



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Rajabov

v

British Embassy in Dushabne

Heard at: London Central

On: 20 December 2019

In Chambers 14 February 2020

Before: Employment Judge Glennie

Representation:

Claimant:

In person, via video link, Mr Adinabay assisting in London

Respondent:

Ms C McCann, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is as follows:

1. The Tribunal does not have territorial jurisdiction to hear the claim.
2. The claim was presented out of time and the Tribunal does not have jurisdiction to hear it.

REASONS

1. This Preliminary Hearing was listed by Employment Judge Clark to determine the issues as to territorial jurisdiction and time limits. The Claimant is located in Tajikistan, and attended the hearing by video conference. I heard the evidence and then gave direction for the provision of written submissions, as there were by this point difficulties with the video link. I gave the parties the date of 14 February 2020 when I would consider my judgment in Chambers. I was not able to complete my deliberations on that date, and pressure of work, added to difficulties arising from the coronavirus pandemic, have regrettably caused some delay in the completion of these Reasons.
2. The complaint is of unfair dismissal. Although the issues have not been definitively established, the Claimant referred to whistleblowing in the claim

form, and I have assumed that he complains of both automatically unfair dismissal under section 103A of the Employment Rights Act 1996 and “ordinary” unfair dismissal under section 98.

Identity of the Respondent

3. The Respondent named in the claim form is British Embassy Dushanbe. A Response was presented by the Foreign and Commonwealth Office (FCO), stating that this is the entity that employed the Claimant and is therefore the correct Respondent. The Claimant does not accept that, and argues that he was employed by the Embassy. The FCO asserts that the Embassy is not a legal entity and that it cannot therefore be the correct Respondent.
4. It seems to me that the Respondent’s argument is correct and that, whatever impression may be given by the documents, the Embassy cannot be the correct Respondent as it is not a legal entity: it does not exist, in the sense of being a “person” that can be sued. Given my other conclusions, however, this point is of no practical consequence.
5. In the reasons that follow, I shall refer to “the Respondent” without repeating the point about the correct identity of that party.

Evidence and findings of fact

6. I heard evidence from the following witnesses:
 - 6.1 The Claimant.
 - 6.2 Ms Suzanne Sumpter, Head of Local Staff Policy & Network for the FCO.
 - 6.3 Mr Peter Fernandes Cardy, Deputy Head of the Department for International Development (DfID), Afghanistan.
7. There was an agreed bundle of documents, and page numbers in these reasons refer to that bundle.
8. The Claimant joined the Respondent in 2002, taking the role of DfID Assistant at the British Embassy in Dushanbe, Tajikistan. By the time that his employment ended, he was a Programme Manager and Finance Lead. He is a Tajik national and was living and working in Dushanbe when he was recruited. He and his family are resident in Tajikistan and, subject to what I shall say about periods spent abroad, this has always been the case.
9. The Claimant’s letter of employment at pages 33a-34 referred to employment “at” the British Embassy. The Claimant signed a set of terms and conditions of service for locally engaged staff at pages 45-52 in 2007. These contained the following provisions, among others:
 - 9.1 Clause 1 referred to service “in the employ of the Embassy”.

