## *R (Hottak & another) v Secretary of State for Foreign and Commonwealth Affairs & another* [2016] EWCA Civ 438; May 9, 2016

### Implications for practitioners

The CA has confirmed that the same test applies to determining the territorial reach of claims under Part 5 (work) of the Equality Act 2010 (EA) as it does to determining the territorial reach of unfair dismissal complaints under the Employment Rights Act 1996 (ERA). That test is the well-established test in *Lawson v Serco* [2006] UKHL 3. Significantly, the CA held that discrimination claims do not benefit from a more generous or flexible approach to extra-territorial jurisdiction.

### Facts

The claimants (Cs) were Afghan interpreters working for the British armed forces at Camp Bastion, Afghanistan. Both left their employment following intimidation and death threats because of their work. They sought to bring claims for direct or, alternatively, indirect race discrimination against the British government (R) as the benefits package they were entitled to on the termination of their employment was less generous than that offered to staff in similar employment in Iraq. The Cs brought their claims by way of judicial review. Their primary argument was that they were victims of work-related discrimination, contrary to s39 EA (contained in Part 5 EA). Alternatively, they argued that R was subjecting them to discrimination in the exercise of its public functions contrary to s29 EA (contained in Part 3 EA). The Cs also contended that R had failed to have regard to the public sector equality duty (PSED) and that no s149 equality assessment had been carried out prior to the formulation of the Afghan benefits package.

### The decision at first instance

The Cs' discrimination claims under s39 failed in the Divisional Court ([2015] EWHC 1953 (Admin); [2015] IRLR 827). [See Briefing 770.] Burnett LJ, with whom Irwin J agreed, noted that, save for some minor provisions, the EA is silent in respect of territorial jurisdiction. In order to discern parliament's intention, Burnett LJ turned to the Act's explanatory notes, which state:

> *As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the Employment Rights Act 1996, 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…In relation to the non-work provisions, the Act is again generally silent on territorial application, leaving it to the courts to determine whether the law applies.*

Burnett LJ held that the same test should apply in determining the territorial scope of claims under s39 EA as applies to unfair dismissal claims under the ERA 1996, namely the now well-established test in *Lawson*. In *Lawson*, the House of Lords held that, as a general rule, employees ordinarily working in the UK at the time of dismissal would be able to benefit from the protection of the ERA. Other exceptional categories of employees would also be able to benefit, such as peripatetic employees based in the UK at the time of dismissal, expatriate employees posted abroad by their British employer, and any other employees with an *'equally strong'* connection to Great Britain.

It was conceded by the Cs that they were not working in the UK at the time of dismissal (in fact their employment was exclusively in Afghanistan), and nor were they peripatetic or expatriate employees. However, they argued that they had sufficiently strong connections with British employment law so as to come within the jurisdictional bounds of the EA. On the facts, the Divisional Court was not persuaded.

The Divisional Court also rejected any suggestion that jurisdiction should be wider in respect of discrimination claims because, as submitted by the Cs, protection from discrimination is *'more fundamental'* than ordinary employment rights. He said that there was *'much to be said for symmetry'* between Part 5 of the EA and s94 ERA because commonly both claims are brought together in the employment tribunal. However, he reached this conclusion with some hesitation, suggesting that there may be a case for discrimination having a **narrower** territorial scope, as principles of non-discrimination contained in the EA may *'conflict with local laws and customs'*.

Burnett LJ then went on to dismiss the s29 claim, reasoning that it could not have been parliament's intention that work-related claims that had failed for want of jurisdiction under Part 5 could instead be brought by way of Part 3.

He did, however, allow the claim in respect of the government's failure to have regard to the PSED and granted the claimants' declaratory relief. The fact that the policy decisions had extra-territorial implications did not mean that the PSED did not apply.

