EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs M Houghton	**v**	**USA**

OPEN PRELIMINARY HEARING

Heard at: **Central London Employment Tribunal (By CVP)**

On: **14 June 2021**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **Mr D Bussau, Counsel**
For the Respondent: **Professor D Sarooshi, Queen's Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

1. *S12 SIA 1978* applies to service of documents for instituting proceedings against a State, even where those proceedings concern proceedings relating to the armed forces of a State in the UK.

2. The decision to accept the Respondent's Response is affirmed.

REASONS

This Hearing

1. This Open Preliminary Hearing was listed to consider:

   1.1. Whether the Respondent's response should be rejected, including whether Employment Judge Brown's decision to accept the ET3 should be reconsidered and set aside.

The Complaint(s)

2. By a claim form presented at the Watford ET on 12 August 2019 the Claimant brought complaints of unfair dismissal and discrimination arising from a disability (s15 Equality Act 2010) against the Respondent.

3. The claim was transferred to Central London ET for service via the FCO and the claim was then served on the Respondent via the diplomatic channel on 11 February 2020.

4. On 27 April 2020 the Respondent presented a substantive Response to the claim. On 17 July 2020 I determined that the Response should be accepted.

5. On 24 July 2020 the Claimant made an application that the Tribunal review its decision of 17 July 2020 to accept the Respondent's Response.

Procedural History of this Claim

6. The ET1 was served by Watford ET on the US Air Force Base at RAF Mildenhall on 29 August 2019. It was returned under cover of Diplomatic Note No. 302 on 19 September 2019. As indicated above, the claim was transferred to Central London ET to effect service through the diplomatic channel.

7. Central London ET sent the ET1 to the FCO's Service of Process Team on 25 November 2019, noting the "Claim is [to be] served through the Diplomatic Channel according to the Employment Tribunal procedures" and that "[t]he Employment Tribunal is instigating the service through the Foreign and Commonwealth Office".

8. On 11 February 2020, the ET1 was served via the diplomatic channel – by the British Embassy in Washington, DC – on the US Department of State, as recorded by the British Embassy Note 012/202.

9. The Notice of Claim stated that the Respondent had 2 months and 28 days from that date of service to present a Response. The ET3 was served within this time, on 27 April 2020.

10. By letter dated 5 May 2020 the Claimant suggested the Response was out of time on the basis that the first attempted service was valid. The letter said, "Rule 91 confirms that any technical irregularity .. in service will not undermine the validity of service". On 24 July 2020 the Claimant made an application that the Tribunal review its decision of 17 July 2020 to accept the Respondent's Response. This hearing was therefore listed.

11. At this hearing, I invited the parties to address me on the issue of whether I should, in any event, exercise my discretion to accept the Respondent's Response in the interests of justice, even if the Response was presented out of time.

The Parties' Contentions

12. Professor Sarooshi QC, for the Respondent, presented a skeleton argument and made oral submissions. There was a Bundle of documents, page numbers in which were referred to thus: [x].

13. He noted that it was not in dispute that the correct Respondent to the claim is a State, the USA. He said that *s. 12(1) State Immunity Act 1978* stipulates a mandatory process and time period for service on a State, all of which must be complied with by Courts and Tribunals.

14. Professor Sarooshi QC said that *s. 12(1) SIA* is clear that "any … document required to be served for instituting proceedings against a State" must be served by being transmitted via diplomatic channels – through the FCDO – to the foreign State's Ministry of Foreign Affairs in its capital city. He drew my attention to *Kuwait Airways Corporation v Iraqi Airways* [1995] 1WLR 1147 at 1155H-1156D where the House of Lords held that a main element of the service requirements under *s. 12(1) SIA* – of transmission through the FCO to the Ministry of Foreign Affairs of a foreign State – could not be met merely by the FCO delivering a writ to the State's Embassy (which otherwise forms part of its Ministry of Foreign Affairs) within the UK. Professor Sarooshi QC contended that the requirements *of s. 12(1)* are construed in such stringent fashion by the courts such that even attempted service by the FCDO on a foreign State's Ministry of Foreign Affairs via email has been held to fall foul of *s. 12(1)* as being invalid service: *Estate of Michael Heiser & 121 Others v. Iran* [2019] EWHC 2074 (QB) at [239].

