



# EMPLOYMENT TRIBUNALS

***Claimant***

***Respondents***

Ms C Loyer

**AND**

BBC Corporation

**Heard by:** CVP

**On:** 5 March 2021

**Before:** Employment Judge Nicolle

**Representation:**

**For the Claimant:** In person accompanied by her friend Ms S Ahmed

**For the Respondent:** Ms D Masters, of counsel

## JUDGMENT

The Tribunal does not have territorial jurisdiction to consider the Claimant's claim for equal pay under the Equality Act 2010 (the EQA) for the period May 2015 to October 2017 (the Relevant Period) against comparator Remy Nsabimana (Mr Nsabimana).

## REASONS

### The Hearing

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
2. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.
3. The parties were able to hear what the Tribunal heard.

4. The participants were told that it is an offence to record the proceedings.
5. From a technical perspective, there were no major difficulties.
6. The Tribunal was provided with an agreed bundle of documents comprising of 250 pages. The Respondent provided the Tribunal with a skeleton argument. Shortly before the hearing the Claimant provided a short witness statement from Enoh N'dri, who had been employed in Dakar as a Senior Broadcast Journalist for BBC Afrique from 2012 to 2018. He did not give evidence, but his statement was read by the Tribunal. The Claimant gave evidence and Marion Lahayville, International HR Business Partner, West and South Africa within BBC News (Ms Lahayville) gave evidence on behalf of the Respondent.
7. The hearing lasted from 10am to 5:30pm and the Tribunal reserved its decision.

### The Issues

8. By a claim form presented on 6 July 2020 the Claimant brought complaints of equal pay. The Claimant applied to amend her claim (a mark-up of her Grounds of Complaint is at pages 48-59 in the bundle but is undated) to compare herself to a further comparator, Mr Nsabimana, for the Relevant Period.
9. At a Closed Preliminary Hearing (CPH) on 3 February 2021 Employment Judge Joffe decided that an Open Preliminary Hearing (OPH) should take place to consider whether the Tribunal has territorial jurisdiction to consider the Claimant's equal pay claim for the Relevant Period) using comparator Mr Nsabimana.
10. Ms Masters confirmed that at the CPH on 3 February 2021 Employment Judge Joffe had allowed the Claimant's application to amend, to include Mr Nsabimana as an additional comparator, but that this was subject to the question of territorial jurisdiction remaining to be determined. This was therefore the sole matter the Tribunal had to decide at the OPH.
11. It is not therefore necessary for me to refer to the draft list of issues which was appended to the Case Management Order of Employment Judge Burns dated 18 November 2020 and which appears at pages 43-47 in the bundle.

### **Findings of Fact**

#### The Claimant

12. The Claimant is a French national. She says that she had a lifelong ambition to work for the BBC. From 2010 she was employed as a journalist based in Reunion.

13. She is a French speaker. She says that her English language skills have significantly improved during her time with the BBC and particularly since she has been working in London.

#### Recruitment by the Respondent

14. The Claimant initially made inquiries regarding possible positions via the BBC website. She then made direct approaches by email to the BBC Office in Dakar in Senegal (the Dakar Office). After three years her approaches were finally successful, and she joined the Dakar Office, initially as a freelancer in August 2014.

#### The Respondent

15. The BBC is a global public service broadcaster. It broadcasts in 42 different languages and has approximately 42 overseas offices or bureau (subsequently referred to as offices).

#### The Dakar Office

16. Ms Lahayville says that the Dakar Office is run indecently of the BBC in the UK, in line with local company and employment legislation and in compliance with the Labour Inspectorate of Senegal (the Inspectorate).

17. The Claimant disputes that the Dakar Office is run independently of the BBC in the UK (for brevity subsequently referred to as London).

#### BBC Afrique

18. More than half of the 54 African countries speak French. BBC Afrique is the French language service for Africa and sits within the BBC World Service (the World Service).

19. All content produced for BBC Afrique is in French and covers radio, digital and TV in Francophone Africa, but also wider African news, and news from outside Africa which is of global significance and/or of specific interest in that region. The news content of BBC Afrique is approximately 50% "local" news i.e., that pertaining to Africa and 50% international.

20. It is accepted that much content broadcast by the BBC is produced, broadcast and then recycled for subsequent use in a range of different platforms rather than necessarily being produced and broadcast solely in any given geographical area served by the BBC. This involves the adaptation of content produced by the BBC, for example in London, for local broadcast. The Claimant says that this would not always be solely a question of translation of the original content from English to French but rather the reworking of the material so that it had a regionally appropriate context.

