Case Numbers: 3327693/2017,
3302985/2018 and 3303862/2018

EMPLOYMENT TRIBUNALS

Claimant Respondent

(1) Mrs A Webster, v The United States of America
(2) Miss C Wright.

Heard at: Cambridge On: 7, 8, 9 & 10 October 2019
In chambers 11 October 2019

Before: Employment Judge Foxwell

Appearances
For the Claimants: Both in person
For the Respondent: Professor D. Sarooshi QC (Counsel)
Mr A Legg (Counsel)

PRELIMINARY HEARING JUDGMENT

1. The correct identity of the Respondent is "The United States of America" and the name of the respondent to these claims is amended accordingly.

2. The Respondent is a sovereign state entitled to rely on the principle of state immunity.

3. The Respondent has not submitted to the jurisdiction of the Employment Tribunal.

4. The Tribunal does not have jurisdiction to hear the claims and they are dismissed.

REASONS

1. In these reasons I use the following abbreviations:

AFI	Air Force Instruction
AFPD	Air Force Policy Directive

AFRIMS	Air Force Records Information Management System
CAC	Common Access Card
CPO	Civilian Personnel Office
CRPS	Complex Regional Pain Syndrome
DoD	Department of Defense (US)
ECHR	European Convention on Human Rights
FARM	Functional Area Records Manager
FES	Fire and Emergency Service
IFSAC	International Fire Service Accreditation Congress
KOM	Knowledge Operations Management Unit
LNDH	Local national direct hire
MoD	Ministry of Defence (UK)
NAF	Non-appropriated funds
NARA	National Archives and Records Administration (US)
NFPA	National Fire Protection Association (US)
RC	Records Custodian
SAV	Staff Assistance Visits
SOFA	Status of Forces Agreement
USAF	United States Air Force
USAFE	United States Air Force Europe
USC	United States Code

Mrs Webster's claims

2. Anthea Webster began working at RAF Lakenheath on 5 December 2011. Her employment ended on 10 October 2017 when she was dismissed. At the time of her dismissal she had been absent from work for some while because of illness.

3. On 5 September 2017, that is before her dismissal, Mrs Webster presented a claim to the Employment Tribunal (case number: 3327693/2017) asserting that she had been subjected to unlawful sex, race, age and disability discrimination and that she had suffered an unauthorised deduction from wages. It is arguable that her grounds of claim also raise a complaint of public interest disclosure detriment, but that is not a matter I have had to resolve in this hearing.

4. Mrs Webster is black and of Afro-Caribbean heritage. She told me that she suffers from Complex Regional Pain Syndrome (CRPS) and this if the condition she relies on as a qualifying disability within the definition in section 6 of the Equality Act 2010.

5. Mrs Webster identified her employer as "USAFE", which stands for "United States Air Force Europe". USAFE had been named as the respondent to the claim.

6. Prior to presenting this claim, Mrs Webster obtained an early conciliation certificate from ACAS as, because of the provisions of the Employment Tribunals Act 1996, this is a necessary step in most Employment Tribunal claims. Under section 18A(8) of the Act, failure to obtain an early conciliation certificate is an absolute bar to presenting a claim in respect of "relevant proceedings". It suffices to state that all the Claimant's claims (and her potential claim) are relevant proceedings.

7. The ACAS Certificate suggests that early conciliation took place between 25 July 2017 and 18 August 2017, but what occurred during conciliation (if anything at all) is inadmissible in evidence without the parties' consent (see section 18(7) of the Employment Tribunal Act 1996), which has not been given in this case.

8. Following her dismissal, Mrs Webster presented a second claim to the Tribunal on 10 November 2017 (Case number: 3328843/17). She named three Respondents: Belinda Whiteman, Tammy Mitchell and Ryan Schiffner. She did not name USAFE as a respondent to this claim but relied on the same early conciliation certificate as she had for her first claim; this certificate named USAFE but did not name Ms Whiteman, Ms Mitchell or Major Schiffner. Mrs Webster claimed unfair dismissal, age, sex, race and disability discrimination.

Miss Wright's claims

9. Caroline Wright began working as a fire fighter at RAF Croughton in Northamptonshire on 19 May 2013. Her employment ended when she resigned in January 2018. On 17 January 2018, she presented a claim (case number: 3302985/2018) of disability discrimination and sex discrimination to the Tribunal. Her claims concerned events following a diagnosis of epilepsy in early 2017. Like Mrs Webster, she had gone through ACAS early conciliation before presenting her claim. She named the Respondent as USAFE.

10. Miss Wright presented a second claim (case number: 3303862/2018) on 3 February 2018 asserting constructive unfair dismissal. She obtained a second early conciliation certificate naming USAFE for this claim.

Other claims, the conduct of the proceedings by the Tribunal and issues

11. A third Claimant who was due to take part in this hearing, Mr R Swan, withdrew his claim shortly beforehand and I have issued a separate judgment dismissing his claim upon withdrawal.

12. The conduct of these claims has been dogged by administrative errors and delays for which I have apologised to the parties on more than one occasion. The principal reason for delay has been a requirement for proceedings to be served on the Respondent through the Foreign and Commonwealth Office. This procedure is poorly understood by administrative staff in Watford who adopted the usual approach to service which is to send the claim to an employer's place of business. In any event, these service issues were overcome in respect of Mrs Webster's first claim and both of Miss Wright's claims.

13. I directed that Mrs Webster's second claim (case number: 3328843/17) be rejected when I took over conduct of these cases at the beginning of 2019. This was because she did not have early conciliation certificates naming the three respondents to that claim. Rejection in these circumstances is mandatory under Rule 12 of the Employment Tribunal Rules of Procedure 2013 (see E.ON Control Solutions v Caspall [2019] EAT/0003). This claim was not served therefore and Mrs Webster has not attempted to resubmit it to the Tribunal.

14. Responses were filed to the three served claims in similar terms. Each response alleged that the correct identity of the Claimants' former employer is 'The United States of America' and each challenged the Tribunal's jurisdiction on the basis that the USA is a sovereign state enjoying state immunity. The responses did not address the substance of either Claimant's allegations and simply provided particulars of their role, employment location and employment dates.

