Case No: 2 YK 74402

IN THE COUNTY COURT AT SHEFFIELD
On Appeal from District Judge Bellamy

Sheffield Appeal Hearing Centre
Sheffield Combined Court Centre
50 West Bar
Sheffield

Date: 29 September 2014

Before :

HIS HONOUR JUDGE ROBINSON

- -

Between :

Mrs Janice Campbell	**Claimant**
- and -	
Thomas Cook Tour Operations Limited	**Defendant**

- -
- -

Miss Sally Cowen (instructed by **Sheffield Law Centre**) for **the Claimant**

Mr Tom Collins (instructed by **Thomas Cook Legal Department**) for **the Defendant**

Hearing date: 1 August 2014

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official recording shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

His Honour Judge Robinson:

Introduction

1. This is an appeal by the Claimant/Appellant from a decision of District Judge Bellamy sitting in the Sheffield County Court, made following the trial of the Claimant's claim for damages for breach of contract and for discrimination under Section 29 of the Equality Act 2010 ("EqA"). The claim was allocated to the Fast Track. Evidence and submissions were heard on 4 October 2013. A written judgment was handed down on 12 November 2013. District Judge Bellamy gave permission to appeal, recognising that the point in issue was important and not straight forward.

2. The point in issue is whether the provisions of Section 29 of the EqA apply in the circumstances of this case. The Judge ruled as a matter of law that the relevant provisions of the EqA did not apply because the discrimination which he found had occurred took place in Tunisia which, he held, was outside the territorial ambit of the EqA.

3. The relevant facts found by District Judge Bellamy can be shortly stated. The Appellant is disabled and has difficulty in walking. She can walk short distances but usually uses a wheelchair. She has difficulty in travelling in an ordinary taxi.

4. She bought a package holiday from the Defendant which included the provision of accommodation in Tunisia at the Tej Marhaba Hotel. An important element of the package holiday was the availability of an indoor swimming pool at the hotel. In advance of the departure date, the Appellant was informed that the indoor swimming pool at her hotel would not be available, but that she would be able to use the swimming pool at a nearby hotel. The Appellant was familiar with the hotels, having stayed in the area before. Her evidence that she was able to walk to the nearby hotel was accepted by the Judge.

5. However, the Judge found that the Respondent "declined to allow the Claimant at no additional charge, to use the [nearby hotel] and alternative taxi arrangements were not available for her to travel to" an alternative swimming pool.

6. The Appellant succeeded in her claim for damages for breach of contract in the sum of £140, against which decision there is no appeal.

7. Dealing with the claim for damages for discrimination, the Judge found that if the EqA applied then the Respondent was under a duty to make reasonable adjustments so as to enable the Appellant to enjoy the facilities of an indoor swimming pool and that the Respondent had breached that duty. In particular he held that "it would not have been disproportionate and indeed would have been reasonable for the Defendant either to arrange a more suitable taxi or enquire as to the cost, following its breach of contract, of permitting the

Claimant to use the pool" at the nearby hotel. He assessed damages under the EqA in the sum of £3,500.

8. However, the Judge went on to find that the relevant provisions of the EqA, in this case contained in Section 29(2)(c), did not apply outside the United Kingdom.

9. He observed that "the Act contains no express provisions as to its applicability outwith the United Kingdom". He referred to sections 102 and 106 in Part V of the Code set out in *Bennion on Statutory Interpretation* (5th edn) and determined that on the basis of those rules "the Act is limited in scope to the territory of the UK and no further".

10. Since the decision of the Judge, the 6th edition of *Bennion* has been published. There are no relevant alterations to the text.

11. The Judge had been referred to a line of employment law cases. In those cases the issue was whether the employee could bring a claim for unfair dismissal in England notwithstanding a foreign element to the employment. I will deal with those cases later in this judgment. For the present it is sufficient to note that the Judge concluded his consideration of the issue in paragraphs 29 and 30 of his judgment:

