Appeal No. UKEATS/0019/13/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 20 November 2013 & 21 November 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR HORST WITTENBERG — APPELLANT

SUNSET PERSONNEL SERVICES LIMITED — FIRST RESPONDENT
TIDEWATER CREWING LIMITED — SECOND RESPONDENT
TIDEWATER MARINE NORTH SEA LIMITED — THIRD RESPONDENT
FAIRWAY PERSONNEL SERVICES LIMITED — FOURTH RESPONDENT
TIDEWATER MARINE INTERNATIONAL INC. — FIFTH RESPONDENT
TIDEWATER INC**.** — SIXTH RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr A OHRINGER (Counsel) Instructed by: Zimmers Solicitors 5 Water Lane London NW1 8NZ
For the First Respondent	Debarred from proceedings
For the Second to Sixth Respondents	Mr A KEMP (Solicitor Advocate) Simpson & Marwick Solicitors 4 Carden Terrace Aberdeen AB10 1US

SUMMARY

Identity of employer: the claimant had a contract dated 1998 with a company, said no longer to exist. The respondents admitted that he was employed but there was a dispute by whom. The ET found that he was employed by the fourth respondent. It was argued by the respondent that there was an error of law in that decision. Held that the ET had erred in law in that it had applied the wrong test.

Territorial reach of Employment Rights Act 1996 (ERA) and Equality Act 2010. The ET found that the territorial reach of ERA and Equality Act 2010 did not include the claimant's situation. It was argued by the appellant that the ET had jurisdiction and should hear his claims. Held: not all relevant regulations had been put before the ET or the EAT.

Case continued for further submissions from parties.

THE HONOURABLE LADY STACEY

1. This is a case about the correct identity of the employer of the claimant and about jurisdiction. By a decision of the Employment Tribunal, Mr R G Christie, sitting alone at Aberdeen advised on 18 January 2013, decided that the claimant was employed by the fourth respondents, Fairway Personnel Services Limited (Fairway); and that the Employment Tribunal had no jurisdiction to decide complaints brought under the Employment Rights Act 1996, namely (a) unfair dismissal; (b) failure to make a redundancy payment; (c) failure to provide written reasons for dismissal and (d) failure to provide a statement of terms and conditions of employment. The ET decided that the complaints brought under the Equality Act 2010 of discrimination because of race and because of age should be dismissed in respect that the Employment Tribunal does not have jurisdiction. It also decided that the complaint brought under regulation 30 of the Working Times Regulations 1998 for a payment in lieu of annual leave should be dismissed in respect that the E T had no jurisdiction and finally it decided that the ET did have jurisdiction to consider the complaint of breach of contract (a failure to make payment of a contractual redundancy payment) which should proceed against Fairway only should be dismissed against all the other respondents.

2. Mr Ohringer, counsel, and Mr Kemp, solicitor appeared for claimant and all but the first respondent respectively both in the ET and before me. In the response to the grounds of appeal Mr Kemp gave notice of his argument that certain grounds had not been before the ET and should not be permitted to be argued. Parties agreed to argue all points raised, under reservation of their rights on that argument. After the case had been heard and when this judgment was incomplete, the decision in the case of **Hasan v Shell International UKEWAT/0242/13** came out. I invited to parties to make submissions as to the effect, if any that decision had on the instant case. Both parties lodged written submissions which I discuss below.

3. The facts put briefly are that the claimant is a mariner who has lived all of his life in Germany, and who is a national of that country. He was employed as chief engineer on board a vessel named the Wilburt Tide, which was working off shore Nigeria. The identity of his employer is a matter of dispute. It is not in dispute however that on 1 November 2011 a letter was sent to the claimant from Fairway terminating his employment. He was 68 years of age at the time. He made a number of claims under the Employment Rights Act 1996 (ERA) the Equality Act 2010 and a claim for breach of contract at common law. The controversy between parties concerned inter-related issues, namely who was the claimant's employer, what was the territorial reach of the legislation on which he sought to rely, and did the ET have jurisdiction to try a claim for breach of contract.

4. All the claims came before the Tribunal at the stage of a pre-hearing review on two particular preliminary issues which were identified as follows:-

(1) The identity of the employer. In the form ET1 the claimant named six different companies as respondents. The claimant stated that the various subsidiaries had opaque contractual arrangements and so he had no choice but to name them all.

(2) Territorial jurisdiction, in the sense of the territorial reach of legislation. The respondents' position was that on the basis that the claimant at no time worked within Great Britain, none of the various statutory provisions under which the complaints were made could apply, since the circumstances of his employment did not enable it to be said that there was a sufficiently strong connection with Great Britain to entitle him to bring the present proceedings before a British Employment Tribunal.

5. The Employment Tribunal decided that the issue concerning identity of the employer should be dealt with first since two of the considerations in determining the issue of territorial jurisdiction could be whether or not the employer company had a place of business in

Great Britain and whether or not the claimant's employment was performed for the purposes of a business carried on in Great Britain.

6. The ET found that the various respondent companies were in one way or another associated with the ultimate parent company of what was described as the "Tidewater Group" namely Tidewater Inc., a US corporation. The main business of that corporation was to provide "offshore service vessels and marine support services to global offshore energy industry through the operation of a diversified fleet of marine service vessels". The ET found that these operations were conducted through both US and international subsidiaries and joint ventures.

7. The ET then went through the cast of respondents and made the following findings:-

(1) Sunset Personnel Services Ltd (Sunset). This entity has not been notified of the proceedings successfully and so did not respond. The claimant did receive a written contract of employment showing Sunset as his employer when he started, but it was a matter of agreement between the parties that by the time of determination of his employment that could no longer have been the case. Parties were agreed that it had long since ceased to be the employer of the claimant. It was not in a list of Tidewater subsidiaries.

(2) Tidewater Crewing Ltd (TCL). The ET found this to be a wholly owned subsidiary of Tidewater Inc., incorporated in the Cayman Islands. It was the entity which all respondents as a group put forward to the Tribunal as the claimant's employer.

(3) Tidewater Marine UK Ltd. This is a wholly owned subsidiary of Tidewater Inc. registered in the UK and with a place of business at Aberdeen. During the hearing counsel for the claimant was allowed to amend in order to substitute a different company, namely Tidewater Marine North Sea Limited (TMNS) which became the third respondent.

(4) Fairway Personnel Services Limited (Fairway). This is a company registered in the UK and part of the Tidewater group. It had a place of business in Aberdeen and carried out a variety of personnel and human resource functions.

(5) Tidewater Marine International Inc. (TMII). This was a wholly owned subsidiary of Tidewater Inc., incorporated in the Republic of Panama, and was the primary international operating entity for Tidewater Inc. It had managerial and administrative operations in the United States of America and exercised control over Tidewater vessel operations in Nigeria and elsewhere. Its principal place of business was in New Orleans, Louisiana, USA.

(6) Tidewater Inc. This was the ultimate parent company of the group, incorporated in Delaware, USA with its headquarters in New Orleans.

(7) Tidewater Marine North Sea Ltd (TMNS). This was the new third respondent and it was a wholly owned subsidiary in the Tidewater group. It was registered in the UK and its functions were conducted from Aberdeen.

8. The ET found that the operation of international shipping arrangements by which vessels are manned and the crew employed are frequently complex. Many operators subcontract the recruitment and other employment related matters to a separate company and in respect of British crew members will seek to do so with a company which is not resident or conducting business in the UK. The reasons include deriving the benefit of a statutory exemption from liability to pay employers' national insurance contributions, together with other fiscal and regulatory benefits. Thus in the present case it may have been to the advantage of the Tidewater group generally to have TCL accepted by HMRC as the employer and as a company not resident or operating in the UK.

