Appeal No. UKEAT/0345/14/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
on 26 March 2015
Judgment handed down on 28 April 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

SITTING ALONE

MR J OLSEN — APPELLANT

(1) GEARBULK SERVICES LTD
(2) GEARBULK (UK) LTD — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	MR JACQUES ALGAZY QC (of Counsel) & MR ADAM OHRINGER (of Counsel) Instructed by: Zimmer Solicitors 5 Water Lane London NW1 8NY
For the Respondent	MR THOM AS LINDEN QC (of Counsel) Instructed by: Watson Farley & Williams LLP 15 Appold St London EC2A 2HB

SUMMARY

PRACTICE AND PROCEDURE: Preliminary Issues

A peripatetic employee, who was Danish and had his home in Switzerland, freely entered into a contract with the First Respondent, a company incorporated in Bermuda, by which he was to occupy an international role, based in Switzerland, as its Strategy and Business Development Director. The contract was governed by Bermudian law and provided that the courts of Bermuda should have jurisdiction. Before doing so he had first considered but rejected a contract which provided for him to work in England, in a contract governed by UK law. He ensured that he never spent so many days in the UK as to be subject to UK taxation, and though whilst working in the UK (which he did for longer than in any other single jurisdiction) he stayed in accommodation in Esher, he arranged for it to be contracted for by a family company rather than in his own name. He was dismissed (he said as the result of making a public interest disclosure) in England, and was told of his dismissal by an employee of the Second Respondent. The ET held his employment was not sufficiently closely connected with the UK and UK law for him to be able to claim; that in any event the UK courts did not have jurisdiction on the proper application of the Brussels Regulation, and that the Rome Convention did not have the effect that the applicable law was that of the UK.

On appeal, the Claimant withdrew a ground alleging that the ET erred in failing to hold him an employee of the Second Respondent. He asserted that the ET had reached a perverse decision, as to the base from which he operated, and as to the conclusion that his employment was not sufficiently closely connected with the UK and UK law. This was rejected: it was not perverse. For the same reason, the challenge to the conclusion based on the Rome Convention had to fail (though under the Rome Regulation, as the applicable instrument, rather than the Convention),. Though the judge had failed to pay regard to an amendment of the ET1 when holding that The Brussels Regulation did not confer jurisdiction, her decision was plainly and obviously right on

other grounds, since she was wrong to hold that the Second Respondent was an agent of the First, within the meaning of the Regulation: from the facts she found, the only permissible conclusion was to the contrary. The appeal was dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Even though a succession of cases, three of which had been at the highest level, have considered the extent to which the provisions of the Employment Rights Act 1996 may be applied extra-territorially, further appeals continue to explore the impact of principle to different facts. Significant features of the underlying facts, in this appeal against a decision of Employment Judge Elliot sitting at London South (whose Reasons were promulgated on 22nd May 2014) are that the Claimant probably worked for more days in the year in the UK than he did in any other jurisdiction, but that before and whilst doing so he took great and deliberate care to distance himself as far as he properly could from the law of the United Kingdom.

2. The Claimant asserted he had been unfairly dismissed, that in any event his dismissal was automatically unfair because he had made a public interest disclosure, that there had been no written reasons for his dismissal, and (by later addition) also raised a contractual claim in respect of a failure to pay him the bonus to which he considered himself entitled. The first three claims were in respect of rights only provided for as such by the 1996 Act.

The Facts

3. The facts as found by the Employment Tribunal included, relevantly, that the Claimant was an employee of the first Respondent. That was in dispute before the Tribunal, where he claimed to have been under contract of employment with the second Respondent, a company incorporated in Great Britain. Though he appealed against the Tribunal's finding, and reasserted on appeal that he should have been regarded as an employee of the second Respondent, Mr Algazy QC (who appeared with Mr Ohringer for the Claimant) withdrew that appeal after the first day of argument before me. He was right to do so.

4. The Claimant is not British: he is a Danish national, domiciled in Switzerland and/or Denmark. His home at the relevant time was in Switzerland. His employer was incorporated in Bermuda. The Tribunal found that incorporation there was not simply a "flag of convenience" as it were but a genuine arrangement. His contract of employment was governed by Bermudian law, and the parties agreed to be subject to the jurisdiction of Bermuda. His work was as a Strategy and Business Development Director. It involved international responsibilities. His employer was part of a group of companies involved in a worldwide shipping business, transporting cargo by sea, operating terminals and providing logistic services. The Claimant's salary and expenses were processed in Bermuda. He was paid in sterling, but that was by his choice, which the Tribunal indicated was because he thought it financially most advantageous to him. The Tribunal found that not only did the contract specify his base as being in Switzerland, but it was so in reality: it was from there that he managed around 100 employees internationally. Some 15-20 of those at any one point would be in the UK.

5. The second Respondent was a member of the group of companies of which the first Respondent was also part. It is a company incorporated in England and Wales. The only major contract that it has is with another company in the group, Gearbulk Management Ltd. However, it employs about 74 employees in Weybridge in Surrey. It provides HR functions not only for them, but also to other members of the group. Though it provides that service for other members of the group, and thereby to the first Respondent, it does not have the power to commit the first Respondent without its prior consent (paragraph 130).

