Appeal No. UKEAT/0464/13/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 March 2014
Judgment handed down on 4 September 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR MICHAEL FULLER — APPELLANT

UNITED HEALTHCARE SERVICES INC — FIRST RESPONDENT
MR ED RADKIEWICZ — SECOND RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS AMY ROGERS (of Counsel) Instructed by: Taylor Wessing Solicitors 5 New Street Square London EC4A 3TW
For the Respondents	MR DAVID CRAIG (of Counsel) Instructed by: Baker McKenzie LLP 100 New Bridge Street London EC4V 6JA

SUMMARY

UNFAIR DISMISSAL

SEXUAL ORIENTATION DISCRIMINATION/TRANSEXUALISM

VICTIMISATION DISCRIMINATION - Whistleblowing

The claimant made claims of unfair dismissal under **Employment Rights Act** (ERA) section 94(1), sexual orientation discrimination under the provisions of the **Equality Act 2010** and automatic unfair dismissal in respect of protected disclosures under section 103A of **ERA**. The respondents argued that the Employment Tribunal did not have territorial jurisdiction, as the claimant's employment did not have sufficient connection to the UK. They argued that the claimant was a US citizen, employed by a US company and paid in US dollars. While he travelled extensively for his work he undertook an international assignment which involved his working in London for about half of his time and living in accommodation rented for him by the respondent.

The Employment Tribunal found that it had no jurisdiction. The appellant argued that it had erred in law by so finding.

Held: there was no error of law by the Employment Tribunal. In light of the factual findings made by the Employment Tribunal, which it was entitled to make, it applied the law to those findings correctly. Appeal dismissed.

THE HONOURABLE LADY STACEY

1. This is a case concerning jurisdiction, or territorial reach, under the **Employment Rights Act 1996** (ERA) and the **Equality Act 2010**. The judgment under appeal was given by Employment Judge A Stewart, sitting alone at London Central on 9 May 2013. The decision was that the tribunal has no jurisdiction to consider the claimant's complaints under **ERA** or under the **Equality Act 2010**.

2. The tribunal heard a pre-hearing review for the purpose of determining whether or not the tribunal had territorial jurisdiction to consider the claimant's complaints of unfair dismissal under section 94(1) of **ERA**, sexual orientation discrimination under the provisions of the **Equality Act 2010** and automatic unfair dismissal on the grounds of his having made protective disclosures under section 103A of the **ERA**.

3. The facts were largely not in dispute. The claimant was employed by the first respondent. It is a company incorporated in the United States of America and is part of the United Health Group (UHG), a health and wellbeing business which has about 120,000 employees throughout the world. The head office of the first respondent is in Minnesota.

4. The claimant is a US citizen whose home is in Texas. He started his employment as Chief Operating Officer, international, of Ingenix International (later called Optuminsight), a segment of UHG, on 12 July 2010. He was based at an office within his home in Texas but spent a lot of time travelling worldwide. His contract provided for salary, participation in a bonus scheme and a sign-on bonus. He was entitled to stock appreciation rights and a pension scheme. His employment relationship was "at will" in that either party could terminate it at any

time and for any reason and all employment disputes would be determined solely by arbitration, administered by the American Arbitration Association. The Employment Judge was told that the contract was silent as to the applicable law; the claimant asked that the tribunal did not determine the issue as he may wish to pursue a contract claim in another court, but he invited the tribunal to proceed on the assumption that the applicable law is not UK law for the purposes of the Employment Tribunal. The respondents' position before the tribunal was that whatever the applicable law of the contract, it is not English law.

5. In October 2011 the second respondent, Mr Radkiewicz was in charge of Optum International which combined the international elements of two business, OptumHealth and Optuminsight. He offered the claimant a newly created role of managing director of UnitedHealth UK Ltd, a subsidiary of UHG, incorporated in the United Kingdom. The role would involve assuming responsibility for providing operational leadership to support the development and growth of Optuminsight's international businesses in the United Kingdom and Europe as well as the Middle East and Africa. The claimant was to retain his previous role of Chief Operating Officer, international, of Optuminsight but his focus would be in Optuminsight's business in the UK and the Middle East. Negotiations followed and it was agreed that the claimant would be allowed time with his partner in the USA, and Mr Radkiewicz explained that if the claimant spent more than 49% of his time in the UK, that he would incur significantly greater tax liability, for which the first respondent would be liable to indemnify the claimant.

