Appeal No. UKEAT/0123/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 24 January 2020

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

MS H HAMAM — APPELLANT

1) BRITISH EMBASSY IN CAIRO
2) FOREIGN AND COMMONWEALTH OFFICE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS HALA HAMAM (The Appellant in Person)
For the Respondent	MS CATHERINE CALLAGHAN (One of Her Majesty's Counsel)) INSTRUCTED BY: Government Legal Department Employment Group E3 102 Petty France Westminster London SW1H 9LG

SUMMARY

JURISDICTIONAL / TIME POINTS

The Employment Tribunal was right to find that it did not have jurisdiction over claims for unfair dismissal, racial discrimination, victimisation and detriment resulting from a protected disclosure brought by an Egyptian national who had been employed as a Vice Consul in the British Embassy in Cairo. She contended that the ET had jurisdiction because she worked in a "British enclave", but that label was not determinative of, and indeed was not relevant to, the "sufficient connection question" (as it was termed by Underhill LJ in **Jeffery v British Council** [2019] ICR 929). The ET's decision was neither perverse nor irrational and it correctly applied the law as stated by Baroness Hale in **Duncombe v Secretary of State for Children, Schools and Families** [2011] ICR 1312:

> **"The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law."**

THE HONOURABLE MR JUSTICE LAVENDER

1. The Claimant is an Egyptian national who was employed between 2008 and 2012 as a Visa Section Office Manager and between 2012 and 2017 as Vice Consul at the British Embassy in Cairo. Following her dismissal, she issued an ET1 claim form asserting claims for unlawful dismissal, racial discrimination, victimisation and detriment resulting from a protected disclosure. The question whether the Employment Tribunal ("ET") had jurisdiction to hear these claims was dealt with as a preliminary issue.

2. The issue on this appeal is whether the Employment Judge ("EJ") erred in law in concluding that the ET did not have jurisdiction over the Claimant's claims because her employment was not sufficiently closely connected to the United Kingdom. The EJ's Reasons for reaching that conclusion were set out in a 29-page Judgment which is dated 8 December 2018, and which was sent to the parties on 13 December 2018.

3. That Judgment followed a two-day Preliminary Hearing on 7 and 8 June 2018 at which the Claimant represented herself but, for medical reasons, did not give oral evidence, while the Respondent was represented by counsel, who called two witnesses, William Neil, the Consular Regional Operations Manager, and Allison Marriot, the Respondents' Head of Corporate Services in Cairo.

4. The Claimant represented herself at the Hearing before me. I bear in mind that she is not a lawyer, but it is also right to note that she demonstrated that she was both extremely articulate and very familiar with of the all the issues, evidence, documents and authorities in this case.

5. At pages 4 to 12 of the Judgment the EJ reviewed the 17 authorities to which she had been referred. At pages 12 to 19 she set out the evidence which she had heard. Her findings of fact are set out at pages 19 to 24. Then at paragraph 94, on pages 24 to 27, she set out her conclusions on the 19 factors which she considered to be relevant to the determination which she had to make, contrasting in many cases the Claimant's position with that of a diplomat from the United Kingdom such as Ms Marriot.