6. Though the Claimant worked from other offices internationally, and also from his home in Switzerland, he did some of his work from Weybridge. Over the three years in which he was employed between 2011 and 2013 he spent just under half his working time at the Weybridge office. This amounted, however, to less than 90 days. This figure had a critical significance: if

the Claimant had worked in the UK for more than 90 days, he would have been subject to UK taxation on his earnings.

7. The Claimant, who had never worked in England before, was introduced to Ms Rhule, an HR officer with the second Respondent, in March 2011, and was interviewed by her and two others one of whom was the Chairman of the holding company. After two interviews, he was sent an offer of employment by the second Respondent and a contract for his consideration. At that stage, it was envisaged that he would move to the UK, and the draft contract gave his place of work as Weybridge. The governing law was to be that of England and Wales. He could be required to work elsewhere, provided that was in the UK. The contract required him to relocate to the UK from Switzerland.

8. Though he gave serious consideration to moving to the UK, he did not accept this contract. Instead, after taking advice on his tax position, and mindful of both financial and family reasons (his future wife did not wish to move to England) he signed a contract instead with the first Respondent, under which he was to be domiciled in Switzerland, and was to be based in Switzerland, with the governing law being that of Bermuda.

9. The Tribunal carefully considered whether there was any disparity of bargaining power as between the Respondents and the Claimant which induced him to enter into the contract he did, rather than, for instance, the contract he had first been offered with its links to the UK. It concluded that there was no disadvantage to the second Respondent if he were to be subject to UK law, but that it was in his interests to structure his affairs so that he avoided the UK taxation regime. It found (paragraph 75) that he made a free choice to enter into a contract with the first Respondent.

10. Though rental accommodation was available for him in Esher, he was clear that he did not wish that to be taken in his personal name. Instead, a family company became the contracting party for the rental. The Tribunal found (paragraph 80) that this was part of his overall strategy to maximise his financial benefits. At paragraph 81 the Employment Judge said:

> **"I find that it was entirely open to the Claimant to sign the UK contract and that he freely chose not to do so. I find that the reason he made that decision was because it was financially advantageous for him to enter into a contract with the First Respondent and that no pressure of persuasion was put forward by either Respondent in relation to that choice. He made similar choices in relation to his place of residence, the currency for payment of his salary and the identity of the tenant on his UK property rental."**

It rejected his contention that the Bermuda arrangement was a fiction. It was (paragraph 88) a legitimate part of the group's corporate structure.

11. On the appeal, the parties were agreed, as they had been below, that the Claimant was to be viewed as a peripatetic employee: I consider this an important agreement, for reasons I shall develop later.

12. Though at one stage it seemed that Mr Algazy QC was contending that the Tribunal erred in law by failing to recognise that the Claimant's base was in the UK, and as such should have been held to be in the same category as that occupied by the Cathay Pacific pilot whose case (**Crofts v Veta**) was considered as one of the three in the appeal of **Lawson v Serco** [2006] ICR 250, IRLR 289 before the House of Lords, it became clear during submissions that he accepted that no separate test of "base" was applicable, and that the test which the Employment Tribunal should have applied, and hence that applicable on appeal, was that of a "sufficiently strong connection" as posed by Lord Hope in the Supreme Court in **Ravat v Halliburton Manufacturing and Services Ltd** [2012] ICR 389**.** In so accepting, he was adopting the view that the mere fact that the Claimant worked for much of his time – and probably on the facts for

a longer time within the UK than in any one other place outside it – was not in itself determinative of the question whether the Employment Rights Act 1996 extended to disputes arising out of his contract of employment, and to the question whether he had the right within section 94 and Part X to complain that he had been unfairly dismissed: it was nonetheless an important factor.

The Tribunal Decision

13. The Tribunal summed up the facts at paragraph 118 as follows:

> **"… the Claimant was an internationally mobile employee, employed on a contract of employment with a Bermudian company and who spent less than half of his working time in the UK. He was not controlled by the second Respondent. He was sufficiently senior to have a great deal of autonomy in the way he spent his working time. Unlike the Claimant in *Ravat* the Claimant in this case lived outside Great Britain and his base was Switzerland.**
>
> **119. He lived in Switzerland and worked from there when not in the UK or travelling elsewhere in the world… In this case the Claimant's home was Switzerland and not Great Britain."**

14. The Employment Judge applied a test which is apparent at paragraph 122 in which she expressed her conclusion:

> **"I find the Claimant's connections with Great Britain were not sufficiently strong for it to be said that Parliament would have regarded it as appropriate for the tribunal to hear his unfair dismissal claim. This is particularly so of an individual who was taking care to structure his working arrangements and the amount of time he spent in Great Britain so that he did not become subject to the British tax regime."**

15. The judgment then considered the correct forum in which to determine the Claimant's claim for breach of contract. Having concluded that the employer was the first, and not the second Respondent, she had decided that the Claimant had entered a contract of employment with an employer which was not domiciled in the EU. She therefore had to consider the requirements of Article 18(2) of the Brussels Regulation (EC Regulation 44/2001/EC) in that light. It provides:

> **"18(2) Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State."**

Unless the requirements of Article 18(2) were met, the rules of the jurisdiction applicable to nationals of the Member States in which the employee was domiciled would govern jurisdiction (Article 2). It thus became essential to decide whether the first Respondent had a "branch, agency or establishment" and whether the dispute before the Tribunal arose "out of the operations of" that branch agency or establishment.

