



EMPLOYMENT TRIBUNALS

Claimant

Mr D Chambers

v

Respondent

The United States of America

Heard at: Bury St Edmunds (by CVP)

On: 19, 20 & 21 October 2021
25 & 26 October 2021 (In Chambers – no parties in attendance)

Before: Employment Judge Laidler

Appearances

For the Claimant: In person.

For the Respondent: Professor D Sarooshi QC.
Mr R Fitzpatrick, Counsel.

RESERVED JUDGMENT

1. The correct identity of the respondent is The United States of America and the name of the respondent is amended accordingly.
2. The respondent is a sovereign state entitled to rely on the principle of State immunity.
3. The respondent has not submitted to the jurisdiction of the Employment Tribunal.
4. The Tribunal does not have jurisdiction to hear the claims and they are dismissed.

REASONS

1. Various acronyms and abbreviations have been used in these proceedings. The following is a list of those most often used prepared by the respondent but added to by the Judge when dictating these reasons:-

Acronym or Abbreviation	Explanation
48FW	48 th Fighter Wing (a.k.a. the 'Liberty Wing') of the Third Air Force, United States Air Force based at RAF Lakenheath.
AFCEC	US Air Force Civil Engineer Centre.
AFI	Air Force Instruction.
AFPD	Air Force Policy Directive.
AST	Above-ground Storage Tank.
BFI	Bulk Fuel Installations.
CAC	Common Access Card.
CEIE	The Environmental Element of the Civil Engineering Squadron (on occasion styled '48CEIE' or '48CES/CEIE', i.e. the Environmental Element of the 48 th Fighter Wing).
CES	Civil Engineering Squadron (on occasion styled '48CES', i.e. the Civil Engineering Squadron of the 48 th Fighter Wing), which forms part of the Mission Support Group.
DIO	Defence Infrastructure Organisation (the MOD body responsible for the MOD estate).
DoD	Department of Defense.
DoDI	Department of Defense Instruction.
ESOHC	Environmental, Safety and Occupational Health Council.
HNCC	Host Nation Co-ordination Cell.
LNDH	Local National Direct Hire.
LRS	Logistics Readiness Squadron (on occasion styled '48LRS', i.e. the Logistics Readiness Squadron of the 48 th Fighter Wing Mission Support Group).
MSG	Mission Support Group.
NATO	North Atlantic Treaty Organization.
OFT	Organizational Fuel Tanks.
POC	Point Of Contact
STAR	Storage Tank Accounting and Reporting.
TMWG	Tank Management Working Group.
USAF	United States Air Force.
USAFE	United States Air Force in Europe.

USF-UK	United States Air Force in the United Kingdom.
USG	United States Government.
UST	Underground Storage Tanks.
USVF	United States Visiting Forces.
WO	Work Order.

2. The claimant has issued two claims, the first on 25 April 2019 following a period of early conciliation between 15 March and 27 March 2019. The second claim was received on 19 June 2019. There were some difficulties with regard to the service which do not now need to be gone into.
3. By letter of 11 May 2020 the respondent filed its response to both claims. This made it clear that the respondent claimed immunity from the jurisdiction of the Tribunal in respect of the claimant's claims pursuant to the State Immunity Act 1978 (SIA 1978) and/or the common law. It asserted that the respondent is a sovereign state and as such enjoys immunity from the Tribunal's jurisdiction. The Tribunal was requested to determine the issue of State immunity as a preliminary matter. As it contested the Tribunal's jurisdiction it made no admissions in relation to any of the matters set out in the claim form. All the respondent's correspondence has made it clear that it is written without prejudice to and solely in support of the respondent's contention that it is immune from the jurisdiction of the Employment Tribunal. It was on that basis that it participated in a case management hearing before Employment Judge Ord on 7 December 2020. At that hearing the claims were not clarified in any detail other than for the Judge to record that the claimant brought complaints of Unfair Dismissal and Equal Pay. This open preliminary hearing was listed to determine the issue of jurisdiction.
4. In relation to the issue of jurisdiction the Tribunal had a bundle of witness statements containing evidence from:
 - (i) Nolan Swick, currently Environmental Engineer and the claimant's line manager at the time of the events complained of;
 - (ii) Colonel Cynthia Kearley, Director of Legal Services for the USAFE in the UK;
 - (iii) Tammy Mitchell, Chief of Local National Direct Hire, Employment Management Relations and Pensions at the Civilian Personnel Office;
 - (iv) The claimant; and
 - (v) Martin Benham on the claimant's behalf.