6. These factors were as follows:

> **(a) Recruitment. The Claimant was recruited in Egypt and the recruitment process was run from Cairo.**
>
> **(b) Place of work. The Claimant worked predominantly and permanently in Cairo. She also worked on one or more occasions for a week in Dubai.**
>
> **(c) The location of her home. This was in Egypt.**
>
> **(d) Where her line management and HR support services were situated. Her line manager was based in Cairo, although he travelled regularly to the other countries which he managed. He was supported by HR hubs and/or the Arabic-speaking service supplied by corporate services. The Claimant was not managed from London, although she received occasional instructions or requests from different departments based in London.**
>
> **(e) Her pay. She was paid in Egyptian pounds or to avoid the financial hardship caused by the devaluation of the Egyptian currency, US dollars, in each case paid into her Egyptian bank account.**
>
> **(f) The benefits for which she was eligible. In particular, she was not entitled to join the civil service pension scheme.**
>
> **(g) Her eligibility to join a union. She could and did join the local staff association, but she was not entitled to join the UK civil service union.**
>
> **(h) Any mobility clause. She had none.**
>
> **(i) The governing law of her contract. This is by implication Egyptian law.**
>
> **(j) Taxation. The Claimant paid Egyptian taxes and no UK taxes or national insurance.**
>
> **(k) Security status. The Claimant was vetted to the same standard as all local staff. She did not have access to all areas in the embassy. She did not sign the Official Secrets Act.**
>
> **(l) Training given. The Claimant attended more than one course in the UK. She also attended consulate conferences in other Middle East countries.**
>
> **(m) The redundancy payment and process followed. This was in accordance with local law and paid in Egyptian pounds by wire transfer into the Claimant's Egyptian bank account, financed from the Middle East and North Africa budget. The decision to make the Claimant redundant was made by Mr Neil and Mr Smith, the Consular Regional Operations Manager for the Levant and approved by the Consular Regional Director in Muscat. Advice was taken from the HR hub in Abu Dhabi.**
>
> **(n) Disciplinary and grievance issues. Any such issues would normally be expected to be dealt with locally rather than from London.**
>
> **(o) Holiday entitlement. The Claimant received time off to recognise Egyptian public holidays as well as those in the UK and after five years was entitled to pilgrimage leave.**

> **Leave allocation did not appear to be consistent with the UK, i.e., the Working Time Regulations and the prohibition of age discrimination.**
>
> **(p) Whether the Claimant worked within what might properly be described as a British enclave. …** [I will come back to this factor.]
>
> **(q) The application of local law. The Claimant invoked Egyptian labour law when a probation period was proposed. The Respondents' Charter of Principles for Local Staff specifically referred to local law and the practice of other good employers. The Claimant's redundancy payment was calculated in line with Egyptian law.**
>
> **(r) Where the Claimant lodged her whistleblowing complaint. She addressed this complaint to London and chased London for a response. She was not redirected nor was it suggested that she should have raised the matter locally.**
>
> **(s) The Claimant's nationality. She is, as I have said, Egyptian.**

7. Finally, in paragraph 95, on pages 27 to 29, the EJ compared the facts of the present case with each of 14 authorities and reached various conclusions as part of the reasoning which led to her Decision.

8. The Claimant advanced several grounds of appeal, but only two were allowed to proceed to a Full Hearing. As reformulated, these are as follows:

> **1) The ET erred in law when determining whether it had jurisdiction and that it failed to apply or properly apply the test or principles set out in Lawson v Serco [2006] UKHL 3 and Ravat v Halliburton Manufacturing and Services Limited [2012] UKSC 1 and consider or properly and fully consider;**
>
> **1.1) Whether the British Embassy in Cairo amounted for practical purposes to or was an extra territorial British enclave and/or a political or social British enclave abroad;**
>
> **1.1.1) Taking account of the nature and functionality of the British Embassy in Cairo, in particular against and in the light of the articles and provisions of the Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963 ("the Conventions") and its inviolate status and;**
>
> **1.1.2) My role is limited in its consideration to the evidence and analysis that British workers do not live on the embassy grounds and the British flag flies over it;**
>
> **1.2) Whether the Claimant was an employee of a British employer operating within what was in effect an extra territorial enclave in a foreign country considering;**
>
> **1.2.1) The nature, role and functions of the embassy, in particular against and in light of the articles and provisions of the Conventions;**
>
> **1.2.2) The nature, role and functions of the Claimant's in her work for the Respondents, in particular against and in light of the articles and provisions of the Conventions;**
>
> **1.2.3) The connection of the Claimant's employment relationship with Great British and British employment law after and in light of the determination on whether the embassy was a British enclave and/or having made that determination in light of the state and diplomatic immunity that the Respondents have in respect of any claim brought by the Claimant against them in Egypt in respect of the matters which are the subject of this claim;**
>
> **1.3) The connection of the Claimant's employment relationship with Great Britain and British employment law in light of the matters set out in paragraphs 1.2.1 to 1.2.3 above.**
>
> **Ground 2 of the ET's Decisions that the embassy was not a British enclave and/or that the connection of the Claimant's employment relationship with Great Britain and British**