16. As to the first of those two questions it was not argued that the first Respondent had a branch or establishment within the UK. Rather, the second Respondent was said by the Claimant to be an agency of the first Respondent within the UK. As to this, the judgment concluded at paragraph 126:

> **"I have considered under Article 18(2) whether the First Respondent (not being domiciled in a Member State) has a branch agency or establishment in a Member State. The evidence of Jonathan Campbell (paragraph 17 of his witness statement) was that the Second Respondent provides services as an agent to the Gearbulk Group. The evidence of Linda Noulton (paragraph 15 of her statement) was that the HR Team in Weybridge "acts as agents for the whole group". I find on this evidence that the First Respondent had an agency in the UK."**

17. As to the second question, the Judge identified the dispute as being whether the Claimant's contract had been broken by failing to pay him the bonus to which he was entitled. She identified the dispute by reciting paragraph 21 of the Grounds of Complaint from his original ET1. Since the bonus scheme which was subject to complaint was operated by Gearbulk Holdings Ltd, and this was a company incorporated in Bermuda, it was not a dispute "arising out of the operations of" the Second Respondent: and "indeed the Second Respondent had no authority to commit the First Respondent or any other group company to the payment of a bonus to the Claimant."

18. Accordingly, because the dispute did not arise out of the operations of the agency which the Employment Judge found to exist, the Brussels Regulation did not operate so as to confer jurisdiction on the Courts of the UK.

19. If the Brussels Regulation did not apply, the next question she asked was whether the Rome Convention did. The Judge came to the conclusion that since the parties had expressly chosen in their contract that Bermuda should be the place of jurisdiction then, applying Articles 3 and 7 of the Rome Convention, the UK Courts did not have jurisdiction within its terms. Accordingly, the claim failed.

The Appeal

20. Though 12 grounds of appeal were asserted initially, by the time it came for decision only grounds under 3 broad heads remained: (1) the territorial scope of the **Employment Rights Act 1996**; (2) the correct forum for the breach of contract complaint; and (3) the applicable law.

Territorial Scope: the Appeal

21. Mr Algazy QC and Mr Ohringer drew attention to the evolution of exemplars of principle following the judgments in **Lawson v Serco** to a statement of generally applicable principle in the two subsequent Supreme Court decisions to have considered the question. In the first, that of **Duncombe v Secretary of State for Children, Schools and Families (No.2)** [2011] ICR1312 Lady Hale said at paragraph 8:-

> **"The principle appears to be that the employment must have much stronger connections both with Great Britain and with the British Employment law than any other system of law. There is no hard and fast rule and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples given for they are merely examples of the application of the general principle".**

In the second, **Ravat,** Lord Hope referred both to the need for an employment relationship to have a "stronger connection with Great Britain than with a foreign country where the employee works" and there should be a "sufficiently strong connection" (with the UK and UK employment law) for Parliament to have regarded it as appropriate for a tribunal to hear his claim.

22. In Counsels' submission, given these authoritative statements of the applicable tests, the answer to the questions posed by a case such as the present could be recognised by the routes adopted by the Employment Appeal Tribunal in first **Simpson v Intralinks** [2012] ICR1343, and then **Powell v OMV Exploration** [2014] ICR 63. In those cases three questions were posed for answer: (i) is there "international jurisdiction": a question to be determined by reference to the Brussels Regulation?; (ii) does the Claimant fall within the scope of the relevant legislation; i.e. the "territorial scope"?; and (iii) what is the applicable law of the contract: to be determined by reference to the Rome Convention (now the Rome Regulation)?[1] (In substance, they correspond to the three broad grounds of appeal, though they were argued in the order set out in paragraph 20 above, rather than the order just mentioned).

23. As to the second of these questions, the Tribunal had erred in failing sufficiently to identify the base from which the Claimant worked. The "base" test was first elaborated by Lord Denning MR in **Todd v British Midland Airways Ltd** [1978] ICR 959 at 964:

> **"A man's base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas. I would only make this suggestion. I do not think that the terms of the contract help much in these cases. As a rule, there is no term in the contract about exactly where he is to work. You have to go by the conduct of the**

[1] These were originally adopted from an article by Louise Merrett. After conclusion of the argument, I became aware of, and subsequently the parties copied to me, a further article by the same author. I have considered it, and see it as broadly supportive of views I express later in this judgment, but it does not require further detailed argument.

parties and the way they have been operating the contract. You have to find at the material time where the man is based."

Thus in **Todd** an employee's base was regarded as being the place from which he worked as a matter of fact, and not the place which his contract identified as being his base (although these two places might, of course, often be one and the same). The Tribunal here had taken too narrow an approach, focussing wrongly on contract, although the **Todd** approach had been reinstated (after initial appellate scepticism) by Lord Hoffmann in **Lawson**.

