Appeal No. UKEAT/0036/11/ZT

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 17 June 2011

Before

HIS HONOUR JUDGE McMULLEN QC

(SITTING ALONE)

REV P WALKER — APPELLANT

CHURCH MISSION SOCIETY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS K FUDAKOWSKI (of Counsel) Instructed by: Minster Law Alexander House Hospital Fields Road York YO10 4DZ
For the Respondent	MR J ALGAZY (of Counsel) Instructed by: Messrs Anthony Collins Solicitors 134 Edmund Street Birmingham B3 2ES

SUMMARY

JURISDICTIONAL POINTS – Working outside the jurisdiction

The Employment Judge made clear findings as to the nature and location of the Claimant's work in Africa. Assessment of those findings raises a question of law. The Claimant did not fall into one of the expatriate categories in **Lawson** entitled to protection by English employment law.

HIS HONOUR JUDGE McMULLEN QC

1. This case is about the territorial scope of the right to claim unfair dismissal under the **Employment Rights Act 1996** section 94(1). I will refer to the parties as the Claimant and the Respondent. It is an appeal by the Claimant in those proceedings, the Reverend Pauline Walker, against the Judgment of Employment Judge Barrowclough sitting at Reading, with Reasons given on 5 November 2010 at a PHR. The Claimant has throughout had the advantage to be represented by Miss Katherine Fudakowski, and the Respondent initially by Mr Mullen, solicitor, who today instructs Mr Jacques Algazy of counsel. The central issue was the Claimant's claim for unfair dismissal said to be by the Respondent on grounds of redundancy, albeit that ground was disputed by the Claimant. The purpose of the hearing was to consider the territorial reach of unfair dismissal protection. It is now known in this arcane field as a **Lawson v Serco Ltd** [2006] ICR 250 HL case. The Employment Judge decided the Claimant was not entitled to bring her claim, since there was no jurisdiction in respect of her employment, which was found to be in Africa. The Claimant appeals against that; directions sending the appeal to a full hearing were given by HHJ Peter Clark, who considered that the question was whether the Claimant had been posted abroad for the purposes of a business carried on in Great Britain rather than working for a branch of a British business abroad. That succinct summary is the issue to be decided today.

The facts

2. The Employment Judge does not say so, but it is common ground that the Respondent, CMS, is a Christian mission agency. It is a voluntary society working with the Anglican and other churches of England, Scotland and Wales. It is actively involved in mission work with the people of Africa, Asia, the Middle East and Europe through the exchange of personnel and

ideas, project funding and scholarships. The Respondent works in partnership with local churches around the world, sharing in evangelism, leadership and theological training, church growth, community development, healthcare, education, pastoral work, and development.

3. Ms Walker was the regional manager, and she was a member of the World Mission Group, responsible for the resourcing, implementation and formulation of the society's work around the world. She was employed by the Respondent in 2001 until her dismissal, by reason of redundancy it is said, in March 2010. From the outset it was envisaged that she would work abroad. The sole job description which is exigible in these proceedings dates from 2000, and says this:

> **"CMS is currently working through the implications of a new Corporate Plan. There are ongoing and varied discussions about building in capacity for change. In this connection, a two-year research and feasibility study is about to be commissioned. It is envisaged that there will be organisational and structural changes as a result. One major issue is that of de-centralising our regional operation and devolving decision-making there. A consequence may be the relocation of the Africa Team into the region in 2-4 years' time. The postholder is expected to make a significant contribution to this research."**

4. That contemporaneous postulation of the future work of the Claimant is given flesh by her own account in 2010, which is in the following terms:

> **"In August 2002 I was relocated to Kampala with the brief to work towards a decentralised CMS Africa, so all my work since that date has been channelled into blending the threads, contacts, priorities and relationships towards that aim, and it would be counterproductive to now hand it back to CMS in Oxford (from where it could no longer be managed anyway) so I won't waste time elaborating on it here [...]."**

5. The Claimant became, it is said, a regional adviser, but that is disputed, and the Judge found that there was only one document that describes her as a regional manager (Africa region), responsible to the regional director (Africa). The threshold was in 2002 when she went to Kampala, Uganda, and then to Nairobi, Kenya. Her work was focussed upon the troubled region of Sudan; it was too dangerous for her to work *in situ*, and so her work there was

conducted in those two other cities. The identification of that project was, as the Judge made clear (see paragraph 3), specifically envisaged at the outset. She would start, as she did, with a year at headquarters in Oxford prior to going out in the field.

