Appeal No. UKEAT/0456/13/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 21 March 2014
Judgment handed down on 28 March 2014

Before

THE HONOURABLE MR JUSTICE LEWIS

SITTING ALONE

EMBASSY OF BRAZIL APPELLANT

MR D A DE CASTRO CERQUEIRA RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	MR NIRAN DE SILVA (of Counsel) Instructed by: Messrs Marriott Harrison LLP Solicitors 11 Staple Inn London WC1V 7 QH
For the Respondent	MR JAMES TUNLEY (of Counsel) Instructed by: Thompsons Solicitors LLP Congress House Great Russell Street London WC1B 3LW

SUMMARY

STATE IMMUNITY

An employee at the Brazilian Embassy in London was dismissed having reached the age of 70. He contended that he had been unfairly dismissed and that the dismissal constituted unlawful jurisdiction on the grounds of age. The claim form was served in accordance with the provisions of section 12(1) of the State Immunity Act 1978, that is by being transmitted via the Foreign and Commonwealth Office to the Ministry of Foreign Affairs in Brasilia. The Embassy contended that that service was ineffective as it was not a form of service provided for under Brazilian law. The Employment Appeal Tribunal held that Parliament did not intend to provide for a method of service in a State which involved the doing of something in that State which was contrary to the law of that State. Contrary to law in this sense meant that the act was prohibited under the law of the State concerned. The Embassy accepted that there was no evidence that service at the Ministry of Foreign Affairs was prohibited by the law of Brazil. In those circumstances, service in accordance with the provisions of section 12(1) was effective service for the purposes of the law of England and Wales (even if it would not have been effective for the law of Brazil). Consequently, the claim in the present case had been validly served.

THE HONOURABLE MR JUSTICE LEWIS

INTRODUCTION

1. This is an appeal against a judgment of the employment tribunal given on 4 July 2013 whereby the tribunal found that a claim form had been effectively served upon the respondent employer, the Embassy of Brazil.

THE FACTS

2. The material facts are as follows. Mr de Castro Cerqueira was employed at the Brazilian Embassy in the United Kingdom. On 31 January 2012, his employment came to an end. He had reached the age of 70 in the previous year. On 24 April 2012, the claimant issued a claim form contending that dismissal at the age of 70 constituted unfair dismissal and age discrimination. The respondent contests the claims. The substantive issues have not yet been heard or determined by an employment tribunal.

3. As the respondent was a foreign state, the claim form was sent to the Foreign and Commonwealth Office. They, in turn, sent the claim form to the British Embassy in Brazil. On 19 December 2012 the Vice Consul delivered the claim form to the Ministry of Foreign Affairs at Brasilia. That is confirmed in a certificate from the Vice Consul dated the 19 December 2012 which is in the following terms:

> **"STATE IMMUNITY ACT 1978: SERVICE OF PROCESS: MR D A DE CASTRO CERQUEIRA – V – EMBASSY OF BRAZIL**
>
> **I, Andrea Chagas, Vice Consul at the British Embassy in Brasilia, hereby certify that copies of the documents were served upon the Ministry of Foreign Affairs of the Government of Brazil by the delivery thereof to the document drop off of the said Ministry of Foreign Affairs at Brasilia on the 19 day of December 2012.**
>
> **Dated this nineteenth day of December 2012."**

4. The Brazilian Ministry of Foreign Affairs sent a note the English translation of which reads as follows:

> **"1. The Ministry of Foreign Relations sends its compliments to the Embassy of the United Kingdom and has the honour of referring to verbal note 192/2012 of 19 of this month whereby a letter rogatory regarding the labour proceedings brought by Mr Dionisio Augusto de Castro Cerqueira against the Embassy of Brazil in London through the British Judicial Authority.**
> **2. The Ministry advises in this regard that under the terms of article 105, I, "i" of the Brazilian Constitution, compliance with letters rogatory on national territory is the object of proceedings prior to a decision by the Superior Court of Justice (STJ), which is responsible for initially hearing and deciding on the granting of "exequatur" requested in foreign proceedings. For that reason, the letter rogatory concerned was sent to the Ministry of Justice to be sent to that Court.**
> **3. The form of notification chosen by the British authorities seems to reflect what is stated in the European Convention on the Immunity of States, whereby a foreign State will be notified by merely sending through by diplomatic channels a copy of the request to the Chancery of the State to be notified. The Ministry records that Brazil is not a party to the said Convention and does not recognise that notification procedure as a normal international rule.**
> **4. Under these circumstances, the Ministry does not consider it has been notified of the judicial request made by Mr Cerqueira, which will depend on the terms of Brazilian legislation and the international rules applicable, subject to judgement by the Brazilian legislation and the international rules applicable, subject to judgement by the Brazilian Judicial Authority."**