6. On 16 December 2011 the second respondent, Mr Radkiewicz wrote to the claimant on behalf of UnitedHealth UK, on note paper headed UnitedHealth Group, confirming the terms and conditions of his "international rotation assignment with Optuminsight". It was to

commence in January 2012 and continue for approximately two years. The letter stated "You will be based in the US but will be required to spend approximately 49% of your time (roughly 180 days in any given calendar year) in the UK… also there will be a need for business travel within the region including operations in Abu Dhabi". The salary was expressed in US Dollars and it was stated that it would continue to be reviewed annually on UHG's common review date. The bonus entitlement, paid time off and holidays would be provided in line with current US policy, including local statutory public holidays applicable in the US. The claimant was to have two company paid round trips per annum for his partner to visit him in the UK, together with a daily cost of living allowance for each day spent in the UK plus a weekly transportation allowance. Relocation allowance was to be paid and the first respondent undertook to meet any additional tax liability in the UK and the United Arab Emirates on company sourced income, so that the claimant would not be worse off, provided that the claimant filed his US and foreign income tax returns in the most cost effective manner.

7. The claimant came to London to start his assignment on 16 January 2012. The first respondent took a two year lease on a flat for his use, determinable at 60 days' notice. The evidence before the tribunal was that that was cheaper for the respondent than hotel costs in London and also was more comfortable for the claimant. There was evidence that the respondent had done the same for a US Chief Executive Officer whose home state in the USA was 6 hours drive from head office where he worked. The claimant gave evidence to the effect that he had personal belongings, mostly artworks, shipped to London but left his furniture and home effects in his Texas home where he and his partner lived. The respondent had an office at Paddington in London. The claimant's email signoff displayed both the first respondent's Minnesota postal address and the London postal address. The salary and other costs of the claimant were charged back to the UK unit, with possible apportionment, as appropriate, to

Abu Dhabi.

8. The claimant's evidence was that he reorganised and reintegrated the business in the UK, Europe, Middle East and Africa and after about two months submitted his proposals on that subject to UHG. While he was in London he also continued with his previous US role of senior strategic leadership, advice and assessment of new potential world markets. He spent 6 days in China in June 2012 and advised the USA head office of the potential strategic liability of the Chinese market. He said that about 20% of his work was involved with such matters but the majority of his focus was the operational role in London. He retained his membership of UHG's Global Diversity Inclusion Council, which was committed to the implementation of global diversity goals, on which he was a key spokesperson. He carried out that work in the USA, where necessary participating by remote calls from the UK. He was also a founding director of the Board of the National Gay and Lesbian Chamber of Commerce.

9. The claimant kept a log of where he spent each day for tax accounting purposes. For the first six and a half weeks, spans of 10 to 14 days spent in the UK were interspersed with two shorter spells in the United Arab Emirates. On 3 March a 10 day spell in the USA began, followed by 6 days in the United Arab Emirates. The pattern thereafter was similar of 2 to 3 weeks in the UK with short spells in the United Arab Emirates and 8 and 12 day spells in the USA until 24 June 2012. The claimant was then absent from the UK until 26 July, in China, the United Arab Emirates, the USA, Mexico, Sint Maarten, on vacation in the British Virgin Islands, then returning to the USA for three days before coming to the UK for a period of 28 days during which his partner came for a company paid visit. After that the claimant spent 1 day in Ireland, 7 days in the United Arab Emirates, travelling directly to the US for 5 days, then back to UK for 16 days. He then took a short trip to France, had 6 days in the USA, 6 days

in the UK and left on 6 October 2012 for 11 days in the United Arab Emirates. He returned from there directly to the USA for 23 days during which, as the Employment Judge (EJ) put it, "on 31 October 2012 he received an unexpected phone call from the second respondent."

10. The claimant was told by Mr Radkiewicz that due to budget issues and a change in status in the United Arab Emirates, his expatriate assignment was being terminated as of 30 November and that if an alternative role was not secured for him his position would terminate on the same date. He was told that there was a commitment to assist him in finding alternative roles but none were available in the existing business. A replacement local leader would be sought to become regional vice president for Europe, Middle East and Africa located in Ireland or the United Kingdom. The claimant was offered the opportunity of not returning to the United Kingdom as planned the following day. He took up that opportunity and remained in the USA where he had his partner's support in this new situation for 8 extra days.

11. On 2 November Mr Radkiewicz emailed the claimant confirming the elimination of his position and giving him information on a severance pay plan and outplacement services. He informed others in the company of the claimant's repatriation to the USA. USA Human Resources emails stated that the claimant had been working as an expat in the UK and had been repatriated to the USA for cost-saving reasons and in order to hire local leadership for long-term stability and stating that if he did not find another position within UHG by 30 November his position would be subject to elimination on that date.

12. The claimant went back to the UK for two periods, being 6 days in November and 9 days in December in order to arrange for the return of his belongings to the USA. He attempted with no success to find another role within the respondent. His termination date was

extended until 3 January at his request in order to allow him more time to seek an alternative role. On 26 December 2012 the second respondent wrote to the claimant formally eliminating his position as of 3 January and setting out the terms of his severance package which the claimant refused to accept. He presented his complaints to the Tribunal on 20 February 2013.