5. The claimant's witness statement was subsequently redacted to remove sensitive information.
6. The Tribunal had a bundle of tribunal documents and a preliminary hearing bundle running to some 1704 pages. It is to be noted that only a small proportion of those documents needed to be considered by the Tribunal in relation to the determination of the issues before it.
7. The claimant decided not to put any questions by way of cross examination to either Colonel Kearley or Tammy Mitchell. They were called merely to confirm the truth and contents of their statements. The respondent had no questions for Mr Benham who did not appear at the hearing. His witness statement did not in any event go to the issues to be determined.
8. The only live witnesses therefore heard were the claimant and Nolan Swick who the claimant did put questions to in cross examination.
9. From the evidence heard the Tribunal finds the following facts.

The Facts

10. The claimant did not challenge the witness statement of Colonel Kearley and having read it accepted that his employer was the United States of America. The title to these proceedings is amended accordingly. The Tribunal accepts that the USAF is one of the military departments under the Department of Defense (DoD) which is an executive agency of the Federal Government of the United States of America. USAF has no separate legal personality from the DoD and operates under the authority, direction and control of the US Secretary of Defense.
11. USAFE is one of the nine Major Commands of the USAF. It covers USAF operations in Europe and Africa. Major Commands have a headquarters staff and their subordinate organisations include numbered air forces, which is another level of headquarters. Within numbered air forces there are Wings. A 'Wing' is a unit of Command subordinate to the Major Command. The host Command at each base is normally a Wing. For example, the host Wing for RAF Mildenhall is the 100th Air Refuelling Wing. Another is the 48th Fighter Wing which is located at RAF Lakenheath.
12. Each Wing will have within its structure several assigned Groups. The Groups are the next level of Command below Wings. Within Groups there are Squadrons. Most people working on the base are part of a Squadron. This organisational form is used uniformly throughout the USAF. USAFE – UK Host Nation Co-ordination Cell (HNCC) is based at RAF Mildenhall. The key purpose of USAFE is to support and as necessary provide forces and combat support to a number of geographically organised combatant groups under the DoD. It is responsible for training and equipping the

USAF units attached to USAFE as well as those supporting NATO organisations.

13. RAF Mildenhall is one of the three largest USAF installations in the UK (the other two being RAF Lakenheath and RAF Alconbury in Huntingdon Cambridgeshire). Those three bases host four separate USAF Wings in the UK, the 48th Fighter Wing (48FW) being at Lakenheath. The four traditional Groups seen within a Wing at any USAF base are Operations, Maintenance, Medical and Mission Support. The Mission Support Group (MSG) is a critical component and provides all the support structure needed to enable USAF operations. It essentially takes care of the day to day operations on the base. The claimant's employment was within the MSG of the 48th Fighter Wing at RAF Lakenheath. The 48th Fighter Wing, also known as the "Liberty Wing" is the largest of the three UK Wings and the largest US Fighter Wing in Europe. It operates three combat-ready squadrons of F-15 planes of two different models. The Wing's purpose is to remain ready at all times to respond across the spectrum of conflict with worldwide combat power and support. It is an integral role in the support of the 48th Fighter Wing mission.
14. The MSG comprises a number of different squadrons including:-
 - (i) The Civil Engineering Squadron (CES) which includes management of the installations and its facilities including the environmental aspects of the activities on base, provides fire and emergency response, maintenance and construction etc (the squadron the claimant was assigned to).
 - (ii) The Communications Squadron, responsible for all matters concerning communication, information and record keeping.
 - (iii) The Force Support Squadron dealing with military and civilian personnel matters and other service elements including recreational facilities.
 - (iv) The Security Forces Squadron performing the USAF security and law enforcement functions.
 - (v) The Contracting Squadron procuring goods and services for DoD activities in the UK.
 - (vi) The Logistics Readiness Squadron responsible for all logistic capabilities of the 48th Fighter Wing to include supplies, fuel or petroleum, transport vehicles etcetera.
15. The claimant's first contract was signed on 30 June 2011 for a position of Clerk. Terms and Conditions of Employment were seen at page 51 of the bundle and were supplemented by the Employee Handbook. In July 2011 the claimant was re-assigned to the role of Supply Assistant within the Logistics Readiness Squadron of the 48th Fighter Wing (page 47). On

10 November 2011 the claimant received a new employment contract for the position of Fuel Distribution System Worker still within the Logistics Readiness Squadron (pages 48 and 53-54).

16. On 1 June 2014 the claimant was promoted to the role of Environmental Engineer within the Civil Engineering Squadron of the Liberty Wing (page 50). The position that he held until his employment ended on 19 December 2018.

17. The Tribunal saw a copy of the Employee Handbook dated 1 December 2002 commencing at page 252 of the bundle. In the forward this stated:-

“You and other local national employees working in the European Theater are part of the United States Worldwide Defense structure. As part of this team, you, and the activity where you are employed, play a vital role in assuring that the USF-UK mission is effectively accomplished.”