15. At a preliminary hearing for case management on 13 May 2019, Employment Judge Manley listed this preliminary hearing to be heard in public over five days to decide the following issues:

    15.1 The identity of the correct Respondent; and

    15.2 Whether the Respondent can claim immunity pursuant to Section 2(4)(a) of the State Immunity Act 1978.

16. At a further case management preliminary hearing before me on 6 September 2019, the second issue was revised as follows,

    "Whether the Respondent can claim immunity pursuant to the State Immunity Act 1978 and the common law."

The Hearing

17. I heard evidence and submissions over four days between 7 and 10 October 2019 to decide the preliminary issues. I reserved and considered

my decision in chambers on 11 October 2019. I had directed that the parties exchange skeleton arguments in advance of the hearing, which they did (Mrs Webster's being contained within her witness statement).

18. At the commencement of the hearing, Mrs Webster asked if it was necessary for her to be present throughout. She said that she was in constant pain and it was uncomfortable for her to sit for long periods. I said that there was no requirement for her to be present throughout but that she should be available to give evidence and to make closing submissions. I also said that she was free to stand up to relieve her symptoms when she needed to. Mrs Webster chose not to remain in the hearing on the afternoons of the first and third hearing days when the Tribunal received evidence relating to Miss Wright's case.

19. Mrs Webster was unwell on the second hearing day and felt unable to attend in person but asked if she could do so by telephone. With the agreement of the other parties, I reconfigured the hearing room to enable her to participate by telephone, including cross-examining witnesses. This approach was within Rule 46 of the Tribunal Rules of Procedure and I considered it to be in accordance with the overriding objective.

20. The parties had exchanged witness statements and the Respondent had prepared a bundle in advance of the hearing. At the commencement of the hearing I had assumed that each party had a full copy of the bundle and all the witness statements I had been given. It emerged during the course of evidence that Mrs Webster and Miss Wright had received the witness statements and documents relating to their own cases only. When I questioned the fairness of this, Professor Sarooshi pointed out that the cases had not been formally consolidated and were merely being heard together to deal with the common preliminary issue. Despite the bundle's size (four lever-arch files of documents, plus pleadings, authorities and witness statement bundles) it transpired that relatively few documents were referred to in the hearing and a key one relating to a presentation in 2017 was replicated in Mrs Webster's and Miss Wright's sections of the bundle. I was satisfied, therefore, that there was no injustice caused by the way in which the bundle had been assembled and distributed.

21. Mrs Webster produced some additional documents on the third hearing day which were added to the end of the bundle at pages 1,464 to 1,489.

22. As the burden of establishing jurisdiction usually lies on a claimant, I suggested that the Claimants should give their evidence first and Professor Sarooshi did not object to this on behalf of the Respondent.

23. Miss Wright gave evidence first. She also relied on a witness statement from PC Barry Duplock who had previously been a fire fighter in the

Oxfordshire Fire Service where Miss Wright had served as a retained fire fighter. PC Duplock gave evidence about the impact on Miss Wright of her diagnosis and the ending of her employment at RAF Croughton.

24. Mrs Webster also gave evidence in support of her claim, although this was not until the third hearing day because of her illness on the second. She relied on short witness statements from former colleagues:

- Jeremy Humphries;
- Libra Joseph;
- Henry Ofori; and
- Chief Roy Bowser.

25. The Respondent called the following witnesses:

- Colonel Mark Allison, Director of Legal Services for USAFE. Colonel Allison is based at RAF Mildenhall in Suffolk and is a member of the USAF.
- Major Brian Higgins, Commander of the Communications Squadron of the 48th Fighter Wing (the Liberty Wing). Major Higgins is based at RAF Lakenheath in Suffolk and is a member of the USAF.
- Ms Tammy Mitchell, Chief of Employment Management Relations for Local National Direct Hires (LNDH's) based at RAF Mildenhall. Ms Mitchell works in the Civilian Personnel Office (CPO) and is a local (British) civilian employee at the base;
- Chief Master Sergeant William Taylor. Chief Taylor was a Fire Chief within the Fire Emergency Services based at RAF Mildenhall between October 2016 and July 2019. Chief Taylor gave evidence by video link from Florida. He presently remains a member of the USAF but is due to retire shortly. As he was based at Mildenhall he did not work with Miss Wright directly, but he gave evidence about the structure and operation of Fire and Emergency Services on USAF bases.
- Deputy Fire Chief Shaun Rankin. DFC Rankin is a British civilian employed at RAF Croughton where Miss Wright was based. His present role is non-operational, but he originally became an MoD fire fighter in 1989 and has worked at US installations since 1995.

26. Miss Wright and Mrs Webster were cross examined by Professor Sarooshi and they had the opportunity to cross examine each of the Respondent's witnesses. While I have taken the additional written statements from witnesses produced by the Claimants into account, I explained that the weight that I could attach to evidence untested by cross examination was less.

27. In addition to this evidence, I considered the documents to which I was taken in the trial bundle. References to page numbers in these Reasons relate to that bundle.

28. Finally, I received closing submissions. I reconsidered the parties' skeleton arguments in this context and had regard to a closing note prepared by Professor Sarooshi. I considered the authorities contained in an authorities bundle and I shall touch on these below in so far as it is necessary for my analysis and conclusions.

Findings of Fact

29. I make the following findings of fact on the balance of probabilities.

What is USAFE?

30. USAFE is that part of the United States Air Force ("USAF") with responsibility for operations in Europe and Africa.

31. The USAF is one of three military departments within the United States, the others being the US Army and Navy (see Title 5 of the United States Code (USC), at paragraph 102). Paragraph 9,011 of USC Title 10 states that the USAF operates under the authority, direction and control of the Secretary of Defense. The Secretary of Defense is responsible for the Department of Defense (DoD) and is a member of the Cabinet of the President of the United States. The USAF does not have any separate legal identity from the DoD, nor does USAFE within it, and it is subject to the ultimate direction and control of the President.

