



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs R Nabil

**Respondent:** Foreign & Commonwealth Office

## JUDGMENT

The Tribunal does not have jurisdiction to consider the claims and they are dismissed.

## REASONS

1 In a claim form presented on 20 January 2018 the Claimant, who had been employed at the British High Commission in Islamabad, complained of unfair dismissal, unauthorised deductions from wages, failure to make a redundancy payment and various types of discrimination under the Equality Act 2010. In its response the Respondent contended that the Tribunal did not have territorial jurisdiction to consider the Claimant's complaints under the Employment Rights Act 1996 and the Equality Act 2010 because the Claimant had at all material times lived and worked in Pakistan. It asked for a preliminary hearing to be listed to determine that issue.

2 I conducted a case management preliminary hearing by telephone on 26 April 2018. The Claimant was in Pakistan. It was very unsatisfactory because we had great difficulty in hearing and understanding what the Claimant was saying. I listed a preliminary hearing to take place on 23 and 24 August 2018 to determine the issue of territorial jurisdiction. I made case management orders in relating to that hearing. In light of our experience on that day, I felt that conducting a hearing of two days by telephone was clearly not a realistic prospect. In any event, I had doubts as to whether rule 46 of the Tribunals Rules of Procedure 2013 would permit us to conduct it by telephone. I made it clear that if the Claimant were not able to attend that hearing, she could either participate in it by video link (provided that the link to be used was tested in advance and found to be satisfactory) or simply rely on written representations.

3 On 17 July 2018, in response to an inquiry from the Tribunal about how she was going to participate in the hearing, the Claimant said that she was going to participate by video link. She did not give any details of the facility that she was going to use and made no contact with the Tribunal to set up tests in advance to see whether it worked. I had serious reservations as to whether the Claimant would be able to make the necessary arrangements to participate in the hearing by video link.

4 On 30 July 2018 I proposed to the parties that, as most of the central facts were unlikely to be in dispute, if the Claimant was not able to attend the hearing, it should proceed by the parties sending in written witness statements and submissions. I advised them that if they wished to make any representations on that proposal, they should do so by 13 August 2018.

5 On 2 August 2018 the Claimant sent to the Tribunal an affidavit from Naveed Khan and a witness statement from herself. That was the date by which the parties were to exchange witness statements for the preliminary hearing.

6 On 3 August the Respondent responded to the Tribunal's letter of 30 July 2018. It agreed to the matter proceeding by the parties submitting written statements and submissions, and suggested a time table for that. The Claimant made no representations on the Tribunal's proposal of 30 July 2018.

7 On 14 August the Tribunal informed the parties that the preliminary hearing would be determined without a hearing and directions were given for the parties to send their written witness statements and submissions to the Tribunal.

8 On 17 August the Respondent sent the Tribunal and the Claimant the witness statements of Christine Oram and Giles Whittaker. The Claimant had been advised that if she wished to submit a statement in response, she should do so by 3 September. She did not submit a further statement. Both parties subsequently sent their written submissions to the Tribunal and to each other. The Respondent also sent the Tribunal a bundle of documents which had previously been sent to the Claimant. Having considered all the oral and documentary evidence, I made the following findings of fact.

### **Findings of Fact**

9 The Claimant is a Pakistani national who lived and worked in Pakistan.

10 Between 2000 and October 2015 the Claimant worked in various different roles under different contracts at the British High Commission in Islamabad.

11 The employees who work in British missions overseas (which includes an Embassy and a High Commission) have different contracts depending on whether they are UK based staff or Locally Engaged staff (also referred to as Local Staff).

12 UK based staff are recruited by HM Government in the UK and posted to the British mission overseas. They are civil servants and entitled to a civil service pension. They pay UK tax, which is deducted at source from their pay, and their salary is paid in pounds sterling into their UK bank accounts. Their terms and conditions include provision of residential housing, schooling for children, utilities and

allowances which compensate for additional expenditure and hardship, and travel back to the UK on a regular basis.

13 Locally engaged staff are recruited in the country in which they work. Their terms and conditions conform to the local practice and law. They are not civil servants and are not entitled to a civil service pension. Their salary is paid in local currency into their local bank accounts. They pay local income tax. They are not entitled to the same allowances or benefits as the UK based staff. Their holiday and redundancy pay entitlements are different from those of the UK based staff.