24. In **Bates van Winkelhof v Clyde and Co**, in the Court of Appeal [2013] ICR883, Elias LJ at paragraph 98 contrasted a case where an applicant is employed wholly abroad with one where an applicant lives and/or works for at least part of the time in Great Britain. In the former case there is a strong connection with the jurisdiction abroad, and Parliament can be assumed to have intended in the usual case that that jurisdiction, rather than that of Great Britain, should provide the appropriate system of law. In such circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work abroad. In the second case, by contrast, the territorial attraction is:

"…far from being all one way, and the circumstances need not be truly exceptional before the connection with the system of law in Great Britain be identified. All that is required is that the Tribunal should satisfy itself that the connection is, to use Lord Hope DPSC's words:

'Sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim.' "

25. Mr Algazy QC complained that at paragraph 118 of its reasons the Tribunal found that the Claimant's base was Switzerland, and at paragraph 120 that his home was Switzerland, but set out no particular fact from which this could be derived: he submitted that the Tribunal had taken the reference to "base" in the contract as the beginning and end of its enquiry. It did not ask where the Claimant was "ordinarily working". Inferences might have been drawn to suppose that his base was in Weybridge and not in Switzerland – the fact that he was not paid to

travel from his home in Switzerland to Weybridge was indicative. To hold that he was ordinarily working in Switzerland was perverse.

26. Even if the conclusion as to "base" were not in error, the Tribunal in its reasons had not drawn specific attention to paragraph 29 of **Ravat**. Lord Hope there identified that it was a question of law whether section 94(1) applied to the particular employment, but it was a question of fact, bearing on the conclusion of law, "…whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain." The Tribunal in its conclusion had placed significant weight upon the determination of the Claimant to organise his affairs so that he did not pay UK tax. The contractual terms reflected this. It ought to have remembered that parties to an employment contract cannot lawfully contract out of the protection given by the Act. Where tax affairs were organised was not relevant to the decision whether unfair dismissal rights extended to a person such as the Claimant.

International Jurisdiction: The Appeal

27. Mr Algazy QC's argument as to international jurisdiction began by recognising that the only basis for asserting it was if Article 18(2) of the Brussels Regulation applied. Its terms are set out above. He argued that the first Respondent had an agency in the UK. That in itself was not sufficient. The Claimant had to show that the disputes arose out of the operations of the agency. This is where he asserted the Tribunal had fallen into error. The policy of international conventions such as the Brussels Regulation was to lean toward protection of employees (see the observations in **Simpson** at paragraph 58, and those of Tuckey LJ in **Samengo-Turner and Others v J and H Marsh and McLennan (Services) Ltd and Others** [2008] ICR 18 at

paragraph 25: see also the opinion of the Advocate General Mengozi in **Mahamdia v Algeria** [2013] ICR1, ECJ, paragraph 35).

28. The Tribunal took the wrong starting point: it appeared to regard the dispute as relating only to bonus, because of the terms of the original ET1. The ET1 had however been amended. The dispute as described in the amended ET1 related not just to bonus but to dismissal and notice. The dismissal was in fact effected in the United Kingdom by Mr Norborg as the Claimant's immediate manager and was said by the Respondents to be taken for performance reasons.

Applicable Law: The Appeal

29. As to "applicable law" the Claimant's contract was subject to the Rome Regulation which applies to contracts, such as the present, entered into as from 17th December 2009. Though the Convention (rather than Regulation) was considered by the Tribunal, it was agreed that there was no material difference between the applicable provisions – though there is a change of numbering since what was Article 6 of the Rome Convention is now Article 8 of the Regulation.

30. The "Rome 1 Regulation" (Regulation 593/2008/EC) applies to contractual obligations in civil and commercial matters. By Article 3 it provides for freedom of choice for the parties: under 3(1):

> **"A contract shall be governed by the law chosen by the parties. The choice shall be made expressly, or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or part only of the contract."**

31. Applying this, Mr Algazy QC recognised that the Tribunal would have to respect the choice of the parties that the law of Bermuda should apply to the Claimant's contract.

However, this ignored the provisions of Article 8 to which he complained that the Tribunal should have given regard. That relates to individual employment contracts and provides:-

> **"(1) An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 3 and 4 of this article.**
>
> **(2) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which, or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.**
>
> **(3) Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.**
>
> **(4) Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply."**

32. **Koelzch v Grand Duchy of Luxembourg** (C-29/10) [2012] ICR112 concerned an employee who was an international lorry driver, domiciled in Germany but employed by a Luxembourg company. He transported goods from Denmark to various destinations, mainly in Germany, by means of lorries stationed in Germany but registered in Luxembourg. He argued that although he worked in more than one country, he systematically returned to Germany and organised his activities there, so he could be treated as habitually working in Germany for the purposes of the predecessor of Article 8. The European Court of Justice held (paragraph 45) that:-

> **"…the criterion of the country in which the work is habitually carried out must be given a broad interpretation and be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities."**

33. Mr Algazy QC pointed out that once it were accepted that the Claimant habitually worked in the United Kingdom, Article 8(1) would apply: it was common ground that amongst

provisions that "cannot be derogated from by agreement under the law" within the meaning of that article are the provisions of the **Employment Rights Act 1996**, since they cannot be contracted out of (see Section 203).