#### Globally applicable policies and procedures

21. The Respondent has certain policies, to include those on Editorial Guidelines, the BBC Code of Conduct, Social Media and Diversity which are of global applicability. Employees and representatives of the BBC in each regional Office are expected to comply with these policies. Appropriate training is given on these policies, and this typically emanates from representatives of the BBC in London either by their attending the local office or the training being provided online.

22. It is accepted that the BBC has a common global ethos. The Claimant referenced a speech by the then Prime Minister, David Cameron in 2015 when he talked of the global influence of the BBC in the context of the UK's "soft power".

23. The Claimant referred to occasional tensions between locally employed journalists and London regarding news content. For example, she referred to a stipulated policy from London that certain news stories would need to be broadcast worldwide regardless of local interest. She gave the examples of the birth of Prince George in 2015 and the coverage of the Duke of Edinburgh's recent ill health.

#### Recruitment procedures

24. Dakar roles are advertised internally first in accordance with local legislation. If there are no suitable internal candidates, the search is then extended to all BBC employees and external candidates.

25. The Editor Afrique based in Dakar sets an annual budget for recruitment. When a hiring manager selects a candidate, they decide on the salary in accordance with this budget.

#### Labour Inspectorate

26. The Inspectorate has significant involvement in the employment relationship between the Dakar Office and its employees. For example, when an employee is recruited, a copy of the employment contract must be stamped by the Inspectorate.

#### The Claimant's career history with the Respondent

27. The Claimant was engaged as a freelancer by the Dakar Office between August 2014 and December 2014.

28. In January 2015, the Claimant was hired by the Dakar Office on a fixed term contract for six months as a class 4, category 5 journalist.

29. The Claimant had a temporary employment contract with the BBC, a British public interest company with a representative office in Dakar, registered in NINEA on 28 October 2009 under number 41209110V0, for a fixed term of six months, from 1 January to 30 June 2015. The contract was in French but has been translated for the purpose of the OPH. Relevant provisions are:

**Article 1: Law of the Contract**

Governed by the Senegal Labour Code.

**Article 5: Place of Work**

The employee will be based in the Dakar Office.

**Article 6: Remuneration**

The Claimant to be paid in Senegalese currency.

**Article 17: Jurisdiction**

The exclusive jurisdiction of the Courts of Dakar.

30. The contract was signed by the Claimant on 19 December 2014 and stamped by the Inspectorate on 5 February 2015.

31. The Claimant entered a further six-month fixed term contract from 1 July 2015 to 31 December 2015. The material terms are as per the previous one.

32. On 1 January 2016, the Claimant entered an indefinite term employment contract. The relevant provisions regarding the law of the contract, place of work, remuneration and jurisdiction were as per the earlier fixed term contracts. This contract was signed by the Claimant on 21 December 2015 and stamped by the Inspectorate on 24 March 2016.

Identity of the Claimant's employer

33. Ms Lahayville said that the Dakar Office is run independently of London, in line with local company and employment legislation and in compliance with the Inspectorate. The Claimant disputes whether the Dakar Office is truly independent from a legal and operational perspective from London and says that London had a 50% shareholding in the local Senegal company. The Tribunal heard no evidence on this point and as such is not able to make a finding on this point.

Collective Agreement

34. The employment of employees in Senegal is subject to the terms of the National Collective Agreement Sector News. The Claimant disputes that the BBC complied with all the terms set out in this detailed agreement to include, for example, locally specific holiday entitlement.

Job description

35. The Claimant says that she was not provided with the job description dated April 2014, which is at pages 80-83 in the bundle, at the time of her recruitment. It gives a job title of Multi-Media Broadcast Journalist based in Dakar in the BBC Afrique department.

36. It sets out requirements for the role which essentially involve a candidate being bilingual between French and English, having relevant journalistic experience with an up-to-date knowledge of French speaking Africa, regional and international current affairs. The section on duties includes reference to complying with the BBC's standards of accuracy, impartiality and fair dealing and adhering to the BBC Editorial Guidelines.

#### The Claimant's move to London

37. The Claimant commenced work for the BBC in London in October 2017. Her permanent appointment in London was confirmed in an email of 21 February 2018 from Jill Wookey, International HR Business Partner, Africa BBC People. The Claimant's role with BBC Africa Children's TV in London was at Band 7.

38. The Claimant is now employed pursuant to a UK contract of employment. This provides for a start date of 30 April 2018 but with her continuous employment being from 7 January 2016.