18. The handbook also provided at paragraph 1 that the terms and conditions of employment described in it are:-

“Patterned upon prevailing customs and employment practices in appropriate UK labor markets and intended to comply with appropriate UK labor laws, including laws prohibiting various form of discrimination in employment. UK law governs the administration of these terms and conditions of employment unless it conflicts with a Treaty or International Agreement to which both the UK and the United States are parties. If there is a conflict between UK law and Treaty or International Agreement, the Treaty or International Agreement will take precedence.”

19. With regard to the employer/employee relationship the handbook provided at clause 4 that:-

“All USF-UK activities that directly hire local nationals will provide conditions of employment patterned upon prevailing customs and practices in appropriate labor markets.

...”

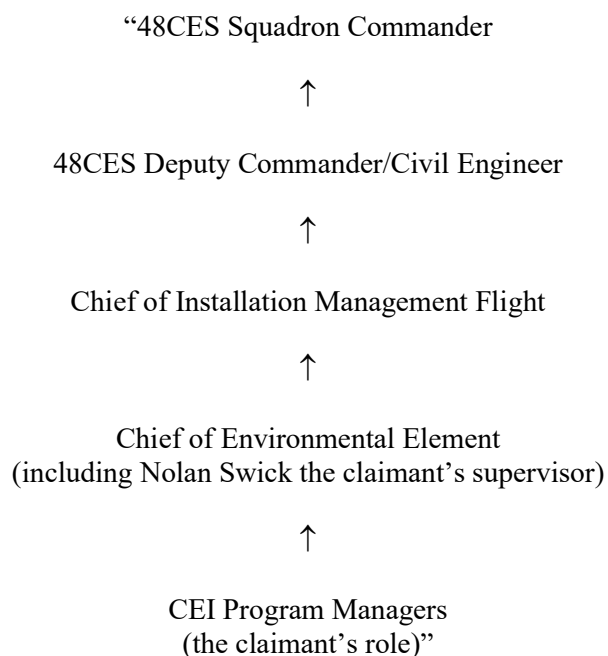
20. The claimant’s Notification of Personnel Action (page 48) recorded that the position was “a position of trust” and he together with all those working on an USAF base was required to obtain and maintain security clearance vetting. The claimant had a security clearance throughout his period of employment. Those working with computers are issued a Common Access Card (CAC) as part of the security system. There was no dispute that the claimant had received such.

21. The Tribunal saw at page 886 a memorandum dated 4 January 2017 being an official request for base access to RAF Lakenheath, Feltwell and Mildenhall for the claimant to fulfil emergency spill response duties and as such he required escort privileges as he brought in contractors to work on the base. The claimant did not initially recall that he had “escort privileges”

but later accepted that he did accompany a third party contractor. He later acknowledged that he had escorted third party contractors around the base to do a survey on the tanks at the time when it was being considered that the Tank Custodian duties would be outsourced. He acknowledged that one of the reasons for having 24/7 access was his involvement in any spills on the base which could be on the runways or taxi area. As stated by Nolan Swick (paragraph 57) Environmental Element staff have more access to sensitive areas than other types of staff because of the nature of their work and the claimant had access to the flight line.

The claimant's role as Program Tank Manager

22. The claimant set out at paragraph 13 of his witness statement the management reporting structure in connection with his role:-



23. In cross examination the claimant confirmed that above the CES Squadron Commander there were two further levels of command held by USAFE military personnel. The next was the MSG Commander and at the very top was the 48th Wing Commander (the US Base Commander).
24. As Tank Program Manager the claimant worked within the Mission Support Group. He was one of several Program Managers within the group.
25. The title Environmental Engineer is a generic position within the USAF and the claimant was tasked to manage the Tank Management Program and perform the role and functions of Tank Program Manager.

26. It is a requirement of Air Force Policy Directive (AFPD) 32-70 (page 1556) that air force installations shall establish and maintain a storage tank program to ensure “air force mission operations are conducted in compliance with all federal ... state and local standards ...”.
27. Air Force Instruction (AFI) 32-7044 dealt with storage tank environmental compliance. It implemented AFPD 32-70. In a section headed ‘Overview’ at clause 1.1 it stated:-
- “**Concept** – storage tanks, properly operated and maintained IAW environmental regulatory requirements, perform an essential function in support of the Air Force mission. Where petroleum and hazardous substances are necessary for use by the Air Force mission, they may be stored in regulatory compliant underground and above ground storage tanks. Tank systems are operated and maintained to comply with the more stringent applicable federal, state or local regulations and this AFI requirement.”
28. From the evidence of Nolan Swick which was not disputed it is known there are approximately 137 tank installations at Lakenheath. Mr Swick gave evidence of the detail of these various tanks as follows:-
- 1 The majority store diesel fuel to supply heating plants that provide heating for buildings on base.
 2. Some store fuel for back-up or emergency generators to be used in the event of a power cut.
 3. Others are used to store jet fuel for fighter planes and other aircraft.
 4. Others contain waste fuels that are generated by aircraft maintenance.
 5. There are others that store petrol for base vehicles and supply the gas station on base the sells petrol to US personnel.