Discussion

34. I shall deal with the arguments in the order in which they were addressed:

Territorial Applicability

35. At paragraph 24 of **Lawson v Serco**, Lord Hoffmann said that the question whether Section 94(1) of the **Employment Rights Act 1996** applied to the employment relationship in question was a question of law: it either applies, or it does not. It is not a matter of discretion. He returned to this point at paragraph 34, where he considered the application of Section 94 "peripatetic employees who are based in Great Britain", adding that:-

> **"Whether one characterises this as a question of fact depends, as I pointed out in Moyna v Secretary of State for Work and Pensions [2003] 1WLR 1929, upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review. I would be reluctant, at least at this stage in the development of a post-Section 196 jurisprudence, altogether to exclude a right of appeal. In my opinion, therefore, the question of whether, on given facts, a case falls within the territorial scope of Section 94(1), should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect"**

36. The words "at least at this stage in the development of a post-Section 196 jurisprudence" anticipate that a change might be desirable once that jurisprudence had sufficiently developed. In paragraph 29 of **Ravat**, quoted above, Lord Hope treated the question of whether a case was within the scope of Section 94(1) as a question of law, but also a question of degree: and recognised that it was a question of fact whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair

dismissal in Great Britain. At the outset of the hearing I asked whether the time may now have come to treat the question of "sufficiently close connection" as indeed being a question of fact, such that a decision by a Tribunal, properly directing itself as to the applicable law, with regard to appropriate cases, would disclose no error of law unless it were shown to be perverse. Mr Linden QC submitted that this was so. In the light of Lord Hope's words, I consider his submission to be well founded.

37. The critical findings of fact, as it seems to me, are summarised in paragraph 118, though they are set out in greater detail earlier in the judgment. The Employment Judge there thought that the Claimant was an "internationally mobile employee". As I have noted, the parties accepted that definition. It was not asserted that simply because he spent a considerable period of time in the United Kingdom he was necessarily within the scope of the Act. Indeed, Lord Hoffmann devoted paragraphs 25-27 of his judgment in **Lawson** under the sub-heading "The Standard Case: Working in Great Britain", before turning to "peripatetic employees". The parties were agreed that the present case was one of a peripatetic employee. At the outset of the case, I was uncomfortable with describing the Claimant as a peripatetic employee, and thus applying the principles expressed by Lord Hope in **Ravat**, and Elias LJ in the Court of Appeal in **Bates** on that footing (even if the latter placed considerable emphasis upon the extent to which an employee might work within jurisdiction). Intuitively, it might be supposed that a person working within the jurisdiction for any substantial period of time should attract the law of that jurisdiction to the work he does, and the working relationships he has, at least within the territory of that jurisdiction. However, in the course of Mr Linden QC's submissions, I began to appreciate that the Tribunal did not see the Claimant, on the facts it found, as someone who regularly worked in an office in Great Britain and only irregularly elsewhere: but instead saw him as a person who was based in Switzerland, in order to perform an international job. That took him more to the United Kingdom than to any other single jurisdiction, if the contrast was

between one single jurisdiction and another: but more to jurisdictions other than the UK than to the UK. The reference to autonomy and seniority in paragraph 118 meant that it was entirely a matter for the Claimant where he chose to perform the tasks which had international effect. The model which the Tribunal had in mind, therefore, was not that of the worker in the UK who occasionally worked elsewhere, nor one who was based in the UK, but one who was based outside the UK, who could discharge his obligations wherever in the world he chose – here finding it more convenient to do so to a substantial degree in the UK – though never so much as to make him a resident for tax purposes, and who had taken great steps to distance himself from having any permanence in the UK by reason of his arrangements in respect of accommodation. Some indication that the view that such a person does not have a sufficiently close connection with the UK and with UK employment law is not perverse may be given by the facts of **Fuller v United Healthcare Services and Radkiewicz**, 4th September 2014, UKEAT 464/13. Though, as paragraph 18 of the judgment of Lady Stacey in the Employment Appeal Tribunal in that case recognises, the Employment Judge in **Fuller** was correct to direct herself that "ordinarily working in the UK at the time of … dismissal is the strongest possible indication that Parliament would intend the Claimant to fall within the legislative grasp of Section 94(1)…", nonetheless in the overall context of the extent of work undertaken in the UK (less than half the working time) and of all the circumstances there was an insufficiently strong connection with the UK and UK employment law to enable it to be said that Parliament would reasonably have intended the Claimant to have the right to present an unfair dismissal complaint to an Employment Tribunal in the UK.

38. In that case the Claimant was a citizen of the United States of America, employed by a United States company and paid in United States dollars. He undertook an international assignment which involved his working in London for about half his time and living in accommodation rented for him there by the Respondent. Lady Stacey emphasised that the

strength of connection in that case, the facts of which have more than passing similarity to the ones before me, had not just to be with Great Britain, but also with British employment law. She found that (at paragraph 44):

> **"…in light of the findings in fact concerning the nature of the contract and the Claimant's initial continuing connection with the USA it seems to me that it cannot be said that his employment relationship with his American employer has a strong relationship with the UK and UK employment law. The result of that decision is that there is no territorial jurisdiction of the ET over his contract."**

39. To focus on the connection which an employee has not just to Great Britain but also to British employment law moves away from attaching sole importance to the place where an employee habitually, physically works. The need to consider British employment law as well as connections with Great Britain originates at paragraph 40 in the speech of Lord Hoffman in Lawson. It was taken up by Lord Hope in **Ravat** (see, e.g., paragraph 29) and began to occupy centre stage in **Fuller.** It may be that the nature of the employment law right being asserted is also of significance. The enquiry before me is as to the territorial extent of the **Employment Rights Act 1996.** There is an analogous question of jurisdiction which arises under the **Equality Act 2010**. There may be a stronger case for supposing that Parliament intended peripatetic workers with an international role in a global business to be governed by the law which they had agreed to adopt as to their contract, and, hence, dismissal from contract, and therefore those rights which related centrally to the contract, as opposed to matters which more obviously involve the assertion of a fundamental civil wrong, in which society more generally has an interest, such as the elimination of discrimination.