#### Relevant elements of the relationship between London and the Dakar Office

##### Pay

39. Whilst the Claimant expresses dissatisfaction in her witness statement regarding the amount of her pay and pension contributions this is not a question which is relevant to the matter I need to determine. What is, however, relevant is the extent to which remuneration was determined locally as opposed to in London.

40. The Claimant says that pay is in effect subject to the control and determination of London. Ms Lahayville says that there is local autonomy but subject to limits within a local budget approved by London. She accepts that any appointment which would be outside the budget and/or increase the head count would need approval from London.

41. Ms Lahayville says that the Claimant's pay was set in line with local pay practices and within the salary ranges specific to Dakar. She refers to pay progression in the Dakar Office consisting of annual statutory increases, seniority bonuses, the annual salary review, which is a general BBC practice in all countries, and promotion increases.

42. The BBC now has an International Pay Policy dated 18 November 2019. I do not need to refer to this further as it was not extant in the Relevant Period.

##### Pension

43. In Dakar, employees are entitled to a state pension, with pension contributions set by the government/social authorities. There is no BBC supplementary scheme or other private pension arrangement, as there is in the UK. A Senegalese employee's pension cannot be transferred to the UK. It

would, however, be possible for the Claimant to transfer her Senegalese pension to France.

#### HR supervision

44. In the Relevant Period the Claimant was supervised by a senior journalist based in Dakar who reported to the Editor Afrique, also based in Dakar, who in turn reported to the Head of West Africa, based in Lagos in Nigeria. He then reported to the Deputy Managing Editor based in London who supports the whole of BBC Africa globally, with a focus on financial, people and editorial matters.

45. The bundle at page 221 contained an organigram for the BBC Afrique service. This went up as far as the Head of West Africa in Lagos but did not show his reporting lines to London.

#### Appraisals

46. Appraisals are conducted locally once per year, usually in French but recorded in English. The Claimant refused to participate in appraisals in the Relevant Period stating that this was not a practice she was familiar with in France. Further, she said that as the forms were in English, and at this time her English was not as strong as it now, she felt she would be disadvantaged.

#### Training

47. The team which provides training to international staff is based in London.

#### Broadcast and content

48. BBC Afrique broadcasts are routed via London. The Claimant says that the Dakar Office does not have the ability to broadcast directly.

49. I was referred to examples of content from the BBC Afrique website with articles featuring the Claimant's name. For example, the Claimant's reports on the violence associated with the elections in the Ivory Coast in 2015.

50. I was also referred to the BBC Afrique audience figures on YouTube (page 228) which shows that three out of the five countries with the highest audience figures for BBC Afrique content were outside Africa (France, United States and Canada).

#### The Claimant's time in Dakar

51. The Claimant accepts that during the Relevant Period she lived in Dakar and worked in the Dakar Office. She did not travel to the BBC offices in the UK during the Relevant Period. She took holidays outside of Africa, typically returning to France, but also visiting friends in London.

#### Global matters

52. The BBC's services worldwide are subject to the Royal Charter. There is to some degree a political component to the role of the World Service with significant managerial decisions regarding matters such as the opening or closing of a new language service needing approval from the BBC Trust and the Foreign Secretary.

53. Ms Lahayville says that there is some monitoring of employees in regional offices to include the appropriateness of pay, consistency of pay between offices to reflect local cost of living and to monitor equality and gender pay. She says that consideration is given to the possibility of international redeployment in the event of local redundancies.

54. Whilst staff are generally recruited locally there will be some incidences where individuals are initially employed in the UK and then deployed overseas or recruited in London and then assigned to foreign offices.

## **The Law**

### Addition of a new comparator

55. The inclusion of a new comparator in relation to a new period is a new claim - Potter v North Cumbria Acute Hospitals NHS Trust (2) [2009] IRLR 900, paragraph 37.

### General position on extraterritorial jurisdiction

56. I have confined sections quoted from judgements to what I consider relevant. Whilst not all the authorities were referred to during the hearing, I consider that they are well known, and it is relevant for me to set out the appropriate authorities considered in reaching my determination, particularly in circumstances where the claimant raised potential arguments, but as a litigant in person, was not able to refer to case authorities beyond the general principles established in Lawson v Serco.

57. It is for the Claimant to show that the Tribunal has territorial jurisdiction, not for the Respondent to show that it does not.