9. The claimant was engaged as chief engineer on a vessel operating off the coast of

Nigeria. He is a national of Germany, who was born there and who lived there all his life. At the time of his dismissal he was 68 years of age, and had spent all of his working life as a mariner. He had worked between 1989 and 1998 for a company named O.I.L. Ltd. On or about 1 May 1998 he entered into a contract of employment with Sunset. That contract was produced before the ET. It included the following clauses:-

> **"1.0 This agreement covers the terms and conditions of service for all officers and ratings employed by Sunset Personnel Services Ltd for service onboard offshore support vessels owned or managed by Tidewater Marine Limited and/or O.I.L. Ltd.**
>
> **20.0 DISCIPLINARY**
>
> **Employees agree to be bound by the disciplinary procedures in force at any time (Appendix D). All employees on this contract will be treated in accordance with, and compliance of, the Code of Conduct for the Merchant Navy – Appendix E.**
>
> **21.0 Grievances**
>
> **If a mutually satisfactory understanding is not reached the matter should then be referred in writing to the personnel manager at Fairway Personnel Services who has the full authority of the company to investigate grievance and conduct hearings on behalf of the company.**
>
> **During the foregoing procedure the employee will have the right to representation by a work colleague or NUMAST official who may advise him and speak on his behalf**
>
> **23.0 General note**
>
> **In an agreement between Sunset Personnel Services Ltd and Fairway Personnel Services Ltd, Fairway Personnel Services will advise Sunset Personnel Services and act on their behalf in all recruitment, career progression, training, personnel administration and disciplinary related matters.**
>
> **24.0 The interpretation and enforcement of this contract of employment is subject to the laws of the United Kingdom.**
>
> **Appendix D**
>
> **9. Dismissals**

In the event of dismissal from the ship, the Personnel Manager of Fairway Personnel Services will convene a hearing ashore on behalf of the Company to review the circumstances of the seafarer's dismissal, and will conduct a full investigation and recommend to the employer whether the contract of employment should be terminated. The employer will decide whether the contract of employment should be terminated. The employee may invite a working colleague or Numast official to be present at the hearing which should normally take place within 5 working days of dismissal from the ship or within 5 working days of arrival in the UK if dismissed abroad.

10. Appeal.

The employee will be advised in writing of the outcome of the hearing. Where dismissal is confirmed and the employee's contract is terminated the employee has 14 days within which to lodge an appeal with a higher level of authority within the company ie direct to Sunset Personnel Services in Cyprus.

Appendix E

16. Nothing in this Code of Conduct should be read as negating any seafarer's right to bring an unfair dismissal claim before an Industrial Tribunal as provided in the Employment Protection (Consolidation) Act 1978."

10. Day to day management of the operations off Nigeria was carried out from an office in Onne Port which is nearby Port Harcourt. The person in charge was a Mr McGimpsey. He lived in Lagos. The vessel on which the claimant was working, the Wilburt Tide, was on a "bare boat" charter to Mobil, that is the vessel alone was the subject of the charter, and did not include the crew. The hire for the vessel was paid to the extent of 40% to a Nigerian bank account and 60% to a bank account in the United States of America in the name of Tidewater Marine International Inc. Mr McGimsey's superior to whom he reported from Nigeria was based in Aberdeen. In relation to the day to day running of the ships, parts and other items required were first sourced if possible locally in Nigeria but specially large items were sought and obtained from elsewhere particularly through the Aberdeen office. The Aberdeen office provided support services including technical, health and safety and environmental. Mr McGimpsey had a contract of employment showing TCL as his employer. He was described as "area manager" and the contract specified that he had an assignment by TCL in Nigeria. The contract was dated June

2010 and showed TCL as having its address at c/o Caledonian Bank and Trust Ltd, PO Box 1403, Georgetown, Grand Cayman, Cayman Islands.

11. The Wilburt Tide was registered in Vanuatu and owned by a company called Gulf Fleet Middle East Limited registered in the Cayman Islands. That entity was a wholly owned subsidiary of Tidewater Inc. The vessel had the word "Tidewater" on its side.

12. Fairway operated out of Aberdeen. It was a UK registered company and a wholly owned subsidiary of Tidewater Inc. Its function was to provide HR services. Mr Hewlett was the Regional HR manager, and had responsibility for people working in Africa and Europe. He and seven members of staff who worked with him in carrying out that function were employed by Fairway, and all worked from the Aberdeen office. Others working in the same Aberdeen office worked for TMNS. Mr Hewlett reported to a Mr Handin who was in charge of TMNS.

13. Fairway carried out a wide range of functions for crew members including recruitment, preparation and issuing of contracts of employment, some of which showed the employer as being TCL (although the claimant did not receive such a contract), arranging visa or work permits, travel arrangements, reports of sickness or other absence, maintaining records of qualifications and training, handling disciplinary and grievance issues. It also carried out dismissals. People working there called themselves things such as "personnel officer, Tidewater Marine (Aberdeen)" and their email addresses consisted of their individual name followed by @tdw.com. When a new payroll system for seafarers such as the claimant was put in place in September 2011 Mr Hewlett sent an email calling himself Regional HR Manager "Tidewater Marine" at the Aberdeen address. Information for pay slips was prepared by Fairway in Aberdeen and printed by a company in Cyprus, sent back to Aberdeen and then sent out to the individuals from Fairway by post. Fairway did not provide any services or have any

activities outside the Tidewater group. For payment of wages information was gathered locally about days worked and so on and then sent to Fairway in Aberdeen who put it on to the computer system. Fairway then contracted the printing of all payslips by a company called Amulite Payroll Services Limited (Amulite) who had an office in Cyprus. There was a contract between TLC and TMNS as customers and Amulite as providers of payroll services. The contract was executed for TCL by Mr Handin, as "Regional Director". Crew members were told, in 2011 that a new computer system was introduced and that 'if they had any queries they should contact their personnel officer through usual email channels,' which was a reference to contacting Fairway in Aberdeen.

14. At paragraph 49 the ET found that the claimant's payslip for August 2011, albeit he was a German national, resident in Germany and paid in Euros, was written in English and showed the familiar entries for deductions of tax and national insurance although neither deductions were in fact made in the claimant's case. The identity of the employer was not shown on the face of the payslip. The envelope had two addresses for return if undelivered, one being T C L in Cyprus and the other being Fairway in Aberdeen.

15. The salaries were paid from a branch of the Royal Bank of Scotland in Jersey, from an account in the name of TCL. Money was transferred into that account by Tidewater Inc., the ultimate parent company, described as (for example) "Payroll for April". As stated above, there was evidence before the ET of a written contract of employment showing TCL as an employer of Mr McGimpsey which shows TCL as having an address in the Cayman Islands. Mr Hewlett gave evidence and claimed that TCL also had a place of business in Cyprus, although as explained below he corrected that evidence on the second day of giving evidence.

16. For the claimant no contract of employment or other written statement of terms showing

TCL as his employer was ever issued, nor was he given notification of any change in the identity of his employer after Sunset employed him. The parties were agreed, both before the ET and before me that Sunset no longer existed and therefore could not be the employer.

17. The ET made findings about the claimant's work, in order to decide who his employer was. It found, at paragraph 75, that he was employed as chief engineer on the Wilburt Tide. Since at least early 1999 he had worked in various vessels which had operated in different parts of the world but never within British waters nor in the UK sector of the continental shelf. Most of the time had been spent off the coast of Nigeria on the contract for Mobil. As would be expected, the day to day control of the claimant's work was via the master of the vessel. In paragraph 77 the ET found that overall control of the marine operations in Nigeria was in the hands of Mr McGimpsey who held the position of area manager of TMII, although as stated above he held a document purporting to be a contract of employment with TCL. There were other managers in Nigeria namely Mr Jones and Mr Talajic who controlled certain aspects of the operation. Their salaries were paid to the same bank account in Jersey, held by TCL.

18. The ET set out the circumstances of the dismissal between paragraph 79 and 82. On 20 August 2011 the claimant was injured on board the vessel and taken back to port. Mr McGimpsey reported this to Mr Hewlett in Aberdeen who arranged that the claimant be flown to Aberdeen in order that he be medically examined. He wanted an opinion from Fairway's own doctors. Mr McGimpsey and Mr Talajic agreed that they did not want the claimant to return to the vessel. The claimant got some informal warning of this from Mr Talajic. Mr McGimpsey spoke to Mr Hewlett and instructed him to terminate the claimant's employment. As a result of that instruction Mr Hewlett wrote to the claimant on 1 November 2011 saying that he would not be offered further employment "with Tidewater", thanking him for his contribution "to Tidewater" and signing the letter "from and on behalf of

Fairway Personnel Services Limited." In that letter, Mr Hewlett made express reference to the applicable terms of termination as being those in the claimant's contract of employment with Sunset, because it was the only document with terms and conditions for the claimant which Mr Hewlett could find. There is no reference in the letter to TCL.