- 9.2 Clause 3 provided that “The law governing these terms and conditions is the law of the Republic of Tajikistan.”
- 9.3 Under “Grievances”, clause 17 provided as follows:
- “Under FCO procedures and Tajik Labour Law, staff have the right to raise grievances which arise from their work for the Embassy. Staff should first take their grievances to their line manager. If they cannot be resolved in this way, or if they feel unable to approach their line manager, they can take the matter direct to the Ambassador. In the event that an employee still believes that his/her grievance remains unresolved an appeal system involving the Foreign and Commonwealth Office in London is available.”
- 9.4 Clause 20 provided that all locally engaged staff would be enrolled in the Republic of Tajikistan’s Social Protection Fund.
- 9.5 With regard to income tax, clause 19 provided:
- “Locally engaged members of the Embassy staff are legally liable for the payment of Tajik income tax. The onus of adhering to Tajik law in this respect lies with the employee concerned.....”
- 9.6 Under Sick Leave, clause 36 provided for full pay for the first 5 days, and thereafter in accordance with the provisions of the Social Protection Fund.
- 9.7 Clause 43 provided for maternity leave in accordance with Tajik law.
- 9.8 Clause 48 provided for retirement at age 58 for female locally-engaged staff and 63 for male locally-engaged staff, and that there was no entitlement to a pension paid by the Embassy, other than that from the Social Protection Fund
10. With regard to salary, the Claimant’s evidence was that he was paid in US Dollars initially, then in Tajik Somoni, and later again in US Dollars. Mr Fernandes Cardy and Ms Sumpter stated that the Claimant was paid in Somoni until 2016, and after that in Dollars. I did not see any inconsistency between this and the Claimant’s evidence on the point: I concluded that the Respondent’s witnesses were unaware of the earlier period of payment in Dollars.
11. It was common ground that from 2002 to 2006 the Claimant was managed by a UK based member of staff, and thereafter by a member of staff based in Dushanbe. The Claimant added that there was a period or periods of months in the latter years when he was acting head of office in Dushanbe and he was managed from the UK: I saw no reason to doubt that.

12. There was also evidence about occasions when the Claimant worked elsewhere than in Tajikistan. In his witness statement the Claimant referred to a period in 2008 when he worked in Tanzania and to working in London in 2011 when another member of staff was on annual leave. In his oral evidence he said that he made “frequent” work-related visits outside of Tajikistan, including to the UK, Kyrgyzstan, and other countries. His home remained in Dushanbe.
13. In his written submissions the Claimant asserted that he made more than 30 visits to the UK in the course of his employment. Ms McCann submitted that there was no evidence to this effect (nor in respect of another assertion to which I shall refer below), and that I should disregard this. I noted that the Tribunal’s case management orders included a direction that the parties’ witness statement should contain all of the evidence that they wished to give. I concluded that I should not accept the Claimant’s unsupported assertion about 30 visits; but if I am wrong about that, I will give my conclusions based on the alternative assumption that there is evidence of 30 visits. My primary finding is that the Claimant made occasional visits to London over the years in the course of his work.
14. Mr Fernandes Cardy’s evidence was that the Claimant “very rarely” visited the UK during the period that he managed him (2015-2018) and that he made occasional short visits to countries other than Tajikistan.
15. In his witness statement the Claimant stated that, in spite of what was said in the Terms and Conditions, the Respondent did not respect Tajik law. He referred to a claim brought by a Mr D arising from his employment and said that the Respondent ignored the proceedings. He further stated that in July 2018 the Ambassador told him that he should not waste his time bringing a claim in the Tajik courts, as the Respondent would ignore the proceedings. The Claimant’s evidence on this point was not challenged. The Claimant also put to Ms Sumpter the case of another individual, Mr B, in 2011, which he said the Respondent had ignored. Ms Sumpter’s evidence was that she had no knowledge of the case.
16. It is not, in my judgment, very significant whether or not the Ambassador said that the Respondent would ignore any claim the Claimant might bring in the Tajik courts. I find that, as a matter of probability, the Respondent failed to take part in the claims brought by D and B, as maintained by the Claimant.
17. Ms Sumpter described in her witness statement the differences between the terms on which locally engaged staff are engaged and those applicable to UK Diplomatic Service staff. The latter have diplomatic privileges and immunities, and are provided with housing, utilities, schooling for children and cost of living allowances, none of which are applicable to locally engaged staff. Diplomatic Service staff have mobility obligations, while locally engaged staff do not. Locally engaged staff who are offered a post in a different country are required to resign from their existing job, while Diplomatic Service staff retain continuity of tenure from one post to another.

Diplomatic Service staff usually hold DV or SC vetting clearance, while locally engaged staff are not required to have access to classified documents. These matters were not challenged, and I find them to be the case.