> "29. I reject the Claimant's submissions that the rules of statutory construction, referred to above, are, or should be disapplied, by reference to a series of cases concerned with the employee/employer relationship. The Claimant in particular has referred to the cases of *Ravat v Haliburton Manufacturing and Services Ltd; Lawson v Serco Ltd* and *Duncombe v Secretary of State for Children Schools and Families*. Whilst these cases relate to employees working overseas and whether or not they were entitled to bring a claim for unfair dismissal under the ERA 1996 the significant difference between those claims and the current claim is the causal connection where the employee is engaged under a contract of employment formulated in the UK, on direction of UK employers and the employer complies with UK employment law in the observance and performance of that contract. The employer has control over the manner in which its staff are treated and the rules and procedures applied to conduct and discipline in the workplace.
>
> "30. While I have hade regard to the Code of Practice, I remind myself that the 'provision of services' relate to the provision of services outside the United Kingdom, and I am not aware of any authority other than the line of employment cases referred to where a supporting view had been taken by the court. With respect to the Claimant's submissions I regard a contract of employment as an entirely different matter to a contract for the supply of services namely a holiday abroad where, for the reasons advances by the Defendant, the imposition of making reasonable adjustments might well involve making physical alterations to land and buildings and which in any event would have to

be subject to local jurisdiction. I do not believe this is a matter where it is open to the court to pick and choose the circumstances in which, with regard to the provision of services, the Act would apply. Either it does or it does not. It seems to me, save only for the employment line of cases, there can be no grounds for arguing on strict statutory interpretation that the Act applies. For the avoidance of doubt I have considered the authorities other than those referred to in this judgment but contained in the bundle prepared for the trial and while I accept both Claimant and Defendant are domiciled in the UK, the contract was made in the UK, its performance was wholly in Tunisia and to a large extent any service provider if required to make reasonable adjustments could only do so subject to local jurisdiction. It is that which distinguishes these circumstances from the employment cases referred to."

Relevant Provisions of the Equality Act 2010

12. It is common ground that the Claimant has a disability within the meaning of Section 6 of the EqA.

13. The generic duty to make reasonable adjustments for disabled persons is dealt with in Section 20 of the EqA. Subsections (3) to (5) of Section 20 specify the three requirements comprised within the duty. On the facts of this case the provision of a suitable taxi, or paying for the Appellant to use the pool in the nearby hotel, clearly fall within scope of the three requirements. Subsection (1) is in these terms:

> "(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes , a person on whom the duty is imposed is referred to as A."

14. Section 21 deals with failure to comply with the duty:

> "(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> "(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Part of this Act	*Applicable Schedule*
Part 3 (services and public functions	Schedule 2
Part 4 (premises)	Schedule 3
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (association)	Schedule 15
Each of the Parts mentioned above	Schedule 21

> "(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened the Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

15. The relevant provision of Part 3 (services and public functions) is Section 29 which provides:

> "(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.
>
> "(2) A service-provider (A) must not, in providing the service, discriminate against a person (B) –
>
> (a) as to the terms on which A provides the service to B;
> (b) by terminating the provision of the service to B;
> (c) by subjecting B to any other detriment.
>
> "…
>
> "(7) A duty to make reasonable adjustment applies to-
>
> (a) a service provider (…)
> (b) …"

16. The EqA does contain some provisions concerning its territorial extent. Section 217(1) provides that the EqA forms part of the law of England and Wales and Section 217(2) provides that most of the EqA forms part of the law of Scotland. Thus Northern Ireland is excluded save for what the authors of *Blackstone's Guide to the Equality Act 2010* describe as "very minor exceptions".

17. Sections 29(9) and 114(1) and (5) together make it clear that in relation to certain entry clearance decisions in immigration cases, "it does not matter whether the act occurs outside the United Kingdom". Section 30 contains provisions relating to the applicability of certain provisions of Part 3 to ships and hovercraft.

18. Otherwise the EqA is silent on territorial extent.

Submissions

19. I have been enormously assisted by Miss Cowen for the Appellant, who stood in at short notice for Miss Casserley who appeared in the court below, and by Mr Collins for the Respondent.

20. It is common ground that, as the Judge observed, the EqA is silent on the issue of territorial extent. The significance of this was approached in different ways by the parties.

21. Mr Collins submits that the standard rules of statutory interpretation apply which, he submits are authoritatively contained within sections 102 and 106 of the Code in *Bennion*:

> "**Section 102. Basic rule as to extent of an Act**
> "(1) Although an enactment may be expressed in general terms, the area for which it is law (known as its extent) must exclude territories

> over which Parliament lacks jurisdiction. It also excludes territories for which Parliament did not in that enactment intend to legislate.
>
> "**Section 106. Presumption of United Kingdom extent.**
> "Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom."

22. Thus Mr Collins supports the approach taken by the Judge. He submits that there is no contrary intention to be found anywhere and thus the undisplaced presumption is that the EqA is limited in extent to the UK or, more accurately in this case, Great Britain.