32. USAFE operates from bases across Europe and has headquarters in Germany. The bases which concern me are RAF Lakenheath (Suffolk), Mildenhall (Suffolk), Croughton (Northamptonshire), Fairford (Gloucestershire) and Welford (Berkshire). RAF Lakenheath is home to a Fighter Squadron, the "Liberty Wing". RAF Mildenhall has tanker planes dealing with mid-air refueling. RAF Croughton is an intelligence and communications centre and has no flying operations. RAF Fairford can accommodate large bombers, but only has flying for about six months in the year. RAF Welford handles munitions.

33. There are other RAF bases used by USAFE in the United Kingdom, but it is unnecessary for me to refer to them in these Reasons.

34. Each of these bases belongs to the Crown but is given over to USAFE (in whole or in part) for its use. This arrangement reflects the close and longstanding military ties between the US and UK and as members of NATO.

35. In 1951, shortly after the founding of NATO, the UK Government entered into an agreement with the US Government concerning the terms under which US Forces were stationed here known as the "North Atlantic Treaty Regarding Status of Forces", or "NATO SOFA". In simple terms, under this agreement the United States as the sending state retains control and legal authority over its military personnel and US civilian personnel. The Visiting Forces Act 1952 gives statutory effect to arrangements of this type, although the NATO SOFA is not itself part of UK law (see Littrell v USA [1995] 1 WLR 82).

How USAFE bases are organised

36. USAFE is divided into Wings; each under a Wing Commander. Each Wing has a specific mission falling within USAFE's overall mission to maintain NATO and protect US interests. Examples in this case are the 48th Fighter Wing at Lakenheath, the 100th Refueling Wing at Mildenhall and the Intelligence Gathering Wing at Croughton.

37. Each Wing ordinarily comprises four Groups: Operations; Maintainance; Medical and Mission Support. The Operations Group focuses on flying planes and the Maintainance Group keeps them in the air. The Medical Group deals with the health and wellbeing of personnel and the Mission Support Group deals with all the other things necessary to run an airbase and air force.

38. Mrs Webster's and Miss Wright's roles at their respective bases fell within Mission Support so I shall explain this aspect in more detail. The Mission Support Group is divided into squadrons reflecting particular specialisations; for example, there is a Communications Squadron, a Logistics Readiness Squadron and a Civil Engineering Squadron.

Personnel working on the Bases

39. Plainly a substantial component of the personnel working at USAFE bases are members of the United States Armed Forces. Additionally, there are civilian workers and these are either US citizens brought over especially, or local nationals (British or EU citizens). Some bases, such as Lakenheath or Mildenhall, are significant local employers of UK staff. Colonel Allison estimated that about a third of civilian personnel on USAFE Bases in the UK are hired locally. Deputy Chief Rankin estimated that there were about 350 military personnel at RAF Croughton, 100 US civilian employees and 250 to 300 local civilian employees. I am concerned solely with the position of local civilian personnel.

Local civilian personnel

40. As I understand it, traditionally some or all the local civilian personnel were employed by the Ministry of Defence and assigned to work at USAFE bases. This was certainly the arrangement for fire fighters. In 2010 USAFE decided to shift from engaging local civilian personnel through the MoD to hiring them directly. This initiative was intended to save money and increase USAFE's control over its workers. US guidelines had been issued on recruiting local nationals directly in 1996 (page 52) and this continued to apply to the new policy. The Guidelines refer to legal obligations under UK law and there is a reference to Industrial Tribunal proceedings at paragraph 10.15 but are silent about the concept of state immunity or its applicability.

41. Employees engaged under this new policy are known as "Local National Direct Hires" or "LNDHs". Both Claimants were recruited under the policy and were LNDHs. Some local civilian personnel originally recruited by the MoD and assigned to a US Base have since converted to LNDH status. Ms Mitchell and Deputy Chief Rankin have both done this. In fact, Deputy Chief Rankin told me that of the 111 Fire and Emergency Services personnel covering RAFs Croughton and Fairford, 98 are UK civilians and of these about two-thirds are LNDHs and one-third MoD staff. Ms Mitchell said that a local civilian employee would have to accept an LNDH contract on taking a promotion or new job within one of the bases. I accept that evidence.

Working on a USAFE base

42. The USAFE bases are military installations subject to tight security. All civilian employees require security vetting and clearance before they can enter and move freely around the bases without an escort or line of sight supervision. In the case of UK civilian employees, their vetting is done by the British authorities on behalf of USAFE. Both Claimants had security clearance allowing access to the bases where they worked and access to the computer systems. They were issued with a Common Access Card or "CAC" but this does not mean that they had unrestricted access to all parts of, or activities on their bases.

Mrs Webster's role at RAF Lakenheath

43. Mrs Webster responded to an advertisement for an 'Office Automation Assistant' placed in July or August 2011. This was a clerical support role based at RAF Lakenheath. Her application was successful and she began work on 5 December 2011 as an LNDH. The Terms and Conditions of Employment Mrs Webster signed on 5 December 2011 are at pages 499 to 500. These refer to a Handbook which appears at pages 121 to 145. The foreword of the Handbook says as follows,

> "We are pleased to have you as a member of the United States Forces United Kingdom (USF-UK) staff! This Handbook is designed as a guide for you during your employment with The United States Forces and provides general information concerning the basic conditions of your employment. For purposes of this Handbook, the US-UK also includes appropriated fund and nonappropriated fund Department of Defense activities in the United Kingdom.
>
> The USF-UK, support the United States – United Kingdom bilateral defense relationship, the North Atlantic Treaty Organization (NATO) multilateral defense agreement and other international obligations in the European Theater. As an employee of the USF-UK, you help contribute to this effort.
>
> You and other local national employees working in the European Theater are part of the United States worldwide defense structure. As part of this team, you, and the activity where you are employed, play a vital role in assuring that the USF-UK mission is effectively accomplished."

44. Mrs Webster had originally expected to work in a different area, but on starting was given the task of sorting historical records going back many years. In fact, she described being presented with a "wall of boxes". Mrs Webster showed great aptitude in dealing with this task and soon took on further responsibilities in respect of records management.

45. The management of records is dealt with by the Knowledge Operations Management Unit ("KOM") which is part of the Communications Squadron at RAF Lakenheath. The Communications Squadron is itself part of the Mission Support Group. It is common ground that Mrs Webster's work was done within KOM, although there is a dispute about whether the nature of her work was reflected accurately in her written terms and conditions and job title (I shall return to this later).

