EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr P Jones	v	**American University of Afghanistan (R2)** **Mr D Sedney (R1)**

PUBLIC PRELIMINARY HEARING

Heard at: London South by CVP **On: 21 November 2022**

Before: Employment Judge O'Neill

Appearance:

For the Claimant: In person

For the Respondent: Mr F Wilmot-Smith

RESERVED JUDGMENT

The claims are dismissed for want of territorial jurisdiction.

REASONS

1. Claims

The claims before the tribunal are for

Unfair dismissal – whistle blowing – s103A Employment Rights Act 1996(ERA)

Money claims

- Notice
- Holiday Pay accrued but not taken
- Arrears of Pay

Victimisation – race – S 27 Equality Act 2010 (EQA)

Harassment – race – S26 EQA

2. Background

The claimant was employed by the American University of Afghanistan (AUAF) and lived and worked in Kabul. He had been employed since May 2019. He was dismissed on 31 May 2020 when his contract was not renewed. He had returned to his home in England for Christmas in December 2019 but was suspended in January 2020 before he had returned to Afghanistan. He did not return to work in his role or in Afghanistan but remained on 'administrative leave' ie suspension at his UK home until his dismissal.

3. Jurisdiction – Purpose of Hearing

The claimant has insufficient continuous service to claim ordinary unfair dismissal but makes a claim under S103 A – Whistle blowing – which does not require two years continuous service.

There is also an issue related to time limits. The ET1 was lodged on 13 October 2020, Acas Early Conciliation began on 18 August 2020 and ended 14 September 2020.

Any discrimination complaint relating to facts arising before 19 May 2020 is prima facie out of time unless it is part of a continuous act extending after 19 May 2021 or the Tribunal extends time under S123 (1) EQA.

The respondent contends that the arrears of pay arising before 19 May 2020 are out of time unless they are found to be part of a series of deductions the last of which is in time or the Tribunal extends time under S23 ERA.

In respect of the money claims, the entitlement to accrued holiday pay and notice pay (if any) would have arisen on the date of dismissal ie 31May 2020 and are in time as is the unfair dismissal claim.

The main jurisdictional issue is that respondent also contends that the Employment Tribunal does not have territorial jurisdiction to hear the claims.

The purpose of this hearing is to determine these jurisdictional questions.

4. Law

4.1 The Employment Rights Act 1996 and the Equality Act 2010 are silent as to their territorial scope. i.e. the geographical 'reach' of the legislation. It has been left to the courts to determine the issue.

4.2 The most relevant authority on territorial jurisdiction is

Jeffery v British Council [2019] ICR 929

which encompasses earlier key decisions such as Ravat and Lawson.

"(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 v Serco Ltd 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, 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".

(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.

(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."

4.3 The parties' choice of law clause is also relevant:

Duncombe v Secretary of State for Children, Schools and Families (No.2) [2011] UKSC 36

Partners Group (UK) Ltd v Mulumba [2021] I.C.R. 1501

4.4 Counsel for the Respondent also provided authorities as set out in Appendix1.

5. Evidence

5.1 The claimant produced a statement which was taken as read and gave evidence in person to the tribunal and was cross-examined.

5.2 The first respondent produced a statement which was taken as read and gave evidence in person and was cross-examined.

5.3 There was an agreed bundle of documents paginated and indexed of 264 pages.

5.4 Each side provided a skeleton and the respondents submitted a Bundle of authorities as set ot in Appendix 1.

Findings

6. Having considered all of the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where I heard or read evidence on matters on which I make no finding or do not make a finding to the same level of detail as the

evidence presented to me that reflects the extent to which I consider that the particular matter assists me in determining the issues. Some of my findings are also set out in my conclusions below in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.