40. If further demonstration is needed that it is not necessarily perverse to hold that the contract applicable to an employee who habitually works in one jurisdiction, but has his home in another, may be that of the employee's home is demonstrated by the decision of the Court of Justice in **Schlecker v Boedeker** (C-64/12) [2013] ICR 1274. Albeit a case concerning Article

6(2) of the Rome Convention, the decisive question was whether it appeared from the circumstances as a whole that the Claimant's contract was more closely connected with a country other than that in which she habitually worked, such that the law of that other country was applicable in substitution for that of the first. The Claimant lived in Germany, and commuted to her work in the Netherlands, though paying social security contributions in Germany. She had worked in the Netherlands for some eleven years when she was told that her position as manager for the Netherlands was being abolished and was invited to take up another post in Germany. She took proceedings in the Netherlands. Her employer, however, contended that the contract of employment was more closely connected with Germany, and such it was found. At paragraph 41 of the judgment the Court said:

> **"…among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case such as the parameters relating to salary determination and other working conditions.**
>
> **42. It follows from the foregoing that Article 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period without interruption in the same country, the national court, may, under the concluding part of that provision, disregard the law applicable in that country, if it appears from the circumstances as a whole that the contract is more closely connected with another country."**

41. The Tribunal in the present case made a finding of fact as to the base of the Claimant, which was an important factor in its decision. There is some force in Mr Algazy QC's criticism that this is sparsely reasoned. However, it is not the case that every finding of fact by a Tribunal has itself to be justified by reference to other findings of fact which bear upon it before it can be said that there is such a failure of reasoning as to amount to an error of law. In this particular case there were not only considerations which favoured holding that Switzerland ***was*** the base – the fact that the Claimant had and maintained his home there; the fact that he worked from there when he was not working in the UK; the fact that his telephone costs in Switzerland

were paid for by his employer; the fact that he deliberately chose to remain in Switzerland, doing a job which he could do from Switzerland, in part because at the time he started his job his fiancée (later his wife) did not wish to move from there. There were reasons also to hold that it ***was not*** the UK. In particular, the Tribunal emphasised throughout its findings of fact the extent to which the Claimant sought to distance himself from the United Kingdom jurisdiction. It was no mere accident, in this case, that his contract did not specify England as the place of jurisdiction and English law as the applicable law; he deliberately arranged his affairs so that he did not pay tax in the United Kingdom; he avoided having a UK residence in his own name. He was offered a contract within the UK and rejected it. The Tribunal therefore set out reasons both for concluding that his base was Switzerland, and reasons for concluding that wherever else it might be, it was not in the UK. The Tribunal heard the evidence, and listened to the cross-examination. The Judge plainly took considerable care in reaching her findings of fact. I do not accept that either the approach to determining where the Claimant's base was, or the conclusion that it was in Switzerland, were erroneous in law as being perverse.

42. Once, therefore, the conclusion is reached as a matter of unappealable fact that the Claimant was based outside the UK, conducting work which although it involved the UK was international in its scope, and was someone whom the parties agreed should be treated as a peripatetic employee, the conclusion which the Tribunal reached that his employment did not have a sufficiently close connection with the United Kingdom was permissible.

43. I reject, too, Mr Algazy's argument that in paragraph 122 the Tribunal was in error in concluding that it was relevant to consider that the Claimant took care to structure his working arrangements and the amount of time he spent in Great Britain such that he did not become subject to the British tax regime. In my view the Tribunal was not only entitled to take this into account, but bound to do so, particularly in an area of law which concerns the protection of

employees. Where an employee is autonomous, and (perhaps unusually, but nonetheless in this case) able to negotiate his own contract as at least an equal party without any pressure being placed upon him, the free choice of law and jurisdiction which would apply, and hence (and specifically, here) that which would not, should in general be respected. To this extent, the approach taken to the interpretation and application of Section 94 of the Employment Rights Act 1996 coincides with the approach taken generally within European law as demonstrated in connection with the Brussels and Rome 1 Regulations (as indeed the decision in **Schlecker** demonstrates).

International Jurisdiction: The Brussels Regulation

44. Mr Linden rode two horses in his response to the argument that Brussels Regulation applied. First, he submitted that it had not been argued below that the decision to deprive the Claimant of a bonus was made in the UK. Though the Respondent had put the matter in issue on the appeal, it had not been addressed in the Claimant's skeleton argument before the Appeal Tribunal. No notes of evidence or submission had been obtained to show that the point was taken: and there was nothing in the judgment to demonstrate that it had been. There was no letter of dismissal put before the Tribunal; nor was there anything said in the Claimant's witness statement (prepared for the purpose of the Employment Tribunal hearing) as to the precise facts of his dismissal; nor was anything said in the Respondent's witness statements. He recognised that in the Claimant's written closing submissions to the Tribunal, under the heading "Facts", in which it was asserted that certain facts were not substantially in dispute, one of those facts was said to be that Mr Norborg, to whom the Claimant reported, was a Gearbulk UK employee based in the UK and was the person who decided to terminate the Claimant's employment. However, no argument drawing attention to these facts was made in that part of the closing submissions which dealt with the application of Article 18(2) so as to suggest they were relevant to it.