Claimant’s Performance Evaluations

29. In the tribunal bundle were the claimant’s evaluations completed during the period when he was carrying out the Environmental Engineer role. These are particularly relevant documents as being contemporaneous and completed by the claimant at the time and with comments from his supervisor.

2014-2015

30. In the remarks section of this evaluation it was recorded that amongst other matters the claimant had:-

“Assessed and reported urgent need for replacement/sustainment of OFT infrastructure leading to funding award of £5.4 million dollars.

Key member of newly formed Team Management Working Group presenting and leading round table multi-level/squad discussion.

Teamed with 48 LRS Quality Assurance Inspection program including planning and execution, measure non-compliance and risk.

Main POC (Point of Contact) for tank related matters providing advice on day to day custodian duties, work order requests and applicable standards.

Focussed on design and development of centralized storage tank inventory database, which will be essential information to end users.

Performed environmental awareness training for over 600 personnel; tanks/spill hazards assessed on Lakenheath/Fentwell and Ely.

Prepared radical program solutions for the tank inventory, drafted cross functional team charter – new way forward for 10 year lack.

Initiated drafting process documenting fuel delivery to non-compliant tanks including signed waiver to ensure 200+ compliance.”

31. His supervisor had recorded:-

“David was tasked to provide an up to date inventory based on AFI 32-7044 and STAR requirements, as well as maintain an accurate environment inspection database.”

2015-2016

32. In the remarks section of this performance evaluation was recorded:-

“Full base wide survey of RAF Lakenheath and RAF Fentwell conducted in June/July 2015 resulting in issue of full AST inventory database ...

New tanks inspected, condition surveys reviewed, design review on a particular pilot tank.

All 8F ASTs inspected as part of condition survey to determine environmental risk priority.

Tank repairs tracked and concern identified between high number of reported discrepancies and comparable low number of work order requests raised as a result. CFI project identified shortfall in generation of work order requests.

Training – comprehensive review of Tank Custodian function, creation of meaningful TC Register and led executive briefing – TMWG established within inaugural meeting in March 2015 followed by meetings in May, September and December 2015.”

April 2016 to March 2017

33. The remarks included the following:-

“ID investigated and reported health and safety concerns at 48FW tank sites.

...

Completed inventory of 48 FW Organizational Fuel Tanks (OFT) in STAR in accordance with AFI 32-7044 compiling 2750 individual pieces of data.

Provided agreed dataset to Sub-Amp manager for loading 48 FW organizational fuel tanks into CE Sustainment Management System (BUILDER).

Completed CPI project to streamline CES work order (WO) process resulting in 75% improvement in average process time from the raising of WOs to FSC2 execution.

Tracked and supported tank replacement and repair works including establishing, organizing and chairing bi-weekly Tank Replacement Project review meeting. Brought together various stakeholders involved in the project scope to enhance co-ordination and communication.

Participated in ECAMP inspections visiting shops to ID and report non-compliance aspects of OFTs.

Authored detailed scope of Tank Custodian duties for submission to NGEC contractor to provide bid.

Responded to spills.”

34. The STAR Database (Storage Tank Accounting and Reporting) is a definitive record of the OFTs present on each USAF installation and contains data on the physical features of the tanks. It is used worldwide across the USAF. Every base in any location globally is required to enter data on all tanks on the installation into the database. Each base only has access to its part of the record. As set out above AFI 32-7044 requires each installation to maintain a tank inventory and the claimant was responsible for updating this. It is accepted that these records allowed the USAF to manage its assets efficiently and assess how it used its resources.

35. The claimant had to collect data for the STAR not only by using existing inventories but also physically viewing the tanks and recording the details.

Tank Custodians

36. The fuel tanks must be monitored on a monthly, weekly or sometimes daily basis to ensure correct fuel levels and to monitor for any faults. This is assigned to Tank Custodians who are sometimes military personnel and others are civilians. At RAF Lakenheath the Tank Custodian Program was primarily managed by the LRS which is in charge of re-supplying fuel.

However, because tanks were managed by both LRS and CES the claimant also played a role in managing the Tank Custodian organization as recorded in his performance evaluation.

37. It was part of the claimant's role to work with Tank Custodians to monitor and manage the physical condition of their assigned tank and report on any issues such as corrosion, faulty gauges or tanks deemed no longer fit to use. The claimant was also responsible for inspecting tank locations on the base and overseeing the inspection records generated by the Tank Custodians to assess whether the Tank Custodians met their responsibilities to monitor and identify issues with the tanks.
38. In 2015 the Environmental Element started a trial of outsourcing the Tank Custodian functions. Nolan Swick was personally involved in the process and the claimant provided strategic input into the change. He assisted with authoring the detailed scope of Tank Custodian Duties for contractors to provide a bid to supply these services.