### Court of Appeal

The CA upheld the Divisional Court's decision in full and confirmed that the *Lawson* test determines the territorial scope of s39 EA in just the same way as it does the territorial scope of unfair dismissal claims. Rimer LJ, with whom Richards and Arden LLJ agreed, also rejected as *'artificial, unjustified and unwise'* the submission that because Part 5 EA is directed at outlawing discrimination *'and so concerns matters viewed by this jurisdiction as going to the very essence of man's humanity'*, it should have wider territorial reach than domestic legislation dealing with ordinary employment rights. He said, at para 47:

> *If the proposition [that the EA should have wider territorial scope] goes to the length of suggesting that Parliament must be assumed to have intended its anti-discrimination provisions in Part 5 of the 2010 Act to operate on a world-wide basis, I regard it as wrong. Had that been Parliament's intention, it would have said so. If the proposition amounts to no more than a submission that an overseas employee's complaint of work-related discrimination should and will have an easier territorial passage through the eye of the needle than his complaint of unfair dismissal (a complaint that might also be brought in the same proceedings), it amounts to reading into Parliament's silence on the question of territoriality a subtly nuanced variance of legislative intention as between the two types of case. There is no warrant for that.*

### Comment

This case provides useful clarification of the territorial scope of EA claims, at least in relation to extra-European cases. The decision that the territorial scope of work-related discrimination claims mirror that of unfair dismissal claims is helpfully straightforward. However, the reasoning behind the assumption that the two categories of claim must have the same territorial jurisdiction appears somewhat thin. The EA's explanatory notes do not state that parliament intended that precisely the same test must apply in relation to discrimination and unfair dismissal claims, merely that just as is the case with ERA claims, flexibility is given to the judiciary to determine the extent of territorial scope. Moreover, the assumption that it is desirable for there to be *'symmetry'* between Part 5 of the EA and the ERA simply because claims are often brought together is simplistic. There are already significant jurisdictional differences between the different causes of action; for example, a broader definition of workers is able to benefit from the protection of the EA than the ERA, as well as employees with less than two year's service.

The CA, at least, does not expressly endorse Burnett LJ's notion that discrimination claims should have a narrower territorial scope than unfair dismissal claims because of the potential to clash with local customs. Given that the rights to equality and non-discrimination are designed to protect human dignity and the *'recognition of the equal worth of every individual'* (per AG Maduro in *Coleman v Attridge Law* [2008] IRLR 722 (CJEU)), why should local customs be able to trump rights protected by the EA? Certainly, Langstaff P in *Olsen v Gearbulk Services Ltd* [2015] IRLR 818 at [39], suggested obiter that wider jurisdiction may be desirable in discrimination cases because of the public interest in countering discrimination.

Neither the CA nor the Divisional Court gave much consideration to the territorial scope of the predecessor equality legislation. It is now possible that, if *Lawson* is the sole test for territorial jurisdiction, discrimination claims that could have been brought pre-EA may now fail.

For example, the Race Relations Act 1976 and the Employment Equality (Age) Regulations 2006 benefitted employees who worked *'wholly or partly'* in Great Britain. In *Mak v British Airways* [2011] ICR 735, 16 Chinese cabin crew working on flights to and from London and Hong Kong brought claims in the ET for race and age discrimination. The CA was satisfied that the tribunal had jurisdiction to hear their claims as the claimants worked 'partly' in Great Britain. It is far from clear whether the cabin crew would satisfy the *Lawson* test if their claim was brought today, but it is doubtful that it was intended that workers who previously would have benefited from the protection of equality legislation would be deprived of that protection under the EA.

It also remains to be seen whether the *Lawson* test will apply in cases where the rival jurisdiction is an EU member state, following the decision of Elias J in *Bleuse*

*v MBT Transport Ltd and another* [2008] IRLR 264 in which it was held that the territorial limitation articulated in *Lawson* should be modified where a claimant is seeking to enforce rights that are directly effective under EU law. *Bleuse* concerned a German national who brought a claim for holiday pay in reliance on the Working Time Directive.

That said, *Hottak* makes clear that, at least in respect of extra-European discrimination claims in which there is no whole or partial employment in Britain, the *Lawson* test is appropriate for determining jurisdiction.

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