45. I was told by Mr Algazy that Mr Ohringer in cross-examination had put to Mr Campbell (Chief Financial Officer of the Second Respondent, who was not involved himself in the decision to dismiss) that Mr Norborg had effected the dismissal.

46. The Grounds of Resistance were to the effect that the Claimant had had a conversation with Mr Norborg and was told that he would be dismissed. This, in the submission of Mr Linden, was to anticipate rather than to effect dismissal. It was to report a conclusion reached by others: had there been an issue as to where the decision to dismiss was taken and by whom this would have been an issue which needed to be determined, in respect of which further evidence would have been required. It had not been raised in those terms.

47. The Respondent's case, as I understood it, was broadly that whereas Mr Norborg was the messenger, the message was written by others. Accordingly, Mr Linden QC took the point that the Tribunal could not be said to be in error of law for failing to address a point which had not been raised clearly in evidence before it, nor where the facts relating to it had been attached to any submission relating to Article 18(2) which is the point to which it is now said to be relevant. It would be unfair now to permit it.

48. Mr Algazy's response was that the matter was raised in the pleadings in the terms I have indicated. Mr Norborg was not called before the Tribunal. Mr Ohringer asked the appropriate question, therefore, of Mr Campbell, obtained an answer which suited his case, and moved on. He should not be criticised for doing so. The matter was before the Tribunal Judge in closing submissions. For his part, Mr Algazy argued that the Respondent to the appeal sought to uphold a decision of the Tribunal on a further ground – namely, that on its findings of fact the second Respondent was not an agency of the first Respondent within the meaning of the

Brussels Regulation. Yet Mr Kibling, who appeared below for the correspondent, had not specifically advanced that point in his closing. It should not have it both ways.

49. It is well recognised, following **Glennie v Independent Magazines UK Ltd** [1999] IRLR 719 that the Appeal Tribunal does not have an unfettered discretion to decide on balance whether justice requires that a new point relating to an issue (in **Glennie** as it happens a jurisdictional issue) should be allowed to be taken. As Laws LJ said, at paragraph 18 in the report of **Glennie** [1999] IRLR 719:

> **"The Employment Appeal Tribunal possesses a discretion, which must be exercised in accordance with established principles, to allow a new point to be raised before it for the first time. It is a general principle of the law that it is a party's duty to bring forward the whole of his case at the proper time… a new point ought only to be permitted to be raised in exceptional circumstances… if the new issue goes to the jurisdiction of the Employment Appeal Tribunal below that may be an exceptional circumstance, but only, in my judgment if the issue raised is a discrete one of pure or hard-edged law requiring no or no further factual enquiry…"**

The general principles applicable to exercising the limited discretion recognised in that extract were collected from the decided cases and detailed in **Secretary of State v Rance** [2007] IRLR 665. Both **Glennie** and **Rance** are among the bundle of 24 "familiar authorities" which parties do not need to copy before advancing their cases in the Appeal Tribunal; the territory they cover is frequently travelled.

50. Essentially the question for me here is not whether I should exercise my discretion but whether the circumstances have arisen in which I might do so. Though I have very considerable reserve that a Tribunal should be criticised for making an error of law when it may not have appreciated that a point was actually in issue before it, it is clear that the applicability of the Brussels Regulation was significant, and that the parties differed on it. Moreover, the Tribunal Judge appreciated that Article 18(2) was the fulcrum of the argument. The fact that the dismissal may have been effected in the United Kingdom by a person who was an employee

not of the First Respondent but of the Second was capable of demonstrating the way in which First and Second Respondents related to one another. Similarly, it was necessary for the Tribunal Judge to determine whether the Second Respondent was an agent of the First. She spent a few sentences deciding the point. Though neither argument (the identity of the person who took the decision to dismiss, and the question of whether the Second Respondent was an agent of the First) was flagged up to the Judge as requiring detailed consideration, they were just sufficiently in play for me to reject the suggestion made by Mr Linden on the one hand, and though less emphatically, by Mr Algazy on the other, that the parties should be artificially restrained on this appeal. The reality is that the focus of the parties, in a case which was complex factually, was elsewhere: the matters now relied on were peripheral to the Judge's vision, but both nonetheless seem to me just sufficiently within sight to be arguable, though, in both cases, I do so with the reserve appropriate to dealing with a point which only really takes on significance for the first time on appeal, even if technically it has been raised before.

51. The Judge was in error in having regard to the initial ET1 rather than the amended grounds. She gave no consideration to whether matters beyond the bonus scheme (such as notice of dismissal) had arisen out of the operations of the agency. Accordingly, but for the question whether the decision can be sustained upon the basis that the Second Respondent was not an agent of the First Respondent within the meaning of the Regulation, the appeal would be allowed on this ground and remitted for further consideration.

52. However, I have concluded that on the findings of fact made - limited though they were - the Judge should have found that the Second Respondent was not an agency of, though it may have provided services to, the First Respondent. Her conclusion was thus plainly and unarguably right, and despite her error the appeal on this basis must also fail.