23. Miss Cowen submits that it is not as easy as that. She referred me to a document entitled "Equality Act 2010 Explanatory Notes". Under the heading "Territorial extent and application – General" paragraph 15 reads:

> "15. 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. However, the Act contains a power to specify territorial application of Part 5 in relation to ships and hovercraft (section 81) and offshore work (section 82). *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.* However, in a limited number of specific cases, express provision is made for particular provisions of the Act to apply (or potentially apply) outside the United Kingdom. Thus, section 29(9) provides for the prohibitions in respect of the provision of services or the exercise of public functions to apply in relation to race and religion or belief to the granting of entry clearance, even where the act in question takes place outside the Untied Kingdom. Also, section 30 contains a similar power to that in Part 5 to specify the territorial application of the services provisions of Part 3 in relation to ships and hovercraft" (emphasis added).

24. Paragraph 1 of the document states in terms that the explanatory notes have been prepared by the Government Equalities Office, the Department for Work and Pensions (in respect of provisions relating to disability and pensions) and a variety of other government departments. The paragraph ends with this comment concerning the explanatory note:

> "Their purpose is to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament."

25. Given the authorship of the document and the self expressed limitation, I do not feel able to attach any significant authoritative weight to it.

26. Miss Cowen also referred me to the EqA Code of Practice applicable to Services, Public Functions and Associations. I am obliged by Section 15(4)(b) of the Equality Act 2006 to take into account any code of practice which appears to be relevant, as clearly this one is:

> "**Territorial scope**
> "3.17 The provisions of Parts 3 and 7 do not apply, and cannot be enforced, in Northern Ireland.
>
> "3.18 The Act does not limit the scope of the services and public functions provisions to activities which take place in Great Britain. *Whether or not an act which takes place outside Great Britain is covered by the Act's provisions will be determined by the county court or the Sheriff court*. The exception to this is services provided by an information society service provider where different territorial rules apply … (emphasis added).
>
> "3.19 There are a number of specific cases where the Act expressly provides for particular provisions of the Act to apply (or potentially to apply) outside the UK: for example, the Act applies to the provision of services and the exercise of public functions in relation to race and religion or belief discrimination in the granting of entry clearance where the act in question takes place outside the UK."

27. There is no indication of the relevant criteria by reference to which the county court will determine whether a relevant act is covered by the EqA's provisions.

28. Other reference works leave the position similarly vague. In *Chitty on Contracts* (31st edn) at paragraph 30-114 it is said:

> "In relation to the rights now contained in the Equality Act 2010, where no explicit scope of territorial application are (sic) indicated, that application, it would seem, is determined by the principles in *Serco v Lawson*, as extended …"

29. In *Dicey, Morris & Collins: The Conflict of Laws* (15th Edition, October 2012) there is full discussion of the employment related provisions in Part 5 of the EqA but no express discussion of Part 3.

30. A training paper (author unknown) provided for Judges by the Judicial College has suggested that, as to territorial scope, normal conflict of law principles will apply.

31. What is absent from these materials is any suggestion that the provisions of the EqA *cannot* apply to acts done outside Great Britain. It is true that sections 102 and 106 of the Code in *Bennion* on the face of them seem to exclude this possibility, given the absence of Parliamentary contra-intention. There is, of course a difference between extent and application, as is noted in the commentary to section 102 in *Bennion*:

> "It is necessary to distinguish between *extent* and *application*. Extent defines the area within which the enactment is law. Application is concerned with the persons and matters in relation to which the enactment operates. These may be within or outside the area of extent."

32. However, *Bennion* offers little comfort to the supporter of extra-territorial application. The issue of application is largely dealt with in section 128(1) of the Code in *Bennion*:

> "(1) Unless the contrary intention appears, and subject to any privilege, immunity or disability arising under the law of the territory to which an enactment extends (that is within which it is law), and to any relevant rule of private international law, an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons or matters."

33. In the commentary to that section, reference is made to the Court of Appeal decision in *Lawson Serco Ltd* [2004] EWCA Civ 12:

> "(1) This subsection has been judicially accepted. Its wording was adopted by Pill LJ in a case [*Lawson*] where the court rejected the 'startling proposition' that the Employment Rights Act 1996 s 94(1) confers a right not to be unfairly dismissed on employees everywhere in the world."

34. On appeal to the House of Lords (*Lawson v Serco* [2006] UKHL 3) their Lordships did nothing to cast doubt upon the correctness of that dictum. *Lawson* was heard alongside appeals from the Court of Appeal in *Botham v Ministry of Defence* and *Crofts v Veta Ltd.* In each case the same issue arose for consideration, namely whether the employment tribunal had jurisdiction to hear the claims for unfair dismissal brought by employee in each case. In two cases the place of employment was outside Great Britain whilst in the other case, the place of employment was in Great Britain but the employer was foreign.