Spills – Environmental Monitoring and Impact Assessments

39. In his own witness statement at paragraph 16 the claimant sets out how in August 2014 he attended along with the Chief of Environmental Element and other CEI Program Managers at the crash site of NHH-60G Pave Hawk helicopter stationed at RAF Lakenheath which came down at Cley Marshes on the North Norfolk coast on 7 January 2014 killing the crew of four. As the site is an internationally recognised nature reserve for wildlife the field visit conducted environmental monitoring to evaluate the condition of the land, in-land water ways, flora and fauna contaminated by the aviation fuel, oil lubricants, ammunition and other debris released in the crash and collect data for the UK and US authorities.
40. Following another crash of an aircraft stationed at RAF Lakenheath into a potato field at Weston Hills in Lincolnshire on 8 October 2014 the claimant attended the crash site the following day along with the Chief of Environmental Element and other CEI Program Managers to help carry out an initial Environmental Impact Assessment. The immediate debris field was cordoned off as the wreckage was still hot and giving off fumes. Data collected during this and subsequent field visits helped calculate and apportion remediation costs between the UK and US authorities.
41. The claimant in his witness statement at paragraph 18 acknowledges that Organizational Fuel Tanks (OFTs) and the fuel stored inside are central to the base's effective function and overall mission capability. He acknowledges further that fuel is critical to aircraft operations, to heat buildings, supply hot water, power back-up generators, operate vehicles and machinery, and run paint shops and other ancillary services. The Organizational Fuel Tanks at RAF Lakenheath and Fentwell consist of Bulk Fuel Installations known as BFIs storing jet fuel, petrol and heating oil, localised storage tanks holding heating oil, fuel tanks contained within

and supplementary tanks externally connected to back-up generators, waste oil tanks and mobile bowsers. They are part of the fixed infrastructure at the bases.

42. As Tank Program Manager the claimant attended meetings of the ESOHC and contributed to briefings.
43. The claimant also led the meetings of a cross functional sub-committee of the ESOHC called the Tank Management Working Group (TMWG). In that capacity he would collect information related to tank management from other organisations and disseminate information on environmental aspect and risks to relevant actors.

Training

44. The claimant was responsible for providing focused environmental training to people in different units across the base.
45. Nolan Swick tasked the claimant to put together training materials for Tank Custodians to inform them of the environmental aspect of the work assigned to them. The claimant provided environmental training for a considerable number of staff as referenced in his Employee Performance Evaluation above.

Training provided to the claimant

46. During his employment the claimant had training on environmental management provided by the USAF. He was sent to take an environmental course at the Air Force Institute of Technology at Wright-Patterson Air Force Base in Dayton, Ohio, USA. He also attended a training course relating to tank management at the Archer Institute, a commercial environmental training provider in the United States. From the evidence of Nolan Swick that training was approximately 2-3 days.
47. The claimant also undertook various computer based training provided by USAF. In particular video based training materials were provided where the subject matter experts provided remote training to Tank Program Managers throughout the USAF.

Relevant Law

48. The State Immunity Act 1978 (SIA) provides as follows:-

- 1 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...

4 Contracts of employment

- (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there except as provided in the following provisions of this Part of this Act.

...

16 Excluded matters

...

- (2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.

Authorities on section 16(2)

- 49 In Holland v Lampen-Wolfe 1 WLR 1573, the plaintiff was a citizen of the United States of America and a professor at a United States university that provided courses at a number of United States military bases in Europe. In 1991, as part of her employment by the university, she taught at a military base in England that was operated and maintained by the United States government as part of its functions as a member of the North Atlantic Treaty Organization. The defendant, who was also a United States citizen, was employed by the United States government as education services officer at the base with responsibility for planning, development and implementation of educational and training programmes. In 1997 the defendant, in his capacity as education services officer, sent a memorandum to the programme director listing complaints about the plaintiff's conduct as an instructor. The plaintiff, having complained that the memorandum defamed her, commenced libel proceedings in the United Kingdom against the defendant. The House of Lords held, dismissing the appeal:-

“... that section 16(2) of the State Immunity Act 1978 was capable of extending to acts done by the civilian component of a state's armed forces; that in any event the publication of the memorandum by the defendant as part of his duty to supervise the education of military personnel was an act done “in relation to” the armed forces of the United States within section 16(2), with the result that section 1(1) of the Act did not apply; that, therefore, it followed that the question of immunity fell to be decided according to the common law; that since the provision within a military base of education and training for military personnel was part of a state's sovereign function of maintaining its armed forces, the publication of the memorandum in the course of the defendant's supervision of such provision was itself an act within the sovereign authority of the United States so as to attract immunity;”

