EMPLOYMENT TRIBUNALS

Claimant: Mr J Singh

Respondent: Foreign, Commonwealth & Development Office

Heard at: London Central (CVP) **On: 2 May 2023**

Before: Employment Judge A.M.S. Green

Representation
Claimant: Mr M McMullen – GMB Union representative
Respondent: Mr J Chegwidden - Counsel

JUDGMENT having been sent to the parties on 19 May 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. For ease of reference I refer to the claimant as Mr Singh and the respondent as the FCO.

2. Mr Singh was employed by the FCO in the role of Fleet and Security Manager at the British High Commission in Fiji. His employment started on 8 May 2018 and continued until he was dismissed with effect from 17 June 2022 on the grounds of gross misconduct. After a period of early conciliation which started on 8 July 2022 and ended on 17 August 2022, Mr Singh presented a complaint to the Tribunal on 4 September 2022. He claims unfair dismissal, refusal of union representation during his disciplinary proceedings, disability discrimination and race discrimination.

3. The FCO denies liability. On 12 October 2022, the FCO applied for an public preliminary hearing to determine whether the Tribunal had territorial jurisdiction to hear Mr Singh's claims [27]. The application proceeds on the premise that the territorial scope of the Employment Rights 1996 ("ERA"), the

Employment Relations Act 1999 ("ERA 1999") and the Equality Act 2010 ("EQA") does not extend beyond Great Britain.

4. At the hearing, we worked from a digital bundle. Unfortunately, this had not been sent to me and we had to delay the start of the hearing to facilitate transmission of the bundle. I then took some time to read the bundle, the representatives' skeleton arguments and the witness statements provided. We agreed that it would not be necessary for the witnesses to give oral evidence as the facts concerning Mr Singh's employment were agreed. The representatives made closing oral submissions. I then adjourned to deliberate and prepare my decision.

Findings of fact

5. Mr Singh is a dual Fijian/British national. He acquired his British citizenship through naturalisation. He served in the British army and is now a veteran. He lives near Suva, which is the capital of Fiji.

6. The FCO advertised a vacancy for the position of Driver/Messenger [84]. The advertisement stated, amongst other things that "Staff recruited locally by the High commission is subject to Terms and Conditions of Service according to local Fiji employment law."

7. Recruitment of country based staff is a process led by the relevant British Embassy, High Commission, Mission, or Consulate. The recruitment for Mr Singh's position was led by and conducted from the British High Commission in Fiji. The Regional Hub at the British Embassy in Manila provided the advertisement, shortlisting and support services to the British High Commission for recruiting to the position. Once the vacancy was closed, the FCO's HR Regional Hub provided the British High Commission the shortlist of candidates [92-93]. The candidates were interviewed in person by the hiring manager with two panellists.

8. Mr Singh successfully applied for the position and was offered the job.

9. The FCO employed Mr Singh as a member of the locally based "country staff" to work for the British High Commission in Suva. The FCO sent him his letter of appointment dated 8 May 2018 [96]. In her witness statement Ms Ashley Watson states at paragraph 5 that country based staff are employed on a local contract at the British Embassy/High Commission in the country where they work. In paragraph 6, she states that they are not civil servants or part of the Diplomatic Service. Country based staff are recruited in each country in accordance with the applicable laws of that country, and are bound by the terms and conditions set out in the staff handbooks produced by the respective Embassy/High Commission. I have no reason to doubt that.

10. Mr Singh's employment was subject to the terms and conditions of service for FCO local staff in Fiji [42]. This provided that his employment contract was governed by Fijian law and subject to the jurisdiction of the courts of Fiji [45]. Mr Singh was paid in Fijian dollars into his local bank account. Copies of his

payslips were produced to the Tribunal [124-126]. Fijian income tax was liable to be deducted from his salary. However his income did not exceed the threshold for paying income tax. His payslips show that his salary was subject contributions to the Fiji National Provident Fund which is a compulsory pension scheme for local employees [124-126].