19. Between paragraphs 83 and 90 the EJ produced a note on evidence. He found that Mr Hewlett did not have "any clear idea" which company Mr Handin worked for, but he was reasonably clear that people who were not employed in HR in Aberdeen were employed by TMNS. He noted that during the hearing and as an addition to the original set of productions, the respondents added a document purporting to be a "special power of attorney by TCL" which bore to give authority to the people listed in it to execute, on behalf of TCL, working agreements with seafarers. The EJ found that this document was of no assistance to him because it had been executed on 24 April 2012, many months after the proceedings had been initiated. He noted that no accounts and annual returns for TCL were lodged. He noted that in his witness statement Mr Hewlett said of TCL the following: –

> **"It has a place of business c/o BUE Services, PO Box 45,048, Larnaca, Cyprus".**

That was taken as part of his evidence in chief and the EJ noted that he did refer to it in oral questioning but when he returned to give evidence at the next day he said that he wished to correct that, and said that TCL had no place of business in Cyprus at all. Mr Hewlett's evidence was that all functions carried out by Fairway were on behalf of TCL under a contract to do so but he did not produce any such contract. He said he was unaware of anyone in charge of TCL and he said that he never had any communication from anyone in that company. The EJ stated at paragraph 90 the following: –

> **"Mr Hewlett referred to TCL as "simply an employing company which provided seafarers to man ships". In fact the evidence as a whole showed that the activity of 'providing seafarers' and dealing with their employment affairs thereafter, including**

dismissing them, was entirely and autonomously conducted and effected by FPS without reference to TCL."

20. The ET found as a fact that TCL did not have an address in Grand Cayman or in Cyprus and had conducted no business or any other activity in either location or indeed anywhere else. There was no evidence before the Tribunal of TCL having any assets, trading revenue or accounts. Thus at paragraph 60 the ET found "in effect it had no operational existence and did nothing". It existed on paper only. At paragraph 61 the ET found that in 2008 or 2009 an undated letter on TCL notepaper and addressed "to whom it may concern" had been issued by Karen Ross, a personnel officer employed by Fairway for the purposes of the claimant obtaining a visa, stating that he was employed by TCL. A letter dated 28 April 2008 was sent by Fairway to the claimant on the subject of a salary review. It included the phrase "On behalf of your employer, Tidewater Crewing Ltd."

21. The ET found that TMNS, that is the new third respondent, was registered in the UK and in its directors' report of March 2011 was said to be a vessel operator for group vessels operating in the North Sea and a vessel owning company providing equipment to other group operating entities in other offshore oil and gas producing areas of the world. Later in the report there was reference to vessels deployed in the Nigerian waters. Their business premises were shared by Fairway and four directors were directors in both companies.

22. The EJ then directed himself on the law in connection with the task of identifying the employer. He began by considering section 230 of the Employment Rights Act 1996 (ERA) and noted that an employee is a person working under a contract of employment. He decided that the starting point should be to look at the contract. He found that in this case both parties agreed that the claimant was working under a contract of employment but "they had no answers as to who the employer was".

23. The EJ directed himself on the case of **Secretary of State for Education and Employment v Bearman 1998 IRLR 431** in which the EAT reversed the Employment Tribunal and at paragraph 22 said as follows:

> **"It seems to us that the correct approach would have been to start with the written contractual arrangements and to have enquired whether they truly reflected the intention of the parties. If they did, then the next question was whether on the commencement of their employment, the applicants were employees of (a) or (b). If the conclusion was that, when properly construed, on commencement of their employment the applicants were employed by (b) then the chairman ought to have asked the question:- 'Did that position change and, if so, how and when?'".**

The EJ noted that in the recent cases of **Firthglow Ltd (t/a Protectacoat) v Szilagyi 2009 ICR 835** and in **Autoclenz Ltd v Belcher 2011 IRLR 820** the question was whether the person was employed or self-employed; he noted that in the *Autoclenz* case the Supreme Court decided at paragraphs 20 and 21 that the normal rule that once a contract is agreed, one cannot seek to elicit the intention of the parties by going behind it, might not apply in all employment law situations. The EJ directed himself that the question in every case was as to the true agreement made between the parties and that that involved examining all the relevant evidence including how they actually conducted themselves. The Supreme Court held that an employment tribunal was entitled to disregard the terms of the written document if they were inconsistent with what was actually agreed having looked at the realities of life. Thus the Supreme Court decided that people who worked under the auspices of a company to valet cars and who were expressly said to be self-employed contractors were in fact employees. The EJ decided that there seemed to be no reason in principle why the approach would be different when deciding who an employer was. Thus he held that even if there was an employment contract it could be held to be a sham if it did not reflect reality.

24. The EJ noted the main points made before him. For the claimant, Mr Ohringer started

with the original contract with Sunset and went on to the various factual aspects of how the claimant's employment operated in practice. He emphasised that although the day to day work was on the vessel and in Nigeria all matters were managed in Aberdeen by Fairway. He said that the law had moved on from **Bearman** and was now contained in the other two later cases. He said that Fairway was in control of the claimant's employment and of other employees in similar positions. They engaged employees and carried out dismissals and Mr Hewlett had agreed in evidence that his job was to supply staff to man vessels operated by the various Tidewater companies. He said that TCL was little more than a legal fiction and in fact everything was done by Fairway. As an alternative he suggested that TMII or TMNS could be regarded as potential employers. Both operated from the same offices in Aberdeen and there was some evidence which tended to show that either one or both had control over the operations in Nigeria in which the claimant was engaged.

25. Mr Kemp for the respondents emphasised that his position was that TCL was the legal employer. He referred to the letter which had been issued by TCL confirming that for the purposes of obtaining a visa the claimant was employed by that company and he referred to the letter of 28 April 2008 from FPS said to have been written on behalf of TCL; he relied on the envelopes for payslips and the bank statements which showed the name of that company. Further, TCL was the employer of the local managers in Nigeria including Mr McGimpsey. He argued that Fairway simply carried out HR functions and there was nothing either unusual or sinister in that. When it came to the dismissal Mr Kemp noted that it had been a local employee in Nigeria who was also an employee of TCL who had given the claimant advance warning that he was going to be sacked. Mr McGimpsey had made the decision to terminate; Mr Hewlett followed his instruction by carrying it out which showed that Fairway carried out personnel functions for TCL. Mr Kemp's position was that if it was not TCL who was the employer then there was no evidence to suggest that it was anybody else.

26. Mr Kemp argued that the decision in **Autoclenz** was in a different context because it concerned whether a person was employed or self-employed. Even if it was thought that it was the true intention of the parties that was important, then it was clear that it was TCL because they paid the salary and employed Mr McGimpsey who made the decision to dismiss.

27. At paragraph 120 the EJ said this was a difficult issue. He started by considering **Bearman** and noted that there was a contract of employment with Sunset. He asked himself if that position changed, and found that it had, because both parties agreed that Sunset ceased to be the employer. However there was no witness who could tell him when that happened.

28. The EJ was not satisfied that there was an effective change from Sunset to TCL as employer. He said that the claimant was clear that nobody had told him that TCL employed him and he had not agreed to any variation in his terms to that effect. At paragraph 130 the EJ listed the things that Mr Kemp relied on, being the letter of 28 April 2008, the reference to TCL on the envelope, at their address in Cyprus and the letter about the visa. He did not regard any of these or all of them taken together as indicating an agreed variation by the claimant of an earlier contract. He then came to look at paragraph 133 at what he described as Mr Ohringer's main point, which was that TCL as a company which employed the claimant, was a sham. The EJ accepted at paragraph 136 that TCL did exist as a corporate entity, incorporated in the Cayman Islands, but he said that apart from that there was not much else that could be said about it because it occupied no premises and appeared to have no form of life.

