**Case Number: 2302919/2018**

# THE EMPLOYMENT TRIBUNAL

**BETWEEN**

| **Claimant** | **and** | **Respondent** |
|---|---|---|
| **Mr Simon Brown** | | **VSO International** |

**Held at London South on** **7 and 8 October 2019**

**BEFORE:** **Employment Judge Siddall (Sitting Alone)**

**Representation**

**For the Claimant:** **Mr N Clarke of Counsel**

**For the Respondent:** **Mr H Davies of Counsel**

## RESERVED JUDGMENT ON PRELIMINARY HEARING

The decision of the tribunal is that there is no jurisdiction to consider the claims of unfair dismissal and disability discrimination. Accordingly they are dismissed.

## REASONS

1. The Claimant claims unfair dismissal and disability discrimination. This preliminary hearing had been fixed to determine whether the tribunal had jurisdiction to consider the claims as the Claimant worked abroad throughout his period of employment with VSO. I heard evidence from the Claimant

himself and from Ms Kathryn Gordon, Executive Director, Global Leader People and Organisation Development on behalf of the Respondent.

2. An agreed bundle contained various contracts of employment, policies, emails and other exchanges of correspondence between the Claimant and the Respondent. The parties had also prepared a statement of Agreed Facts, together with a List of Personnel and a Chronology, all of which were of assistance. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.
3. The Respondent is registered as a private company limited by guarantee and is a registered charity. It has a registered office in London and operates in 24 developing countries.
4. The objects of the Respondent as set out in the Memorandum of Association are: to advance education and to aid in the relief of poverty in any part of the world; to promote the effective use of resources for these purposes; and to promote the voluntary sector. For those purposes it has the objective 'to send volunteers to other countries to share and develop their skills and understanding and to share their experience with others on their return'.
5. It was the evidence of Ms Gordon, which I accept, that the Respondent runs programmes in twenty-four countries which have the aim of empowering, assisting and supporting local people to improve and bring about lasting and sustainable change to education, healthcare and food production capabilities (paragraph 4.2 of her witness statement). The Respondent recruits volunteers from around twenty different countries to travel overseas to work alongside local volunteers on projects that are working towards these aims. I accept that the work of the Respondent benefits not only the people in developing countries who are supported by these projects, but also brings great benefits to the volunteers who work on them and who then (as the objectives above state) return to their home countries to share the skills and experience they have gained.
6. The Claimant is a British citizen. Prior to the termination of his employment with the Respondent, he had not lived in the UK since 1993. He owned a property here until 2003. At the time of his first engagement with VSO in 2007 he was living in France where he ran a guest house.

7. The Claimant worked as a volunteer for the Respondent in Nepal from 21 February 2007 to 17 July 2009. He was interviewed in the UK and received training in Birmingham before his departure. After his time in Nepal the Claimant spent some time living in Barcelona where his wife had a property.
8. In March 2010 the Claimant commenced a role of Assistant Country Director in China. He was issued with a statement of particulars of employment for international staff. His address is recorded as being in Spain. His normal place of work was 'the China programme office in Beijing'. Paragraph 3.2 records that he could be required to travel within China or internationally.
9. Salary was described in Sterling. A ten per cent deduction would be made to fund accommodation in the host country. National insurance would be paid for 52 weeks after which the member of staff could elect to pay voluntary Class 2 contributions. The Claimant did so elect, and the Respondent paid his national insurance contributions over and above the sums paid to him by way of salary.
10. Paragraph 34.1 of the statement says that 'this agreement shall be governed by and construed in accordance with the law of England and Wales'. Paragraph 34.2 states: 'each party irrevocably agrees to submit to the exclusive jurisdiction of the courts of England and Wales over any claim or matter arising under or in connection with this agreement'. It is the Respondent's case that in 2014 they changed their policy and started issuing contracts governed by the law of the country where the member of staff was based. Despite this, I have noted that a UK contract was issued to the Claimant in October 2016, which I refer to below.
11. The Claimant carried out a number of roles based in China and was ultimately appointed as Regional Director (Interim) for Asia Pacific. He remained based in China for the most part until 1 June 2014 (although worked for a few months in Thailand). He was based primarily in India from 2 June 2014 to 1 October 2014.
12. The Claimant was appointed as interim country director for Bangladesh in April 2015 and took up the role on a permanent basis from 1 August 2015 until his dismissal on 23 July 2018. During the course of this appointment he also acted as interim country director for Papua New Guinea for around six months in