11. Mr Singh's employment was conducted in Fiji. It was not limited to the physical confines of the British Diplomatic Mission. His duties concerned the activities of the British High Commission and he was line managed from there.

Applicable law

12. Territorial jurisdiction concerns the reach of British legislation and the span of the authority given by Parliament to British courts and tribunals. In the employment context it is obvious that an employee living in Great Britain and working in Great Britain for a company incorporated in Great Britain will be entitled to bring a claim before a British employment tribunal in reliance on employment rights provided by British legislation. Equally obvious, an employee living and working overseas for an overseas employer and having no connection with Great Britain will not be entitled to do so: Parliament does not legislate for the world. Other scenarios will be less clear: what of, for example, a peripatetic employee based in Great Britain but regularly working abroad, or an employee working and living abroad but in a British enclave such as a military base? The answer to whether such workers can rely on employment rights provided by British legislation will depend on an analysis of the territorial jurisdiction provisions of the particular statutes under which the putative claim is brought, and the interpretation the appellate courts have given to those provisions in previous cases.

13. In the combined appeals in **Lawson v Serco Ltd, Botham v Ministry of Defence, and Crofts v Veta Ltd [2006] UKHL 3**, the House of Lords considered for the first time what limits apply to the territorial scope of employment legislation which contains no express limitations on the reach of an employment tribunal's jurisdiction. In **Lawson**, Lord Hoffmann (who gave the only reasoned speech) noted that the right to pursue a claim for unfair dismissal before a British employment tribunal necessarily does not have worldwide effect: there are implied territorial limitations to which the courts must give effect. Lord Hoffmann's speech in **Lawson** opined that 'There is no reason why all the various rights included in the ERA 1996 should have the same territorial scope' (para 14). This view has not subsequently been followed and it has become established that the principles regarding the implied limits to the territoriality of unfair dismissal apply to all provisions within ERA . This has been held to include whistleblowing detriment and automatically unfair dismissal under ERA ss 47B and 103A (see **Green v SIG Trading Ltd [2018] EWCA Civ 2253** and **Smania v Standard Chartered Bank [2015] IRLR 271**).

14. The same **Lawson** principles also apply to other employment statutes which are mute on their span of territorial jurisdiction and therefore rely on implied

restrictions. In relation to EQA this was confirmed by the Court of Appeal in **R (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWCA Civ 438**. In that case, the Court of Appeal rejected an argument advanced by the claimants that discrimination claims under the EQA should be regarded as having a wider territorial reach than unfair dismissal claims. Sir Colin Rimer stated that if Parliament had intended the discrimination provisions in the EQA to operate on a world-wide basis, it would have said so, and there were no grounds for implying such an intention (see para 47). Other statutes which mirror the ERA and EQA in relying on implied territorial limitations include the right to be accompanied to a grievance or disciplinary meeting and associated provisions in ERA 1999 ss 10–13 (see **CreditSights Ltd v Dhunna [2014] EWCA Civ 1238**).

15. An employee who both lives and works abroad but wishes to bring a claim before a British employment tribunal faces a high hurdle to establish territorial jurisdiction. In **Ravat v Halliburton Manufacturing and Services Ltd [2012] UKSC 1, [2012] IRLR 315** Lord Hope (with whose judgment Lady Hale, Lord Brown, Lord Mance and Lord Kerr agreed) described such an employee as a 'true expatriate' (at [28]) and held that for true expatriates there must be 'an especially strong connection with Great Britain and British employment law before an exception can be made for them' (at [28]). The starting point is for such an employee to show that his or her employment relationship has a stronger connection with Great Britain than with the foreign country where the employee works (para 27). This comparative exercise was described by Elias LJ in **Bates van Winkelhof v Clyde & Co LLP [2012] EWCA Civ 1207**: 'In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force'.