35. In each of the three cases it was held that, in the circumstances of each case, it was permissible for the employee to bring proceedings in England under section 94(1) of the ERA 1996.

36. Section 196(1) of the 1996 Act provided that, subject to certain exceptions, Section 94 of the 1996 Act does "not apply in relation to employment during any period when the employee is engaged in work wholly or mainly outside Great Britain".

37. That section was repealed by Section 32(3) of the Employment Relations Act 1999 and, as observed by Lord Hoffman giving the leading speech in *Lawson*, at paragraph 8, Parliament "put nothing in its place".

38. The House of Lords determined that the right not to be unfairly dismissed contained within section 94(1) of the 1996 Act did not have worldwide application. However, it was also held that when faced with a case with a

foreign element, the Courts had to determine whether section 94(1) applied to it, notwithstanding its foreign elements.

39. A similar stance was taken by the Supreme Court in *Duncombe v Secretary of State for Children Schools and Families (No 2)* [2011] UKSC 36 where the Claimant was appointed by the Secretary of State as a teacher at a school in Germany.

40. Miss Cowen submitted that the legislative history of the geographical extent of discrimination legislation is similar to that of employment legislation. Section 19(2)(b) of the Disability Discrimination Act 1995 provided that: "a person is a 'provider of services' if he is concerned with the provision, *in the United Kingdom*, of services to the public or to a section of the public" (emphasis added). The silence in the EqA of any reference to territorial scope in relation to Part 3 of the Act is, she submits, similar to the treatment of the right not to be unfairly dismissed.

41. Moreover, she points to the identical treatment within the EqA of Part 3, dealing with discrimination in the provision of services, and Part 5 dealing with discrimination in the context of work. This, she submits, is demonstrated by Section 21 of the Act which lists Parts 3 to 7 of the Act, and the schedules applicable to each of those respective sections, and provides that discrimination occurs against a disabled person if there is a failure to comply with the relevant duty.

42. She submits that by reference to the approach taken in *Lawson* and *Duncombe* cases, the territorial extent of Part 5 of the Act should be determined along the same principles and, by parity of reasoning, so should the territorial extent of Part 3.

43. Miss Cowen's approach to the territorial scope of Part 5 of the EqA is generally supported by the authors of *Dicey, Morris & Collins* in paragraphs 33-290 et seq. However, there is detailed discussion about the impact of relevant European Directives and, in paragraph 33-291, reference to:

> "… the sentiment recently expressed by the Supreme Court which, in *Duncombe v Secretary of State (No.1)* [2011] UKSC 14 doubted whether 'if the protection of European employment law is to be extended to workers wherever they are working in the area covered by European law, that protection should depend upon whether or not it gives rise to directly effective rights against organs of the state'."

The authors concluded by saying:

> "It does not, however, mean that the 2010 Act does not have territorial limits. Indeed, the link with the Directives suggests that its provisions should not be extended to those working wholly outside the EU (or EEA, where relevant), even if the employment relationship is expressed to be governed by English law."

44. Thus it seems to me that there is still, in work cases, a requirement to show that the employment "must have much stronger connections both with Great

Britain and with British employment law than with any other system of law" - see *Duncombe (No 2)* per Baroness Hale at paragraph 8.

Discussion

45. It is first necessary to formulate the question that arises in this case. On one view it is simply whether a claim for damages for discrimination under Part 3 of the EqA (which is not an entry clearance claim) can be made in respect of breaches of duty which took place outside Great Britain.

46. If that is the relevant question then, at risk of re-stating the obvious, the EqA does not assist one way or the other.

47. The relevant sections of the *Bennion* Code seem to indicate that the EqA should not be given extra territorial effect or application. However, if that were so it would not be possible for any of the provisions of Part 5 of the EqA to apply to workers based overseas, and that is plainly not the position.

48. There is no academic commentary which objects to the relevant duty under the EqA applying to acts done outside Great Britain.

49. The Code of Practice supports wide application.

50. It may be that phrasing the question in the manner set out in paragraph 45 creates its own difficulty. It may be said that the question itself gives rise to uncertainty. As with the employment law cases, the answer may not be clear cut.

51. The question as phrased overlooks this important issue – what is the relevant duty? In my judgment it is not simply a duty not to discriminate.

52. The obligation in relation to disabled persons imposed by sections 20, 21 and 29(2) is a duty to make reasonable adjustments so that the disabled person is not discriminated against:
    (a) as to the terms on which the service is provided;
    (b) by the termination of the provision of the service;
    (c) by subjecting the disabled person to any other detriment.