employment law was not stronger than it was with any other system of law were not supported by the evidence and/or were irrational and perverse.

9. In her skeleton argument for this Hearing, the Claimant included a number of matters which in substance constituted an attempt to reargue grounds of appeal which she had not been permitted to take forward to a Full Hearing. I indicated during the course of the Hearing that in my judgment those aspects of the skeleton argument did not relate to the two grounds of appeal which I have set out and consequently were irrelevant to this appeal.

10. Before addressing the grounds of appeal, it is appropriate to say something about the relevant law. I do not propose to go through all of the authorities which were cited to me, but will begin by focusing on those which address the issue of what constitutes a "British enclave" and the significance of that concept. Many of the cited cases focus on other relevant factors, which were not at issue in the present case, or on the application of the underlying principles to different factual situations.

11. The claims brought by the Claimant all arise under statute, i.e. Sections 47(b)(1) and 94(1) of the **Employment Rights Act 1996** ("the ERA") and Section 49(2) and (3) of the **Equality Act 2010**. In paragraph 2 of his judgment in **Jeffery v British Council** [2019] ICR 929, Underhill LJ, after referring to many of the cases which were cited before me, very helpfully summarised the position as established by the case law in seven sub-paragraphs, as follows:

> **"(1) As originally enacted, section 196 of** the Employment Rights Act 1996 **contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then the Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94 (1) of the Act); nor is there any such provision in the Equality Act 2010.**
>
> **(2) The House of Lords held in *Lawson* that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the Act in the cases where an employee works overseas.**
>
> **(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker – that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer – will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case-law as "the territorial pull of the place of work". (This does not apply to peripatetic workers, to**

> **whom it can be inferred that Parliament intended the Act to apply if they are based in Great Britain.)**
>
> **(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law,1 which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".**
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> **(5) In *Lawson* Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a "British enclave" abroad. But the decisions of the Supreme Court in *Duncombe* and *Ravat* made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is 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.**
>
> **(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what *Ravat* was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/EU-funded international schools considered in *Duncombe*.**
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> **(7) The same principles have been held by this Court to apply to the territorial reach of the 2010 Act: see R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWCA Civ 438, [2016] ICR 975."**

12. Lord Hoffmann's second example is the one which is most relevant for present purposes. He said as follows in paragraph 39 of his speech in **Lawson v Serco** [2006] ICR 250:

> **"Another example is an expatriate employee of a British employer who is operating within what amounts for practical purposes to an extraterritorial British enclave in a foreign country. This was the position of Mr Botham working in a military base in Germany. And I think, although the case is not quite so strong, that the same is true of Mr Lawson at the RAF base on Ascension Island. While it is true that Mr Lawson was there in a support role, employed by a private firm to provide security on the base, I think it would be unrealistic to regard him as having taken up employment in a foreign community in the same way as if Serco Ltd were providing security services for a hospital in Berlin. I have no doubt that *Bryant v Foreign and Commonwealth Office* [2003] UKEAT 174, in which it was held that section 94(1) did not apply to a British national locally engaged to work in the British Embassy in Rome, was rightly decided. But on Ascension there was no local community. In practice, as opposed to constitutional theory, the base was a British outpost in the South Atlantic. Although there was a local system of law, the connection between the employment relationship and the United Kingdom were overwhelmingly stronger."**

13. Whether or not the British Embassy in Cairo is properly described as a British enclave, it is clear that the Claimant's employment did not fall within the scope of Lord Hoffmann's second example, since the Claimant was not an expatriate. The Claimant did not necessarily accept this, but the real thrust of her case was that her employment was more closely connected with the

English legal system than with the Egyptian legal system. The focus therefore has to be on the question of whether the EJ dealt properly with that submission.