### Position under the EQA and the Employment Rights Act 1996 (the ERA)

58. The applicable test for a tribunal having territorial jurisdiction is the same under the EQA to that which applies, albeit not directly applicable to this case, in the case law for unfair dismissal claims under the ERA). As much of the relevant case law concerns the jurisdiction of tribunals to hear complaints of unfair dismissal under the ERA many of the authorities referred to involve claims under the ERA, rather than the EQA, but the principles are equally applicable.

59. Following the repeal of s.196 in October 1999, the ERA contains no generally applicable geographical limitation. The EQA is also silent on mainstream questions of territorial scope and leaves the gap to be filled by the courts. The Explanatory Notes (paragraph 15) to the EQA says as follows:



As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the ERA, the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain.

Lawson v Serco

60. Following Lawson v Serco [2006] IRLR 289 an analysis of the factual matrix is required. Lord Hoffman gave guidance as to what sort of employee would be “within the legislative grasp” of the ERA by reference to three examples:

- the standard case (working in Great Britain);
- peripatetic employees; and
- ex-patriate employees.

61. Lord Hoffmann 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:

- 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
- where he or she works in a “British enclave” abroad.

62. In respect of peripatetic employees, the House of Lords in Lawson agreed with the common-sense approach adopted by the Court of Appeal in Todd v British Midland Airways 1978 ICR 959, CA. Peripatetic employees do not perform their services in one territory, owing to the nature of their work. Lord Hoffmann held that in such cases, the employee’s base, the place at which he or she started and ended assignments, should be treated as his or her place of employment. Determining where an employee’s base is requires more than just looking at the terms of the contract; it is necessary to look at the conduct of the parties and the way they operated the contract in practice.

63. The basic rule is that the ERA only applies to employment in Great Britain. However, in exceptional circumstances it may cover working abroad. As summarised by the Court of Appeal in Bates van Winkelhof v Clyde and Co LLP and anor 2013 ICR 883, CA:

“Where an employee works partly in Great Britain and partly abroad, the question is whether the connection with Great Britain and British employment law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim”.

64. Where an employee works and lives wholly abroad, it will be more appropriate to ask whether his or her employment relationship has much stronger connections both with Great Britain and with British employment law than with any other system of law — Duncombe v Secretary of State for Children, Schools and Families (No.2) 2011 ICR 1312, SC.

65. In Ravat v Halliburton Manufacturing and Services Ltd 2012 ICR 389, SC the Supreme Court said that the resolution of territorial jurisdiction will depend on a careful analysis of the facts of each case, rather than deciding whether a given employee fits within categories created by previous case law. If an individual lives and/or works partly in Great Britain they need only to show that there is a sufficient connection to employment in the UK to establish jurisdiction.

66. In Ravat, Lord Hope stated that “the case of those who are truly ex-patriate because they not only work but also live outside Great Britain requires a specially strong connection with Great Britain and British employment law.’

67. Underhill LJ’s judgement in Jeffery v British Council [2019] ICR 929 included:

- (a) As originally enacted, section 196 of the ERA 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 ERA has contained no express provision about the territorial reach of the rights and obligations which it enacts.
- (b) The House of Lords held in Lawson v Serco that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the ERA in cases where an employee works overseas.
- (c) In the generality of cases Parliament can be taken to have intended that an ex-patriate 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 ERA or EQA. 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 ERA to apply if they are based in Great Britain.
- (d) 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.

68. The decisions of the Supreme Court in Duncombe and Ravat make it clear that the correct approach was not to treat the Lawson categories as fixed, 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.

69. Where the worker is “truly ex-patriate”, in the sense that he or she both lives and works abroad (as opposed, for example, to a “commuting ex-patriate”, which is what Ravat was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be especially 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/European Union-funded international schools considered in Duncombe.

#### Choice of Law

70. In Jeffrey, the employers argued that an express choice of English law as the law of the contract was immaterial. Underhill LJ disagreed, and held that the Court of Appeal was bound by the Judgment of the Supreme Court in Duncombe No 2: [2011] ICR 1312, in which the Court “expressly took account of the existence of an English choice of law clause in considering the sufficient connection issue”.

In Duncombe No. 2, Lady Hale noted that:

“The claimants were employed under contracts governed by English law; the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Although this factor is not mentioned in Lawson it must be relevant to the expectation of each party as to the protection which the employees would enjoy. The law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by Parliament in order to fill a well-known gap in the protection offered by the common law to those whose contracts of employment were ended.”