13. The EJ directed herself as to the law. She noted that **ERA** is silent as to the territorial reach of the Act. The **Equality Act 2010** is also silent on territorial reach. She therefore directed herself that the fundamental question is one of statutory construction. She noted that the question is whether in the particular circumstances of each case, Parliament can be presumed reasonably to have intended the claimant to fall within the legislative grasp or intendment of the statutory provision in question, notwithstanding foreign elements in the case. The Employment Judge set out the reasons from which she drew the conclusion that the claimant's employment in London "did not constitute a true break with the substantive nature of his previous work, nor did it sever any of the continuities or realities of his existing US employment." She distinguished the case of **Pervez** on the facts, in that the claimant maintained his home in Texas. His pay was in US Dollars and his existing US terms and conditions as to pension, bonus, holidays, which included US public holidays, and pay rises continued as before. She noted that he was responsible for the respondents' operations internationally before he came to London. His contract stated in terms that he would be US based but would be required to spend time in other places including the United Kingdom and the United Arab Emirates. The Employment Judge took a nuanced approach to this, by noting that there may well have been a difference in emphasis especially during the early period on the work carried out by the claimant. She noted however that he carried on his international diversity work in the USA.

14. The EJ listed the cases which were cited in argument before her (and as they are the same cases cited to me it is convenient to list them) as follows:-

> **Lawson v Serco Ltd [2006] ICR 250 HL; Bleuse v MBT Transport Ltd [2008] ICR 488 EAT; Secretary of State for Children Schools and Families v Fletcher [2010] ICR 815 CA and [2011] ICR 495 SC; Duncombe v Secretary of State for Children Schools and Families (No 2) [2011] ICR 1312 SC; Pervez v Macquarie Bank Ltd (London Branch) [2011] IRLR 284 EAT; Ministry of Defence v Wallis [2011] ICR 617 CA; Ravat v Halliburton Manufacturing Services Ltd [2012] ICR 389 SC; Bates van Winkelhof v Clyde & Co LLP [2012] IRLR 992 CA; Simpson v Intralinks Ltd [2012] ICR 1343 EAT; Dhunna v Creditsights Ltd (unreported) UKEAT/0246/12/LA; Boukhalfa v Germany [1996[CMLR 22; Petersen v Finanzamt Ludwigshafen EU Case C-544/11; BP plc v Elstone [2010] ICR 879 EAT.**

15. The EJ found that the respondent decided to embark on a restructuring exercise, having decided that the claimant's assignment in the UK was too costly. They decided to hire local leadership to be based in Ireland or the UK. She noted that the claimant was in the obverse situation from claimants in the leading cases in that he was not "working abroad" and seeking to invoke UK employment legislation; rather he was seeking to invoke UK legislation because he was present in the UK, on business, for much of his time.

16. At paragraph 19.5 the EJ reminded herself that contract terms are not determinative, and she went on to look at the realities of the situation. She noted that the contract was an up-to-date agreement intentionally designed to cover the claimant's situation. Therefore there was no way in which contract had become out of date. It was not suggested that the contract was in any way a sham. She indicated that had it been necessary to consider where the claimant was based she would have found that he was based in the USA.

17. In paragraph 19.7 the EJ turned her attention to the termination of the assignment. She noted that it was done by telephone on 31 October 2012 while the claimant was in the US. She was careful not to give that undue significance, as the evidence before her was that it was done that way as the respondent did not want the claimant to receive bad news whilst in the UK and

therefore far from personal support. She did however accept that there was a distinction between the ending of his rotational assignment and the termination of his employment. That is because the assignment ended before the employment ended. At first the claimant was told that his employment would end on 30 November if no alternative suitable role was found for him but that was extended to 3 January 2013. On either basis, it is clear that the respondent decided to end the arrangement whereby they had a manager on assignment in the UK, and therefore the claimant was effectively recalled to the USA and as no suitable post could be found for him his employment was terminated.

18. The EJ correctly directed herself at paragraph 19.8 "that ordinarily working in the UK at the time of his dismissal is the strongest possible indication that Parliament would intend the claimant to fall within the legislative grasp of section 94(1) of [**ERA**]." She decided however that it was not absolutely determinative and concluded that in the overall context of the extent of work undertaken in the UK and of all the circumstances there was 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. She found that "Overwhelmingly the strongest connection, both in the deliberate intention of both parties to the employment relationship, as contractually expressed, and in the factual outworkings (sic) of that contract was to the United States." The EJ found that the work carried out was a continuance of his previous work, with a different emphasis. She therefore decided that the tribunal had no jurisdiction to consider the claimant's complaint of unfair dismissal.