14. Inevitably, the Employment Appeal Tribunal's decision in **Bryant v Foreign and Commonwealth Office** [2003] UKEAT 174 is of considerable significance on this appeal. So far as I am aware, it is the only reported decision which concerns the question whether or not Section 94(1) applies to people employed in British Embassies. Lord Hoffmann said that it was correctly decided. It concerns someone who was domiciled in England, but worked at the British Embassy in Rome, where she had a position of responsibility in respect of police and judicial liaison.

15. Apart from the fact that she was a British citizen, Mrs Bryant's case had many similarities with the Claimant's case. The facts of her case were set out in paragraph 3 of the Employment Appeal Tribunal's judgment:

> **"(1) She was engaged and employed at all times outside the United Kingdom;**
>
> **(2) Her post did not involve reporting back to or taking instructions from the Respondent's offices in the United Kingdom;**
>
> **(3) Her duties were carried out entirely in Italy;**
>
> **(4) She was paid at local rates, and employed on local terms and conditions;**
>
> **(5) Her employment was subject to Italian law."**

16. I will come back to the Claimant's submissions in relation to **Bryant**. However, it is clear that Lord Hoffmann did not regard Mrs Bryant as someone to whom Section 94(1) applied because she was working in a British enclave. In particular, he distinguished Mr Lawson's case from that of Mrs Bryant on the basis that there was no local community on Ascension Island. Prior to her recruitment, Mrs Bryant had seemingly been part of the local community in Rome and she remained so after her recruitment.

17. It is relevant for the purposes of this appeal to note which Claimants have or have not been held to be working in a British enclave:

(1) Mr Botham worked in a military base in Germany. He was regarded by Lord Hoffmann as working in a British enclave.

(2) Mr Lawson worked as a security supervisor at a military base on Ascension Island. However, he was not employed by the Ministry of Defence, but by a private contractor. There was no local community. The implication of Lord Hoffmann's speech is that, had there been a local community, he would have been regarded as part of that, rather than as part of a British enclave.

(3) In **Ministry of Defence v Wallis** [2011] ICR 617 the Claimants were the wives of British servicemen posted to NATO organisations in Belgium and the Netherlands and were employed by the Ministry of Defence in the British section of the international schools which were part of the NATO headquarters. The Court of Appeal upheld the decision that they were within the scope of Section 94(1) of the ERA. Elias LJ described them as the spouses of persons who formed part of a British contingent working in an international enclave.

(4) In **Duncombe v Secretary of State for Children, Schools and Families** [2011] ICR 1312 the Claimant worked as a teacher at a school in Germany for the children of parents working for the European institutions. The Supreme Court held that he fell within the scope of Section 94(1). In giving the judgment of the court, Baroness Hale said in paragraph 16 that teachers such as Mr Duncombe:

> **"were employed in international enclaves, having no particular connection with the countries in which they happened to be situated and governed by international agreements between the participating states."**

(5) In **R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 975 the Claimants were Afghan nationals employed by the British government as interpreters for the British forces working in and from a British military base or bases in Afghanistan and also carrying out frontline duties. In paragraph 54 of his judgment, Sir Colin Rimer accepted that they worked in what might be regarded as British enclaves. (At one stage, the Claimant submitted that Sir Colin Rimer was saying that the British Embassy at Kabul constituted as a British enclave, but she withdrew that submission.)