71. Underhill LJ in Jeffrey also noted that Lord Hope had made similar observations in Ravat, in which the Supreme Court was faced with the situation of a “commuting ex-patriate”. Lord Hope held:

“Lady Smith said in the EAT that the employment tribunal was wrong to take account of the proper law of the parties' contract and the reassurance given to the claimant by the employer about the availability to him of UK employment law, as neither of them were relevant. The better view, I think, is that, while neither of these things can be regarded as determinative, they are nevertheless relevant. Of course, it was not open to the parties to contract into the jurisdiction of the employment tribunal. The question whether the tribunal has jurisdiction will always depend on whether it can be held that Parliament can reasonably be taken to have intended that an employee in the claimant's position should have the right to take his claim to an employment tribunal. But, as this is a question of fact and degree, factors such as any assurance that the employer may have given to the

employee and the way the employment relationship is then handled in practice must play a part in the assessment”.

72. The assurances that were given in Ravat’s case were made in response to his understandable concern that his position under British employment law might be compromised by his assignment to Libya. The documentation he was given indicated that it was the employer's intention that the relationship should be governed by British employment law. This was borne out in practice, as matters relating to the termination of his employment were handled by the employer's human resources department in Aberdeen. This all fits into a pattern, which points quite strongly to British employment law as the system with which his employment had the closest connection.

73. Hottak and anor v Secretary of State for Foreign and Commonwealth Affairs and anor 2016 ICR 975, CA demonstrates that the scope of the EQA is narrower than that of previous discrimination legislation, since it appears to exclude those recruited in Britain for a British business but who work outside Great Britain unless their circumstances constitute a connection with Great Britain that is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim. However, such circumstances will be rare.

Identity of the Claimant’s employer

74. As the Claimant in her evidence questioned whether the purported employment relationship between her and the Dhaka Office represented the genuine identity of her actual employer, I consider it appropriate to set out the relevant case law. In doing so I am mindful of the fact that the Claimant, albeit clearly a very intelligent and articulate woman, is not a lawyer and was not legally represented. I do, however, record that even with an extended tribunal day at the OPH it was not possible to consider the case law on this question or the potential direct effect of European law as set out below with the parties.

75. In the judgment of Mann LJ in Clifford v Union of Democratic Mineworkers [1991] IRLR 518:

"A question as to whether A is employed by B or by C is apparently a question of law for it is a question as to between whom there is the legal relationship of employer and employee. The resolution of that question is dependent upon the construction of the relevant documents and the finding and evaluation of the relevant facts. Where the only relevant material is documentary in nature then the question is not only apparently, but it is also actually, a question of law. Where, however, the relevant material is an amalgam of documents and facts then the apparent question of law is often said to be a mixed question of law and fact. The present case is one where the relevant material is an amalgam of documents and facts and it can thus be described as a case of mixed law and fact. This description does not, however, in my judgment mask the reality that the answer to the question is determined by the determination and evaluation of the relevant material”.

76. In the judgment of Morrison P in Secretary of State for Education and Employment v Bearman & Others [1998] IRLR 431:

“The correct approach would have been to start with the written contractual arrangements and to have inquired whether they truly reflected the intention of the parties”

77. In Dynasystems v Moseley (unreported, EAT, 25 January 2018), Langstaff J held that it was permissible for a tribunal to look at the dealings between the parties and who carried out what functions during the employment to decide who the real employer was. It was permissible for the Tribunal to use the judgment of the Supreme Court in Autoclenz Ltd v Belcher [2011] UKSC 41 to determine who the real parties to the contract were which includes:

“After all, if the parties to an agreement have indeed agreed X but they behave as if they have agreed Y, that would be surprising. If, however, they have agreed Y it is entirely to be expected. To behave as if they have agreed Y is therefore some evidence that they have indeed done”.

#### European case law authorities

78. For completeness, as the Claimant is a national of a European union country, I include reference to applicable European case law authorities.

79. The EQA is the measure adopted by the United Kingdom which gives effect to the Employment Equality Directive, which provides at Article 5 that:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

80. In Bleuse v MBT Transport Ltd and anor 2008 ICR 488, EAT, B, a German national, was employed by a company registered in England but he lived in Germany and worked solely in mainland Europe. His unfair dismissal claim failed because, as the EAT held, although he worked for a company based in the UK, he did not operate out of the UK and had virtually no connection with it. It made no difference that his contract provided that it was to be governed by, and construed in accordance with, English law as s.204 ERA makes it plain that the law of the contract of employment is ‘immaterial’. The only issue was whether, as a matter of fact, the employee was based in the UK and neither the terms of the contract nor its applicable law determined that question. The EAT did allow B’s claim under the Working Time Regulations 1998.