7. The claimant began his employment with the second respondent as an English teacher in January 2019. He was subsequently promoted to CECO (chief ethics and compliance officer) in August 2019. The claimant alleges he had a fixed term contract of three years in his capacity of CECO but the written contract of employment provides an end date of 31st of May 2020 and 30 days' notice.
8. The contract came to an end on the 31st of May 2020 when the respondents declined to renew or extend it and issued a letter stating that his last working day would be 31st of May 2020.
9. The claimant has insufficient service to bring a claim under section 94 of the ERA 1996 but he brings his unfair dismissal claim under section 103B which does not require a minimum period of notice. His other claims being discrimination on money claims do not require any continuous service.
10. The respondent R1 is an American citizen who acts as a trustee of the university (AUAF). He has no connection with the United Kingdom. The second respondent AUAF is a higher education establishment based in Kabul at the time and set up in 2005 as a consequence of an agreement between the pre 2021 government of Afghanistan and the USA. It is funded by the USA Aid and is governed by protocols linked to the United States funding authority. It also receives some private funding but none of the donors are connected to the United Kingdom and funding from the UN. There are no trustees who are UK citizens.
11. I do not accept the claimant's proposition that there is a nexus between the R1 and the UK because the UK provides general funding to the United Nations and the UN provides some funding to the university.
12. The claimant was employed under a contract which provides that the law of Afghanistan is applicable to the contract and Afghanistan is to be the legal venue for settlement of disputes. Although it is doubtful that following the return of the Taliban in August 2021 that it is a practical legal venue, the contract term shows that there was no intention that the contract should be governed by English law and disputes resolved within the English jurisdiction.
13. The bundle contains documents issued by USA aid which demonstrates that the claimant has previously raised grievances on matters of dispute with that agency under a formal procedure in respect of which U.S. law may apply as the letters invite him to take out proceedings in the American courts if not satisfied. One document (which I accept to be a genuine document notwithstanding that the claimant claims not to have had it before the Bundle) dated 5 January 2022 indicates a strong and contemporary connection between the USA and the resolution of disputes which the claimant may have with AUAF and reads as follows:

> *'Because the Administrator has issued an order denying relief, Phillip Jones has exhausted all of his administrative remedies with respect to the complaint, and he may bring a de novo*

> *action at law or equity against the contractor or grantee to seek compensatory damages and other relief available under 41 U.S.C. § 4712 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. A civil action under § 4712 must be brought within two years of the date on which administrative remedies were exhausted'.*

14. The claimant was originally hired as an English teacher and was already living and working at the university in Kabul as an expat teacher when he applied for and was appointed to the post of CECO. The post was based entirely in Afghanistan and there was no requirement or expectation that any part of the role would be conducted in the United Kingdom the claimant was paid in U.S. dollars into an Afghan bank account.
15. On the 8th of January 2020 the claimant was placed on administrative leave, which was in effect suspension on full pay, by R1 during a telephone conversation of the 8th of January 2020 followed up by an e-mail. A second e-mail of the 16th of January specifically instructed the claimant '*to take no action as an AUAF employee'* and confirmed he had '*no authority to represent yourself as an acting for the AUA*F.' The claimant was in England when this conversation took place, having returned for the Christmas holidays. The e-mail of the 8th of January also directed the claimant not to return to Kabul.
16. The claimant then spent the rest of his contractual term in the UK until his contract ended on the 31st of May 2020. During this period he was suspended and not working as such. The contract ran from the 18th of August 2019 to the 31st of May 2020 and in real terms the claimant spent about half the time in post in Kabul and half on suspension at home in the UK.
17. The claimant contends that he was working in this period. But he was submitting time sheets which he himself completed and which recorded no working hours. At the beginning of his administrative leave he was involved in handing over files and passing over information but by the 8th of February he was not doing any work at all at the behest of the respondents.
18. The claimant says he was working by completing the time sheets but I find this was negligible. On his own admission this added up to about 30 minutes a month.
19. The claimant also says that he spent time supporting and advising others in their grievances with the respondents and this constituted work. I do not accept this to be the case. He may have chosen to assist others but he was not doing this in the course of his work and he had been expressly told to stop doing the work of the CECO and other people had been appointed to take over the work of CECO in the interim.
20. The claimant further contends that as he was under the instruction of the first respondent to stay at home and in effect do nothing and this constituted passive working and by so doing he should be regarded as working under the contract. I do not accept this proposition. The Claimant was at home on suspension doing nothing.

Conclusions

Territorial Jurisdiction

21. The claimant was not working in the United Kingdom or England in particular. He only ever worked in Afghanistan. He was an expatriate worker in the classical sense. As such the English tribunal has no jurisdiction unless there is an especially strong reason to find that this is an exceptional case.

22. There is an argument for holding this to be an exceptional case because in August 2021 the government of Afghanistan was taken over by the Taliban. The appropriate body of law and forum for resolution under the contract is Afghanistan. Counsel for the respondent tells me that the courts are functioning normally however even if that is the situation, I accept the claimant's submission that it would be unreasonable to expect him to return to Afghanistan in the current circumstances for fear for his safety.