18. I note the following points about the authorities. First, there is no definition of what constitutes a British enclave. Secondly, as **Hottak** illustrates, not everyone who works in a British enclave comes within the scope of Section 94(1). Thirdly, there is no case in which a locally employed individual has been held to fall within the scope of Section 94(1) because they worked in a British enclave. Fourthly, although the facts are not always clear from the reports, there are some cases, especially those concerning military bases, where it may be that the employee lived as well as worked within the enclave, but there appear to be others in which the employee worked, but did not live, within the enclave.

19. I bear in mind that the question which arises in a case as such present has been held to be a question of law. In **Jeffery v British Council** Longmore LJ, with whom Peter Jackson LJ agreed on this point, said at paragraphs 135 and 136 of his judgment as follows:

> **"135. For my part I do not find it altogether easy to reconcile the statement by Lord Hoffmann in paragraph 30 of *Lawson v Serco* [2006] ICR 250 that the question, whether on given facts a case falls within the territorial scope of section 94(1) of the 1999 Act, should be treated as a question of law with the statement by Lord Hope in Ravat v Halliburton [2012] ICR 389 at 400 C-E that the question, whether the connection between the circumstances of an employee's employment and Great Britain is sufficiently strong to enable it to be said that it is appropriate for the employee to have a claim for unfair dismissal, is a question of fact. It is most unlikely that Lord Hope intended to disagree with Lord Hoffmann on the matter.**
>
> **136. The differing approaches can, in my view, be reconciled on the basis that the decision on the question whether the connection is sufficiently strong is an evaluative judgment to be made on the basis of the underlying facts (as to which there will often be no dispute). That is, strictly speaking, a question of law but it is well settled that an appellate tribunal will not interfere with a first instance evaluative judgment of this kind unless that tribunal took into**

> **account matters it should not have taken into account or failed to take into account matters it should have taken into account or made some error or was otherwise wrong…."**

20. I start with grounds 1.1 and 1.2.1, which concern the nature of the British Embassy and the question whether or not it was a British enclave. The EJ's review of the evidence which she heard included a number of passages concerning the Embassy and its status. In paragraph 20 she said:

> **"Although the First Respondent is considered 'inviolable' (in the sense that nationals of the host state cannot enter without invitation), it is part of the local community and has as its objective the representation of the UK's interests and building and improving relations with the host country. It pays local taxes and social insurance for its locally engaged staff."**

21. At paragraph 28 she said:

> **"Mr Neil explained that the embassy, like all embassies, is inviolable in that the building and grounds are not open for 'just anyone' to walk into; even the Egyptian police are not permitted into the compound or to enter buildings, and Egyptian officials need an invitation to do so."**

22. At paragraph 38 she said:

> **"Ms Marriot drew the distinction between: the Claimant's entitlement to allowances and benefits (including pension) and that offered to UK-based staff; accreditation at the post for the Claimant (again, by contrast to UK-based staff); and security clearance levels including access to zones within the post. She asserted that the British Embassy in Cairo is not a 'British enclave' that has no connection to the local community, but is instead a place to develop and improve links for a number of issues between Britain and the host country."**

23. In paragraph 46 she said:

> **"Dealing with the question of whether the mission is an 'enclave', Ms Marriot said that the embassy offices are in a garden city. The diplomats live in Zamalek, which is close by, and Maadi, which is further out and closer to the international schools. Nobody lives in the compound."**

24. The EJ said as follows in paragraph 94(p) of her Judgment, when addressing the issue of whether the Claimant worked in what might properly be described as a British enclave:

> **"Of course, I heard no evidence from the Claimant on this, but she did not challenge Ms Marriot's analysis that the British workers abroad do not live on the embassy grounds but in the Cairo suburbs, unlike (say) a military base, where the workers tend to live in a community that retains its essentially British feel (e.g. British schools, supermarkets etc). I accept that the British flag flies above the Embassy. It does not, without more, mean that it is a British enclave in the Lord Hoffmann sense;"**

25. One of the Claimant's submissions is that the ET disregarded the special status of the British Embassy because it did not mention, for example, the Embassy's inviolability in subparagraph 94(p) of the Judgment. I do not accept that submission. The Judgment has to be read as a whole. Paragraph 94, although long, is a summary based upon what has gone on before.