6. The scope and focus of her activities was specifically upon the region that she went to, and I note that originally she was responsible for Africa, but this then became entirely focussed upon Sudan. She line-managed a number of individuals, and her day-to-day line manager was based in Africa. She was under the line management of a person who was employed by one of its associated organisations, CMS Africa, and CMS Africa is autonomous. The purpose of the employment was to decentralise the regional operation and decision-making from the centre, Oxford, to the locale, Sudan. Monies were provided locally at the discretion of those staff based in Africa. The mission work in Sudan was the central focus; the Claimant more or less formulated and led the policy for the Respondent's work in Sudan. It relied, as it was entitled to do by the Claimant's experience, upon her local knowledge. Her earnings were not subject to UK tax; her day-to-day expenses were provided by CMS Africa. She remains substantially involved in the work in Sudan run by her from Kenya and Uganda. The Judge found that she was in effect working for the overseas branch of a British business or undertaking; perhaps a difficult concept when one is dealing with a faith, but nevertheless that fitted the categories in **Lawson**, to which I will turn.

The Claimant's case

7. The issue that the Claimant advances is based upon two examples given in **Lawson**. These are that the Claimant was effectively the foreign correspondent of the CMS in Oxford, operating out of two cities in Africa. Alternatively, she falls within a category which is entitled to parallel protection by the UK employment laws because there is an equal connection to, for

example, the foreign correspondent. The issue before the Employment Judge was to determine the facts, such as I have set out above, and then to make a legal assessment of whether or not the case falls within the jurisdiction of the Employment Tribunal, and that is a matter susceptible on appeal as a question of law. The Judge had focussed too narrowly upon the questions of fact before him and as a matter of law that narrow focus was wrong. The Claimant should have been in the category of a foreign correspondent of a UK business. Alternatively, if that is rejected she has the protection of the residual category. The totality of the evidence is that she was working for an organisation based in the UK and she was sent abroad to work for it and to spread it.

The Respondent's case

8. On behalf of the Respondent it is contended that the focus is at all times on the date of dismissal to determine the relationship as at that date. Merely having a sufficient connection to Britain is not the correct test. The residual test of a connection is imprecise and no example has been given which fits the circumstances of this case in any of the authorities.

9. Mr Algazy indicates two developments in the law following the repeal of the relevant provision in the **Employment Rights Act 1996** and **Lawson**: namely, those cases which rely upon some connection to EU-derived rights (see for example **Duncombe v Department for Education and Skills** [2011] UKSC 14 and **Bleuse v MBT Transport Ltd** [2008] IRLR 264); and secondly, the one authority that has added to the categories set out in **Lawson**, the Judgment of the Court of Appeal in **Ministry of Defence v Wallis** [2011] EWCA Civ 231.

10. In engaging imagery, Mr Algazy says the search for facts that fit the residual category in **Lawson** is analogous to that for the elusive God-particle engaging the endeavours of the

scientists at CERN in Switzerland, although in fairness this is not his idea; it emerges from an Employment Judge's reference.