5. The Foreign and Commonwealth Office wrote to the employment tribunal on 12 February 2013, in the following terms and enclosing the certificate of service:

> **"Service of documents under State Immunity Act 1978: Mr D A Castro Cerqueira v Embassy of Brazil**
> **I refer to the request for service of process in regards to the above matter.**
> **The British Embassy in Brazil has returned the request duly executed. Please see the enclosed certificate of successful service for further details."**

6. There was then a pre-hearing review on 1 May 2013 at the employment tribunal. The tribunal found, first, that it had jurisdiction over the claim and the Embassy did not benefit from immunity from proceedings under the Act. The tribunal held that the written contract of employment between the Embassy and the claimant involved a clear and unequivocal submission to jurisdiction in accordance with section 2 of the Act. The Embassy accepts that

finding. There is no appeal against it. The Embassy, therefore, accepts that the tribunal has jurisdiction to hear the claim.

7. The next question concerned the validity of the service of the claim upon the Embassy. The Embassy contended that service upon the Embassy by means of service at the Ministry of Foreign Affairs did not comply with the law of Brazil and was, therefore a nullity. The Embassy contended first, that section 12(1) of the Act was subject to a qualification, namely that service could not be effected by a means contrary to the law of the State in which service was to be effected. Secondly, it contended that that service would be contrary to law for these purposes if the method of service was not one permitted by the law of the State concerned; it was not necessary to show that the method was prohibited by the law of the State concerned. Thirdly, it was contended that service was only permitted under the law of Brazil when authorised by the Supreme Court (in the form of what was described as a grant of exequatur). Consequently, it was submitted, service by means of service at the Ministry of Foreign Affairs was not permitted by the law of Brazil, it was therefore contrary to law and so was not effective service.

8. The employment tribunal held that section 12(1) of the Act was not subject to any qualification such as a qualification that service should not be contrary to the law of the State in which service was to be effected. Secondly, it held that, in any event, service would only be contrary to law if the method of service was prohibited by the law of Brazil. The fact that the method of service was not provided for or permitted under Brazilian law did not mean that it was contrary to law. Thirdly, it held that, on the evidence that it had heard, it was not satisfied that, under Brazilian law, the Supreme Court was the only body that could undertake the task of authorising service. The tribunal concluded as follows:

"I am satisfied that the State Immunity Act 1978 provides a procedure whereby service of legal process according to English Law can be effected abroad. That procedure was followed by the Claimant and I find that service has been effected on the Respondent. As mentioned there is no evidence that such service is contrary to the law of Brazil."

9. For completeness, the employment tribunal initially refused the Embassy an extension of time to lodge its response to the claim and entered a default judgment. That judgment was set aside on a review and an extension of time for lodging a response was granted. The claim has subsequently been stayed for other, unconnected reasons.

10. The Embassy has appealed against the finding that service was validly effected. The matter is of importance to the Embassy and may be important to other States whose law does not provide for service by means of transmission of a claim through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State in which service is to be effected. The three grounds of appeal are as follows:

(1) the tribunal erred in finding that section 12(1) of the Act was not subject to any qualification; that section was subject to a qualification analogous to that contained in the Civil Procedure Rules 6.40(4) that service was not authorised where it is contrary to the law of the state where service is to be effected;

(2) the tribunal erred in finding that service would only be contrary to law if it were prohibited by the law of the state where service was to be effected. Service by the means envisaged by section 12(1) of the Act would be contrary to law if it were effected by a means not permitted by the law of the state where service was to be effected.