29. At paragraph 137 the EJ listed the normal characteristics, duties and functions of employers and noted that TCL did none of these things. He recognised that it is not uncommon for employers to contract out some personnel matters but he noted that in this case there was no

evidence of any of the personnel matters carried out by Fairway having been done by any type of agreement formal or otherwise with TCL. He found at paragraph 140 that Fairway operated quite autonomously. He noted that the bank account in Jersey was used to pay the salaries, but he found that it was merely a channel, and that no funds were credited to the account or withdrawn by TCL. He found that the HMRC agreement was not conclusive, being simply for the purposes of tax. He noted that the point for the respondents of mariners being shown to have an employer resident abroad was to achieve financial advantages of being relieved of the employer's national insurance contributions. He referred to the case of **Szilagyi** where the employee was portrayed by both parties as self-employed, being paid gross without PAYE deduction and accounting for his own income tax. That was not to stop an Employment Tribunal deciding that he was actually an employee. He decided at paragraph 149 to "eliminate TCL as the employer", in light of the findings in fact which he had made. He then had to decide which company was the employer.

30. The EJ decided the employer was Fairway because of all the things that they did which he found were most closely characteristic of what an employer does, listed at paragraph 150 as follows:-

> **"(1) Recruiting the seafarers**
>
> **(2) Assigning the seafarers to particular vessels**
>
> **(3) Preparation and issuing of terms and conditions of employment (at least apparently in some cases)**
>
> **(4) Calculating seafarer's wages and issuing their payslips to them**
>
> **(5) Making travel arrangements for the seafarers to get to and from work**
>
> **(6) Arranging medical examinations**
>
> **(7) Effecting any termination of employment."**

31. He appreciated that Fairway did not control the claimant's daily work but said that was not unusual and referred the case of **James v London Borough Council of Greenwich 2007**

IRLR 168. While the EJ had previously made findings that the provision of mariners to ships was commonly dealt with by a number of companies, he did not suggest that the case last referred to was of assistance in that situation, as it refers to agency workers and not to mariners.

32. The EJ noted that the claimant had no knowledge or appreciation of the parts which made up the Tidewater Group as a whole. He attached no fault of the claimant for that, noting that many people would not take any particular interest in such matters until something goes wrong. At paragraph 153 the EJ found as follows: –

> **"Of course certain matters, such as work rotas etc. were dealt with locally by the onshore Nigerian office over which Mr McGimpsey had control, but the claimant's main contact in relation to anything of significance was with Fairway who carried out all of the above functions. Admittedly they did so according to the business requirements of the shipping operation but otherwise carried out these duties apparently quite autonomously."**

33. At paragraph 154 the EJ found the following: –

> **"Again like the agency situation, where the client has no further need for the employee, or wishes to terminate the agreement, and no other worker is available, the dismissal from employment is effected by the agency as the employer."**

He accepted that Mr McGimpsey was an employee of TCL. He further accepted that Mr McGimpsey decided that for the purposes of the shipping operation that he no longer wished the claimant to be the chief engineer and so informed Mr Hewlett. He noted that the dismissal was then carried out by Mr Hewlett, representing Fairway, with no mention of TCL. The EJ found that although he accepted that Mr McGimpsey was an employee of TCL, he stated at paragraph 156 that

> **"I did not regard him as wearing that hat when he prompted the claimant's dismissal. It could not have been done or in the context of TCL's business operation since that company did not have any such thing (sic)"**

The EJ did not accept the alternative suggestions of TMNS or TMII as employers because he did not find that there was evidence sufficient to arrive at such a conclusion in respect of either.

34. Mr Kemp cross appealed on the question of who the employer was. His grounds of appeal were to the effect that the EJ had found, at paragraphs 130 and 131 that there was a letter on 28 April 2008 to the claimant from Fairway concerning a salary review, written by an employee of Fairway, but "for and on behalf of TCL"; there was a reference to TCL on the envelope of the payslip; that a letter, undated but said to be around 2009 from Karen Ross, of Fairway, for the purposes of an application for a visa or work permit was written on TCL headed paper and said that the claimant was employed by TCL. Further the wages of the claimant came from an account bearing the name of TCL. Thus there was evidence to show that TCL was the employer. He argued that the cases referred to concerning contracts which were a sham related to the question of what the true relationship was between parties to a contract, which was therefore a different issue from that before the EJ. He argued that the EJ had applied the wrong test by finding which company had functions which were most closely characteristic of an employer of the claimant, as the test was not which entity carried out functions most closely characteristic of an employer, but which party was the employer. He made reference in that connection to the test found in the case of **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance 1968 2Q B 497**, and reminded me of the essence of the decision which required, for an employment relationship that the following be found to exist: –

(i) the servant agreeing to perform services for his master and consideration for a wage or other remuneration;

(ii) sufficient control of the individual to make one party the master;

(iii) That other provisions of the contract are consistent with its being a contract of service.

35. Mr Kemp argued that in the instant case there was no evidence that the claimant had agreed to perform services for Fairway, nor that Fairway had agreed to pay him wages. There

was no evidence of control by Fairway. The evidence showed that Fairway was concerned in peripheral matters; he described Fairway's function as incidental to the main purpose of the contract of employment.

36. Mr Kemp submitted that uncertainty would be created in legal obligations if contracts of employment were held to be "a sham" because persons other than the employer had some control over the employee. He submitted that service companies are used in many industries, as legitimate tax planning vehicles or for other reasons. He gave two examples, shown in the cases of **Dolphin Drilling Personnel PTE Ltd v Winks UKEATS/0049/08** and **Diggins v Condor Marine Crewing Services Ltd [2010] ICR 213**. In this case, he submitted that Mr McGimpsey was a US citizen working in Nigeria under a contract of employment with TCL which was itself governed by the law of Louisiana. The EJ appeared to find that TCL had no life and was simply a fiction. He also accepted, however, that Mr McGimpsey was employed by it. These were inconsistent findings. Mr Kemp criticised the EJ in finding that the only people with whom the claimant had contact in regard to matters concerning his employment, apart from day-to-day operations, were the personnel of Fairway. Mr Kemp argued that day-to-day operations were important in making the decision as to who was the employer whereas the mechanics of payroll and other personnel functions were not. He noted that the EJ had made reference to agency workers which he said was an entirely different situation. He argued that the EJ had failed to take account of relevant factors such as the control over the work carried out by Mr McGimpsey who was an employee of TCL. He argued that the EJ's decision was perverse and that the EJ had undertaken an impermissible lifting of the corporate veil. He referred to the case of **Prest v Petrodel Resources Ltd [2013] UKSC 34** at paragraphs 34 and 35 where Lord Sumption stated:-

> **"34. These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it evade the law or to frustrate its**

> **enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely on the fact (if it is a fact) that liability is not the controller's because it is the company's. On the contrary that is what incorporation is all about…**
>
> **35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil…"**

37. Mr Kemp made reference to the case of **Clifford v Union of Democratic Mine Workers [1991] IRLR 518** and to **Secretary of State for Education & Employment -v- Bearman 1998 IRLR 431**. He argued that the employment judge had misdirected himself. He admitted that the evidence before the ET was slight. In discussion, he accepted that the position could be said to be unsatisfactory because the parties were agreed that the claimant was working under a contract of employment; one would have expected his employer to be able to state exactly what that contract was and to produce it. If it could not be produced then one would expect the employer to be able to explain why not. In contrast, the employer was only able to state that there had been a contract with Sunset, which company no longer existed. Mr Kemp frankly explained that he appreciated that that position was an unfortunate position for a litigant to be in and he understood that that made it difficult for the EJ to make any findings about who the employer was. Nevertheless, he argued that there was sufficient evidence before the employment judge to enable him to make a decision that the employer was TCL.