46. The United States Code ("USC") codifies by subject matter the general and permanent laws of the United States. USC Title 44, Chapters 29, 31, 33 and 35 set out rules for the maintenance, disposal and archiving of State records. These requirements are given effect to in the DoD though its Records Management Program contained in DoD Instruction 5015.02 (the version in the bundle is dated February 2015 which post-dates some of Mrs Webster's employment but I find that similar policies applied throughout). Paragraph 3A of the Instruction, describes the DoD's policy as follows (page 679a),

> "The information and intellectual capital contained in DoD records will be managed as national assets. Effective and efficient management of records provides the information foundation for decision making

> at all levels, mission planning and operations, personnel and veteran services, legal inquiries, business continuity, and preservation of US history."

47. The USAF implemented the DoD's Records Management Program through Air Force Instruction ("AFI") 33-322 (pages 535 to 615). Mrs Webster's evidence was that she knew and understood the terms of this Instruction and, in fact, provided training on records management to service and civilian personnel based on it.

48. Responsibility for keeping records lies with individual units within the USAF. Records Custodians ("RCs") are given the primary task of compiling records for their area of activity in accordance with set standards. Mrs Webster's evidence, which I accept, was that this was an additional and often unpopular duty for service personnel.

49. There can be a number of RCs within a squadron and these are overseen by Functional Area Records Managers ("FARMs") appointed by the relevant squadron or group leader.

50. As Mrs Webster became more proficient in records management, she became responsible for training RCs and FARMs and overseeing their compliance with relevant standards. There seems to have been a continuing requirement for such training because of the turnover of military personnel at the base.

51. Mrs Webster was permitted to use base vehicles to attend units to carry out inspections of their record keeping practices (euphemistically called "Staff Assistance Visits" or "SAVs").

52. Mrs Webster told me that she could theoretically access confidential or sensitive information but in practice this was difficult because she was usually in sight of others and there was, in any case, insufficient time to read or look at individual documents. She also emphasised that she was a person of integrity who would not do such a thing and I accept her evidence on that.

53. Another aspect of Mrs Webster's work related to the Air Force Records Information Management System ("AFRIMS"). When Mrs Webster began working in records management there was a lack of expertise in using this IT system so she set about understanding it and then training people on how to use it correctly and effectively. She also oversaw basic records management training which was delivered through an on-line course to all military personnel joining the base.

54. A further aspect of Mrs Webster's work concerned the destruction or archiving of records. In either case, the records had to go through a process known as "staging" which required documents to be checked and boxed correctly. Documents for archiving would then be sent to the United States' National Archives and Records Administration (NARA) in Washington DC. Sometimes, documents would go to the Pentagon depending on their classification.

55. Mrs Webster's work also required her to deal with Freedom of Information Act and Privacy Act requests made by US citizens under US law. I did not have the impression that she was solely responsible for this, rather she was part of a team looking out the necessary records to comply with such requests.

56. I have mentioned already that Mrs Webster was recruited as an Office Automation Assistant. Her appraisals for the financial year beginning April 2012 (pages 173 to 177) show her job title as "Knowledge Operation Manager". I observe in passing that her performance was rated 'outstanding' in every year apart from the first when it was rated 'very good'. I have no doubt that she was an outstanding and dedicated employee; I could see her pride in her work from the way she gave evidence to me about it.

57. The job title "Knowledge Operations Manager" is repeated in the service awards Mrs Webster received (pages 178 to 181). In contrast, personnel records continued to refer to her as an "Office Automation Assistant" until October 2016 when her title was changed to "Assistant Base Records Manager" (page 659). The inconsistency between these documents is, I suspect, the reason for the dispute about Mrs Webster's precise job title. There is no dispute, however, about the work she actually did.

58. The organisational chart at page 171 illustrates the command structure in KOM and, while Mrs Webster said that some of the individuals named there were not in fact contemporaries of hers, she did not challenge the structure as such. Mrs Webster's role fell under a line of command culminating in the Communications Squadron Leader and involving other military personnel.

59. Mrs Webster emphasised in her evidence that she was born in the United Kingdom, was educated here, had had other employment here, paid UK taxes on her earnings at RAF Lakenheath, and is a British citizen. I accept that evidence without hesitation.

60. One issue that Mrs Webster raises (as does Miss Wright), is the source of the funds from which she was paid. Mrs Webster's appraisals are headed "NAF Employee Performance Review". NAF stands for "Non-Appropriated

Funds". The USAF has two sources of funding: "appropriated funds", which are the funds voted to it by Congress, and "non-appropriated funds", which are funds generated by it through other activities such as selling goods or services. Mrs Webster's contention is that roles funded by commercial activities done in the UK by UK citizens should fall within the jurisdiction of British Courts and Tribunals. Accordingly, she maintains that the source of funding for her role, that is appropriated or nonappropriated funds, is relevant to the jurisdiction of the Employment Tribunal.

61. The Respondent's evidence is that both Claimants' roles were funded through appropriated funds but that the distinction between these and nonappropriated funds is irrelevant as in either case the funds are those of a department of the United States Government.

Miss Wright's role at RAF Croughton

62. Miss Wright began working for USAFE as a fire fighter in May 2013. She was engaged as an LNDH. Her first set of particulars of employment are dated 20 May 2013 (pages 891 to 893) and describe her role as "Fire Fighter (Basic Life Support), Grade 7". Her work location is given as RAF Croughton. Under clause 3 of the particulars, USAFE reserved the power to change Miss Wright's duties, location or work schedule upon giving reasonable notice.

63. Miss Wright told me that, in addition to working at RAF Croughton, she sometimes did shifts at RAF Fairford and Welford although she was not contractually obliged to. The Respondent disagreed with this analysis given the terms of clause 3 but it is common ground that Miss Wright was asked to, and did occasionally, work at these bases. Miss Wright was also a retained fire fighter in the local Oxfordshire Brigade.