It does not repeat all of the evidence. There is no reason to believe that the EJ had forgotten the evidence referred to in the paragraphs which I have cited. Indeed, the reference in subparagraph 94(p) to the British flag can and should be read as a shorthand reference to that evidence.

26. A similar point applies to the Claimant's contention that the EJ overlooked the fact that the Claimant was employed by the British government, which has been held to be a strong connection with the United Kingdom. This is ground 1.2.1. The Claimant says that the EJ either failed to take it into account or failed to give it sufficient weight. The weight to be given to this factor was a matter for the EJ, but I am not persuaded that the EJ failed to take it into account at all.

27. The Claimant's submission is that it was not taken into account because it was not discussed in paragraph 94 of the Judgment. However, the EJ's reasoning included paragraph 95 and this issue was dealt with in subparagraphs 95(a), (e) and (j). In subparagraph 95(a), for example, the EJ said:

> **"This Claimant did not work for a commercial employer but for the British government, but in my view, although that is of course a very close connection indeed with the United Kingdom, that is the only element on which she can argue she should have the benefit of UK law."**

28. I turn now to the Claimant's submission that the British Embassy in Cairo is a British enclave in the sense in which the term was used by Lord Hoffmann in **Lawson v Serco**. In support of this submission the Claimant referred to international law and, in particular, the **Vienna Convention on Diplomatic Relations** and articles 20, 22.1, 22.3, 23.1, 24, 27.2, 28, 45a and 45b of that convention. There is of course no definition in international law of what constitutes an extra-territorial British enclave.

29. Ms Callaghan for the Respondents proposed a suggested definition. She suggested that enclave means an area or territory where people live and work together in a community or group which has a distinct cultural nationality from the area around it. This definition has much to commend it, but I doubt whether it is an accurate definition in the sense that it captures all of the cases to which I have referred since, as I have noted, the question of where the employee lives does not appear to have been treated as determinative of the question whether there is a British enclave.

30. The Claimant argued that, because Lord Hoffmann mentioned the case of **Bryant** in paragraph 39 of his speech in **Lawson v Serco**, he must have regarded the British Embassy in Rome as a British enclave. On the other hand, Ms Callaghan contended that Lord Hoffmann had not decided in that paragraph that the British Embassy in Rome was a British enclave and, indeed, she submitted that he appeared to regard it as not being a British enclave.

31. It could be said that Lord Hoffmann's judgment is ambiguous on this point. He said that he considered that **Bryant** was rightly decided, but he did not specify whether he considered that **Bryant** was rightly decided; (1) because the British Embassy in Rome was not a British enclave; or (2) because Mrs Bryant was locally engaged. However, looking at paragraph 39 as a whole and in context, it seems to me that the question of whether the British Embassy in Rome was a British enclave just did not arise on Lord Hoffmann's analysis, because Mrs Bryant was locally engaged. Although a British national, she was not an expatriate employee of the kind he was talking about in paragraph 39 and the preceding paragraphs. As I have said, the Claimant in the present case is not an expatriate and so the question of whether she falls within Lord Hoffmann's second example just does not arise.

A 32. As to the approach to be adopted in cases which fall outside Lord Hoffmann's two examples, Baroness Hale said as follows in paragraph 8 of her judgment in **Duncombe**:

> **"It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law. There is no hard and fast rule and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples given, for they are merely examples of the application of the general principle."**

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33. Much of the argument which I have heard on this appeal could, and I say this without any unkindness, be described as an example of what Baroness Hale was referring to when she said that it would a mistake to try and torture the circumstances of one employment to make it fit one of the examples given.

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34. Building on that passage in Baroness Hale's judgment, Underhill LJ said as follows in paragraph 109 of his judgment in **Jeffery v British Council**.