2017. During his evidence he stated that he also held a role as global sponsor of agricultural based value chains.

13. There is a job description for the role of Country Director, VSO Bangladesh which states that the purpose of the role is: 'to lead the strategic development and implementation of all of VSO's work in Bangladesh, effectively managing country office employees, volunteers, partnerships, programmes, funding, finances, brand and risk in order to maximise VSO's impact on reducing poverty in Bangladesh' (page 537). I have noted from the correspondence relating to the Claimant's health and the eventual termination of his employment that the respondent considered it important that he engaged with local partners and that it may be necessary for him to travel to remote and rural areas to enable him to do so (although this was disputed by the Claimant).

14. There is a second statement of particulars of employment dated 3 October 2016 which relates to the appointment of the Claimant as country director for Bangladesh. This contract is similar in form to that issued for the first of his China roles. His address is stated to be in Dhaka. His place of work is the VSO office Bangladesh. Paragraph 3.2 states that 'you will be required to undertake travel within the portfolio of countries for which you are responsible and internationally for the proper performance of your duties or to undertake briefings or training'. Clause 3.4 states that he agreed to be 'internationally mobile'. Salary was again described in sterling.

15. A new clause 5.4 states that 'as part of VSO's approach to tax management, you authorise VSO to deduct hypothetical tax from your gross salary at a flat rate of 20% in accordance with VSO's tax equalisation policy. VSO will be responsible for settling any actual income tax due on your employment income whilst you are on assignment'. It was Ms Gordon's evidence which I accept that the rate of deduction was not set in relation to UK income tax rates but after considering the various rates of tax that would apply globally. The purpose of this deduction was to ensure that different groups of employees were not treated differently as a result of their tax status or the different rates that applied in different countries. She refers me to the Tax Equalisation Policy at page 96 of the bundle which she says applied to international staff such as the Claimant. One of the objectives of the policy is to ensure that 'all employees on

international assignments are treated fairly and consistently with regard to income tax (ie irrespective of the host country tax rates, all employees will pay the same flat rate of tax)'. VSO satisfied any local income tax liability that had to be met out of the sum deducted. The Claimant was at all times exempt from paying UK income tax. In Bangladesh, local tax was paid on his behalf by the Respondent.

16. This second contract contains (at paragraph 20) the same 'governing law' clause as that found in the contract issued in January 2010.
17. It seems that these are the only two sets of terms of employment that can be traced. As the Claimant's role changed, it appears that he was often issued with a letter confirming the change as opposed to a new set of terms and conditions.
18. It is the evidence of the Claimant which I accept that over the course of his employment with the Respondent he did have to visit the UK on a number of occasions, mainly to attend meetings or conferences. He would sometimes combine these visits with periods of leave to visit his family who still lived in the UK. Mr Clarke's skeleton argument provided examples of visits that the Claimant made to the UK in 2010 and 2013. In 2018 he made one trip to the UK with the primary purpose of attending his niece's wedding. Overall I find that these periods of work in the UK amounted to no more than a few weeks in any particular year. The Claimant was also required to attend meetings in other countries from time to time.
19. After suffering a heart attack in December 2017 the Claimant received specialist medical care in China. In an email dated 29 March 2018 he states that he was claiming for the cost of a flight 'home to China at Christmas'. Following his dismissal, the Claimant spent some time in Bangkok and Bangladesh and returned to England in the Spring of 2019.
20. There are a few specific matters relating to the Claimant's employment that the parties have raised, and I deal with them here.