15. Professor Sarooshi QC said that the express elements of the main rules embodied in *ss. 12(1)-(2)* reflect customary international law as summarised in the Respondent's Diplomatic Note rejecting service, as follows: "Under customary international law, a foreign sovereign is not required to file a responsive pleading or appear before the courts or other tribunals of another State, unless proper service of process is provided. Customary international law requires that proper service of process upon a foreign State: (1) provide notice of the suit either (a) through diplomatic channels or (b) in accordance with an applicable international convention or other method agreed to by the State concerned; (2) afford at least sixty (60) days before a responsive pleading or appearance is required; and (3) include sufficient information about the case, usually in the form of a complaint, statement of claim, or similar document, to enable the foreign State to determine the nature of the case, whether it is a proper party, and in what tribunal the case has been filed. The Embassy further notes that under Sections 12(1) and (2) of the State Immunity Act 1978, service upon a foreign State must be effected through the Foreign and Commonwealth Office and that any time for entering an appearance shall begin to run two months after the date on which the writ or document is received by the foreign State."

16. Professor Sarooshi QC also drew my attention to a decision of Employment Judge Foxwell in the joined cases of *Wright v USA and Webster v USA* which referred to "a requirement for proceedings to be served on the Respondent through the Foreign and Commonwealth Office" at [12].

17. Professor Sarooshi QC rejected the contention that, because s*. 16(2) SIA* disapplies the provisions of Part 1 of the SIA to proceedings relating to the armed forces of a State in the UK, that this means *ss. 12(1)-(2) SIA* do not apply.

18. He said that, as a matter of construction, *ss. 12(1)-(2) SIA* apply in connection with "instituting proceedings", whereas *s. 16(2)* applies to "proceedings", once they have been instituted. He said that, even if the Claimant's construction of *s. 16(2)* is

correct, then the requirements of *ss. 12(1)-(2) SIA* would apply as a matter of customary international law, with the same outcome.

19. Professor Sarooshi QC said that this construction - that *s. 12(1)* applies to initiation of court (or tribunal) proceedings – is supported by Mr Justice Hamblen (as he then was) who stated in *L and others v Y Regional Government of X* [2015] 1 WLR 3948 at [35]-[36]:

    "35. … it is correct that section 12(1) would not apply to interlocutory applications in existing court proceedings. [Since] [t]hey involve no initiation of court proceedings. …

    36. Once proceedings have been started following the issue and service of an arbitration claim form then applications within those proceedings would not be subject to section 12(1). But the initiation of those proceedings is so subject."

20. He contended that, by contrast, *s. 16(2)* provides: "This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952." In other words, *s. 16(2)* does not apply until proceedings have already been commenced, and proceedings can only be instituted against a sovereign State in accordance with *s. 12(1).*

21. Professor Sarooshi QC said that the consequence of *s. 16(2)* is that the common law exceptions to State immunity (which applies customary international law), rather than the statutory exceptions to immunity in *Part 1 SIA,* apply "to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom".

22. He said that *s. 16(2)* does not disapply the procedural requirements of *s. 12* SIA, which must be followed before there can be any proceedings afoot. Were it otherwise, it would lead to the anomalous situation that Parliament requires service of a State pursuant to *s. 12* for all States, but that the protections contained in *s. 12* should not apply to a foreign State which operated a military base in the UK. He said that this cannot be correct. He said that I should reject an unlikely construction of what Parliament intended, *L and others v Y Regional Government of X* [2015] 1 WLR 3948 at [38]-[39] and [55], including the rationale for s. 12(2) at [32] – States properly require time to respond to proceedings commenced against them.