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> **"In the first place, I do not think that in the light of the post-*Lawson* case-law it is right to conduct the analysis by reference to labels such as 'the posted workers exception', useful as they may be as shorthands. The correct approach is explicitly to address the sufficient connection question, as the ET did here. Lord Hoffmann's statement that the 1996 Act applies to workers of the kind identified at para. 38 of his opinion establishes that in such a case the connection with Great Britain will typically overcome the territorial pull of the place of work, but his observations are in fairly general language and are not a substitute for a careful examination of the facts of the particular case: the developing case-law has shown a number of different factual circumstances that do not fall neatly into Lord Hoffmann's exceptions."**

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35. In my judgment, therefore, it does not matter whether or not one applies the label "British enclave" to the British Embassy in Cairo. What the EJ had to do, and what she did do, was to look at the nature of the British Embassy and take it into account as one of the factors relevant to the application of what Underhill LJ called "the sufficient connection question". Looking at all the factors relevant to that question in the round, it is plain that the EJ approached the sufficient connection question in the appropriate way and, indeed, in my judgment, gave the correct answer to the sufficient connection question.

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36. It follows that there was no error of law involved in her holding that the British Embassy in Cairo was not a British enclave, as that was merely part of her assessment of the facts. Indeed,

A I agree with the Respondents' submission that the decision in **Bryant** is effectively determinative of this case.

B 37. The Claimant submitted that **Bryant** could be distinguished on a number of grounds relating, in particular, to the nature of her work and her status as a consular officer. She was, she submitted, more senior than Mrs Bryant and performing more responsible functions. For instance, she acted in certain respects as a representative of the British government and she C performed governmental functions such as the issue of emergency travel documents.

D 38. However, looking at all of the factors in the round, I do not consider that the present case is sufficiently distinct from the decision in **Bryant** to bring the Claimant within the scope of Section 94(1). Indeed, in one significant respect the Claimant's connection with the United Kingdom is weaker than Mrs Bryant's, since Mrs Bryant was a British citizen and domiciliary and the Claimant is not.

E 39. I turn now to ground 1.2.2, which concerns the Claimant's role. The nature of the work which the Claimant did was a relevant consideration. That appears, for instance, from paragraph F 77 of Underhill's LJ judgment in **British Council v Jeffery**. (The Claimant also referred me to paragraph 73 of Lord Sumption's judgment in **Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs** [2017] UKSC 62, but it does not seem to me that that paragraph is of any significance in this context.)

G 40. The Claimant's submission under ground 1.2.2 was that the nature of her role was not listed as one of the factors in paragraph 94 of the Judgment and therefore the EJ must have failed H to take it into account. It would perhaps have been preferable if it had been identified as a separate factor in paragraph 94, but the Judgment has to be read as a whole. The EJ took the trouble to

A set out the evidence and her findings as to the nature of the Claimant's role in paragraphs 21, 22, 23, 29, 30, 31, 44, 45, 63 and 81 of the Judgment. Against that background, I do not accept that the EJ failed to take that evidence into account when addressing the sufficient connection question.

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41. I turn next to ground 1.2.3, insofar as it concerns state and diplomatic immunity. The Claimant's submission is that she cannot bring a claim in Egypt against the Respondents, since they are the British government or its agents. Much time was taken up at the Hearing with debates about what evidence was produced before the ET. There was no expert evidence on Egyptian law. The Claimant did place some documents before the Tribunal and also referred to some of them in her written submissions.

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42. So far as diplomatic immunity is concerned, it is accepted that Egypt is party to the **Vienna Convention on Diplomatic Relations**. The Claimant relied on Presidential Decree No. 469 of 1964, which gives effect in Egyptian law to the **Vienna Convention on Diplomatic Relations** and she also relied on an Egyptian authority, which was an example of a case in which an Egyptian court held that it had no jurisdiction to hear an employment claim against the British Ambassador in Cairo. Ms Callaghan for the Respondents accepted that it was unlikely that the Claimant could bring a claim in an Egyptian court against individual British diplomats unless they waived their diplomatic immunity.