38. Mr Ohringer argued that the EJ had not erred in law. He was entitled to ask the fundamental question which was what in reality the agreement between the parties was. He was entitled to argue by parity of reasoning that he could do so in light of the cases concerning whether or not persons were employed or self-employed. The evidence as it was put before the EJ was to the effect that parties were agreed that the claimant had originally been employed by

Sunset but that the identity of the employer must have changed because Sunset no longer existed. It was however accurate for the EJ to observe that there was nothing which indicated that anyone had told the claimant that his employer was now TCL. He argued that the EJ was entitled to find that the functions of an employer were actually conducted by Fairway, all undertaken autonomously. TCL did not undertake any of them. He argued that this was consistent with the deferred prosecution agreement between the Tidewater Group and the United States Department of Justice dated 29 October 2010 which described TCL as an "administrative" employer only. He did produce that document before me but as it had not been before the EJ I took no notice of it. He summed it up by saying that as Fairway conducted all of the functions of the claimant's employer, the EJ was entitled to find that Fairway was the claimant's employer.

39. Like the EJ, I have not found it easy to decide this part of the case. It seemed to me that the respondents were in a very precarious position. They put before the EJ very little evidence on matters on which they would reasonably be expected to be well informed. The parties were agreed that, putting it broadly, the Tidewater group employed the claimant. I entirely agree with the EJ that one would not expect the claimant himself to have paid much attention to the actual corporate entity which employed him. One would however expect the respondents, the Tidewater group, to do so. The evidence before the EJ was not only sparse but was confusing, given that Mr Hewlett gave contradictory evidence about whether or not TCL had an address in Cyprus. Nevertheless, I have come to the view that Mr Kemp is correct when he says that the EJ has applied the wrong tests. Firstly, the situation of agency workers seems to me irrelevant. As the EJ has indicated, he has long experience of the arrangements made for seafarers and people working in the oil industry generally. He is well aware that there are complex arrangements by which vessels are supplied with a crew. They are not however agency arrangements such as that in the case to which he made reference. Secondly, it does seem to me

that Mr Kemp is correct to say that the test is who actually was the employer rather than who carried out some of the functions that an employer has to carry out. I take the view that the EJ has himself found that functions such as payroll are often carried out by contractors. Therefore a finding about which company carried out that function does not necessarily indicate which company is the employer. Further, I do not accept Mr Ohringer's suggestion that the EJ was entitled to find that the actions taken by Fairway, for example in dismissing the claimant, were done autonomously. The evidence found by the EJ was clear that Mr McGimpsey and Mr Talajic decided that they did not want the claimant to return to the vessel and that they instructed Mr Hewlett to dismiss him. That seems to me a clear indication that the decision to dismiss was not taken by Mr Hewlett acting autonomously.

40. I therefore have to decide what action I should take given that I have formed the view that the EJ has erred in law in his decision-making on the matter of the correct employer. I am very conscious that the EJ had the benefit of hearing the evidence, which I do not have. I am also aware of recent Court of Appeal authority reminding me that, sitting in the EAT, I should not make findings in law which are dependent on findings in fact which I am not in a position to make. I am minded to remit this case to the EJ in order that he reconsider his finding as to the correct employer in light of the correct tests which he should apply. I will however give parties an opportunity to make submission on this matter, as discussed at the hearing.

41. The EJ was quite correct to decide the question of the identity of the employer first, before deciding the question of territorial reach of the legislation. That is because the identity and place of business of the employer is of relevance to the second question. Therefore it may not be necessary for me to make any decision about territorial reach, as I have decided that the EJ has erred in law in his finding on the first question. His views on the second question are of course based on his answer to the first question. However, lest I should be wrong in my

decision, and in deference to the arguments put before me, I will give my view on this matter.

42. At no time did the claimant perform any part of his work in Great Britain but he brought various complaints to a British Employment Tribunal and the question is does it have jurisdiction in the sense of territorial reach in respect of either statutory claims or common law claims? Did the EJ err in law in answering that question in the negative as regards statutory claims and in the affirmative as regards common law claims? Clearly the EJ's view was in the context of his having found that Fairway was the employer.

43. The EJ looked at the history of the statutory provisions and noted that section 196 of ERA 1996 was repealed in 1999. That section had the effect of disapplying almost the entire Act "to any employment where under his contract of employment the employee ordinarily works outside Great Britain". The EJ correctly directed himself that nothing was inserted into the Act to replace that section. The same lack of any statutory provision about territorial reach applies to the bringing together of all discrimination law under the Equality Act 2010, according to the way in which this case was presented, although I address this below.

[44] He then turned to the case law, considering the cases of **Lawson v Serco Ltd 2006 IRLR 289**; **Ravat v Halliburton Manufacturing & Services Ltd 2012 IRLR 315** and **Duncombe & others v Secretary of State for Children, Schools and Families (No.2) 2011 IRLR 840.** He noted, at paragraph 165, that the speech of Lord Hoffman in **Lawson v Serco** in which he indicated that people had to be fitted into categories being local, peripatetic or expatriate had been developed in Ravat, where at paragraphs 27 and 28 Lord Hope of Craighead said as follows:-

> **"27…..The general rule is that the place of employment is decisive. But it is not an absolute rule. The open ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be**

> **justified. The case of the peripatetic employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment is another.**
>
> **28. The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them…..It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them".**

45. He also considered looked at the case of **Van Winkelhof v Clyde & Co LLP [2013] ICR 883** (in the Court of Appeal; the case has now been decided by the Supreme Court but no argument was presented in that court on this part of the case) and noted that it was decided in that case by concession that the jurisdiction was the same under the Equality Act as under ERA.

46. He made the point that given that the legislation was altered with nothing being put in its place one could assume that Parliament meant that there was to be a different approach and he quoted the explanatory notes accompanying the Equality Act 2010 at paragraph 15 as follows:-

> **"As far as territorial application is concerned, in relation to Part 5 (Work) and following the precedent of ERA 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".**

47. The EJ noted that for the holiday pay under the Working Time Regulations and the discrimination complaints there is an additional complication in respect that these rights derive from provisions made under EU law, being the Equal Treatment Directive and the Working Time Directive.

48. He considered the case of **Bleuse v MBT Transport Ltd & another 2008 IRLR 264**.

In that case Elias J, as he then was, reversed the decision of an employment tribunal to exclude a claim for holiday pay by a claimant who was a German national working as a lorry driver in Austria and Germany but employed by a company registered in the UK. Elias J decided that such a claim requires to be accommodated by a British Employment Tribunal even though the worker in question had never worked in Great Britain and did not have any particularly strong connections with Great Britain or British employment law. His contract of employment identified English law as the proper law of the contract and purported to confer exclusive jurisdiction on the English courts. The EJ noted that Mr Bleuse had been working in EU countries and contrasted that with the current case where the claimant works offshore Nigeria. He said that there was an indirect reference to the point in the case of **Pervez v Macquarie Bank Ltd & another 2011 IRLR 285** where Underhill J. made a passing reference to the case of ***Bleuse*** by saying that it might be right to ignore **Bleuse** where the acts complained of occurred outside the European Union. There is another indirect reference from the same judge in **Ministry of Defence v Wallis & Grocott EAT/0546/08** at paragraph 21 where he said that **Bleuse** seemed to say that the Working Time Directive necessarily required member states to accord the rights conferred by it to all employees (at least working within the EU).

49. At paragraph 178 the EJ decided that for the purposes of the present case the **Bleuse** principle cannot be invoked because the claimant did not work in the EU.

50. The EJ then considered the complaint of breach of contract in the form of a failure to make payment of a contractual redundancy scheme which provided for a higher amount than the statutory minimum. The source of the Tribunal's jurisdiction in such matters is the Employment Tribunal's Extension of Jurisdiction (Scotland) (Order) 1994 paragraph 3. That provides that proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages if the claim is one to which section 3(2) of the

Employment Tribunals Act 1996 applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear. The EJ decided that a civil court in Scotland would have jurisdiction over the subject matter which is put forward by the claimant as it would be subject to the common law relating to contract. He said that the reference in paragraph 3 of the 1994 Order would comprehend jurisdiction of a civil court in the territorial sense because unlike regulation 19 of the 2004 Procedure Regulations its terms are specific to this one form of claim.