**Pension**

21. There is a reference in both sets of terms to a right to join a Scottish Widows pension scheme. The Claimant says and I accept that he was not offered the opportunity to join this scheme. Ms Gordon's evidence was that VSO's pension

scheme did not 'work' for international staff and so nobody joined it. An email dated 9 February 2016 indicates that the Respondent could not trace any form completed by the Claimant requesting to join the scheme, and so a backdated payment would be made via payroll. Paragraph 10.6.3 of the statement of particulars dated October 2016 states that the Claimant could join the pension scheme if he had worked in the UK at any time and had a national insurance number, and further that staff who were not residing in the UK at the date of their employment with VSO or in the preceding five years would receive an additional allowance of 5% of basic salary in place of pension contributions. It is agreed that the Claimant was never a member of the Scottish Widows scheme.

**Salary**

22. Although the Claimant's salary was always described in Sterling, he had the option of requesting that some or all of this was paid in local currency in the country where he was working (where this was permitted). I was shown examples in the bundle of where such requests had been made. I note that he opted to receive a proportion of his salary paid locally while in China. The Claimant says and I accept that this was not possible in Bangladesh as foreign nationals could not hold domestic bank accounts there.

**Line Management**

23. The Claimant's line manager changed as his role changed. During periods where he held overlapping roles he often reported to two different people. I have noted that between 2010 and 2012 the Claimant reported in turn to three managers based in the UK: SH, MF and MT. He also reported to SW for a period in 2014 when he was regional funding manager for India. While he was carrying out hybrid roles in India and China he reported to SV based in Thailand. However from 2015 onwards and throughout his assignment to Bangladesh the Claimant reported to overseas managers who were mainly based in Thailand.

24. Paragraph 3.6 of the Agreed Facts notes that it is accepted by the parties that since he became a volunteer in Nepal in 2006, the Claimant's medical issues were overseen through the Respondent's UK-based international medical unit.

The Respondent states and I accept that this was a requirement of their global medical insurer.

25. The Claimant also asserts that the decision to terminate his employment was made at Executive Board level in the UK and was heavily influenced by advice from the UK medical unit. I have noted however that the letter dated 8 July 2018 confirming his dismissal is signed by SV, Operations Director Asia-Pacific who was based in Thailand and was the manager who conducted the meetings with the Claimant that preceded this decision. I have not been shown any evidence to suggest that the decision was taken at UK board level although the correspondence shows that various UK managers were part of the discussions and were consulted prior to that decision being taken.
26. HR support seems to have been provided both from a centralised operation in the UK and from local or regional teams.

**Funding**

27. Ms Gordon stated that funding for VSO operations can come from a number of different international sources**.** She described how some projects in some countries are funded, for example, by Deutsche Bank or by the Australian government. In relation to Bangladesh, she agreed that up to ninety per cent of the funding came UK government's Department for International Development via two contracts: International Citizen Service and VSO's Volunteering for Development contract. In both cases, the Respondent had to tender for the work from DfID.
28. **Applicable Law**
29. The Claimant contends that he was always treated by the Respondent as if he was covered by UK law. He refers in particular to an email dated 12 August 2014 from a senior HR manager in the UK, JR, who was advising on whether the Claimant's contract should be treated as fixed term or open-ended. On page 312 of the bundle JR states: 'For employment rights purposes VSO treats expats as if they were subject to UK employment law including the accumulating of the right to redundancy pay and not being unfairly dismissed after 2 years service…of course, having these right also make the employee more secure and hopefully a more productive and committed worker'.