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43. As for state immunity, the Claimant sought to rely on two documents. Firstly, articles 3, 5, 6 and 11 of the **United Nations Convention on Sovereign Jurisdictional Immunities**. However, this convention is not in force and it does not appear that Egypt is a signatory. Secondly, she relied on chapter 14, unit 2 of the Egyptian Attorney-General's Ministerial Judicial

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and Prosecution Instructions. However, it appears that this document only relates to diplomatic and consular immunity, rather than state immunity.

44. Ms Callaghan submitted therefore that there was no evidence as to the law of state immunity in Egypt. Where there is no evidence as to foreign law, English courts and tribunals can and do presume that foreign law is the same as English law. Ms Callaghan accepted that, if that presumption applied, then the United Kingdom would be immune from suit by the Claimant in the Egyptian courts unless the immunity was waived. It seems to me that this is an appropriate case in which to apply that presumption and so, notwithstanding the deficiencies in the evidence, I proceed on the basis that the Respondents would be immune from suit in Egypt, but of course that it would be open to them to waive that immunity.

45. There was no evidence before the ET of any efforts made by the Claimant to commence proceedings in Egypt. It does not seem to me that that is relevant, given the position of the law as I have found it. The Claimant told me that she had in fact tried to commence proceedings in Egypt and that that had not been possible, partly on the grounds of state immunity and partly because the causes of action which she sought to assert, being based on UK statute, were not known to Egyptian law. Although I record that I was told these things, they were not in evidence before the ET, so I pay no attention to them.

46. In relation to her submission that she should be allowed to sue the Respondents in the United Kingdom, because she cannot sue them in Egypt, the Claimant again referred to Lord Sumption's judgment in **Benkharbouche**, this time to paragraphs 18, 34, 65 and 73. It does not seem to me that any of those passages are of any relevance to the present case. The question at issue in **Benkharbouche** was whether two provisions of the **State Immunity Act 1978** were consistent with the **European Convention on Human Rights** and the **European Union Charter**

of Fundamental Rights. That was a very different issue from the issue in this case and I derive no assistance from **Benkharbouche**. It does not support the grounds of appeal which are being advanced before me.

47. The fact that state immunity may prevent a Claimant from suing his or her employer in his or her own country is a relevant factor, but it is certainly not determinative. In particular, **Bryant** and **Hottak** are cases in which the Claimant argued that they should be within the scope of Section 94 because state immunity meant that they could not sue the British government in the courts of their own state. In neither case did that argument succeed: see, in particular, paragraphs 10, 20, 26 and 27 of the Employment Appeal Tribunal's judgment in **Bryant** and paragraphs 41 and 55 of Sir Colin Rimer's judgment in **Hottak**. Moreover, the EJ correctly acknowledged this aspect of those decisions in subparagraphs 95(a) and (i) of her Judgment.

48. As for the Claimant's point that she cannot bring unfair dismissal claims in Egypt because they are not known to Egyptian law, it is relevant to note that in paragraphs 40 and 41 of his judgment in **Dhunna v Creditsights Ltd** [2015] ICR 105 Rimer LJ held that the relative merits of the competing systems of law, i.e., in this case Egyptian and English law, have no part in the inquiry to be carried out in a case such as this. The EJ correctly acknowledged that in subparagraph 95(h) of her Judgment.

49. Ground 1.3 in the grounds of appeal is merely a summary or conclusory ground, dependent on what goes before, all of which I have already dealt with. As for ground 2, for the reasons which I have already given it is in my judgment plain that the EJ's Decision that the connection of the Claimant's employment relationship with Great Britain and British employment law was not stronger than it was with any other system of law was neither irrational

A nor perverse. Indeed, in my judgment, it was obviously right. Accordingly, for all of those reasons I dismiss this appeal.

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