50 Lord Hope stated:-

“It is clear that the expression “armed forces” in section 16(2) cannot be regarded as meaning only military personnel or servicemen and women who handle weapons and equipment and are in uniform. Regard must be had to the fact that it is a matter for each state to decide how best to organise its own armed forces and related services. We are concerned in this case with events that took place on a military base on which the United States of America maintains units of its armed forces by arrangement with her Majesty's Government. The organisation and support of armed forces on a military base overseas is a complex exercise. For a variety of reasons, not the least for reasons of security, it may be thought to be desirable for the base to be as self-contained as possible. This may involve the provision of services there which are not, in the strict sense, military in character. For example, services whose purpose is to sustain morale or to promote mental or physical well-being and efficiency may be seen as an essential part of the whole exercise. This may be regarded as crucial to the retention of trained personnel and to the process of equipping them for promotion or for their retirement. This is an activity on which the state is engaged in the exercise of its sovereign authority. So the approach which I would take to this matter is to regard decisions as to whether to rely solely on men and women in uniform or to employ others to provide these services for its armed forces as a matter which is at the discretion of each state in the exercise of that authority.

...

For these reasons I would hold that the question whether an individual is here as part of a state's armed forces for the purposes of section 16(2) must be determined by reference to the nature of the duties which he or she is here to perform...

As to the position at common law, I agree with my noble and learned friends, Lord Clyde and Lord Millett, that the United States is entitled to invoke the immunity. The facts which I have outlined above are relevant to this issue also. As they have explained, it is the nature of the act that determines whether it is to be characterised as *jure imperii* or *jure gestionis*. The process of characterisation requires that the act must be considered in its context.

In the present case the context is all important. The overall context was that of the provision of educational services to military personnel and their families stationed on a U.S. base overseas. The maintenance of the base itself was plainly a sovereign activity.”

51 Reference was made by the House of Lords to the decision in Littrell v United States of America (No. 2) [1995] 1 W.L.R. 82, in which the Court of Appeal accepted that the issue as to the extent of sovereign immunity had to be determined according to the common law. The case concerned a serving member of USAF based in the UK who was admitted to a US military hospital on the UK base. He brought a claim for medical negligence. It was held that the whole context needed to be considered and that this came within the sphere of sovereign or governmental authority and as such the defendant was immune from suit.

- 52 Hicks v USA EAT 28 July 2005 concerned a US citizen, employed as an equipment repairer at a bowling alley at a US air base in England. He was dismissed in anticipation of the closure of the base and brought proceedings for unfair dismissal and redundancy payments. The United States asserted State immunity which was rejected by the Employment Tribunal which held that the claimant was employed in a commercial rather than sovereign activity. The appeal was allowed. The EAT confirmed that the State Immunity Act 1978 did not apply and the case fell to be determined by reference to common law. The test was whether:-

“... the act on which the proceedings were based was of a sovereign character or one which any private citizen could perform. The primary purpose for which recreational facilities were provided at an air base was to sustain the effectiveness of the central military activity of that base, which was clearly a sovereign activity...It would be impossible to investigate the claim without considering whether the United States of America had been right to determine that the base in question should be closed. That was a task which the Tribunal could not undertake.”

- 53 Two Employment Tribunal cases were referred to in the respondent's submissions. They are not binding on this tribunal but are of some relevance to its considerations.

- 54 In Harrington v United States of America 1807940/2013 (in a decision sent to the parties on the 27 March 2015) the tribunal upheld the respondent's claim of State immunity in relation to discrimination proceedings brought against it by a former employee of Army and Air Force Exchange Services (AAFES), a non-appropriated fund instrumentality of the Army and Air Force under the jurisdiction of the respective Chiefs of Staff of those services and is therefore an integral part of the US Armed Forces. It found that in his role as a computer operator the claimant carried out an oversight function in respect of all AAFES operations in the UK. He was one of two people with a high level of access to the system called 'Chronos' and he could override the data submitted by managers at the various sites if necessary. The tribunal concluded that the claimant was himself engaged in the public functions of the US military and that as such it warranted a claim State immunity.

- 55 In Webster & Wright v United States of America 3327693/2017 the tribunal upheld the respondent's claim of state immunity in relation to Ms Webster who had responsibility for the maintenance, preservation and if necessary destruction of US military records and Ms Wright a fire fighter at a base. It is understood from Mr Sharooshi that these decisions are being appealed but only that of Wright in relation to immunity.

