were reasonably arguable, meaning that striking out was not justified.

What happened in this case?

Dr Armes is a research scientist. He founded a US company, TwistDx Inc, to carry out his work. He also founded a UK company, TwistDx Ltd. In 2010, TwistDx Inc and TwistDx Ltd became subsidiaries of a US company called Alere Inc. Dr Armes remained the sole Director of TwistDx Ltd and was employed as its Managing Director. His wife, Mrs Helen Kent-Armes, was employed as its COO.

In late 2017, Alere Inc was acquired by the multi-national US company, Abbott Laboratories. In May 2018, Dr Armes and his wife were both dismissed. They brought various claims in the Employment Tribunal against:

- TwistDx Ltd (the UK company);

- Abbot Laboratories (the US company);
- Mr Eppert, Mr Haas and Ms Qiu (the US-based individuals);and
- Mr Macken and Mr Muggeridge (the UK-based individuals).

(together, the Respondents).

The Respondents applied to strike out the claims against the US company and US-based individuals. The Employment Judge dismissed the strike out applications, concluding that the Respondents had failed to show that Dr Armes and Mrs Kent-Armes had no reasonable prospects of successfully establishing that the Employment Tribunal had international jurisdiction.

The Respondents appealed to the EAT.

What was decided?

The EAT began by underlining that jurisdictional issues may arise in Employment Tribunal claims in two ways. First, does the Tribunal have international jurisdiction so that the parties can be brought before it? Second, does the claim fall within the territorial scope of the relevant law? This appeal concerned the first jurisdictional issue only.

Claims against the US company

As far as the claim against the US company was concerned, the EAT had to consider the Recast Brussels Regulation (which was in force at the time the claims were brought). In short, this Regulation provided that in order for the Employment Tribunal to have international jurisdiction over the US company, either the US company would have to be the employer of Dr Armes and Mrs Kent-Armes, or the UK company must be a *"branch, agency or establishment"* of the US company.

Turning first to the question of whether the US company could have been the "employer" of Dr Armes and Mrs Kent-Armes, the EAT considered case law where individuals have been treated as employees of companies with whom they did not have a traditional contract of employment:

- In Samengo-Turner and others v J&H Marsh McLennan, employees of a UK company entered into an incentive award scheme under which they had obligations towards the US group companies. The Court of Appeal accepted the employees' contention that the incentive award documentation formed part of their individual contracts of employment. The result was that the US entities were to be treated as their employer for the purposes of the Recast Brussels Directive.

- In Petter v EMC Europe Ltd, the employee was employed by a UK company, while the ultimate parent company, EMC, was based in the US. A substantial part of the employee's remuneration arose from restricted stock unit

(RSU) agreements made between him and ECM. In these RSU agreements, he agreed to comply with a key employment agreement in the EMC employee handbook, including a 12-month non-compete restriction in favour of EMC and its subsidiaries. Relying on Samengo-Turner, the Court of Appeal held that a company which provides benefits to employees of associated companies within the same group may be regarded as an employer for the purposes of the Recast Brussels Regulation if it provides those benefits in order to reward and encourage those employees for the benefit of their immediate employer and the group as a whole.

The EAT concluded that the concept of "employment" for the purposes of the Recast Brussels Regulation could potentially include a situation where there was no contract between the "employee" and "employer".

Turning to the alternative question of whether the UK company was a branch, agency or other establishment of the US company, the Respondents sought to rely on a number of non-binding opinions of the Advocates General of the ECJ that suggested a branch, agency or other establishment cannot have a separate legal personality or authority to fix matters such as working hours (as TwistDx Ltd did). However, the EAT did not accept that these decisions established an absolute prohibition on a branch, agency or other establishment having a legal personality.

The EAT said that it was clear why the Employment Judge had concluded that the Respondents had failed to show that there

were no reasonable prospects of Dr Armes and Mrs Kent-Armes establishing that the Employment Tribunal had international jurisdiction to hear the claims against the US company. The Employment Judge had been entitled to conclude that it was arguable that the US company could be the employer for the purposes of the Recast Brussels Regulation and/or that the UK company might be a branch, agency or other establishment of the US company.

Claims against the US individuals

As to the claims against the US individuals, Dr Armes and Mrs Kent-Armes had argued that Rule 8 of the Employment Tribunal Rules 2013 conferred international jurisdiction on the Employment Tribunal on the basis that:

- at least one of the respondents to the claim 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; and/or
- the claim relates to a contract under which the work is or has been performed partly in England or Wales.

In contrast, the Respondents had argued that Rule 8 was solely concerned with the division of cases between the alternative UK jurisdictions of England, Wales or Scotland.

The EAT noted that there were case authorities supporting both sides of the argument and, therefore, concluded that there was no error of law in the Employment Judge's decision that Dr Armes and Mrs Kent-Armes' case was reasonably arguable.

Therefore, the appeal against the refusal to strike out the claims against the US company and the US individuals was dismissed.

What does this mean for employers?

It is important to remember that the EAT has *not* determined the substantive question of whether an Employment Tribunal has international jurisdiction. Instead, it was tasked with considering the narrower question of whether there was an error of law in the Employment Judge's decision not to strike out the claims against the US company and US-based individuals.

Striking out a claim is a Draconian step which should only be taken where an applicant can cross the high threshold of showing that the claim (or response) has "no reasonable prospects of success". Here, the EAT found that the Employment Judge had been entitled to conclude that it was *reasonably arguable* that the US company and US-based individuals fell within the international jurisdiction of the Employment Tribunal. This is not the same as saying that the Employment Tribunal *does have* international jurisdiction in these types of scenarios.

Frustratingly, the substantive question has yet to be answered. Indeed, the EAT Judge remarked that he

was *"troubled"* that this issue had been left undecided but said this was the inevitable result of the fact that the issue had been addressed via a strike out application. The substantive question will eventually be considered when this case returns to the Employment Tribunal. However, given that this litigation *"…has the feel of a war of attrition, the end of which seems dispiritingly far from view"*, the strike out decision may yet be appealed further to the Court of Appeal, which will delay the hearing of the substantive question.

In the meantime, international employers should be prepared to respond to Employment Tribunal claims brought against overseas entities and individuals. Given the shifting sands in this area, it would also be wise to seek legal advice should this issue arise in a claim.

TwistDx Limited and others v Dr Armes and others

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.