23. Professor Sarroshi QC further contended that this interpretation was bolstered by CPR Rule 6.44 , which contains the specific requirements contained in *ss. 12(1)-(2) SIA*. If the ET were to depart from *s. 12(1)* then it would lead to the further anomaly whereby: service to institute proceedings against a State which operates a military base in the UK could be done in an employment case by the ET simply sending the ET1 to the US military base, whereas, in the High Court, to institute a case against the foreign State for acts relating to the same military base, compliance with the mandatory requirements contained in *s. 12(1),* as embodied in CPR 6.44, would be required.

24. Professor Sarooshi QC said that, even if the Tribunal considers that *s. 12 SIA* does not require service to be effected in this case through diplomatic channels, the result would be the same: service would still need to be effected via diplomatic

channels in accordance with customary international law, as summarised above in the Diplomatic Note with the attendant 2 month additional period for response being afforded the State.

25. He contended that this should not be contentious. However, if it were considered necessary to address the requirements of customary international law in detail, it would not be possible to do so at this PH, as it would require the compilation of evidence of the practice and legal position of States as to customary international law on the service of proceedings on States.

26. (I said that I would address the proper construction of *ss 12 & 16 SIA* at this hearing, but if I considered that I needed to hear submissions on the application of customary international law, I would adjourn the hearing to allow both parties time to present further submissions. The Claimant agreed with this procedural approach.)

27. Finally, Professor Sarooshi QC, said that *ET Rules of Procedure 2013 r91* does not and cannot disapply the requirements and proper method for service of proceedings on a sovereign State.

28. He said that, in any event, it would be in the interests of justice for the Tribunal to extend time for presentation of the Response given that the USA has filed a substantive response in good faith in the appropriate time.

The Claimant's Contentions

29. Mr Bussau, appearing for the Claimant, agreed that the correct Respondent in the case is the USA, a State. However, he contended that *s. 16(2) SIA* excludes the provisions of Part 1 State Immunity Act 1978 regarding proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom.

30. He said that the wording of *s16(2)* plainly disapplied the whole of *Part 1 SIA 1978* to such proceedings, including *s12*. He said that, if *s16(2)* was intended <u>not</u> to apply to service of proceedings, it would have said so.

31. Mr Bussau said that, if the construction of *s16(2) SIA* were as the Respondent contended, there would be no need for the CPR to have specified that service on States must be by the diplomatic channel. Mr Bussau pointed out, however, that there was no such procedural requirement in the Tribunal. He said that customary international law is not binding on the ET unless enacted by Parliament.

32. The effect was that the Tribunal procedures did not require service on States through the diplomatic channel.

33. That being the case, Mr Bussau argued the original service by Watford ET on the Respondent was effective service and time ran for presentation of the Response from that date.

34. Mr Bussau said that this point of construction was never directly considered in the authorities relied on by the Respondent. Accordingly, the propositions relied on by the Respondent arising out of them were not the ratios of the relevant judgments.

35. In the Watford ET cases to which the Respondent referred, the Claimants were self represented, so that the point was never raised that the FCO service regime did not apply.

36. Mr Bussau accepted that, in the circumstances of this case, it would be in the interests of justice for the Tribunal to extend time for presentation of the Response, given that the rules for Tribunal service on armed forces had been misunderstood. However, he asked that the Tribunal clearly state the rules for service of proceedings relating to armed forces of a foreign State in the present case, so that, in other cases, the Respondent could not argue that it should be allowed additional time to respond to a claim validly served by sending it directly to the armed forces' address.

37. Mr Bussau also drew my attention to the Claimant's letter of 5 May 2020, which argued that Rule 91 ET Rules of Procedure 2013 gives the Tribunal a discretion to treat as validly served a document where it has not complied with the rules for delivery of documents to a party, if the Tribunal is satisfied that the document has come has to the attention of that person.

Discussion and Decision

38. *s 12(1)-(2) SIA 1978* provide

"12. Service of process and judgments in default of appearance.

(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid."