The legal principles

11. The legal principles derive from **Lawson**. It is reassuringly common ground that a very simple, accurate summary of the principles is given in my Judgment in **Burke v The British Council** UKEAT/0125/06 at paragraph 23 where, on behalf of the EAT, I said this:

> **"As we see it from the judgments of Lord Hoffmann and Lady Smith, there are five gateways to jurisdiction:**
>
> **a) The standard case; the employee is working in Great Britain at the time when he is dismissed with the focus on that time rather than on the time the contract was made.**
>
> **b) The peripatetic employee; the employee's base i.e. the place where he is ordinarily working, as judged not so much by the terms of the contract but by the conduct of the parties, is in Great Britain.**
>
> **c) The expatriate (1); the employee who works and is based abroad and who is the overseas representative, posted abroad by an employer for the purposes of a business carried on in Britain e.g. foreign correspondent of the Financial Times (see Lord Hoffmann para 38).**
>
> **d) The expatriate (2); the employee who works in a British enclave abroad; jurisdiction will be established provided the employee was recruited in Britain; this was the position of Mr Botham (Germany) and Mr Lawson (Ascension Island) but not of Ms Bryant (British Embassy, Rome) who was engaged in Rome: *Bryant v Foreign and Commonwealth Office* EAT/174/02 10 March 2003.**
>
> **e) The expatriate (3); the employee who has equally strong connections as the above two with Britain and British employment law."**

12. That simple summary requires for the purposes of the present case a more express analysis of what Lord Hoffmann described in the fifth category; and he said this:

> **"40. I have given two examples of cases in which section 94(1) may apply to an expatriate employee: the employee posted abroad to work for a business conducted in Britain and the employee working in a political or social British enclave abroad. I do not say that there may not be others, but I have not been able to think of any and they would have to have equally strong connections with Great Britain and British employment law. For the purposes of these two appeals, the second of these examples is sufficient. It leads to the conclusion that the appeals of both Mr Lawson and Mr Botham should be allowed."**

13. The approach of the EAT on appeal is to consider questions of law. Lord Hoffmann examined this under his heading "Fact or law?", and it is common ground before me that this requires two stages. The first is for the Judge at first instance, to whom considerable respect must be accorded, to determine the facts. The evaluation and assessment of those facts against the legal standard is a question of law. Perversity, originally argued in this case obliquely, is replaced now with a straightforward attack on the lawfulness of the decision, and is, I dare say, a preferable approach given the very high hurdle placed in the way of an Appellant alleging perversity.

14. It is common ground that the focus is upon the time at which the dismissal occurred. However it is described, whether as a principle or a rule, the point is that in general English law is applied in English cases, and one looks to see whether someone who is working abroad at the time of dismissal should have the protection accorded to those who work in England. The sole concrete example of a case falling in the fifth category is **Wallis**, and where the Court of Appeal, upholding Underhill P, said this:

> **"The question whether the application of the *Serco* principles to the facts establishes a right to claim for unfair dismissal is a question of law, as Lord Hoffmann noted in *Serco*. However, as he also observed, it is 'a question of degree on which the decision of the primary fact finder is entitled to considerably respect' (para. 34). Mummery LJ has set out in his judgment (para. 18) the analysis of the employment judge. In my view it is both cogent and convincing. Although I accept that the claimants were not working in a British enclave, and did not therefore specifically fall into that category of expatriate employees whom Lord Hoffmann held would be entitled to claim for unfair dismissal, nevertheless they were in my judgment working in closely analogous circumstances. They were the spouses of persons who formed part of a British contingent working in an international enclave, and they obtained their employment only because of that relationship. In my judgment they have equally strong connections with Great Britain and British employment law as those employed in British enclaves abroad. It follows that they are entitled to claim for unfair dismissal notwithstanding that they are not employed within the United Kingdom itself."**

The claim there was clearly piggy-backing upon the claim that would undoubtedly have been aptly made by the husbands of the wives as being in an enclave. No other example has been given.