16. The formulation adopted by the Supreme Court in **Duncombe v Secretary of State for Children, Schools and Families (No 2) [2011] UKSC 36**, was whether the true expatriate 'has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection' (per Lady Hale JSC at [16]). It is therefore not enough for the claimant to show a closer connection with Britain and British employment law than with the country where they perform their work and that country's legal system. The connection must be 'overwhelmingly closer'. That is not a common threshold in employment law and indicates just how strong an expatriate's case will have to be to establish that the UK tribunals have territorial jurisdiction. Although the 'overwhelmingly closer' dictum was not explicitly referred to in **Ravat,** the comparative test described in Lord Hope's judgment in the latter case (and with which Lady Hale, who also sat in **Ravat**, concurred) is consonant with the way in which Lady Hale described the test in **Duncombe**.

17. In the case of **Rajabov v Foreign and Commonwealth Office [2022] EAT 112 (19 August 2022, unreported)** the court addressed head on the

relevance of a situation in which the respondent will or may have diplomatic or state immunity in the courts of the country in which the employee lived and worked such that it would or might defeat any employment law claim brought in that jurisdiction. The EAT in **Rajabov** held that this issue was relevant but 'not a factor which intrinsically discloses a closer connection with Great Britain' and 'not a matter of overriding significance which trumps other factors tending against jurisdiction'. The EAT noted that the same decision had been reached by other constitutions of the EAT in **Bryant v Foreign and Commonwealth Office [2003] All ER (D) 104 (May) (10 March 2003, unreported)** (which had been described as correctly decided by Lord Hoffmann in **Lawson**) and also in **Hamam v British Embassy in Cairo [2020] IRLR 574**. In **Rajabov** itself, the would-be claimant had been dismissed on grounds of redundancy from his post in Tajikistan. The tribunal rejected the assertion of territorial jurisdiction, noting that the governing law of the contract was that of Tajikistan, the claimant's residence was in Tajikistan and he had been locally recruited and was taxed and made social security contributions there. Whilst accepting that the employer had connections with the UK government and that on the claimant's case, he had been told that UK whistleblowing laws would protect him if he raised concerns about financial wrongdoing, the tribunal held that those points did not outweigh the other factors which showed a stronger connection with Tajikistan than Great Britain. The tribunal had also considered, but given little weight to, the fact that when a colleague of the claimant had pursued a claim against the FCO in Tajikistan, the FCO had successfully relied upon a claim of diplomatic immunity. As stated above, the EAT declined to interfere with the reasoning or decision of the tribunal and dismissed the appeal.

18. Taking account of the case law, and when considering the connection with both Britain and with British employment law, factors relevant to the comparative exercise will include:

    a. the amount of time, if any, the employee spends living and/or working in Great Britain versus the foreign country;

    b. the employee's place of domicile and residence status as well as the nationality and citizenship of the employee;

    c. where and why the employee was recruited;

    d. how long the employee has been and is likely to be an expatriate and what the situation was before and after this status;

    e. in which country the employee's salary, pension and benefits are paid and in which currency;

    f. in which country the employee pays tax;

    g. the employee's line management structure and administrative support and where those things are based;

h. the law of the contract, why it was chosen and whether the employee had any influence over its choice;

i. any other representations that were made by the employer about the applicability and protection of British employment law available to the employee;

j. the identity of the employer and the extent of its connection with Great Britain; and

k. whether the employer will or may have diplomatic or state immunity in the courts of the country in which the employee performs their work.

19. A case in which the comparative approach led to a conclusion that there was no jurisdiction over the claim was **R (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs [2016] EWCA Civ 438**. There, two Afghan nationals, who had been recruited by the British Government to serve as interpreters with the British military in Afghanistan, were held not to be entitled to bring discrimination claims (on grounds of nationality) in Great Britain under the EQA as they did not have stronger connections with Great Britain and British employment law than with Afghanistan and Afghan law. The Court of Appeal concluded that the only connection that the claimants had with Great Britain was the identity of their employer, the UK Government. They were not expatriate or peripatetic workers; they were not British citizens, but Afghan nationals; they lived, were recruited, and worked exclusively in Afghanistan; their employment contracts were governed by Afghan law; and they did not pay UK tax. The British tribunals, therefore, had no jurisdiction to hear their claims. The argument of the claimants that state immunity precluded them from suing the British government in Afghanistan, and therefore the connection with British law was closer than the connection with Afghan law, was also unsuccessful.