30. The Claimant refers to the correspondence leading up to the termination of his employment and asserts that this sets out the process that would be expected under UK law, with references to 'consultation' and other matters. He refers to emails in which he made reference to the Equality Act in June and July 2018. He also points to an email he wrote on 9 July 2018 requesting 'the statutory reason for dismissal under the Employment Rights Act 1996'. A reply at page 445 of the bundle states that the principal reason for dismissal related to his health.
31. I have noted the Respondent's Global Sickness Policy and Global Equal Opportunities and Diversity policy. In each case the policies emphasise their global nature in the introduction and state that they reflect VSO best practice. The Equal Opportunities policy states, for example: 'this is a global policy following VSO best practice and may vary in different countries in line with local legislation…all countries need to ensure that local legislation and minimum standards are followed'.
32. **Headed notepaper**
33. The Claimant pointed to many examples where managers based outside the UK wrote to him using the headed template for the UK address of the Respondent. The Respondent asserts that this was either an error or was laziness on part of the staff concerned.
34. **The Law**
35. Whereas the right to claim unfair dismissal for example was previously confined to employees who ordinarily worked in Great Britain, section 94(1) of the Employment Rights Act contains no geographical limitation.
36. Both parties agree that the Claimant meets the definition of an expatriate employee as defined in case law. They also agree that there would have to be especially strong factors 'to overcome the territorial pull of his place of work' (as Mr Clarke put it) to establish employment protection under the Employment Righs Act and the Equality Act. The situation must considered as at the date of the dismissal of the Claimant, at which point he was working in Bangladesh.
37. The extent of UK employment protection was considered in the leading case of *Lawson v Serco Limited [2006] UKHL 3.* At paragraph 35 Lord Hoffman deals with expatriate staff. At paragraph 36 he says: 'the circumstances would have

to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. But I think there are some who do'. He goes on to say that it would not be enough to be working for an employer based in Great Britain, even if recruited there: 'something more is necessary'.

38. Lord Hoffman went on to give two possible examples: an employee posted abroad for the purposes of a business carried on in Great Britain, for example the foreign correspondent of a British newspaper; or an employee operating in an 'extra-territorial enclave in a foreign country'.
39. In *Duncombe v Secretary of State for Children School and Famillies [2011] UKSC 36* the fact that the employees were employed by the UK government to teach in schools in Europe was a sufficiently strong factor to allow them to bring claims in the UK employment tribunal.
40. The Claimant places particular reliance on the recent case of *Jeffery v British Council [2018] IRLR 123.* Mr Jeffery, like the Claimant, had almost always worked abroad and was working for the British Council at a teaching centre in Bangladesh.
41. The Employment Appeal Tribunal decided that Mr Jeffery could bring his claim in the UK tribunals. The particular combination of circumstances that led to this conclusion were that:
    a. He was a UK citizen recruited to work for a UK organisation;
    b. The contract of employment provided for English law to apply;
    c. He was entitled to a civil service pension;
    d. His salary was subject to a notional deduction for UK income tax maintain compatability with those working in the UK;
    e. The British Council, whilst not directly part of government, was 'recognised as playing such a part in the life of the nation that it was right to afford a civil service pension to its employees'.
42. The Court of Appeal upheld this decision. It held that the existence of a choice of English law clause is a relevant factor but was not necessarily decisive. 'It was necessary to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other'. The court found that the EAT had been right to place weight upon the five factors identified above.

43. I turn to the question of the Claimant's connection with the UK. It is his position that for all intents and purposes, he was employed by a UK organisation under a contract governed by the laws of England and Wales. He contends that all decisions concerning his employment were effectively taken in the UK, that the respondent acted on the basis that he was covered by UK laws and that he is therefore entitled to UK employment protection.

44. I take into account that the Claimant was employed by a charity registered in the UK and under a contract that was governed by British law. Ms Gordon seeks to argue, at paragraph 3.8 of her witness statement, that this was something of an anachronism. She agrees that up until 2014 international staff such as the Claimant were employed under terms and conditions that met the requirements of section 1 of the ERA 1996 because the respondent considered this to be a requirement. However she asserts that since 2014 the Respondent has been working to a global operating model and that staff are issued with contracts that reflect the law of the country they are working in. I do not consider that affects the Claimant's position. It is relevant that his contract is stated to be governed by the law of England and Wales; and despite Ms Gordon's evidence about a change of policy in 2014, the Respondent chose to issue the Claimant with a UK contract in 2016 when he started working in Bangladesh.