15. Two cases appear in relation to what is described as satisfying a *sufficient connection* test, as the EAT (Cox J) held in **YKK Europe v Heneghan** [2010] IRLR 563. Mr Rubenstein's head-note in the IRLR accurately reflects the Judge's ruling, which is this:

> **"The starting point for tribunals, in each case, will therefore be into which of the categories identified the particular claimant falls. *Lawson* now establishes the test to be applied, in each of the three categories of employee identified, and the focus should now be on what was happening as at the date of dismissal rather than at the outset of the relationship. In a standard case, the application of s.94(1) will depend on whether the employee was working in Great Britain at the date of dismissal. For peripatetic employees the most helpful test is to decide where the employee was based at that time. Expatriate employees, who both work and are based abroad, will not normally fall within the scope of s.94(1), but they might do so if they were posted abroad by a British employer, for the purpose of a business carried on in Great Britain, or worked in what was in effect an extra-territorial British enclave in a foreign country."**

16. My attention has been drawn to the Judgment of the Court of Session Inner House, and in particular to the minority Judgment of Lord Dobie, in **Ravat v Halliburton Manufacturing & Services Ltd** [2010] CSIH 52, where in clear terms the proposed test of strong connection is eschewed. That case, as I understand it, has been listed before the Supreme Court, but a date is not available. However, in **Dolphin Drilling Personnel Ltd v Winks** UKEATS/0049/08, Lady Smith in the EAT expressly rejected any test based upon a finding of a substantial connection to Great Britain.

17. Two first instance Judgments (**Convill v Catholic Agency for Overseas Development** 2328430/2009 (Employment Judge Stacey) and **Convill v Christian Aid** 2302440/2006 (Employment Judge Hall-Smith)) point in the direction of findings these days which preclude access by overseas employees working for faith or charity organisations to the protection.

Discussion and conclusions

18. With those principles in mind, I prefer the argument of Mr Algazy. I agree with Miss Fudakowski that what I am doing here is considering a question of law. The primary facts are found by the Judge and they are inviolable; it is not now said that they are perverse. It is his treatment of the aggregate of those facts that is said to give rise to a question of law, and I agree it does (see Lord Hoffmann). However, I do not agree that the Judge made an error in his assessment. He considered all of the factors and in particular the central focus of the Claimant's work and the mindset of the Respondent to decentralise its and her work from Oxford to the (Africa) regions. The Claimant had been there for eight years. In my judgment, the Claimant did not fall within Lord Hoffmann's first category of the expatriate (see 23(c) of my Judgment in **Burke** above). This is conveniently in shorthand the 'foreign correspondent'. Ms Walker was not the foreign representative of the Oxford-based organisation, but was conducting her work and was engaging in work overseas. There is no error in the Judge's assessment of the factors that he had in mind when making his decision that she did not fall into Lord Hoffmann's first expatriate category. It is common ground that she did not fall within the enclave category, and all that is left therefore is whether she had equally strong connections as the above two categories; that is, the enclave and the foreign correspondent.

19. It is telling that none of the highly experienced members of the Bar appearing before the House of Lords in that case (including Mr Algazy whose appeal on behalf of the employee Mr Lawson was allowed), nor Lord Hoffmann himself nor any of the other four Law Lords who agreed with him, was able to find an example to fit the third residual category. In the time since the Judgment was given there has been one, and that is **Wallis**, but it is clear that that is a species of the enclave case. The claimants in that case had equally strong connections to the UK as those of their husbands who were in the enclave, and so it is not a wholly new example

in the residual category but an extension of the enclave. Its correct depiction is not necessary for this Judgment, but it is illustrative that there is no other case put before me from which one could say, "yes, that is definitely within Lord Hoffmann's third residual category." The difficulty for Miss Fudakowski's case is that she puts no new matters forward for this second alternative argument than she had for her first; that is, the residual category yields no new facts not already the subject of the exegesis in respect of the primary case (the foreign correspondent). Since it was a permissible option for the Judge to form the view that she was not within the foreign correspondent category and no new material is adduced for the third category, both grounds of appeal must fail.

20. The appeal is dismissed. Permission to appeal to the Court of Appeal is refused (reasons not transcribed).