81. The Bleuse principle provides that the Lawson guidance ought to be modified in its application to UK law where necessary to give effect to directly effective rights derived from EU law. Since most discrimination laws are so derived, it is arguable that a wider test should apply to claims brought under the EQA.

82. Further, in Ministry of Defence v Wallis and another [2011] I.C.R. 617 Elias LJ held that:

“Indeed, in my judgment once a claimant is seeking to enforce a directly effective EU right, it matters not which national law is applicable to the right in question, provided at least that it is the law of a Member State. This is because whichever system of law within the European Union is the appropriate state law to apply, either it gives effect to the EU right when appropriately construed, or it must be disapplied to the extent that it does not. So, once the British court is properly seized of the issue, it would be obliged to give effect to the directly effective right one way or another, irrespective of which body of national rules applies. I suspect that in most cases at least it would involve the denial of an effective remedy to require the claimant who is properly before the British courts to go elsewhere to enforce the right, particularly if other claims are properly before the court”.

83. The judgment of the ECJ in Boukhalfa v Germany (C-214/94) [1996] ECR 1-2253 suggests that the implied territorial scope of Community Law may reach beyond those who work in the EU, who nonetheless have EU employment law rights because, on the facts, there is a sufficiently strong connection between their employment and the EU or the EU system of law. the Court held that:

“The Court has consistently held that provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community.

In the present case, it is clear from the documents before the Court that the plaintiff's situation is subject to rules of German law in several respects. First, her contract of employment was entered into in accordance with the law of the Member State which employs her, and it is only pursuant to that law that it was stipulated that her conditions of employment were to be determined in accordance with Algerian law. Secondly, that contract contains a clause giving jurisdiction over any dispute between the parties concerning the contract to the courts in Bonn and, ultimately, Berlin. Thirdly, the plaintiff in the main proceedings is affiliated for pension purposes to the German State social security system and is subject, though to a limited extent, to German income tax”.

84. In the decision of the Scottish EAT in Wittenberg v Sunset Personnel Services Ltd and others UK EATS/19/13 and the judgement of Lady Stacey. At paragraphs 63 and 64 she made the following comments:

“The question still remains, why should legislation emanating from the EU have territorial reach all over the world? It seems to me that it must be limited in its application, just as UK law is limited to its own territory and those other situations where the Court finds that Parliament must have intended there to be territorial reach”.

85. She went on at paragraph 64 to state:

“I find that by parity of reasoning, rights which exist because of EU Directives are rights to which effect must be given inside the EU. I am not persuaded that there is any reason why the territorial reach of such rights should automatically extend beyond the EU”.

#### Submissions of Ms Masters

86. Ms Masters says that the fact that there is jurisdiction in relation to a later part of the litigation (here, once the Claimant has moved to work in London) does not mean that the earlier allegations which concern discrimination alleged to have occurred in Senegal are also within the Tribunal’s jurisdiction (Tradition, Securities and Futures SAVX [2008] IRLR 934 paragraphs 21-33).

87. Ms Masters referred me to the judgment of Underhill LJ in Jeffrey and specifically paragraph 3:

“In the generality of cases Parliament can be taken to have intended that an ex-patriate 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”.

88. And at paragraph 4:

“However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pulls 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”.

#### **Conclusions**

##### Approach taken

89. I consider that the scenarios set out by Lord Hoffman in Lawson are illustrative, and not exhaustive, and in accordance with the principles enunciated in cases such as Bates van Winkelhof and Ravat the test I need to apply is whether the connection with Great Britain and British employment law is sufficiently strong for the Tribunal to hear the claim. This involves undertaking a

careful analysis of the facts of the case, rather than deciding whether any given claimant fits within categories created by previous case law.

90. Whilst I have carefully considered the specific factual and legal scenarios in the authorities referred to above, I do not consider that attempting to categorise the specific factual and legal circumstances of the Claimant's position, as to whether she falls within or outside any given case law authority, or group of authorities, is the most appropriate way of determining this issue. I reach this conclusion for the following reasons:

- (a) most of the authorities cited involve decisions of the EAT or Higher Courts as to whether a first instance Employment Tribunal's decision was one open to it, rather than being guiding principles on how subsequent cases should be decided; and
- (b) the reported cases are a relatively small subset of the total cases determined by tribunals, which have not been appealed. Whilst they provide useful guidance as to the applicable criteria for determining territorial jurisdiction, they do not provide a complete picture of all decided cases. Each case is inevitably dependent on its own specific legal and factual matrix decided by the tribunal based on the relevance of the particular facts in the case before it.