53. If the matters set out in paragraphs (a) to (c) in Section 29(2) cannot be avoided by the making of reasonable adjustments, then there is no breach of duty.

54. In the typical case of a service provider based in Great Britain who provides to a disabled person in Great Britain a package foreign holiday, there is plainly a duty to make reasonable adjustments in relation to acts which take place in Great Britain.

55. It seems to me that the key to this issue is the appreciation that the scope of the duty is simply one to make *reasonable* adjustments, and that there is no breach of duty if relevant adjustments cannot reasonably be made.

56. I am concerned in this case with the provision of a holiday with accommodation and other services to be supplied in Tunisia. For present purposes I am content to accept in order for the duty to be applicable in any particular case, it is not enough simply to show that both service provider and disabled person are based in Great Britain. In common with the employment cases, a greater connection with Great Britain must be shown.

57. In this case, the discrimination arose out of the failure to make reasonable adjustments to enable the Appellant to enjoy a facility which the Respondent had contractually agreed to supply. Furthermore, the evidence accepted by the Judge showed that the Respondent had agreed to make the indoor swimming facilities of the nearby hotel available for her. As such, the Respondent had assumed a contractual obligation to provide that service for a person it knew to be disabled. This obligation was assumed as an alternative to providing the facilities which, it had been discovered, would not now be available at the Appellant's accommodation hotel.

58. At the trial the Respondents submitted witness statements from two witnesses. Marina Bergaoui was employed by the Respondent as an Overseas Representative based at the Tej Marhaba Hotel, where the Appellant was staying. Ray Linley has worked for the Respondent since May 2000. He was the Respondent's Tunisian Quality Manager at the time the Appellant took her holiday.

59. Thus the Respondent had employees based in the location where the Appellant took her holiday.

60. On a proper interpretation of the relevant provisions of the EqA, and in the circumstances of this case, I am satisfied that there is sufficient connection with Great Britain to rule, as a matter of law that the Respondent was under a duty to make reasonable adjustments. The duty was to make reasonable adjustments to enable the Appellant to enjoy the alternative indoor swimming facilities in the nearby hotel, which the Respondent had promised to her, or alternatively to make reasonable adjustments to enable her to enjoy alternative indoor swimming facilities elsewhere.

61. It seems to me that the following factors are of significance in determining that the duty to make reasonable adjustments applied in this case:
    (1) The discrimination related to a failure to provide alternative swimming facilities which had been offered to a person known to be disabled once it was realised that the accommodating hotel could not provide such facilities during the Appellant's stay;
    (2) The Respondent employed staff located in Tunisia who were able to discharge the duty.

62. The Judge held that the application of the relevant duty under the EqA required an "all or nothing" approach. As he put it, in relation to the application of the Act "either it does or it does not". He put weight upon the argument that "the imposition of making reasonable adjustments might well

involve making physical alterations to land and buildings and which in any event would have to be subject to local jurisdiction".

63. It seems to me that this consideration overlooks the qualifying factor of reasonableness. What if, in any particular case, the service could only be made accessible to the disabled person by making physical alterations to land or buildings in which the service provider did not have an interest? What if local planning permission was required? Definitive determination of such issues will have to wait until they arise directly in a case brought before the courts. However, it seems to me at present that such wide ranging adjustments are unlikely to be shown to be reasonable. This seems to me to be the answer to the concerns noted by the Judge.

64. On the issue of the "all or nothing" approach I acknowledge that the approach I have taken requires an examination of all of the circumstances to determine whether the connection to Great Britain is sufficiently close that the duty to make reasonable adjustments is engaged. As matter of principle it may be difficult to understand the objection to the imposition upon a service provider of the duty to make reasonable adjustments to prevent discrimination in relation to all elements of the service provided within the scope of the package holiday, regardless whether the individual element is provided inside or outside Great Britain. This is especially so in the current age of inclusiveness, where some might argue that the policy should be to extend the protection against discrimination as widely as possible. However, that wider issue does not arise for consideration in this case.

65. In this case it was a relatively simple matter for the Judge to determine the nature and extent of reasonable adjustments. He identified some fairly simple things that could have been done. As the Judge found, it should have been equally simple for the staff of the Respondent service provider to perform the same exercise on the ground during the period of the holiday, and to have implemented sufficient measures to have enabled the Appellant to have enjoyed the provision of indoor swimming facilities.

66. Accordingly I allow the appeal. The Order of the District Judge will be varied to give judgment in the additional sum of £3,500.

****