64. The primary purpose of any fire service is the preservation of life and the protection of property. That said, large airfields operating regular commercial or military flights have specific safety requirements for fire cover because of the possibility of dangerous payloads, damaged planes and, in extremis, an attack on the airfield itself. DoD Instruction 6055-56 requires military branches to establish a Fire and Emergency Service ("FES") (pages 1092 to 1123) with the aim of protecting DoD personnel and the public, preventing or minimising injury and damage to property or the environment, assisting civil authorities under mutual aid agreements and enhancing "mission capability". Paragraph 4 of the Instruction describes mission capability as being enhanced by protecting US Bases through prevention, education and emergency response.

65. USC Title 10, paragraph 2465 prohibits, save in limited circumstances, the contracting out of FES (page 1127). Indeed, a factor in the United States'

decision to recruit LNDH fire fighters was the MoD's policy of contracting out its own fire-fighting capability to a private sector provider.

66. Air Force Policy Directive ("AFPD") 32-20, implements DoD Instruction 6055-06. Paragraph 3.2 of the Directive restates the policy that FES is required at each installation. Paragraph 3.3 stipulates that professionally qualified FES staff are required.

67. AFPD 10-25 is headed "Air Force Emergency Management Program". Paragraph 1 sets out the background to the Directive, which is said to be the protection of the American people, their way of life and advancing their influence in the world (page 1189). Paragraph 3 describes the policy as a means of "sustaining mission assurance, enhancing maintainance operations and restoring combat readiness" (page 1190).

68. AFI 32-2001 (see page 1129 onwards) implements AFPD 10-25. Paragraph 2.1 describes the scope of the FES mission as fire protection and minimisation, dealing with the release of hazardous substances whether chemical, biological, radiological or nuclear and dealing with weapons of mass destruction (page 1136). Aircraft rescue and fire-fighting are operational tasks identified (see paragraph 3.5.2 at page 1147). The instruction refers to regulatory guidance at paragraph 2.5, including, amongst other things, "NFPA" standards (page 1138).

69. The National Fire Protection Association ("NFPA") is a United States body providing guidelines and standards for fire-fighter training, health and welfare. NFPA 1582 contains an occupational health programme for fire departments which classifies certain medical conditions as Category A, "not meeting medical requirements", and Category B, "meeting those requirements with qualifications" (page 801). Under the Guidelines Category A conditions preclude operational fire-fighting. Paragraph 6.17.1(8) refers to a seizure as a Category A condition. Under paragraph 6.17.1.1, it only ceases being so if a fire fighter has been seizure free for one year without medication or five years with medication (page 809).

70. DoD 6055-06 contains the certification programme for DoD fire-fighters (page 1067). US Forces fire-fighters are trained to the International Fire Service Accreditation Congress (IFSAC) standard at the Goodfellow Air Base in San Angelo, Texas. LNDHs are not required to have this specific qualification but should have a local equivalent. Some are also given the opportunity to train at the Goodfellow Air Base and Miss Wright attended two courses there during her time with USAFE.

71. The manpower required for FES at each installation depends on the work undertaken there. Chief Taylor told me, for example, that the fire-fighting complement at RAF Mildenhall was 77, of which approximately half would

be military fire-fighters and half civilian (both US and local civilians). He and Deputy Chief Rankin said, and I accept, that the split between military and non-military personnel is important to ensure continuity of cover as military personnel are deployable, sometimes at short notice, to other locations.

72. Fire-fighting roles are described according to their function, for example "driver/operator", and could be filled by either military or civilian personnel. I note in this context, that Chief Taylor is a Master Sergeant in the USAF and that Deputy Chief Rankin is a UK civilian (for the avoidance of doubt, I am aware that they worked at difference bases).

73. Miss Wright was based at RAF Croughton, an intelligence gathering centre with no flying operations. The FES at RAF Croughton was part of the Civil Engineering Squadron which in turn was part of the Mission Support Group there.

74. Miss Wright told me that she did not have to attend a fire in the five years she worked at the base. Nevertheless, fire-fighters had responsibility for fire prevention and inspections and she had access to many of the buildings on the base for these purposes. Deputy Chief Rankin told me that the FES would respond to health and security incidents as a matter of routine and that there were approximately 150 of these a year. I am sure that this is work Miss Wright would have done.

75. On the occasions when she was at RAF Fairford, Miss Wright was part of the fire-fighting cover for flying operations.

76. I was not told about fire-fighting work done at RAF Welford and I had the impression that Miss Wright only worked there in the early part of her career.

77. Miss Wright had the necessary security clearance to do her job. I do not think for one moment, however, that she could go wherever she liked on the bases, nor could she explore every nook and cranny of the computer system notwithstanding her access to it.

78. Miss Wright's appraisals between May 2013 and March 2016 (the last I was shown) demonstrate that she was a committed and well-regarded employee. She was rated 'very good' on each occasion. In 2014 she undertook HAZMAT Commander and Weapons of Mass Destruction Training at Goodfellow Airbase. It was put to her that following this she could take command of such an incident if no more senior fire-fighter was available. She accepted that this was possible theoretically, but contended that it was so unlikely as to be implausible. I accept her evidence on this.

79. Other training modules (among many) that Miss Wright completed were 'Airport Fire Fighter' and 'Munitions Fire Fighter'. All training was done using American equipment as that is what is used on the bases. Miss Wright also cascaded training on a new 911 system to her fellow fire-fighters.

80. Miss Wright drew my attention to the fact that none of her contractual or other documents referred to her as an employee of the USA. Her statements of particulars of employment dated May 2013 (page 891) and June 2016 (page 947) respectively refer to her employer as "United States Vising Forces". A pension statement provided by Legal and General (page 934) refers to USAFE.

81. Like Mrs Webster, Miss Wright's appraisals were on a form headed "NAF Employee Performance Evaluation", where NAF refers to nonappropriated funds. In Miss Wright's case however, there is further documentary evidence from HMRC dated 5 July 2019 which describes the source of her income from her work for USAFE as "USAF Non-Appropriated Fund" (page 984). It is probable that this description was given by USAFE and not simply applied by HMRC. I mentioned above the qualified prohibition on contracting out FES under USC Title 10, paragraph 2465: the Code states that this provision relates to funds <u>appropriated</u> to the DoD and does not mention <u>non-appropriated</u> funds. These are additional factors pertinent to Miss Wright's argument that the source of funding for her role is relevant to the question of state immunity.