53. The reasons for this conclusion are as follows. In **Mahamdia v Peoples Democratic Republic of Algeria** Advocate General Mengozzi drew together the case law relating to the "agency" to which the Brussels Regulation refers. In **Somafer SA v Saar-Ferngas AG** (Case 33/78) [1978] ECR2183, the court had stated this involved

> **"…the concept of branch, agency or other establishment which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such a parent body but may transact business at the place of business constituting the extension"**

In **Blanckaert v Willems PVBA v Trost** (c-139/80) [1981] ECR 819 at paragraph 12, and **SAR Schotte GmbH v Parfums Rothschild Sarl** (c–218/86) [1987] ECR 4905 paragraph 16 a branch agency or establishment "must appear to third parties as an easily discernable extension of the parent body". In **De Bloos SPRL v Societe en Comandite par Actions Bouyer** (c-14/76) [1976] ECR11497:

> **"One of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body."**

54. This links to where the disputes arise out of the operations of such an agency. Thus in **Mahamdia** it was noted that

> **"…the dispute must concern acts relating to management of those entities or commitments entered into by them on behalf of the parent body".**

Although the definition I have to identify is one which is autonomous, I note that the approach is similar to that taken in English law to that which constitutes agency, in which the function of the agent is to bring third parties into contractual relations with its principal.

55. The Employment Judge found that the parent company of the group was Gearbulk Holdings Ltd. The Second Respondent acted as agent for another company in the group (Gearbulk Management Ltd (paragraph 44)), by agreement with it. Under its agreement with

Gearbulk Management, the Second Respondent carried out some day to day administration and business support for the wider group. This was a finding that it delivered "services ***to***" the wider group: it does not suggest that the Second Respondent negotiated business ***for*** the First Respondent (or members of the wider group) with third parties so that those third parties did not need to deal directly with the First Respondent (applying **Somafer**).

56. The Tribunal also found that the Second Respondent provided HR services for the First Respondent. Indeed, Ms Rhule conducted the original interview for employment with the Claimant. The evidence it found was not that the Second Respondent could bind the First but rather that the First Respondent would not be bound unless it separately decided so to be. The Second Respondent was neither the alter-ego of the First (see **Somafer**, at page 2192 of the Report, paragraph 12) nor an independent commercial agent for the First Respondent (**Blanckaert**, page 829 paragraph 12).

57. The basis on which the Judge determined that the Second Respondent was agent of the First was insufficient for the findings she made. At paragraph 126 she relied upon the fact that the Second Respondent provided services "as an agent **to** the Gearbulk Group". That is not within the concept of agency to which the European cases relate. The evidence of Linda Noulton was to similar effect: what is described are services to the Group, not acting as a representative of the Group in transactions with third parties. It was for the Claimant to prove that the Second Respondent was an agent of the First within the meaning of the Article. I have not been directed to any other evidence touching upon the question, capable of showing that the Second Respondent effected contractual relations between the First Respondent and third parties.

58. I have concluded that Mr Linden is right to submit that on the findings of fact made and recorded by the Tribunal, it was bound to find that the Claimant had not established that the Second Respondent was agent for the First.

Applicable Law: Rome 1

59. Thought the Claimant's contract was subject to the Rome Regulation, the judgment refers to the Rome Convention. Counsel are agreed there is no material difference between the relevant provisions. I shall take those from the Rome Regulation, even though the judgment itself refers to the Convention. This Regulation determines the applicable law.

60. Article 8(4) takes the argument back to the question of close connection. In determining that the Claimant's contract was not sufficiently closely connected to the UK and to UK employment law, the Employment Judge was holding that if Great Britain were the country indicated by Articles 8(2) or (3), the contract was nonetheless more closely connected with a country other than Great Britain. I need not, therefore, resolve whether within Article 8(2) the Claimant could be said habitually to be carrying out his work from the UK, though it seems to me unlikely that this would be the case given the conclusion of the Judge as to the Claimant's base and the fact that in **Koelzsch** the place where work is habitually carried out is (paragraph 45, judgment) to:

> **"be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activity, to the place where he carries out the majority of his activities."**

Here, on the facts, the Tribunal thought his centre of activity – his base – was in Switzerland, and not in Great Britain, for the reasons I have set out above. However, Article 8(3) indicates that British law should apply, since the test appears to be a factual one, and the words "place of business" may indicate a wider concept than that of "branch, agency or establishment" for the

purposes of the Brussels Regulation. Nonetheless, the Claimant's appeal founders upon the central question of close connection.

Conclusions

61. It follows that each of the three grounds of appeal are dismissed. The judge was entitled to hold as a matter of fact that there was no sufficiently close connection between the Claimant's employment and the UK and UK employment law. It was not perverse to hold that his base was not in the UK, and was in Switzerland. The Rome 1 Regulation did not apply for the same reason. Though, on the assumption that the Second Respondent was an agent of the First Respondent within the meaning given to that word under the Brussels Regulation, the Employment Judge was in error in holding that the dispute could not have arisen out of the operations of the agency, she was nonetheless right to reject the applicability of that Regulation since on her own findings of fact she was bound to hold that the claimant had not proved that the Second Respondent was actually such an agent.

62. The appeal is dismissed.