Common law principles of immunity

- 56 As has already been referred to in the decision of Holland it is the nature of the acts carried out by the claimant that is relevant to this tribunal's considerations. Lord Hope stated:-

“In the present case the context is all important. The overall context was that of the provision of educational services to military personnel and their families stationed on a U.S. base overseas. The maintenance of the base itself was plainly a sovereign activity. As Hoffmann L.J. (now Lord Hoffmann) said in *Littrell v. United States of America (No. 2)* [1995] 1 W.L.R. 82, 95, this looks about as imperial an activity as could be imagined. But that is not enough to determine the issue. At first sight, the writing of a memorandum by a civilian educational services officer in relation to an educational programme provided by civilian staff employed by a university seems far removed from the kind of act that would ordinarily be characterised as something done *jure imperii*. But regard must be had to the place where the programme was being provided and to the persons by whom it was being provided and who it was designed to benefit—where did it happen and whom did it involve? The provision of the programme on the base at Menwith Hill was designed to serve the needs of U.S. personnel on the base, and it was provided by U.S. citizens who were working there on behalf of a U.S. university. The whole activity was designed as part of the process of maintaining forces and associated civilians on the base by U.S. personnel to serve the needs of the U.S. military authorities. The memorandum was written on the base in response to complaints which are alleged to have been made by U.S. servicemen about the behaviour of the plaintiff, who is also a U.S. citizen, while she was working there. On these facts the acts of the defendant seem to me to fall well within the area of sovereign activity.”

- 57 In Littrel reference was made to the speech of Lord Wilberforce in I Congreso del Partido [1983] AC 244 in which he stated:-

“The conclusion which emerges is that in considering, under the "restrictive" theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.”

- 58 In Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62 Lord Sumption stated:

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Application to contracts of employment

As a matter of customary international law, if an employment claim arises out of an inherently sovereign or governmental act of the foreign state, the latter is immune. It is not always easy to determine which aspects of the facts giving rise to the claim are decisive of its correct categorisation, and the courts have understandably avoided over-precise prescription. The most satisfactory general statement is that of Lord Wilberforce in I Congreso del Partido [1981] 2 All ER 1064 at 1074, [1983] 1 AC 244 at 267:

“The conclusion which emerges is that in considering, under the restrictive theory, whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to

deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage or whether the relevant act(s) should be considered as having been done outside that area and within the sphere of governmental or sovereign activity.'

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In the great majority of cases arising from contract, including employment cases, the categorisation will depend on the nature of the relationship between the parties to which the contract gives rise. This will in turn depend on the functions which the employee is employed to perform.

- 59 In Sengupta v Republic of India [1983] ICR 221 EAT, the court had to consider whether the appellant, an Indian national, employed as a clerk at the Indian High Commission in London could pursue his complaint of unfair dismissal. The EAT was satisfied that the tribunal did not have jurisdiction. Mr Justice Browne – Wilkinson (as he then was) stated:

The restrictive theory is that although a state is immune from claims arising out of its public acts done under its sovereign powers (*jure imperii*) it enjoys no immunity in respect of claims arising out of acts of a private law character such as a private citizen might have entered into (*jure gestionis*). We will refer to these classes of acts as “public” and “private”. The classic example of a private act done by a sovereign state is the state entering into an ordinary commercial contract.

...

Mrs. Higgins further submitted that the question of immunity has to be decided by reference solely to the terms of the contract without regard to the breach of it by the state. She submits that we should not have regard to the fact that the investigation of the question “Was the applicant unfairly dismissed?” will or may involve an investigation of the manifestly public acts of the Republic of India, i.e. how it runs its diplomatic representation in the United Kingdom. We reject this submission. Lord Wilberforce, in I Congreso del Partido [1981] 3 W.L.R. 328, 336, pointed out that one of the foundations of the restrictive theory is that to require a state to answer a claim based upon private law transactions:

“does not involve a challenge to or inquiry into any act of sovereignty or government act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.”

In our view, to admit a claim such as a claim for unfair dismissal which would or might involve an investigation into the public acts of the foreign state would not comply with Lord Wilberforce's requirements.

...

In our judgment, in seeking to decide whether the claim in this case is excluded by the doctrine of sovereign immunity, we must ask the following questions: (a) Was the contract of a kind which a private individual could enter into? (b) Did the performance of the contract involve the participation of both parties in the public functions of the foreign state, or was it purely collateral to such functions? (c) What was the nature of the breach of contract or other act of the sovereign

state giving rise to the proceedings? (d) Will the investigation of the claim by the tribunal involve an investigation into the public or sovereign acts of the foreign state?

...