45. I agree that a significant amount of administration was supplied from the UK, where the Respondent had its headquarters. I am referring for example to the involvement of the HR team in the UK in discussing contract changes with the Claimant and issuing letters and amendments to him. It is also clear that the medical team in the UK had a substantial input when the Claimant suffered poor health, and when decisions were being taken about his future employment. The existence of centralised administration services is common to many international organisations. Whilst the Claimant has sought to trace his reporting lines back to the UK, from 2015 onwards his line managers were predominantly based overseas.

46. The Claimant has made reference to the correspondence which refers to the requirements of UK employment law. I remind myself that it is not open to an employer and employee to 'contract in' to UK protection. But in any event, the

policies produced by the Respondent demonstrate that they have moved towards being a truly global organisation. The section of the Equal Opportunities policy sets out how the Respondent seeks to apply 'best practice' but that minimum legal requirements will be followed in each country. This approach is supported by JR's statement in the email dated 12 August 2014 that the Claimant would be treated 'as if' UK employment law applied. I find this wording to be significant.

47. I also accept that the Respondent's tax equalisation policy was introduced to ensure fairness to staff working across the globe in terms of the deductions that were made from their salary, rather than to simply avoid a discrepancy between staff working in the UK and overseas. The notional deduction of 20% was not set with reference to UK tax rates but after looking at the picture globally.
48. I note that the Claimant was not a member of a UK pension scheme but that he received an allowance by way of compensation for loss of this benefit.
49. There is not a great deal of information in the witness statements about the nature of the Claimant's duties overseas, but I have considered the job description referred to. I have also considered the discussions between the Claimant and the Respondent about the role of country director which led up to the termination of his employment.
50. The primary purpose of the Claimant's role in Bangladesh was to manage and develop the in-country programmes that the Respondent was running there. The purpose of these programmes, as set out in the Respondent's charitable objectives, is to relieve poverty and provide support and assistance to local people. Many of these projects are supported by volunteers. I have to agree with the Claimant that volunteering must provide real benefits not only to those volunteers themselves but to the communities to which they will return. The Claimant of course had not been a volunteer since 2009 and had been working overseas for the Respondent since that date.

**Application of the law on jurisdiction to the Claimant**

51. I sum up the Claimant's connections to the UK as follows. He is a UK citizen although he had not lived here for many years and was non-resident for tax purposes. He was employed by a UK charity which provided a number of centralised services out of the UK. He worked under UK terms and conditions,

although these were adjusted to reflect his overseas status. He was not a member of a UK pension scheme. Throughout his career with the Respondent he always worked abroad, usually in senior roles where he was managing the Respondent's programmes within a number of developing countries. With some exceptions he reported to line managers overseas. He had to visit the UK occasionally for meetings. Over the course of his employment it is likely that he spent a few weeks here.

52. I go on to consider the Claimant's connections to Bangladesh, where he was working at the time of his dismissal. The Claimant was (prior to becoming unwell) the Respondent's most senior manager in the country. He reported to a manager in Thailand. He worked in Bangladesh full time and had the lead role in overseeing the projects that the Respondent was running for the benefit of local people. He was provided with accommodation. Local taxes were paid on his behalf. I was not provided with any evidence about the scope of employment protection in Bangladesh, but Mr Davies points out to me that the quality of any such protection is not a matter for me to consider.
53. Are there especially strong factors in this case that lead to a conclusion that the Claimant, an expatriate employee, should be entitled to UK employment law protection?
54. I have considered whether the Claimant falls within the exception outlined by Lord Hoffman in *Lawson v Serco* of a person appointed abroad for the purposes of a UK business. That is not the situation here. The Claimant was appointed to overseas roles to manage and promote the activities being carried out in each country. The aim of these projects is clearly to benefit the populations of those countries and to alleviate poverty there, rather than to benefit the operations of the Respondent in the UK (as one might expect of a charity engaged in global development).
55. Are there other strong factors in this particular case which would satisfy the test set out in *Lawson v Serco?*
56. The Claimant places particular weight upon the *Jeffery* case. I have to agree that there are some similarities with the Claimant's situation. Both were employed by a UK non-profit organisation under a UK contract, and as it happens both were working in Bangladesh.