(3) the tribunal acted perversely, or no evidence, in finding that authorisation by the Supreme Court was not the only means of authorising service under Brazilian law.

THE LAW

11. The law governing proceedings in the United Kingdom by or against other States is contained principally in the Act. Section 1 of the Act confers a general immunity on states

from the jurisdiction of the courts (which includes tribunals) of the United Kingdom in the following terms:

> **"General immunity from jurisdiction.**
>
> **"(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act."**
>
> **"(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."**

12. The Act then sets out a series of exceptions to that immunity. Where the exceptions apply, the courts do have jurisdiction in respect of a foreign state. Section 2 of the Act provides, so far a material, that :

> **"(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom."**
>
> **"(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission."**

13. It was pursuant to section 2(1) of the Act that the employment tribunal in the present case concluded that the Embassy had submitted to the jurisdiction of the courts by reason of the terms of its written agreement with the claimant.

14. Other exceptions to the immunity are set out in the Act. By way of example, section 4 of the Act provides that a State is not immune as respects proceedings relating to a contract of employment, including proceedings between the parties to such a contract in respect of any statutory rights or duties to which they are entitled as employer or employee. That exception, however, does not apply to the employment of the members of a diplomatic mission or holding consular posts: see section 16 of the Act. Furthermore, certain provisions of the Act conferring immunity may need to be disapplied in relation to claims for rights derived from

EU law: see for example, the decision of the Employment Appeal Tribunal in *Benkharbouche v Embassy of the Republic of Sudan* UKEAT/0401/12KN which is currently subject to appeal.

15. Section 12 of the Act deals with the service of documents instituting proceedings and judgments in default of appearance. It provides as follows:

> **"12.— Service of process and judgments in default of appearance."**
>
> **"(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and Service shall be deemed to have been effected when the writ or document is received at the Ministry."**
>
> **"(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid."**
>
> **"(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings."**
>
> **"(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired."**
>
> **"(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry."**
>
> **"(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner."**
>
> **"(7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action *in rem*; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction."**

16. Paragraph 1 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 ("the Regulations") provide that a claim shall be brought before

an employment tribunal by the claimant presenting to an employment tribunal the details in writing. If the claim is accepted, it is sent to the respondent. Paragraph 4 of Schedule 1 to the Regulations provide that if the respondent wishes to respond to the claim, he must present a response to the employment tribunal office within 28 days of the date on which he was sent a copy of the claim. Paragraph 4E of Schedule 1 to the Regulations provides that:

> **"This rule is subject to section 12 of the State Immunity Act 1978"**

17. One of the consequences of that provision is that the 28 day time limit for serving a response will begin to run two months from the date when the claim is received at the Ministry of Foreign Affairs.

18. For completeness, reference was made to the provisions of the Civil Procedure Rules. They only apply to proceedings in the county court, the High Court and the Civil Division of the Court of Appeal: see CPR 2.1. They do not apply to proceedings in the employment tribunal. There is provision for requiring the permission of the court to serve proceedings out of the jurisdiction in specified cases: see CPR 6.36. General rules about the method of service outside the jurisdiction are included in CPR 6.40. Where a document is to be served outside the jurisdiction, then CPR 6.40(3) permits service by a number of methods including by service under CPR 6.44. That rule, in turn, provides for service of a document on a State either by transmission from Court to the Foreign and Commonwealth Office with a request that the documents be served or, where the State has agreed to a method of service other than through the Foreign and Commonwealth Office, by the agreed method. In either case, CPR 6.40(4) applies and that provides that:

> **"Nothing in paragraph (3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country where the claim form is to be served"**

ANALYSIS

The First Ground of Appeal – the Scope of Section 12 of the Act

19. The first ground of appeal concerns the question of whether section 12(1) of the Act was subject to a qualification whereby service could not be effected in accordance with that subsection if that were contrary to law.

20. The argument originally proceeded on the basis that, as the provisions of the Regulations were silent on service outside the jurisdiction, employment tribunals could derive assistance from the provisions of the CPR, including CPR 6.40 (4), even though those provisions were not directly applicable to proceedings in the employment tribunal. Reliance was placed upon the decision in *Nowicka-Price v Chief Constable of Gwent Constabulary* UKEAT/0268/09/ZT.