If we have asked ourselves the right questions, then in our judgment the necessary result must be that there is no jurisdiction to entertain the applicant's claim. It is true that any private individual can employ another, i.e. can enter into a contract of employment. Therefore in that sense the entry into a contract of employment is a private act. But when one looks to see what is involved in the performance of the applicant's contract, it is clear that the performance of the contract is part of the discharge by the foreign state of its sovereign functions in which the applicant himself, at however lowly a level, is under the terms of his contract of employment necessarily engaged. One of the classic forms of sovereign acts by a foreign state is the representation of that state in a receiving state. From the doctrine of sovereign immunity were derived the concepts that the embassy premises were part of the soil of the foreign sovereign state, and that diplomatic staff are personally immune from local jurisdiction. A contract to work at a diplomatic mission in the work of that mission is a contract to participate in the public acts of the foreign sovereign. The dismissal of the applicant was an act done in pursuance of that public function, i.e. the running of the mission. As a consequence, the fairness of any dismissal from such employment is very likely to involve an investigation by the industrial tribunal into the internal management of the diplomatic representation in the United Kingdom of the Republic of India, an investigation wholly inconsistent with the dignity of the foreign state and an interference with its sovereign functions.

- 60 There are also helpful statements made by the other law lords in Holland to which reference has already been made above. Lord Clyde stated:

Investigation of the claim would involve a consideration of the appellant's performance of her duties and so inevitably of the nature and substance of the educational service which the state was providing for its armed forces and their families. I have concluded that the Court of Appeal was correct in holding that this is a case which is covered by state immunity.

Lord Millet stated:

The doctrine of state immunity

It is an established rule of customary international law that one state cannot be sued in the courts of another for acts performed *jure imperii*. The immunity does not derive from the authority or dignity of sovereign states or the need to protect the integrity of their governmental functions...It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another...

Submissions

- 61 The respondent had prepared a very detailed skeleton argument that the Tribunal read at the beginning of this hearing which ran to 53 pages. In preparation for submissions Counsel produced a 12 page "Speaking

Note". It is not proposed to set out the details of these documents here suffice to say that the legal position is relatively non-contentious. Whilst appreciating that the claimant is not legally represented he has not sought to argue with any of the authorities relied upon by the respondent.

- 62 Again acknowledging that the claimant has not been represented, it has to be noted that the skeleton argument produced by him and his closing submissions set out matters which were not relevant to the issues to be determined. His closing submissions in particular really veered into matters which might be necessary were the Tribunal to accept it had jurisdiction in this matter and were not relevant to the preliminary issue that it had to decide.

Conclusions

- 63 As stated clearly in Benkharbouche the determination of the preliminary issue before this Tribunal will depend on the functions which the employee was employed to perform. The Tribunal must follow the authorities and is satisfied from the evidence it has heard that the claimant's performance of his employment functions was involved in the exercise of US sovereign authority or government functions in the UK. The claims being brought by the claimant would require the Tribunal to investigate US policies and decisions that were taken in exercising its sovereign authority.
- 64 It must be acknowledged that the claimant performed even more significant functions for the respondent in the exercise of its sovereign authority than appeared in some of the earlier cases in which it was held that the respondent was entitled to claim State immunity. The claimant was performing a much more significant function than a bowling alley equipment repairer (Hicks v USA) and it could be argued involved in a much more strategic role to do with the running of the air base than a civilian education services officer (Holland v Lampen-Wolfe).
- 65 The claimant was employed to work within the USAFE Environmental Element of the Mission Support Group for the 48th Fighter Wing under the command of a US Air Force Military Wing Commander. In his own statement the claimant recognises the critical role performed by the Mission Support Group and particularly the Environmental Element of which he was a part. The Tribunal further accepts the evidence of Colonel Kearley with regard to it being a critical component. The function that the claimant was performing of Tank Program Manager was important to the mission of USAFE bases so that the Wing Commander had up to date and accurate information on the extent and degree of risks. The importance of the claimant's role is demonstrated by the level of security clearance he had and his role in being first on the scene where accidents had occurred which involved a spillage of fuels and other products which might cause environmental damage.
- 66 Of particular relevance to the Tribunal in coming to these conclusions are the contemporaneous documents completed by the claimant and his

supervisor with regard to his performance evaluation. These show quite clearly as has been set out above the nature and complexities of the role that the claimant was undertaking. These were documents written well before any contemplation of these proceedings.

- 67 The authorities also make it clear that the Tribunal must give consideration to whether the acts being challenged in these proceedings relate to the maintenance and operation of the US military bases in relation to which the USA is immune. That is clearly the case. As stated by Counsel for the respondent at paragraph 140 of the skeleton argument all of the acts complained of by the claimant relate to acts taken by other USAFE employees in the course of their duty and there is no question that those acts were also performed in the exercise of USA sovereign or governmental functions in respect of which the USA is immune.
- 68 It follows that this Tribunal does not have jurisdiction to determine the complaints and all complaints are dismissed.

Employment Judge Laidler

Date: 11 November 2021

Sent to the parties on:

6 December 2021

For the Tribunal Office