82. The Respondent could not account for these anomalies, but maintained that the source of payment of salaries was irrelevant to the real question which is the identity of the employer.

83. Miss Wright emphasised that she is a British citizen working in the United Kingdom, paying UK taxes. She said that the fire-fighting capability at RAF Croughton was only sufficient to provide a first response and anything larger would be dealt with in co-operation with the local fire service under a mutual aid agreement. I accept Miss Wright's evidence on these points, but note also that the existence of the internal capability to provide a first response to an incident allows USAFE to control and manage access to classified materials or locations.

84. Both Mrs Webster and Miss Wright rely on PowerPoint presentation slides dated April 2017; versions appear at pages 147 and 954. Neither Claimant said that this was a presentation made to them and Ms Mitchell said she was unaware of it, although it appears to have been produced by the CPO where she worked. Mrs Webster thought that the slides had been prepared for MoD employees contemplating transfer to LNDH status and

this is consistent with the information at page 959. Bullet points at page 960 read as follows:

- All LNDH employees will work under UK law and this will NOT change for existing or future employees.
    - Employees are entitled to all rights and entitlements afforded under UK law.

85. Miss Wright explored this with Ms Mitchell in cross examination and it is a matter I asked Ms Mitchell and Colonel Allison about. Ms Mitchell said that USAFE complied with UK Employment Law and she gave the examples of respecting the right to be accompanied at disciplinary meetings and providing UK maternity rights. When asked about the impact of the assertion of state immunity on the right to a judicial determination of employment claims of the type raised by the Claimants, she said she did not have experience of this.

86. Professor Sarooshi argued that the information in the presentations was not misleading in failing to mention the possibility of state immunity effectively removing LNDHs' right to make a claim to an Employment Tribunal, as the doctrine of state immunity is part of UK Law. While this may be correct technically, I consider such a reading to be far removed from the ordinary meaning of the words used in this presentation. In my judgment, most UK employees receiving this information would believe this meant that they had an unfettered right to have employment claims recognised by law adjudicated on in an Employment Tribunal.

The Legal Framework

The concept of State Immunity

87. The concept of state immunity in the context of employment law was considered by the Supreme Court recently in the case of Benkharbouche v Embassy of Sudan and Others [2017] ICR 1327. While I consider the claim in Benkharbouche to be distinguishable from the instant cases for reasons I shall come to, the judgment of Lord Sumption nevertheless provides an invaluable insight into the relevant law. For example, at paragraph 17, he describes the principle of state immunity as a "mandatory rule of customary international law which defines the limits of a domestic Court's jurisdiction". He continues as follows:

> "Unlike diplomatic immunity, which the modern law treats as serving an essentially functional purpose, state immunity does not derive from the need to protect the integrity of a foreign state's governmental

> functions or the proper conduct of inter-state relations. It derives from the sovereign equality of states."

88. State immunity, where it applies, means that the sovereign acts of a state cannot be adjudicated upon by the courts of another state, which must dismiss the claim without determining its merits. This principle does not affect any right a claimant may have to pursue the claim in the courts of the foreign sovereign state itself, in this case that would be the USA if the Respondent's case is correct.

The relationship between state immunity, the European Convention on Human Rights and the EU Charter of Fundamental Rights

89. The principle of state immunity appears on the face of it to conflict with Article 6 of the European Convention on Human Rights (ECHR) which forms part of UK Law under the Human Rights Act 1998. Article 6 requires contracting states to maintain fair and public judicial processes and forbids denying individuals access to these processes for the determination of their civil rights. This apparent conflict was considered by the House of Lords in Holland v Lampen-Wolfe [2000] 1 WLR 1573. Lord Millet put the matter in this way (at 1588C-F),

> "Article 6 requires contracting states to maintain fair and public judicial processes and forbids them to deny individuals access to those processes for the determination of their civil rights. It presupposes that the contracting states have the powers of adjudication necessary to resolve the issues in dispute. But it does not confer on contracting states adjudicative powers which they do not possess. State immunity, as I have explained, is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself.
>
> The immunity in question in the present case belongs to the United States. The United States has not waived its immunity. It is not a party to the Convention. The Convention derives its binding force from the consent of the contracting states. The United Kingdom cannot, by its own act of acceding to the Convention and without the consent of the United States, obtain a power of adjudication over the United States which international law denies it."

90. Courts and tribunals in the United Kingdom are required to take into account the Charter of Fundamental Rights of the European Union when applying EU Law ("the Charter"). Article 47 of the Charter guarantees the right to a fair trial and an effective remedy. Claims of discrimination, but not unfair dismissal, derive from EU Law (see Article 21 of the Charter, for example). The right in Article 47 is engaged when such claims are presented. The scope of Article 47 is not identical to Article 6 of the ECHR (see paragraph 78 of the judgment of Lord Sumption in Benkharbouche) but in my judgment, the reasoning of Lord Millet in Holland in respect of Article 6 applies equally to Article 47. Accordingly, article 47 does not confer upon a British court or tribunal a jurisdiction it does not have because of the rules of customary international law.

The State Immunity Act 1978 and associated treaties

91. The State Immunity Act 1978 codifies the principles of customary international law rather than seeking to amend or redefine them as Parliament has no power to impose its will on other sovereign states by legislation. The United Nations Convention on Jurisdictional Immunity of States and their Property 2004 and the European Convention on State Immunity 1972 are instruments of international law, but the former adds nothing relevant to the State Immunity Act 1978 and the latter is simply irrelevant to these claims which do not concern relations between the United Kingdom and another EU state.

92. Part 1 of the State Immunity Act 1978 deals with proceedings in the UK by or against other states. Section 1 confirms that a state is immune from UK jurisdiction subject to the other provisions in the Part even if the state does not appear in the proceedings.

93. Under section 2, the UK Courts will have jurisdiction where the state in question has submitted to the jurisdiction. In practical terms, this will happen where a state takes steps in the proceedings beyond disputing jurisdiction. An example of a case where the USA submitted to the jurisdiction of the UK Courts is USA v Nolan [2015] ICR 1347.