18. The Claimant made a further point in his written submissions, which was to state that in February 2018 a DFID audit mission raised concerns about reporting of financial wrongdoing. He said that in the past raising concerns had been “harshly punished”; and “they” told him that he would be protected under UK laws relating to whistleblowing. The Claimant then handed over some documents which, it seems, he believed showed financial wrongdoing.
19. Ms McCann again submitted that I should not take these assertions into account, as they had not been the subject of evidence in the hearing. I would have expected evidence of this nature to be included in the Claimant’s witness statement. It is true that this element appears in box 2 of the claim form. One of the difficulties arising from its non-appearance in the evidence is that there has been no opportunity for it to be challenged (if appropriate) or for its context and significance to be explored. As with what was said about 30 visits to the UK, I concluded that I should not accept the Claimant’s unsupported assertion: but also that I should give my conclusions on the alternative assumption that I should take this into account.
20. Finally on the issue of territorial jurisdiction, the Claimant submitted further written submissions after the exchange of submissions that I had directed. In the event, I found that the Claimant’s further submissions added nothing that made a difference to the conclusions I reached, and that there was no disadvantage to the Respondent in my having read them.
21. Turning to the evidence about time limits, the Claimant was dismissed on 30 June 2018. He contacted ACAS on 12 August 2018, and the ACAS certificate was issued on 6 September 2018. The claim form was presented on 2 March 2019.
22. In paragraph 5 of his witness statement the Claimant relied on the Respondent’s failure to provide him with documents relating to his redundancy as explaining why he did not present his claim at an earlier date. He stated that he received some only of the documents that he had requested on 31 January 2019; that he tried for several weeks without success to obtain further documents; and that the absence of documents meant that he did not have answers to his questions about the legality of his redundancy.
23. When cross-examined about this aspect, the Claimant said that he searched the internet for information about bringing a Tribunal claim, and that most likely he saw that there was a 3-month time limit. He was aware of the mandatory ACAS process. He said that he was “looking for answers from the FCO and DfID officials to decide whether to bring it to the

Employment Tribunal.” He agreed with the suggestions that the delay was because he was trying to obtain information and answers to his questions in order to see whether there was a reason for the redundancy, and that he waited until he had no doubt that as to the legality of his dismissal. He agreed that he wanted to eradicate all doubt. Later in his oral evidence, the Claimant said that his doubts were reducing with the passage of time: he was referred to an email of 4 September 2018 at page 186, where he wrote that his redundancy “was not coincidence, but the direct consequence of my cooperation with the counterfraud team.”

24. On the same point, the Claimant said in his oral evidence that he suspected at the time of his dismissal that his whistleblowing was the issue, but that he was thinking that there might be something that he needed to know. In re-examination, the Claimant stated that “with the trust I had for the UK Civil Service I thought it was too early to take the case to the UK Employment Tribunal.”

The applicable law and conclusions: territorial jurisdiction

25. The right not to be unfairly dismissed is found in section 94(1) of the Employment Rights Act 1996 in the following terms:

“An employee has the right not to be unfairly dismissed...”

26. In **Ravat v Halliburton Manufacturing & Services Limited [2012] ICR 389** Lord Hope gave the judgment of the Supreme Court in a case where the employee concerned lived in Great Britain but travelled to and from his employment in Libya. Lord Hope’s judgment included the following observations:

“26. [having referred to **Lawson v Serco Limited [2006] ICR 250**].....The question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements. Parliament cannot be taken to have intended to confer rights on employees having no connection with Great Britain at all. The paradigm case for the application of the subsection is, of course, the employee who was working in Great Britain. But there is some scope for a wider interpretation, as the language of section 94(1) does not confine its application to employment in Great Britain.....It is not for the courts to lay down a series of fixed rules when Parliament has decided.....not to do so. They have a different task. It is to give effect to what Parliament may reasonably be taken to have intended by identifying, and applying, the relevant principles.

“27.the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic

employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.”