21. That approach, in my judgment, is not a permissible approach. Section 12 of the Act deals with the method of service on States of documents instituting proceedings. Paragraph 4 of Schedule 1 to the Regulations deals with responses to such claims. Paragraph 4E provides that the rule is subject to the Act. The Regulations therefore provide that the Act is to regulate service of the response. In my judgment, the provisions of the Act are not qualified by the Regulations themselves. Furthermore, it would not be permissible for a court to seek to restrict the words of the Act by reference to provisions of other subordinate legislation, such as the CPR provisions, which are not applicable to proceedings in employment tribunals.

22. The true question, in my judgment, however, is whether, on a proper construction of section 12 of the Act, Parliament intended that the method of service prescribed by that section – namely that documents instituting proceedings "shall be served "by transmission

through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs - was to be used where that would involve the doing of something which was contrary to the law of the State where service was to be effected. In my judgment, properly construed, section 12 was not intended to have that effect.

23. The Act was intended, as appears from the long title, to make new provision with respect to proceedings in the United Kingdom by or against other States. The purpose was to deal with proceedings in the United Kingdom. In that context, section 12 (under the broad heading of "procedure") is intended to deal with service of process and judgments in default of appearance. The purpose of that is to provide for a means by which a State can be given notice of proceedings against it. In that context, Parliament cannot have intended that service of the document commencing proceedings had be effected by the means specified in section 12 of the Act even if that was contrary to the law of the State in which service was to be effected. Parliament cannot have intended that the Foreign and Commonwealth Office engage in actions within another State's territory if those actions would contravene the law of that State.

24. In my judgment, that construction of section 12 of the Act also explains the principle underlying the provisions of CPR 6.40(4) and 6.44. Those provisions reflect the fact that service by the method envisaged by section 12 of the Act was not intended to be utilised if that is contrary to the law of the State where service is to be effected. It is not that CPR 6.40(4) operates as a qualification or restriction on section 12 of the Act. Indeed, section 12(7) of the Act only provides that subsection 12(1) is not to be construed as "affecting any rules of court whereby leave is required for the service of process outside the jurisdiction". There is nothing in section 12 of the Act which authorises the making of a rule which imposes a qualification or restriction rule such as that referred to in CPR 6.40(4). That, in my judgment,

is because section 12 of the Act was not intended to authorise the doing of acts which would be contrary to the law of the State where service is to be effected. In other words, CPR 6.40(4) reflects the limits of the section 12 of the Act and does not act as a qualification or restriction upon them.

The Second Ground – The Meaning of Contrary to Law

25. The next question concerns the meaning of contrary to law. More accurately, it involves ascertaining the correct interpretation and scope of section 12 of the Act. The essential argument put by the Embassy is that service will be contrary to law if it is not permitted by the law of the State where service is to be effected.

26. In my judgment, on its proper interpretation, service may be effected by the method envisaged by section 12 of the Act unless that method would be contrary to law in the sense that it would involve acts which were prohibited by the law of the State where service is to be effected. I reach that conclusion for the following reasons.

27. First, section 12 of the Act is dealing with the method by which service is to be effected for the purpose of the laws of the constituent parts of the United Kingdom. It is prescribing the method by which service is to be effected as against a State for the purposes of proceedings within the United Kingdom. It is not concerned with the different question of whether that means of service would be effective for the purposes of the law of the State where service is to be effected. Consequently, while Parliament did not intend to require service by a means prohibited under the law of the State concerned, there is no reason to equate the situation where the method of service is not provided for by the law of the State concerned with the different question of whether the law of the State concerned prohibits the acts in question.

28. Secondly, in the context of the provisions of the CPR, the courts do recognise that the phrase "contrary to law" in CPR 6.40(4) means prohibited by the law of the State where service is to be effected. Thus, in *Habib-Bank Ltd. v Central Bank of Sudan* [2007] 1 W.L.R. 470, the High Court considered that the court could order the service of a claim form in Sudan in a manner which was not expressly permitted by the law of Sudan so long as the method was not contrary to the law of Sudan.