39. *s. 16(2) SIA 1978* provides: "This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952."

40. I agreed with the Respondent that, while the wording of *s16(2) SIA* disapplies *Part 1 SIA* to "proceedings relating to … the armed forces of a state", the wording does not disapply *Part 1* in relation to service of documents for instituting those proceedings. Taking the provisions together, *s12 SIA* anticipates that the relevant service takes place in order to institute the proceedings. The proceedings are not instituted and do not exist until service is effected in accordance with *s12*.

41. Accordingly, while *s16(2)* disapplies *Part 1 SIA* to proceedings once they have been instituted, it cannot disapply *Part 1* from the prescribed procedure before there are proceedings.

42. I considered that this interpretation was supported by Mr Justice Hamblen (as he then was) who stated in L and others v Y Regional Government of X [2015] 1 WLR 3948 at [35]-[36]:

    "35. … it is correct that section 12(1) would not apply to interlocutory applications in existing court proceedings. [Since] [t]hey involve no initiation of court proceedings. …

    36. Once proceedings have been started following the issue and service of an arbitration claim form then applications within those proceedings would not be subject to section 12(1). But the initiation of those proceedings is so subject."

43. Mr Justice Hamblen clearly drew a distinction between "existing court proceedings", which have already been started, and "initiation of court proceedings". He viewed the proceedings as having started only, "following the issue and service..". Applying that interpretation to *Part 1 SIA*, it was apparent that *s16* only applies once proceedings have been commenced by correct service.

44. I considered that, not only was this the natural interpretation of the *SIA*, but that it accorded with the recognized procedural protection given to States in international law regarding the service of proceedings. As Professor Sarooshi QC contended, the caselaw recognizes that States require time to respond to proceedings against them, *L and others v Y Regional Government of X* [2015] 1 WLR 3948 at [32] and [38]-[39] and [55].

45. The fact that the subject matter of the proceedings involves things done by the armed forces of a State does not derogate from the need for a State, where it is the appropriate Respondent, to be given this time to respond to the proceedings. There may be policy reasons for disapplying immunity to actions of a State's army in the UK, but those policy reasons would not apply to service of the documents required to initiate proceedings, because the subject matter of the proceedings does not alter the identity of the Respondent as a State, which still needs time to respond.

46. To find otherwise would also be to permit Tribunal proceedings to be effected on a State in an entirely different manner to Court proceedings. That would be an anomalous result and I agreed that I should not adopt such an unlikely interpretation of a statute. In any event, the *SIA* provides that Tribunals, as much as Courts, are required to give effect to state immunity as set out under the *SIA*.

47. In any event, I considered that it would be in the interests of justice to accept the Respondent's Response, even if it was received out of time.

48. I considered that the Respondent had presented a substantive Response to the claim and had explained the reason for delay, in that it had understood that the *s12 SIA 1978* mandatory service procedure applied. The contemporaneous Diplomatic Note No. 302 on 19 September 2019 had set out this understanding. The Respondent had presented its Response within the period it understood to be the applicable period. Furthermore, the Respondent's understanding of the correct process had been supported by the Tribunal's own practice in the case. It would be grossly unfair for the Tribunal now to reject the Response, when the Tribunal had

agreed that FCO service was required and had re-served the claim, giving a new date for presentation of the Response.

49. Applying *Pendragon plc (t/a CD Bramall Bradford) v Copus* [2005] ICR 1671, and *Kwik Save Stores Ltd v Swain* [1997] ICR 49, EAT, I took into account all these matters, including the fact that a fully-pleaded defence had been presented on the merits of the whole claim. I considered that, if time was not extended and the Response was not accepted, the Respondent might be held liable for a wrong which it has not committed. Given that the balance of the other factors also pointed to it being fair to accept the Response, it was clearly in the interests of justice to do so.

Dated: 14 June 2021

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Employment Judge Brown

ORDERS SENT TO THE PARTIES ON

16/06/2021..

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FOR THE TRIBUNAL OFFICE