91. In reaching my determination I am of course mindful of, and give weight to, the guidance provided in the relevant authorities. Ultimately the test set out in both the UK and European case law authorities points to a clear test which a claimant needs to fulfil to establish that their employment had a connection with Great Britain that is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim. In assessing this question, I need to evaluate the relationship between the parties objectively.

92. The determination of the territorial jurisdiction of the Tribunal in this case is a complex exercise, with a multiplicity of relevant factors, some of which point towards the Tribunal having jurisdiction and others against.

#### Relevant factors taken into account in reaching my decision

##### The Claimant's nationality

93. The Claimant is a French citizen and save for a period as on au pair in 2007/8, had not previously worked in London prior to obtaining a position with the BBC in London in early 2018. During the Relevant Period, the Claimant did not travel to the UK in connection with her employment with the Respondent.

##### Recruitment

94. The Claimant accepts that her recruitment arose as result of a direct approach to BBC Afrique in Dakar and not via London. She was not interviewed



in London and save for administrative tracking and rubber-stamping London had no role in her recruitment.

The Claimant's residence

95. During the Relevant Period, the Claimant lived in Dakar. Her base was the Dakar Office. Her duties related to the coverage of new stories in Francophone Africa.

Claimant's employer

96. I have carefully considered whether the reality of the employment relationship between the Claimant and the Respondent in the Relevant Period was consistent with her being employed by the Dhaka Office as opposed to directly by the BBC in London. Whilst I consider that questions exist as to how independent the Dhaka Office is from London, I nevertheless find that the employment contracts in the Relevant Period represent a genuine reflection of the reality of the working relationship between the claimant and the BBC and the Dakar Office and are consistent with the Claimant being an employee based in Dhaka and not London.

Contracts of employment and job description

97. Whilst the Respondent says that the contracts of employment for local offices are individually developed, or at least were during the Relevant Period, I have some reservations about whether this would be fully the case given that the provisions within the contracts would appear to follow a generally accepted international template to include provisions on matters such as confidentiality, intellectual property and transmission of information and property. I consider that it would be surprising if the BBC regional offices had substantially different provisions in respect of these type of matters.

98. I also consider it likely that there would, at least to some extent, have been a common source for the content of the job description which includes reference to generic BBC Editorial Guidelines, accountability and impartiality.

99. As such I consider that the contractual position is not determinative, and I regard it as merely a factor in my assessment of what is a multi-factorial assessment of factors militating towards and against the Tribunal having territorial jurisdiction.

Governing law and jurisdiction

100. The Claimant's employment contracts during the Relevant Period were subject to the law of Senegal and the exclusive jurisdiction of the Courts of Dakar.

Pay

101. I find that whilst the precise amount of the Claimant's remuneration was determined in Dakar that it was subject to the overall control of London both in terms of budget but also insuring broad comparability. It is accepted that there is a tracking and monitoring of pay levels and ultimately budgets are finite. I find there would be limited ability in practice for any significant alterations to be made in the pay of an employee in the position of the Claimant in the Relevant Period without the prior consent of London. I therefore find this factor to be neutral.

102. I do however find it to be relevant that the Claimant was paid exclusively in local currency and was on the local pay role. During the Relevant Period she did not have any benefits, whether pension, private medical insurance or otherwise, which arose in the UK. This is therefore a factor pointing to the non-application of UK jurisdiction.

#### HR supervision and management

103. I find that substantive decisions regarding employee performance in the Relevant Period were undertaken from London. It is accepted that Ms Lahayville and other representatives of the Respondent based in London would on occasion travel to regional offices in West Africa. I find that major issues such as the dismissal of employees for gross misconduct, strike action etc would involve, at least to some degree, the input of London based managers.

#### The role of the BBC and editorial content

104. I find it to be incontrovertible that the BBC is a global service. Indeed, the term "one BBC" is commonly used. Inevitably there are common standards of journalism which apply to the BBC worldwide to include those of impartiality, respect and accountability. The BBC undoubtedly has a global ethos, reputation and broadcasting style which transcends individual continents, countries and languages.

105. It is also inevitable that in an international news organisation that there is to a certain degree a common platform with the pooling and sharing of content. However, I consider that the Claimant as part of the journalistic team in Dakar would have had significant autonomy in the coverage of regional stories of interest to Francophone Africa. Further, I find that the day-to-day control of her work and broadcast content would not have been from London.