94. Sections 3 and 4 of the 1978 Act appear to create exceptions to the principle of state immunity in respect of commercial transactions (section 3) and contracts of employment (section 4). For reasons I shall explain, it is not necessary to look at the section concerning contracts of employment in detail, but in broad terms it appears to exclude from immunity contracts of employment made in the UK with UK nationals or residents to perform work here. The Claimants in this case appear to fall into that category.

95. Section 5 provides that a state is not immune in respect of claims of personal injury or damage to property. A claim of discrimination can fall within this exception; see Ogbonna v Republic of Nigeria [2012] ICR 32.

96. Section 16 qualifies the exclusion from state immunity of contracts of employment contained in Section 4; in other words, it creates an exception to the exception. Section 16(1) effectively purports to restore state immunity in respect of claims by the employees of a diplomatic mission. The case of Benkharbouche concerned the lawfulness or compatibility of this sub-section having regard to Article 47 of the Charter and Article 6 of the Convention respectively.

97. Section 16(2) of the Act provides as follows:

> 16(2) 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.

98. In short, therefore, nothing in Part 1 of the State Immunity Act 1978 applies to employees of visiting forces such as the USAF; nor is the position of such employees dealt with elsewhere in legislation in so far as they are local civilian workers (US civilian workers are covered under the NATO SOFA and fall within the jurisdiction of the United States). Accordingly, this category of worker is not covered by the 1978 Act at all, rather the worker is subject to the common law which applies the principles of customary international law. The Supreme Court did not consider section 16(2) in Benkharbouche; the claimants there were employed in diplomatic missions and not by visiting forces.

The common law principles of state immunity

99. The relevant common law test was considered by the House of Lords in Holland (supra). There, a professor working for a sub-contractor engaged to provide education services at a US military base in England, brought a libel claim against an individual defendant employed by the US Government as an education services officer. The defendant had listed complaints made about the plaintiff's conduct as an instructor. Both parties were US citizens. In finding that the claim was subject to the principle of state immunity and therefore had to be dismissed with no enquiry into the merits, the House of Lords held that the essential question is the nature of the act in issue: whether it is a governmental act ("jure imperii"), or a non-governmental act ("jure gestionis"). Immunity attaches to the former but not the latter. In his speech Lord Hope said as follows (1576C-E),

"It is clear that the expression "armed forces" in section 16(2) cannot be regarded as meaning only military personnel or servicemen and women who handle weapons and equipment and are in uniform. Regard must be had to the fact that it is a matter for each state to decide how best to organise its own armed forces and related services. We are concerned in this case with events that took place on a military base on which the United States of America maintains units of its armed forces by arrangement with Her Majesty's Government. The organisation and support of armed forces on a military base overseas is a complex exercise. For a variety of reasons, not least for reasons of security, it may be thought to be desirable for the base to be as self-contained as possible. This may involve the provision of services there which are not, in the strict sense, military in character.

He continued at 1577B-F

"As to the position at common law, I agree with my noble and learned friends, Lord Clyde and Lord Millet, that the United States is entitled to invoke the immunity. The facts which I have outlined above are relevant to this issue also. As they have explained, it is the nature of the act that determines whether it is to be characterised as jure imperii or jure gestionis. The process of characterisation requires that the act must be considered in its context.

In the present case the context is all important. The overall context was that of the provision of educational services to military personnel and their families stationed on a US base overseas. The maintenance of the base itself was plainly a sovereign activity. As Hoffman LJ (now Lord Hoffman) said in Littrell v United States of America (No. 2) [1995] 1 WLR 82, 95, this looks about as imperial an activity as could be imagined. But that is not enough to determine the issue. At first sight, the writing of a memorandum by a civilian educational services officer in relation to an educational programme provided by civilian staff employed by a university seems far removed from the kind of act that would ordinarily be characterised as something done jure imperii. But regard must be had to the place where the programme was being provided and to the persons by whom it was being provided and who it was designed to benefit – where did it happen and whom did it involve? The provision of the programme on the base at Menwith Hill was designed to serve the needs of US personnel on the base, and it was provided by US citizens who were working there on behalf of a US university. The whole activity was designed as part of the process of maintaining forces and associated civilians on the base by US personnel to serve the needs of the US military authorities."

100. It is clear, therefore, that the scope of Section 16(2) is not limited to military personnel and that the distinction between governmental acts and non-governmental acts is context specific. The former may include the compilation by one individual in the course of his job of a list of complaints about another.

101. I was provided with several examples of the practical application of these principles. In Sengupta v Republic of India [1983] EAT ICR 221, a "lowly clerk" in the Indian Embassy was nevertheless held to be participating in the public functions of a foreign state such that immunity applied. In Hicks v The United States of America (1995) 120 ILR 606, the Employment Appeal Tribunal cited the Judgment of Mr Justice Browne-Wilkinson (as he then was) in Sengupta at first instance and applied it to the facts of that case. The test was said to be fourfold as follows (at 609):

a. Was the contract of a kind which a private individual could enter into?

b. Did the performance of the contract involve the participation of both parties in the public functions of the foreign state or was it purely collateral to such functions?

c. What was the nature of the breach of contract or other act of the sovereign state giving rise to the proceedings?

d. Will the investigation of the claim by the Tribunal involve investigation into the public or sovereign acts of the foreign state?

102. In Hicks the EAT reversed a first instance decision that an employee engaged to maintain bowling equipment at a USAF base was not engaged in a US sovereign function.

103. Employment Judges have concluded that state immunity applied in the case of a British citizen employed by the US Navy at RAF West Ruislip (Cook v USA, case number 6000203/2001) and of a British citizen employed as a computer operator at RAF Menwith Hill (Harrington v USA, case number 1807940/2018). In each case the proceedings were dismissed without a trial of the merits because the doctrine of state immunity applied.

Conclusions

The correct identity of the Respondent

104. I have no hesitation in concluding that the correct identity of the Respondent is the United States of America. There is no evidence

showing that USAFE or the USAF have legal identities distinct and separate from the State they serve, on the contrary USC Title 5, paragraph 102 says that the USAF is a department of the US Government.