27. The essential test, therefore, where an employee works in a foreign country, is whether the employment relationship has a stronger connection with Great Britain than with the foreign country. In the present case, I am satisfied that it is correct to say that the Claimant worked in Tajikistan. His employment was based in the British Embassy in Dushabne, and the fact that he made visits to other countries (including the UK) in the course of his work did not, in my judgment, mean that in this sense he worked in those countries. Focussing on the UK, occasional visits to London in order to work would not mean that London, rather than Dushabne, was where the Claimant worked. I would find the same to be the case even if, contrary to what I have decided with regard to the evidence, I should have accepted that the Claimant made as many as 30 visits to London over the 15-16 years of his employment: that would still only be around 2 visits per year on average.
28. Various factors have been considered in the authorities and identified as relevant, none being conclusive in themselves. I find that the following are applicable in the present case and tend to show that the Claimant's employment was more closely connected with Tajikistan than with Great Britain (or the UK):
 - 28.1 The governing law of the contract was stated to be that of Tajikistan (as identified by Underhill LJ in **Jeffery v The British Council [2019] ICR 929 (Court of Appeal)** at paragraph 61.
 - 28.2 The Claimant's residence was in Tajikistan and he did not have a residence in the UK (in **Ravat** the Supreme Court identified the fact that the Claimant's home was in Great Britain as being relevant).
 - 28.3 The Claimant was locally recruited (in **Bryant v The Foreign and Commonwealth Office (2003) EAT/174/02** Burton P held that a locally recruited British national who worked in the British Embassy in Rome fell outside the scope of UK employment legislation).
 - 28.4 At least from 2006 onwards, the Claimant's managers were mainly based in Dushanbe.
 - 28.5 The Claimant was taxed in Tajikistan and contributions were made to the Tajikistan Social Protection Fund (in **Olsen v Gearbulk Services Limited [2015] IRLR 818** Langstaff P held that a relevant factor was that the Claimant's employment was arranged in such a way that he did not become liable to pay UK income tax or National Insurance Contributions).

- 28.6 The Claimant was not entitled to a Civil Service Pension (as was the Claimant in **Jeffery**).
29. Ms McCann also referred to the place of payment and the currency in which the Claimant was paid as a factor also identified in **Fuller**. The Claimant in the present case was at all times paid in Tajikistan, although it seemed to me that the variations in the currency used (US Dollars, Sterling, and Tajik Somoni) rendered this point somewhat less clear cut than the others listed above. It did not, however, demonstrate a closer connection with the UK than with Tajikistan.
30. There were then two factors which might be thought of as going into the balance in favour of a connection with the UK, although in the final analysis I found that they were of little weight. These were:
- 30.1 The employer clearly has connections with the UK government. In **Duncombe v Secretary of State for Children Schools and Families (No.2) [2011] ICR 1312** the Supreme Court identified this as a factor which assisted towards the conclusion that there was a sufficiently close connection with Great Britain. The governing law of the contract was, however, English law: in contrast with **Bryant** where the employee was, as in the present case, recruited to work at the British Embassy.
- 30.2 If, contrary to my primary finding, I should take into account the Claimant's assertion that he was told that he would be protected by UK laws relating to whistleblowing, this might appear to fall within what was said by Lord Hope in paragraph 8 of the judgment in **Ravat**, i.e: "...the Claimant was concerned to know whether his employment contract would remain governed by UK employment law.....He asked his manager there [in the UK] what his position was and was assured that he would continue to have the full protection of UK law while he worked abroad". If the statement that the Claimant relies on in the present case was made, the circumstances were different from those in **Ravat**. In that case, the context of the assurance given was that the Claimant was originally employed under a contract governed by English law, and it was to the effect that this would not change. In the present case, the Claimant was employed under a contract governed by Tajik law, and I have not been told anything that would suggest that a variation of that was effected.
- 30.3 I can understand that, if the Claimant was told that he would be protected by UK whistleblowing legislation, and then went on to make disclosures, only to find that the Respondent denied that he was so protected, he would have reason to feel that he had been treated unjustly. Taking the Claimant's case on this aspect at its highest, however, I would still find that, given the weight of the other factors identified above, there was not a stronger connection with Great Britain than with Tajikistan.