57. However the other 'special' factors that applied in the *Jeffery* case do not apply here.
58. In *Jeffery* the British Council was described as a 'non departmental public body' which served as 'the UK's international organisation for cultural relations and educational opportunities'. The court of appeal found that 'this aligned the nature of the work with British public service'.
59. The Respondent is a well-established British charity doing extensive work overseas and involving large numbers of volunteers both from the UK and from other countries. I have taken note of the fact that it receives funding from the Department for International Development. However it is an autonomous organisation registered as a corporation and as a charity. It has had to tender for projects funded by DfID, a factor which emphasises that it deals with government on an 'arm's length' basis. It could not be described as a public body even if (like many charities working overseas) it receives public funding.
60. The EAT took the view that it was highly relevant that British council employees were entitled to a civil service pension. That is not the case here. The Claimant is not a member of any UK pension scheme offered by the Respondent.
61. The British Council's tax equalisation policy was also relevant to the decision in *Jeffery* but I find that it operates rather differently in the case of Respondent. The policy was not introduced solely to mitigate any unfairness to UK-based employees but to produce a 'level playing field' for staff across the globe in light of the differing tax regimes that applied in different countries.
62. I conclude that the Claimant's situation is not quite comparable to the situation of Mr Jeffery. Nevertheless are there sufficiently strong connections to the UK in his situation that should lead to him having employment protection?
63. I have noted that the Court of Appeal considered a second appeal at the same time as it was considering the *Jeffery* case: *Green v SIG Trading Limited.* Mr Green was a UK citizen who had been living in Lebanon. He had been recruited in the UK, but was appointed as managing director in Saudi Arabia. Like the Claimant, he had UK terms and conditions. He was non-resident for UK tax purposes. He was paid in sterling and had a UK line manager, and IT,

HR and payroll support was provided by the UK. The court found that Mr Green was not entitled to UK employment protection.

64. I have to say that in reading the Court of Appeal judgment as a whole, it seems to be that the case of the Claimant is closer to that of Mr Green than to Mr Jeffery, but nevertheless remind myself that it important to carry out the evaluative exercise as to the competing connections between the UK and the actual place of work before reaching a decision.

65. Mr Clarke submits that in reality there is little to connect the Claimant to Bangladesh. He suggests that the picture painted is of an employee working for a truly global organisation, as demonstrated by the fact that latterly his line managers were based in places like Thailand or South Africa. In light of the global nature of the Respondent's organisation, the Claimant had a closer connection to the UK than to anywhere else, and should be granted employment protection here.

66. I have some sympathy with that argument but remind myself that at the time of his dismissal the Claimant had been living and working in Bangladesh, with responsibility for all the projects there, for around three years, and there is very little evidence of visits to the UK throughout that period. The extent of employment protection in other jurisdictions is not a matter for me, and I heard no evidence on this point. I return to the principles set out by Lord Hoffman in *Lawson v Serco:* it is unusual for an employee who works and is based abroad to come within the scope of British labour legislation. There will be some who do, but it is not enough simply to be working for an employer based in the UK. It is only if there are very strong factors linking to the UK that an employee working overseas can bring claims to the employment tribunal. While there are a number of factors here pointing to a connection with the UK, such as the terms of employment and the provision of centralised support, I do not find that any of these are sufficiently strong to overcome the basic principle of jurisdiction set out in *Lawson v Serco.* The Respondent is not a public body. The Claimant was not resident in the UK and did not pay income tax. He lived and worked overseas, on overseas projects, and made short business trips to the UK. He was subject to local taxes. He may have had a reasonable amount of contact with UK managers and support services such as HR and the medical

unit, but that would be a feature of many international organisations and does not in my view establish a sufficiently strong connection. The Claimant also had extensive contact with line management and support services in places such as Thailand and India.

67. I conclude that the tribunal does not have jurisdiction to consider the claims of unfair dismissal and disability discrimination, and that they cannot proceed.

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Employment Judge Siddall
Dated: 16 October 2019