51. The EJ noted that jurisdiction in Scotland is governed by the Civil Jurisdiction and Judgments Act 1982. He said that the central principle of the Scottish rules under that Act is that people may be sued in the courts of the place where they are domiciled and in respect of corporate bodies they may be sued in the courts of the location where they have their "seat". A corporation or association has its seat in a particular part of the UK if, amongst other things, it has an official address in that part or a place of business in that part. He decided at paragraph 184 that it follows that if any of the respondents meet these qualifications they may competently be convened as respondents in an employment tribunal in response to a complaint of breach of contract under the 1994 Order. He then looked at paragraph 185 at jurisdiction between England and Scotland. Regulation 19(2) of the Employment Tribunals (Constitution and Procedure) Regulations 2004 says that Scotland shall only have jurisdiction where the respondent carries on business in Scotland or the proceedings relate to a contract of employment, the place of execution of performance of which is in Scotland.

52. At paragraph 187 he said that to decide this he had looked at the judgment of Mummery LJ in **Duncombe**. The court found that the fact that the contract was performed outside Great Britain did not prevent regulation 8 having effect; that the **Serco** principles are irrelevant; that there may be jurisdiction over work done outwith Great Britain and that there is

no need to look at the strength of the connections with Britain. At paragraph 189 the EJ noted that the proper law being English law was not essential as the English courts can apply the law of another country if need be.

53. The parties made written submissions in relation to this. Mr Ohringer referred to EC Regulation 44/2001 commonly known as the Brussels 1 Regulations. He referred to the case of **Bates Van Winkelhof** and he said that in the present case the claimant's employment had little connection with any country other than the UK and the particular points of connection were:

(1) The contract was expressed to be governed by UK law.

(2) The employment was controlled entirely from Aberdeen

(3) The employer's operations were in Aberdeen, and

(4) The references to Cyprus and the USA did not accord with the reality of the situation.

He submitted that the claimant would meet the test whether it was that the contract had a substantive connection to Great Britain, or if the test was that it had to have more connection with Great Britain than with anywhere else.

54. Mr Kemp argued that it was relevant that the claimant had no UK connections. He said that the proper law point was immaterial by reference to section 204 of ERA and he submitted that on the contract claim, on the basis that Tidewater Crewing Limited was the correct employer, there was no jurisdiction in either Scotland nor England as that company was not British and had no place of business here.

55. The EJ listed the factors that seemed to point towards a connection with Britain and those that pointed away from it in paragraphs 202 and 203. He noted in paragraph 204 that it is

not just a count of the number of factors, but rather a qualitative assessment of them. He decided at paragraph 212 that there was not a particularly strong connection with Britain. At paragraph 215 he discussed whether or not it was a comparative test which has to be applied and decided that it is not.

56. As regards the breach of contract he decided that there is jurisdiction. He decided that the employer was Fairway; it had a place of business in Aberdeen; the claimant was entitled to bring a common law claim of breach of contract in a Scottish court, and in light of the extension of jurisdiction to the employment tribunal, to bring such a claim in the forum.

57. Both parties lodged skeleton arguments for the EAT. Each has appealed or cross-appealed. Thus Mr Ohringer argued that there is territorial reach in respect of the statutory claims and that Fairway is the employer. Mr Kemp argued that Fairway is not the employer, but that even if it is, there is no territorial reach. Mr Kemp accepted that if Fairway was the employer then there was jurisdiction to hear the claim for breach of damages.

58. Mr Ohringer argued that as regards territorial jurisdiction the judge was wrong to say that jurisdiction would vest only if the connection with Britain was especially strong. He made reference first of all to **Lawson v Serco** in which Lord Hoffman looked at it in terms of "a choice of law". He then referred to Lady Hale's speech **Duncombe** at paragraph 8 to the effect that the principle appears to be that the employment must have much stronger connections both with Britain and with British employment law than with any other system of law. He submitted that Lady Hale expressly identified a further example of the principle laid down in **Lawson v Serco** as existing where the employment relationship is related to Britain and its laws more than to any other jurisdiction. Considering the cases up to and including **Ravat** he argued that it is quite clear that the Tribunal must decide which system of law should apply. He referred to the

case of **Tokyo Industries Ltd v Megwa UKEAT/0954/11**. Counsel reminded me that if there was no error of law in the decision of the ET then it should stand. Usually the law of the land in which the work is conducted will apply, but that presumption is displaced where the ties to Britain are stronger than to the local jurisdiction.

59. Counsel referred to **Bates Van Winkelhof** and to **Dhunna v Credit Site Limited 2013 ICR 909** in which Slade J. decided that the comparative exercise is appropriate where an employee is employed wholly abroad. Counsel maintained that the employment relationship had a stronger relationship with Britain than with any other jurisdiction.

60. The second ground of appeal was that having decided that the breach of contract claim could be heard in Scotland, it was inconsistent to decide that there was an insufficiently strong connection with Britain for the ET to hear the statutory claims. It cannot have been intended by Parliament that there should be litigation in two places about the same contract.

61. The third ground of appeal was that it was perverse to decide that there was insufficient connection between the claimant's employment and Britain.

62. The fourth ground of appeal was that the ET was wrong to say that **Bleuse** did not apply when the work was not done within the EU. Counsel argued that the ET must provide an effective remedy for breaches of EU derived rights in a situation such as the present where the employer and employee are both domiciled in EU member states, even if the work is undertaken outside of the EU.

63. The fifth ground of appeal was that the ET having concluded that the Employment Tribunal was the appropriate forum for the breach of contract claim, should have applied the

reasoning of the EAT in the case of **Simpson v Intralinks Ltd 2012 ICR 1343** and concluded that the rights under the Equality Act 2010 and the Working Time Regulations 1999 were part of the mandatory system of law which had to be applied. This argument was not before the EJ. Mr Ohringer argued that it should be entertained by me on the basis the case of **Simpson** had not been decided at the time of the ET hearing; the argument however does not require any further fact finding, as it is purely a question of law.

64. The sixth ground of appeal was that the EJ erred in law in holding that section 204 of ERA required him to attach little weight to the choice of law.

65. The seventh ground of appeal was that the ET failed to recognise that the effect of its decision on jurisdiction is that the claimant's employment has no statutory protection in any country despite being employed by a British entity and he argued that that cannot have been intended. Counsel argued that article 30 of the Charter of Fundamental Rights of the European Union, article 24 of the European Social Charter and article 8 of the International Labour Organisation Convention are all to the effect that an employee should have an effective remedy in the case of unjustified termination of employment.

66. Mr Kemp's grounds of appeal in his skeleton firstly make the point that there are new arguments being made which he argued should not be allowed. He made reference to the cases of **Jones -v- MBNA International Bank [2000] EWCA Civ 514**, and to **Jones -v- Governing Body of Burdett Coutts School [1998] ICR 38** and to **Kumchyck v Derby County Council [1978] ICR 1116**. He stated that the points of law in the 4th 5th and 7th grounds of appeal were not argued before the ET. Having considered the written notes of argument, it appears to me that Mr Ohringer is correct when he says that the arguments about the EU and the conventions were before the ET. The written reasons indicate that no fine detail was given, but these

matters were mentioned. The point about the case of **Simpson** which Mr Ohringer makes that is that it was not available at the time of the ET and that it concerns law only is, in my opinion, correct. Therefore I regard these matters as properly before me.

67. Mr Kemp argued that the appellant had conceded that the test for a remedy derived from EU law was the same as that for unfair dismissal. He maintained that there had been no argument put forward on the authority of **Simpson**. Further, there had been no argument put forward on the terms of the European Social Charter, or the International Labour Organisation Convention Concerning Termination of Employment.

68. Mr Kemp argued that the test that should be applied has been developed in a series of cases starting with **Lawson -v- Serco Ltd [2006] ICR 250** in which Lord Hoffman stated as follows: –

> **"employment is a complex and sui generis relationship, contractual in origin but, once created… Capable of having consecutive or simultaneous points of contact with different jurisdictions. So the question of territorial scope is not straightforward.… The general principle of construction is, of course, that legislation is prima facie territorial."**

He argued that the test for statutory rights is different to the test which applies in a common-law claim for breach of contract. Mr Kemp submitted that Lord Hoffmann in the case of **Lawson v Serco** identified 3 or 4 types of case in which an individual can receive unfair dismissal protection, as follows: –

1. employees ordinarily working in Great Britain.
2. peripatetic employees.
3. expatriate employees.
4. Persons who do not fit into the above categories but have an equally or sufficiently strong connection with Great Britain and British employment law.