14 In all her roles in the British High Commission in Islamabad the Claimant was employed under the terms and conditions of Locally Engaged staff. She was recruited in Pakistan through recruitment procedures for Locally Engaged staff and worked for the Respondent wholly in Pakistan.

15 On 16 November 2015 the Claimant commenced employment as an Accommodation and Furnishing Officer in the Estates-Corporate Services section the High Commission in Islamabad. Her salary was stated in Pakistani rupees. The Terms and Conditions of Service for Local Staff ("LS") applied to her. These included the following terms –

*"In the event of any question arising out of or in connection with the interpretation of these Terms and Conditions or any other relevant matter not covered hereunder, the decision of the High Commissioner will be final."*

*"All LS staff must have a Pakistani bank account. For new entrants that do not have a local bank account, one should be organised within the probation period. Accounts Section should be given details of the bank account as soon as possible, to enable salary payments to be made."*

*"LS normally resident in Pakistan are legally liable for the payment of Pakistan income tax. The onus of adhering to Pakistan law in this respect rests with individual members of LS. Corporate Services will provide members of LS individually with details of annual earnings. If requested, the BHC [British High Commission] will provide details of their local employees to the Pakistan Income Tax authorities."*

*"All LS will be eligible for an initial twenty-two days leave per year. After three years continuous service, this entitlement will increase to twenty-five days and after five years continuous service to thirty days."*

*"Upon successful completion of the probationary period and subject to the expected term at BHC not being less than one year, LS will automatically become a member of the [Staff Provident] Fund (i.e. LS cannot opt out). Therefore, 10% of the basic salary (as defined in the Provident Fund rules) will be deducted from the salary of every member of the LS who is a member of the Fund and credited to such member's provident Fund account with the bank. The BHC will also contribute an equivalent amount of money for every member of the LS who is a member of the Fund to the relevant member's Provident Fund account. On leaving employment with BHC, the leaving member of LS will receive a lump sum in his/her personal account plus his/her share of appropriate accrued interest on the investment of the Fund's assets."*

*“It may be necessary for the BHC to make redundancies. In such circumstances, LS will be entitled to 1 month’s notice or 1 month’s pay in lieu of notice in addition to 2 months’ redundancy pay as well as the normal terminal benefits.”*

*“The appointment does not carry any entitlement to pension.*

*A gratuity is payable upon leaving the BHC after a qualifying period of 1 year of continuous service up to 31 March 2014...*

*One month’s salary will be paid for each completed year of service up to a maximum of twenty months...”*

16 The Claimant’s role was based in Pakistan and her duties were carried out exclusively in Pakistan, with no expectation or requirement for any duties in the UK (for which a UK visa would have been necessary). Her responsibilities and duties in her role were to carry out inspections of residential properties before staff departed and when new staff arrived, to assess properties and identify repairs or replacements required for furnishings and to take forward required works with suppliers and contractors, to oversee the running of the House hotels, to plan and arrange furnishings upgrades and submit estimates to the Head of A & F for inclusion in budget bids and to line manage four House Hotel staff. The Claimant was not required to report back to the UK or take instructions from the Respondent’s offices in the UK. The only time that she may have had contact with the UK was for occasional procurement purposes but that was not a major part of her role. The Claimant’s line management was based in Pakistan and her line manager was also an LE member of staff.

17 On the termination of her employment the Claimant was paid a gratuity (based on service from 8 March 2004) and a sum out of the Provident Fund in accordance with the terms and conditions of service for Local Staff. UK based staff were not entitled to those payments.

### **The Law**

18 The Employment Rights Act 1996 (“ERA 1996”) and the Equality Act 2010 (“EA 2010”) do not contain any express provision about the territorial reach of the rights and obligations which they enact. The principles to be derived from the reported cases on the territorial scope of those two Acts are as follows.

19 The general principle of construction is that legislation is prima facie territorial, and the scope of the provisions of ERA 1996 and EA 2010 must have implied territorial limits. Considering the territorial scope of any legislative provision *“requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?”* (**Lawson v Serco Ltd [2006] ICR 250, at paragraph 6**).