105. The thrust of the Claimants' case on this point really amounts to an assertion that it was unclear, and was never made clear, that they worked for the USA. When both were asked who they worked for, if not the USA, they said USAFE but could not explain why this was separate from the USA. On the other hand, the evidence shows that they worked on bases operated and controlled by the USA and worked under the management and supervision of US military personnel.

106. I do not find that the conflicting documentary evidence about the source of funding for the Claimants' roles has any relevance to the question of the identity of their employer. Whether their salaries were funded through allocated or non-allocated funds, both Claimants worked for the USA in my judgment.

107. It follows that I find that the doctrine of state immunity may apply to the Claimants' cases

108. Furthermore, as the Claimants were employed by a visiting force, the relevant principles are those of customary international law at common law rather than under Part 1 of the State Immunity Act 1978 because that Part is excluded under section 16(2).

109. I direct that "The United States of America" is substituted for "USAFE" as Respondent to these claims by way of clarification.

Submission to the Jurisdiction

110. Neither Claimant suggested in evidence or submissions that the Respondent had submitted to the jurisdiction but I am conscious that they act in person so have considered this nonetheless.

111. There is no evidence to show that the Respondent has submitted to the jurisdiction in either Claimant's case. In fact, the Respondent has been scrupulous to avoid any such inference: for example, by insisting on service through the Foreign and Commonwealth Office; by not responding to the substance of the Claimants' complaints; and by attaching carefully worded disclaimers to the statements, skeleton arguments, indexes and such like filed or submitted in these proceedings. I am satisfied, therefore, that the Tribunal has not acquired jurisdiction by this means.

Did Mrs Webster's role involve her in the public or governmental functions of the United States of America?

112. Mrs Webster's role involved the maintenance, preservation and where appropriate, destruction of US military records. In my judgment, military record keeping is a function of the state, the importance of which is illustrated in this case by the provisions of the USC, the DoD Instruction and the AFI Instruction concerning record-keeping described above. Additionally, such records may be classified because they contain state secrets.

113. Further evidence that records management is a governmental activity of the United States is the fact that records are archived nationally in Washington DC or at the Pentagon to remain a permanent source of information for the State.

114. The provision of training on record keeping and inspection to ensure compliance with record keeping procedures, is also, in my judgment, an extension of the same state function. The USAF implemented a structure for proper record keeping involving RCs, FARMs and oversight by KOM at cost to the State to retain a permanent source of information for its use.

115. Litigation of claims of discrimination in the Employment Tribunal is likely to involve judicial consideration of the policies and objectives of the United States in its management of record keeping and of the staff who work within it. The United States might be called on to justify objectively treatment which might otherwise be unlawful under the Equality Act 2010 were it to apply. In my judgment this would amount to an investigation by a British tribunal into the sovereign acts of a foreign state.

116. I do not find that any possible uncertainty about the source of funding for Mrs Webster's role is relevant to these considerations; whether paid from appropriated or non-appropriated funds, Mrs Webster was performing a governmental task for a sovereign state, the United States of America, such that the principle of state immunity applies.

117. The fact that Mrs Webster is a British citizen, working in the United Kingdom and paying UK taxes does not change the identity of her employer. It is the status of her employer as a sovereign state and the nature of her work which confers state immunity, none of which is dependent on her nationality, location or tax status.

118. In these circumstances, and having regard to the test in Holland, I find that the Respondent is entitled to rely on the principle of state immunity and,

therefore, that the Tribunal has no jurisdiction. I must therefore dismiss Mrs Webster's claim with no inquiry into its merits.

Did Miss Wright's role involve her in the public or governmental functions of the United States of America?

119. I have reached the same conclusion in Miss Wright's case, albeit she performed a very different role from Mrs Webster.

120. The requirement to maintain an independent FES is imposed by US Law, as is the standard which it is required to achieve. The objectives of this policy go beyond those of any domestic fire service: for example, the Air Force Emergency Program says that it is intended to protect the American people, their way of life and to advance their influence in the World. These are all policy objectives of the United States. The same Program refers to FES's contribution to combat readiness, another function of the state.

121. In my judgment, those in the FES, including fire-fighters, are an integral part of the mission of the bases where they work: where there is flying, the planes could not fly safely without such emergency protection; in the case of RAF Croughton where confidential information is processed, the information could be lost or compromised without protection. The ability of the Respondent to provide a first response to emergencies, including fire, enables it to retain control over incidents which may involve classified or controversial information. It is notable that the United States has restricted the power to contract out FES (unlike the UK) and this demonstrates to me that the provision of an independent fire-service is an integral part of US military policy.

122. I find, therefore, that the role filled by Miss Wright as a fire-fighter employed by the United States at its facilities at RAF Croughton and Fairford, involved the United States' sovereign functions. Litigation of claims of discrimination and constructive dismissal in the Employment Tribunal would involve judicial consideration of the arrangements the United States makes to protect its military bases and it could be called on to justify objectively treatment which might otherwise be unlawful under the Equality Act 2010 were it to apply. This would constitute an investigation by a British tribunal of the sovereign acts of a foreign state and that is impermissible at common law under the principle of state immunity.

123. As in Mrs Webster's case, I find that the distinction between appropriated funds and non-appropriated funds is irrelevant to the issue of state immunity in Miss Wright's case, notwithstanding the express reference to appropriated funds in USC Title 10 at paragraph 2465.

124. For the same reasons as given in Mrs Webster's case, the facts that Miss Wright is a British citizen working in the UK and who paid UK taxes are not answers to the legal and factual questions I have had to address.

125. It follows that the doctrine of state immunity applies to Miss Wright's claims and I must dismiss them also without inquiry into their merits.

Postscript

126. I have personal sympathy with the position in which the Claimants find themselves. They had not been told during their employment that they might not be able to seek a judicial determination in this Country of their employment rights and it will undoubtedly appear unjust to them that they are excluded from rights most other employees and workers in the UK are entitled to exercise. I can only say that they conducted themselves with great dignity in the hearing before me and that none of the reasons for rejecting their claims relates to the underlying merits which, as stated above, have not been considered.

_____
Employment Judge Foxwell

Date: Monday 21 October 2019

Sent to the parties on: .....

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For the Tribunal Office