Even for an employee who is working and based abroad the fact that they were recruited in

Britain by a British employer would not be sufficient he argued. Such a person would, in terms of Lord Hoffmann's speech, require "something more". That could be for example working for the British employer operating within what amounts to an extraterritorial political or social enclave in a foreign country or being posted abroad by a British employer for the purposes of a business carried on in Great Britain, such as a foreign correspondent on the staff of a British newspaper.

69. Mr Kemp argued that the later case of **Duncombe -v- Secretary of State for Children Schools and families (no 2) [2011] ICR 1312** showed that Lord Hoffmann's third category was open-ended. He referred to the speech of Lady Hale from which he extracted the proposition that there required to be an overwhelmingly closer connection with Britain and with British employment law than with any other system of law.

70. He then considered the later case of **Ravat**. He argued that Lord Hope stated that in cases where the employee's place of work is not Great Britain, the correct question to ask is whether the connection with Great Britain is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim. He argued that this would always be fact sensitive. Those who live and work outside Great Britain will require an especially strong connection with Great Britain and British employment law before they will be able to argue that the 1996 act has territorial reach to include them.

71. Mr Kemp referred to the case of **Williams –v- University of Nottingham [2007] IRLR 660** in which he argued that the claims made in that case for unfair dismissal and disability discrimination were both dismissed, in a situation where the claims showed a far greater connection with Britain than in the current case. He referred also to the case of **Bleuse** in which the claimant who was a German national worked solely in mainland Europe but was

employed by a UK company under a contract governed by English law. Nevertheless it was held that there was no jurisdiction to claim unfair dismissal. He referred also to the case of **Dolphin Drilling Personnel Ltd -v- Winks UKEAT S/0049/08** in which the claimant worked in Nigeria for the crewing company of an international group. He was resident in Great Britain. Mr Kemp accepted that while it was held in that case that there was no jurisdiction, it was prior to the case of **Ravat**. He referred next to the case of **Diggins v Condor Marine Crewing Services Ltd [2010] ICR 213** in which the claimant's tour of duty began and ended in the UK. It was found that there was jurisdiction; and he made the distinction between that and the present case being that the claimant lived in the UK. In the case of **Ministry of Defence -v- Wallis [2011] ICR 617** the claimants were the wives of serving members of the Armed Forces who were dismissed from jobs when their husbands left the Armed Forces. It was concluded that they had a clear and firm connection with Great Britain and therefore jurisdiction was established. That was in contrast to the case of **Rogers -v- Deputy Commander and another UKEAT/0455/12** in which the German wife of a British soldier was employed to manage a children's play area which was used by forces personnel, but was not exclusively for their use. That connection was held not to be enough. In the case of **Aldabe -v- Standard Chartered Bank [2012] EWCA Civ 1393** the employee was recruited in London for a job in Singapore. He attempted to claim unfair dismissal in London; he did not succeed. It was found that while the ET should not have taken into account his nationality, his lack of connection with the UK in terms of where he worked and lived was such that there was no jurisdiction. Mr Kemp referred to the case of **Dhunna -v- Creditsights Ltd** in which the court took the view that the ET had erred by applying the approach set out in **Lawson** without considering the cases which had followed. The principles set out in that case were to the following effect: –

(1) the overarching question is whether Parliament intended that ERA section 94 (1) would apply to a person in the circumstances of the claimant;

(2) the general rule is that the place of employment is decisive; but

(3) where the employment has much stronger connections both with Great Britain and with British employment law than with any other system of law the claimant will be within the scope of section 94(1);

(4) the comparative exercise is appropriate when the claimant is employed abroad. As suggested in paragraph 98 of Bates Van Winklehof of the comparison is between Great Britain and the jurisdiction in which the claimant works;

(5) the country in which the claimant lives is relevant. If he lives as well as works abroad an especially strong connection with Great Britain and British employment law is required before an exception can be made for him;

(6) when the claimant lives and/or works for at least part of the time on Great Britain, the comparison of connections with Great Britain and with the country in which he works is not required. All that is required is a sufficiently strong connection to enable it to be said that Parliament would have regarded it appropriate for an ET to deal with claimant's unfair dismissal claim.

72. The next case to which Mr Kemp referred was **Powell -v- OMV Exploration & Production Ltd [2014] ICR 63UKEAT/0131/13**. The claimant lived in the UK and was employed by a company incorporated in the Isle of Man which was managed and operated from Austria. He worked in Dubai for three weeks out of four and spent the fourth week in the UK. It was held that there was no jurisdiction despite his claim being stronger than in the current case.

73. Mr Kemp summed up this part of his argument by stating that it was clear that the employment tribunal had applied the correct test particularly in paragraphs 215 and 216. The claimant did not have a sufficiently strong connection with Great Britain and British employment law to enable territorial jurisdiction of the employment tribunal.

74. He argued that there was no inconsistency in holding that the ET had jurisdiction to the breach of contract claim but not for the unfair dismissal claim. The basis for contractual jurisdiction is entirely different from the statutory jurisdiction under ERA.

75. He argued that the only connections which the claimant had with Great Britain were that the entity found to be his employer was a UK company, there were some peripheral aspects of the employment relationship which were managed from Aberdeen, and that he had visited the UK once for a medical after an accident at work which took place in Nigeria. On the other side of the scales, he was a German national living in Germany, working in Nigeria, controlled by line managers in Nigeria, paid in euros from an account outwith the UK, did not pay UK tax and national insurance; and travelled to and from his work in Nigeria from his home in Germany. Thus it could not be said that it was perverse for the ET to have decided as it did.

76. Mr Kemp then turned to the question of EU rights. He argued that the case of **Bleuse** concerned a person living and working within the EU. That was sufficient to distinguish it from the present case. He also submitted that when the case of **Duncombe** was argued in the Supreme Court, there was a submission to the effect that the case of **Bleuse** was wrongly decided; however it was not necessary for the court to decide the issue. He argued that where work is performed outside Europe, EU derived rights are not applicable. Those rights set out in directives are addressed to member states for implementation within those states.

77. He argued that in the case of **Simpson** the question which was decided dealt with parties and work within the EU. He also noted that the case addresses matters on the basis that the international conventions have direct effect in determining the territorial reach of the UK Statute. He noted that that had not been considered in the case of **Bleuse** at paragraph 47 where

Elias LJ took the view that the Rome Convention did not have any bearing on the content of the mandatory laws. In so far as there is a conflict between the cases, he argued that **Bleuse** is correct.

78. Mr Kemp set out his understanding of the Rome Convention, the Rome 1 Regulation and the Brussels 1 Regulation. Mr Kemp addressed the case of **Simpson**. The case involved an employee who worked predominantly in Germany and who brought claims under the Sex Discrimination Act 1975 and Equal Pay Act 1970. The company has its registered office in London but the employee's address and place of work were in Germany. The contract was written in both English and German but provided that German would prevail in the event of any discrepancy. The employee could be transferred within Germany and could be required to travel inside and outside Germany from time to time. She spent some time working in London. The contract provided that any disputes would be governed and construed "exclusively in accordance with the laws of Germany" and that the place of jurisdiction was Frankfurt. The EAT overturned the employment tribunal's decision that it did not have jurisdiction to hear the claims, holding that article 19 of the Brussels 1 Regulation permitted the claims to be brought in the UK. By applying article 6 (2) of the Rome Convention the applicable law of the contract was German law. However article 7 (2) of the Rome convention meant that notwithstanding that the applicable law was German, the Sex Discrimination Act and Equal Pay Act are mandatory laws of the UK. In remitting the case to the tribunal the EAT observed that the claims may not be easy in some respects to determine, because in particular, whether there was a contract of employment within the meaning given to that phrase might depend on German law rather than English law. Mr Kemp submitted that in any event the case of **Simpson** dealt with parties and work within the EU. The current case does not. In the current case the only written contract must have involved Sunset. The difficulty is that everyone thought that that company no longer existed and neither did the contract. Mr Kemp argued that it is not clear what the EJ

decided. He must have decided that there is a contract with Fairway, and presumably he decided that at least the company's registered office was in the UK; however he did not decide what the applicable law of the contract was.