20 What Parliament must have intended as the standard, normal or paradigm case of the application of section 94(1) of ERA 1996 was the employee who was working in Great Britain – **Lawson v Serco Ltd (paragraph 25)**.

21 Exceptionally section 94(1) can apply to an employee who works outside Great Britain – **Lawson v Serco Ltd (paragraph 36)**. The test as to whether it applies in

such a case is whether the connection between the employment relationship and Great Britain and British law is sufficiently strong, i.e. stronger than with any other system of law, to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain – **Ravat v Halliburton Manufacturing and Services Ltd [2012] ICR389, Ministry of Defence v Wallis [2011] ICR 617, Duncombe v Secretary of State for Children, schools and Families (No 2) [2011] ICR 1312.**

22 Where an employee works wholly abroad Parliament can be assumed to have intended that in the usual case that jurisdiction, rather than Great Britain, should provide the appropriate system of law. *“In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force.”* - per Elias LJ in **Bates van Winkelhof v Clyde & Co LLP [2013] ICR 883.**

23 The fact that the employee is British, was recruited in Britain and works for an employer based in Great Britain is not in itself sufficient to bring the employee within the scope of section 94(1). Something more is necessary – **Lawson v Serco Ltd paragraph 37.**

24 The same principles apply to discrimination claims. The suggestion that Part 5 of the Equality Act 2010 (outlawing discrimination in employment) should be regarded as having a wider territorial reach than legislation outlawing the unfair dismissal of an employee was rejected by the Court of Appeal in **R (Hottak and another) v Secretary of State for Foreign and Commonwealth Affairs [2016] ICR 975.** Sir Colin Rimer stated, at paragraph 47,

*“the most recent word from the Supreme Court on the topic is that it is a matter of ‘fact and degree’ as to whether an overseas employment will have a sufficient connection with Great Britain to entitle the employee to the benefit of section 94(1) of the 1996 Act. To impute to Parliament an intention to engraft on to that test an unidentified qualification to the effect that a more generous standard is to be applied when the relevant inquiry is the availability of discrimination provisions in Part 5 of the 2010 Act is a course I would regard as artificial, unjustified and unwise. I would decline to do it.”*

25 In **Bryant v Home Office (EAT/174/02)** the claimant, who was a British national, worked at the British embassy in Rome. The Tribunal found that she was engaged and employed at all times outside the UK; her post did not involve reporting back to or taking instructions from the FCO’s offices in the UK; her duties were carried out entirely in Italy; she was paid at local rates, and employed on local terms and conditions; her employment was subject to Italian law. The Tribunal’s decision that it did not have jurisdiction to determine in her claim was upheld by the Employment Appeal Tribunal. Lord Hoffman stated in **Lawson v Serco** that that case was rightly decided.

26 Article 8(2) of the Rome Regulation (No.593/2008) provides that where the law applicable to the individual contract has not been chosen by the parties, the contract should be governed by the law of the country in which the employee habitually carries out his work in performance of the contract. Article 8(4) provides that where it

appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in Article 8(2) the law of that other country shall apply.

**Conclusions**

27 In the present case it is not in dispute that the Claimant worked wholly outside the UK. The question then is whether the connection between her employment relationship and Great Britain and British law is sufficiently strong, i.e. stronger than with Pakistan and Pakistani law, to enable it to be said that it would be appropriate for her to have claims under the Employment Rights Act 1996 and the Equality Act 2010 in Britain.

28 The Claimant is a Pakistani national who lived and worked in Pakistan. She was recruited in Pakistan through recruitment procedures for Locally Engaged staff. She was employed under the terms and conditions of Locally Engaged staff. Those terms and conditions conform to local practice and law. Her salary was paid in Pakistan rupees into a Pakistani bank account. She paid income tax in Pakistan. She was not required to report back to or take instruction from the Respondent's staff in the UK. In the absence of the parties agreeing which country's law applied her contract, her contract was governed by the law of Pakistan. The only connection that her employment has with Great Britain is that her employer is the British government. That in itself does not even begin to displace the territorial pull of her place of work and all the other factors listed in this paragraph. All the evidence indicates that there was a far stronger connection between the Claimant's employment and Pakistan.

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Employment Judge Grewal

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Date 5 February 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

5 February 2019

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FOR THE TRIBUNAL OFFICE