20. Another example that Lord Hoffmann gave in **Lawson** was of an expatriate employee who would be entitled to bring a claim of unfair dismissal before a British employment tribunal is that of an employee of a British employer who is operating within what amounts for practical purposes to an extra-territorial British enclave in a foreign country. In the **Lawson** case itself a British company employed the employee to work as a security supervisor on Ascension Island, a dependency of a British overseas territory with no local population, where the company had a contract to service the RAF base. Lord Hoffmann held that '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 was overwhelmingly stronger' (para 39). Lord Hoffmann contrasted the case with **Bryant** which he held had correctly decided that ERA s 94 did not apply to a British national locally engaged to work in the British Embassy in Rome: one distinguishing feature between **Bryant** and **Lawson** was that the workplace of Mr Lawson had no local community and, presumably, none of the structures of a competing jurisdiction that were present in Rome.

Discussion and conclusions

21. Mr Singh's employment with the FCO did not demonstrate an overwhelmingly closer connection with Britain and with British employment law than with Fiji and the laws of that country. I say this for the following reasons:

    a. Mr Singh spent all of his time living and working in Fiji when he was employed by the FCO. He was not a peripatetic employee going to and from Britain;

    b. Mr Singh's place of domicile and residence status is Fiji. I acknowledge that he is a dual British/Fijian national but the fact of his British citizenship does not of itself support his claims should be heard by the Tribunal.

    c. Mr Singh was recruited locally in Fiji to provide his service as - to the British High Commission in Fiji and nowhere else.

    d. Mr Singh was not an ex patriot. He was a local hire.

    e. Mr Singh was paid his salary in Fijian dollars which was paid into his bank account in Fiji. His pension benefits were also paid locally.

    f. If Mr Singh's income had exceeded the threshold above which in which he would be liable to be taxed, tax would have been levied in Fiji by the Fijian tax authorities.

    g. Mr Singh was managed by locally based managers.

    h. Mr Singh's contract of employment was governed by the laws of Fiji. It was chosen because of where he was required to work which is entirely logical and to be expected. On the evidence, I cannot say whether he had any influence over the choice of law. I suspect not given his junior position but that is only speculation.

    i. The advertisement for Mr Singh's role clearly stated his employment would be governed by the laws of Fiji. There was nothing to suggest that he could claim that there was any representation by the FCO that he would benefit from any of the laws relating to any part of Great Britain (e.g. English law or Scots Law).

    j. The FCO is a department of the British State. It obviously has a strong connection to Great Britain but that in itself does not tip the balance in favour of the Tribunal having jurisdiction to hear these claims. Many of the cases referred to above involve the same respondent on similar facts and cannot be distinguished and not followed in Mr Singh's case.

    k. I presume that the FCO will or may have diplomatic or state immunity in the courts of Fiji where Mr Singh performed his work. In itself, that

does NOT persuade me that the Tribunal has jurisdiction to hear these claims.

22. For these reasons, the Tribunal does not have jurisdiction to hear Mr Singh's claims.

23. Finally, I understand from Mr McMullen that Mr Singh had previously attempted to assert his rights before the courts in Fiji but had been prevented from doing so. He told me that the local courts had not accepted jurisdiction. Consequently, he had gone to the Tribunal essentially seeking a remedy of last resort. Whilst I have sympathy for his predicament, I have not seen any evidence of a court order or similar document issued by the courts of Fiji declining to hear his claim.

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Employment Judge A.M.S. Green

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Date 24 May 2023

REASONS SENT TO THE PARTIES ON

.13/06/2023

FOR THE TRIBUNAL OFFICE