79. Mr Kemp submitted that in **Bates van Winklehof** the Court of Appeal decided that the case of **Lawson** was the most useful authority when determining territorial jurisdiction under the Equality Act 2010. On the facts of that case the claimant's very strong connections with Great Britain were such as to bring her employment dispute within the territorial reach of the UK legislation. He argued that the claimant correctly conceded before the ET that the same test applies to the claims of age and race discrimination under The Equality Act 2010 and to the holiday pay claim and unfair dismissal and therefore they were properly dismissed.

80. Mr Kemp argued that if the territorial scope of EU directives has to be determined one should proceed by applying basic principles. The first is that there is a presumption of a limited territorial scope. The second is that the EU is legislating for those states within its membership and therefore within the territory of the EU. This would apply, he argued, to the charter if it is properly referred to. He said that the ET was correct to note that there is no authority to the effect that directive has global reach. He said that would be extraordinary. He further argued that the EJ in paragraph 213 and 214 considered the choice of law as one factor. He referred to section 204 ERA and argued that the scope of the ERA cannot be determined by the choice of law in the contract, which Mr Kemp argued can be taken from the case of **Bleuse**.

81. As regards ground of appeal 7 Mr Kemp argued that it may be that there is no statutory protection available to a person employed by a UK company, as could be seen in the cases discussed. He submitted that neither the Charter nor Convention referred to by the appellant are material because they have no direct effect and confer no enforceable rights between private

citizens. He maintained that the case of **Bleuse** is authority to that effect.

82 In preparing this judgment I have had sight of the written submissions made by Mr Ohringer and Mr Kemp to the EJ. I note that while the clause in the contract with Sunset which refers to the Employment Protection (Consolidation) Act 1978 is mentioned in the written submission from Mr Ohringer, it is not discussed in the written reasons of the EJ. Nor was any submission made to me about it, according to my notes and to my recollection. It seems to me to be an important matter, as it may indicate that the parties to that contract, the claimant and Sunset, intended that the statutory law of UK would apply to the contract. I was not addressed on whether parties were at liberty to incorporate statutory law in such a fashion. The tests set out in the various cases are based on the connection or lack of connection between the employment relationship and the UK. Thus any attempt to include in the contract a clause to the effect that the statutory law of the UK applied is an important matter, on which parties might seek to submit that a connection did or did not exist.

83. In the written submissions made following the case of **Hasan v Shell and others**, Mr Kemp submitted that regulation 4 of the Equality Act 2010 (Work on Ships & Hovercraft) Regulations 2011 is not applicable to the instant case because the vessel upon which the claimant worked was not a UK registered ship. He submitted that the case supports the respondents' argument that in so far as the **Bleuse** principle is correct in law, it is inapplicable when the work is carried on outwith Europe.

84. Mr Ohringer argued that the respondent did not rely on these provisions either at first instance or before the EAT at the hearing, and that any attempt to rely on them now should not be allowed; a formal application to amend should be made if reliance is to be put on this matter. He submitted that if the respondent were to be allowed to rely on this point, further argument

and possibly an oral hearing would be required. He submits that his arguments would be to the effect that **Hasan** can be distinguished, as the employer was outside the UK. In any event, he argues that the decision in **Hasan** is incompatible with the clear statement in **Bleuse** and in **Ministry of Defence v Wallis** that EU derived rights must be upheld when Scots law is the law of the contract, or provides the mandatory rules applicable to the contract under the Rome convention. He refers to **Simpson**, which he argues is consistent with **Bleuse**. Mr Ohringer further indicates that he would anticipate making an argument that the requirements of paragraph 1 of the regulations must be dis-applied as they are inconsistent with article 3 of EC Directive 2000/78 ("the equality framework directive").

85. Thus it appears that Mr Kemp for the employer seeks to pray in aid the provisions of the regulations; Mr Ohringer objects to the late inclusion of such an argument and seeks a further opportunity to be heard if that argument is to be taken into account.

86. It is clear that the regulations were not drawn to the attention of the ET or the EAT. I have decided that the regulations should have been drawn to my attention at the hearing, and to the attention of the ET. On the face of it they have relevance to the questions raised in this case. I accept that Mr Ohringer is correct that they were not referred to and there has been no explanation given for that omission. While it is Mr Kemp who seeks to rely on them in his case, it seems to me that the existence of these regulations should have been drawn to attention by both parties. Had it been a matter of the respondent failing to take a point he could have taken I would not allow him to do so now. However the matter is of fundamental importance and I am prepared to allow fresh argument on it.

87. The regulations so far as material are in the following terms:-

> **"2. (1) In these Regulations –**

"the Act" means the Equality Act 2010;

…

(2) for the purposes of regulations 3 (3) (c)and 4 (2) (b) –

(a) the legal relationship of the seafarer's employment is located within Great Britain if the contract under which they seafarer is employed –

(i) was entered into in Great Britain; or

(ii) takes effect in Great Britain,

(b) whether the legal relationship of the seafarer's employment retains a sufficiently close link with Great Britain is to be determined by reference to all relevant factors including –

(i) where the seafarer is subject to tax;

(ii) where the employer or principles incorporated;

(iii) where the employer principle is established;

(iv) where the ship or hovercraft which the seafarer works is registered.

4. Application of Part 5 of the Act to seafarers working wholly outside Great Britain and adjacent waters.

(1) Part 5 of the Act applies to a Seafarer who works wholly outside Great Britain and United Kingdom waters adjacent to Great Britain if the seafarer is on –

(a) a United Kingdom ship and the ship's entry in the register and maintained under section 8 of the Merchant Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice, or

(b)…

and paragraph (2) applies.

(2) This paragraph applies if –

(a) the Seafarer is a British citizen or a national of an EEA State other than the United Kingdom or of a designated state, and

(b) the legal relationship of the Seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain."

In the interpretation section of the regulations, "designated state" is defined. It does not include Germany.

88. Thus it is not correct to say that the Equality Act 2010 is silent on territorial reach so far as it relates to seafarers. It may be that the matters that had been considered by the ET are largely those in the regulations, but the very existence of the regulations may lead to argument

on the intention of parliament as regards territorial reach.

89. As indicated above, it was discussed at the hearing that an invitation to make submissions should be made in order that I might have parties' views on the correct disposal of the case. Such an invitation has become all the more necessary in light of the lack of representation about the regulations and about the term of the contract with Sunset. I therefore seek representations from parties.

90. I do not intend to give a decision on the submissions made to me on the matter of the territorial reach of legislation because neither the ET nor I have been addressed fully. It may assist parties if I indicate that on the submissions which were made, I was not persuaded that the ET had erred in law in any substantive sense in deciding that the facts were such as to indicate the claimant's employment did not have a sufficiently close connection to establish territorial reach. My view, which has to be a preliminary view only, is that the state of the case law is such as to show that the place of performance being outwith the EU presents difficulty in relying on rights derived from EU law. Further, I did not regard the case of **Simpson** as in point, as the employee in that case did some work in Great Britain, and so the dicta about territorial reach may not be of assistance. The dicta on jurisdiction and choice of applicable law may or may not be in point depending on the decision on the contract of employment. In any event, these matters require to be properly addressed in light of the regulations. The matters on which submissions are necessary are: –

1. the correct disposal of the case in light of my decision that the ET has erred in law in its decision on the identity of the employer.
2. the correct disposal of the case in the light of the omission by either party to address the regulations in either the case before the ET of the case before the EAT.

3. the correct disposal of the case in the light of the lack of any explanation in the written reasons of the ET's view of the significance, if any, of appendix E of the contract.

91. Parties should seek to reach agreement on whether further submissions are to be in writing or are to be made orally. I give directions that parties should indicate by letter to EAT within 14 days of the seal date of this judgment the way in which they wish to proceed. Failing agreement, parties should make their submissions on the matter of the best way to proceed by letter, copied to the other party.