29. Similarly, it is implicit in my judgment, that the Supreme Court drew a distinction between a method of service which was not provided for or permitted by the law of the State where service was to be effected and a situation where the method of service would contravene the law of that State in *Abela v Baadarani* [2013] 1 W.L.R. 2043. In that case, it had not been possible to effect service of a claim form on a person in the Lebanon by any means permitted by the law of Lebanon. The High Court therefore authorised service by another means which was not permitted by the law of Lebanon but did not contravene that State's law. The Supreme Court upheld the decision of the High Court and drew a distinction between service permitted by the law of a State and acts which were prohibited by, and so contrary to, the law of that State. The distinction is recognised by Lord Clarke of Stone-cum-Ebony at paragraph 24 where he said:

> **"It is important to note that rule 6.15 applies to authorise service "by a method or at a place not otherwise permitted" by CPR Pt. 6. The starting point is thus that the defendant has not been served by a method or at such a place otherwise so permitted. It therefore applies in cases (and only in cases) where none of the methods provided in rule 6.40(3), including "any other method permitted by the law of the country in which it is to be served" (see rule 6.40(3), has been successfully adopted. The only bar to the exercise of the discretion under rule 6.15 (1) or (2) , if otherwise appropriate, is that, by rule 6.40(4) , nothing in a court order must authorise any person to do anything which is contrary to the law of the country where the claim form is to be served. So an order could not be made under rule 6.15(2) in this case if its effect would be contrary to the law of Lebanon. Although it was held that**

delivery of the claim form was not permitted service under Lebanese law, it was not suggested or held that delivery of the documents was contrary to Lebanese law or that an order of an English court that such delivery was good service under English law was itself contrary to Lebanese law."

30. Lord Clarke makes a similar point in paragraph 45 of his judgment where he says this:

"The rules as to the method of service set out above seem to me to have the legitimate sensibilities of other states in mind. It is for that reason that CPR r 6.40(4) provides that nothing in CPR r.640(3) or in any court order authorises or requires any person to do anything which is contrary to the law of the country of service. I have already expressed my view that the order recognising the delivery of the claim form as alternative service under English law is not contrary to Lebanese law. Moreover it was not in breach of any convention or treaty but merely recognised that the claim form (and other documents) had been brought to the attention of the respondent. I do not think, therefore, that in a case not involving the Hague Service Convention or a bilateral service treaty, an order under rule 6.15(2) must be regarded as "exceptional" or, indeed as suggested in para 29 of Longmore LJ's judgment, that there must be a "very good reason" for it. As already stated, the CPR do not so provide. They merely require good reason."

31. I recognise that these cases deal with service outside the jurisdiction on individuals not upon a State. In my judgment, however, the approach in these cases reflects the proper approach to determining the scope of section 12 of the Act itself. The Act was not seeking to require a method of service to be adopted if that involved a contravention of the laws of the State in which service is to be effected. But, the fact that the method of service was not permitted (as opposed to being prohibited) and would not have been effective for the purposes of the law of the State where service is effected does not alter the fact that it is the means of service permitted by the Act for the purposes of proceedings in the United Kingdom and is valid for that purpose.

32. Mr de Silva, on behalf of the Embassy, accepts that there is no evidence that the method of service adopted in the present case, whilst not a method of service provided for by the law of Brazil, was prohibited by the law of Brazil.

33. In my judgment, therefore, on a proper construction of section 12 of the Act, service of the claim form by the method of transmitting it via the Foreign and Commonwealth Office to the Ministry of Foreign Affairs in Brasilia was effective for the purposes of the law of England and Wales. It was not a method of service provided for by Brazilian law and would not have been effective service for the purposes of Brazilian law. It was, however, not contrary to Brazilian law.

34. In those circumstances, the third ground of appeal does not require to be determined. It is not necessary to consider whether or not the employment tribunal erred in law or acted perversely or on the basis of no evidence in concluding that the evidence did not establish that the only permissible means of service under Brazilian law was by the grant by the Supreme Court of exequatur.

CONCLUSION

35. In the circumstances, therefore, I conclude, albeit for different reasons, that the employment tribunal was correct in finding that the claim in the present case had been validly served. The appeal is accordingly dismissed.