31. I have therefore concluded that the Tribunal does not have territorial jurisdiction to hear the claim.

Time limits

32. Section 111 of the Employment Rights Act 1996 contains the following provisions about time limits:

(2)an employment tribunal shall not consider a complaint under this section unless it is presented to the Tribunal –

(a) Before the end of the period of three months beginning with the effective date of termination, or

(b) Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

33. The ACAS early conciliation provisions can have the effect of extending the statutory period of 3 months. In the present case, it was common ground that the relevant dates were that the effective date of termination was 30 June 2018; that the extended time limit expired on 24 October 2018; and the Claimant presented his complaint on 2 March 2019.

34. The claim was, therefore, presented outside the primary time limit. I have to consider whether it was not reasonably practicable for the Claimant to present it within time. In **Palmer v Southend Council [1984] ICR 372** May LJ stated that “reasonably practicable” meant “reasonably feasible”. This involves considering the Claimant’s reasons for not presenting the claim within time.

35. The essence of the Claimant’s explanation is that he most likely was aware of the 3-month time limit, but wanted to be sure of his ground, or believed that he should be sure of his ground, before commencing proceedings.

36. On a human level, I can understand the Claimant’s thinking and his concern not to rush into litigation without being confident that his claim was justified. Not being sure of the merits of a claim is not, however, a legal impediment to bringing it. Whether or not the Claimant’s state of mind can properly be described as “mistaken”, or as one of “ignorance of essential matters”, I consider that I should be guided by what was said by Brandon LJ in **Wall’s Meat Company Limited v Khan [1979] ICR 52**, as follows:

“Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance...or the mistaken belief...is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made.....”

37. In the present case, the Claimant was seeking further information from the Respondent, but was growing more sure of his ground with the passage of time. He was sufficiently confident to notify ACAS on 12 August 2018. By 4 September 2018 (before the ACAS certificate was issued, on 6 September, and well within the period of 3 months from 30 June in any event) he was able to send an email asserting that his redundancy was a direct consequence of his cooperation with the counterfraud team. That is the case that he now seeks to bring before the Tribunal.
38. If, by the expiry of the extended limitation period on 24 October 2018, the Claimant believed that he should still not present his claim until he was even more certain of its merits, then I find that such a belief was not reasonable. On his own account, the Claimant was probably aware of the time limit and made use of the internet to research bringing a Tribunal claim. I cannot see how he could reasonably have reached the view that, having notified ACAS of the dispute, and having put the essentials of his claim to the Respondent in his email of 4 September 2018, he should then hold back from commencing proceedings until he was even more certain of the position.
39. I therefore find that it was reasonably practicable for the Claimant to present his claim within time. If I am wrong about that, the question would then arise whether he presented his claim within such further period as was reasonable. In general terms, I do not consider that it was reasonable to delay for a further period of more than 4 months (24 October 2018 to 2 March 2019) in the context of a primary limitation period of 3 months. Furthermore, the Claimant received at least some of the documents that he had requested on 31 January 2019. I consider that it was not reasonable at that point to continue asking for more information, without promptly presenting the claim. At this point the Claimant delayed for a further period of over one month. If I am wrong in all my conclusions up to this point, I would find that a further reasonable period at this stage would be not more than around one week, given the 3 month primary limitation period, the amount of time beyond that which had already passed, and the degree of certainty about his position that the Claimant had already expressed.
40. I therefore find that the claim was presented out of time and that the Tribunal does not have jurisdiction to hear the claim on this ground also.

Conclusion

41. I have therefore decided that, for both of the reasons relied on by the Respondent, the Tribunal does not have jurisdiction to hear the claim.

Employment Judge Glennie

Dated:15 June 2020.....

Judgment sent to the parties on:

15 June 2020

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For the Tribunal Office