23. However, in considering exceptionality as set out in the Jeffrey case I am required to have regard to *whether 'there are factors connecting the employment to Great Britain, and British employment law, 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'.*

24. I conclude that the claimant has failed to show that his were circumstances where Parliament intended the employment to be governed by British employment law because

    24.1 AUAF, the claimant's employer is not a British institution and has no connections with Britain. It has no operations or assets in the UK and is not a British company or educational institution nor is it a shell company for a UK based entity. It is truly independent of the UK.
    24.2The claimant is a classic expatriate worker who was working and living in Kabul. He was appointed while he was already living and working in Kabul.
    24.3Afghanistan is the chosen law of the contract and legal venue.
    24.4His salary was paid in dollars into an Afghan bank.
    24.5He was not a posted worker as described above in the Jeffrey case (Paragraph 5).
    24.6The claimant was not a worker coming and going from Britain to do spells of work in another country for a British based entity. It was the expectation of all parties that he would live and work in Afghanistan the whole time.
    24.7 Mr Sedney has no connection with the UK, he is a United states citizen without any assets or interests in this country.
    24.8There appear to be avenues for dispute resolution between the claimant and AUAF connected to the United States which the claimant has already taken up.

24.9 The funding and governance of the University and the inter governmental agreement under which it was established tend to show a connection to the USA and a much stronger pull in that direction than to the UK.

25. The claimant is a British citizen. The claimant was in England on suspension at the time of his dismissal. He was not in the UK at the behest of the respondents he was here by happenstance. The university is an international organization with staff from a number of countries who may return home for Christmas or spend Christmas anywhere in the world. The claimant went home to England for Christmas and was still here when suspended and eventually dismissed. His whereabouts at the time of dismissal could have been anywhere other than Kabul where he was instructed not to return. I conclude this is insufficient to outweigh the pull of the other factors.
26. In all the circumstances I find that the Employment Tribunal of England and Wales has no jurisdiction to hear these claims.

Continuous service

27. I did not address the matter of continuous service. The claimant relies on S103A-whistle blowing which does not have a service requirement. To determine whether the claimant is exempt from the requirement in S108 it would be necessary to determine the substantive claim and the reason for dismissal. That is a matter best left to a substantive hearing had I found this Tribunal to have had territorial jurisdiction.

Time Limits

28. At the onset of the hearing the claimant clarified his particulars of claim. The respondent agrees that had there been territorial jurisdiction the claims of unfair dismissal and those relating to notice play and holiday pay arising at the date of dismissal are in time.

29. The claimant explained that 'other payments' at paragraph 8.1 of the ET1 are the same as the claim for arrears of wages. The claimant says that after his suspension on the 8th of January pay the respondents failed to pay him an uplift to his wages called Post Hardship Differential Allowance and this is his other money claim. The respondent argues that these payments are out of time if they fell before 19 May 2020.
If these payments are shown to be properly payable (and I leave that question to another Tribunal), then I find that they are a series of deductions and as such the last falls on the dismissal date and they are in time (but without territorial jurisdiction).
30. The Claimant explained that his racial harassment claim is founded on his allegation that in September 2019 the Head of Security sent him an offensive monkey photograph with a caption relating to the child of the Duke and Duchess of Sussex. That is the only example of racial harassment he offered at this hearing or may be found in his 'victim statement'. The claimant appears to have made complaints about that and other matters through the universities own procedures and has offered no explanation as to why he failed to lodge a

Tribunal claim in time or why I should extend time. In the circumstances I find this claim to be out of time.

31. The claimant explained that his other race discrimination claim was made under S27 – Victimisation. He asserts that the 'protective act' was a report he made concerning his own harassment and that of others as described in the Victim Statement he produced for the investigation conducted by the university. The claimant contends that this led to his suspension and ultimately to his dismissal. He asserts that the detriment he suffered was the dismissal on 31 May 2020. Had I found territorial jurisdiction I would have found this claim to be in time.

Employment Judge O'Neill

25 November 2022

Appendix 1

Lawson v Serco Ltd [2006] UKHL 3; [2006] I.C.R. 250
Duncombe v Secretary of State for Children, Schools and Families (No.2) [2011] UKSC 36
Ravat v Halliburton Manufacturing and Services Ltd [2012] UKSC 1
Jeffery v British Council [2019] ICR 929
Williams v Brown UKEAT/0044/19
Partners Group (UK) Ltd v Mulumba| [2021] I.C.R. 1501
Kong v Gulf International Bank (UK) Ltd [2022] EWCA Civ 941

Appendix 1