#### Claimant's transfer to London

106. When the Claimant commenced a position in London with the Respondent she did so under a new contract of employment. This involved a different employing company, the Claimant being paid in the UK as opposed to Senegal and receiving benefits in the UK, to include pension provision, to which she was not entitled in Senegal. This points to the fact that the Respondent considered that this was a new position of employment rather than merely a continuation of the existing employment. There was to a large extent, but not completely, a cessation of existing terms to include, but not limited to, the non-transferability of the Claimant's accrued holiday entitlement.

107. Notwithstanding the transfer it is relevant that the Respondent permitted the Claimant's employment in Senegal to count towards her continuity of employment. This is a factor, but not a conclusive one, pointing to a common employer of the BBC in London.

#### Purpose of the EQA

108. Whilst not directly relevant to my decision I address the Claimant's argument that as the purpose of the EQA is to combat discrimination on account of race or nationality and therefore that it would be inconsistent for the Claimant's French nationality to be a factor depriving her of a protection under the EQA. I do not accept this analysis. I find that what is protected under the EQA is not indicative of who is protected by it. This represents a separate question. The Claimant's argument would in effect mean that all employees working anywhere in the world for a UK registered company would have protection under the EQA regardless of their level of connection with the UK. This would be inconsistent with the criteria for determining territorial jurisdiction set out in the relevant authorities.

#### European case law authorities

109. Having carefully considered the potential applicability of the cases I have cited above I do not consider that they assist the Claimant's position as their application would still require, in accordance with the guidance set out in Wallis, Boukhalfa and Wittenberg, the Claimant being able to demonstrate a sufficiently close connection with the UK, which I have found she has not done, for the Tribunal to be seized of the claim.

#### Overall conclusion

110. I find that the Claimant's employment with the Respondent during the Relevant Period did not have a sufficient level of connection with Great Britain to give the Tribunal jurisdiction to consider her complaint for equal pay in respect of Mr Nsabimana.

111. Whilst there are factors pointing to a significant level of connection with the UK, I find that when considered overall the balance of factors points against the existence of jurisdiction during the Relevant Period. The following factors were of particular significance in my reaching this decision:

- (a) the Claimant was she is a French national with no significant prior connection with the UK prior to commencing employment with the BBC;
- (b) recruited entirely independently of the Respondent in the UK;
- (c) the terms of her employment contracts during the Relevant Period are consistent with being based in Dhaka and not London;
- (d) her employment and employment contract were monitored and regulated by the Inspectorate in Senegal;
- (e) she lived exclusively in Dakar during the Relevant Period;
- (f) her base was the Dakar Office;

- (g) she did not perform any duties, or indeed visit, London for business purposes during the Relevant Period;
- (h) she exclusively covered new stories relevant to BBC Afrique in French language broadcasts;
- (i) she was paid and received pension contributions solely in Senegal in Senegalese currency during the Relevant Period; and
- (j) when she transferred to London, she entered a new contract of employment, albeit with continuity of service preserved, and transferred to the London payroll and received other London benefits.

112. Whilst there are some factors pointing towards a level of control from London these factors do not in my opinion outweigh the above factors militating against UK jurisdiction. For example, it is clear that London had a degree of oversight and involvement on matters such as local budgets, broadcasting being consistent with their BBC Editorial Guidelines, headcount and compliance with BBC policies on matters such as diversity and social media, the possible origin of various HR policies and contractual templates and training these factors do not, in my opinion, point to a sufficiently substantial level of connection between the Claimant and the UK during the Relevant Period for the Tribunal to have jurisdiction. It is also apparent that as a globally respected international broadcaster, operating from 42 overseas offices, that there will be some commonality of policies, procedures, remuneration and budgetary considerations and at a senior level the setting of objectives, editorial decisions, deployment to different locations and so on.

113. Given that many of the factors pointing towards jurisdiction would apply to all employees of the BBC worldwide, for example, the need to comply with the terms of the BBC Code of Conduct, Editorial Guidelines, social media and diversity policies the implication of a decision that jurisdiction applied to the Claimant during the Relevant Period would be that all BBC journalists worldwide are subject to UK employment law. I do not accept that this interpretation would be consistent with the relevant case law authorities.

114. For these reasons I find that the Tribunal does not have jurisdiction to consider the Claimant's equal pay claim in respect of Mr Nsabimana during the Relevant Period.

115. For the avoidance of doubt all other elements of the claim proceed to a full merits hearing.

**Employment Judge Nicolle**

Dated: **12 March 2021**

Judgment and Reasons sent to the parties on:

15<sup>th</sup> March 2021

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For the Tribunal Office