19. In paragraph 21 and onwards the EJ considered section 103A of **ERA**. It was contended before her by the claimant that the test should be different when construing this section on the

basis of the public interest in the encouragement of the disclosure of wrongdoing. The respondent, in contrast, contended that the test was the same. Reference was made to the **Bates** case, particularly to the *obiter dicta*. The EJ found however that case concerned an employer in Great Britain. While the EJ was well aware that there was a UK incorporated company, she had found that the employer in the instant case was in the USA. Further, she took the view that the **Bates** case concerned detriment and discrimination rather than dismissal. In the present case the claimant complained of unfair dismissal and of dismissal due to whistleblowing. The EJ was of the view that it would be logical as well as desirable to have consistency of approach when dismissal was the fact on which the complaint was based. The EJ accepted that the case of **BP v Elstone** urged a purposive construction of the provisions on protected disclosure. She found, however, that there was no basis on which she could conclude that Parliament had reasonably intended that the claimant should fall within the legislative grasp of section 103A of **ERA**.

20. The EJ looked separately at the **Equality Act 2010** section 13. The claimant maintained that he had been treated less favourably because of his sexual orientation. The EJ concluded that there was no sufficiently close connection to the UK to enable the EJ to decide that this legislation was intended by Parliament to apply in the current circumstances.

21. The next matter on which the EJ gave a decision was a contention by the claimant that the **Marleasing** principle required the tribunal to construe the **Equality Act 2010**, so far as possible, in order to give effect to the claimant's rights under EU law not to suffer discrimination on grounds of his sexual orientation "by analogy with the **Bleuse** case". The contention for the respondent was that EU rights were not engaged in the first place and therefore the reasoning in the **Bleuse** case did not apply. The EJ noted that she had been invited

by the claimant to proceed on the basis that the applicable law of the contract of employment is not English law. She noted that the case concerns a US citizen, employed and dismissed by a US company, in the US, whose terms and conditions were all oriented towards the US and whose work was essentially international while based in the US. She considered the cases of **Boukhalfa** and **Petersen** in which the gateway to the protection of UK employment law was considered. She noted that in both cases both parties were either nationals of member states, or were member states. She construed both cases as requiring a close connection with the EU not necessarily in terms of where the work was done, but in terms of the applicable law of the contract of employment, as one example.

22. The EJ found that in the current case there was no sufficiently close connection with the UK and therefore no gateway via the **Bleuse** principle.

Submissions for the claimant

23. Counsel for the claimant argued that the conclusion reached by the EJ was plainly wrong. She noted that the EJ had accepted that the claimant was living and working in London on a long term secondment and had also accepted that the fact that a person works in the UK at the time of his dismissal is the "strongest possible indication" that Parliament would intend the claimant to be within the legislative grasp of section 94 of **ERA** and also of the **Equality Act 2010**. Counsel argued that that being so, it was unsustainable that the EJ had found that there was an insufficiently strong connection with the UK and UK employment law. She prayed-in-aid the note from HHJ Richardson who allowed the case to proceed to a full hearing in which he said the following:-

> **"…It would to my mind arguably be surprising if an employer who employs a person to work 49% of the time in the UK is beyond the reach of its equality law. It is sufficient to say that in this difficult area, even making allowances for the respect to be paid to the primary fact**

finder, it is at least arguable that the 'territorial pull' of the claimant's time in the UK was sufficient to bring him within the reach of one or both of the statutes concerned."

Counsel reminded me that the practical effect of the decision made in the ET would be to erode protection offered to employees who are seconded from elsewhere to work alongside colleagues in the UK on a full time basis. The claimant would be left without any jurisdiction in which he could seek redress if he suffered discrimination or was dismissed unfairly or was otherwise subject to detriment because he had been a whistleblower. Counsel drew a contrast between a person that she described as a peripatetic employee who had only the loosest base in the jurisdiction who would obtain protection under European and domestic law but an executive working in London for more than half his time would not.

Counsel argued that the decision of the ET eroded protection for people working on an expatriate basis in the UK and would leave them with nowhere to seek redress if discriminated against, or unfairly dismissed.

24. As noted by the EJ there was not a dispute on the facts. The dispute was on the proper conclusion to be drawn from the facts. Counsel noted that it was not in dispute before the tribunal that the tribunal had jurisdiction to hear the claimant's complaint in the sense in which the word jurisdiction is used under the Brussels I Regulation nor was it disputed that the claimant's contract was a contract of employment no matter what the applicable law might be; nor that if the claimant could demonstrate that he came within the territorial reach of the **ERA** and **Equality Act 2010**, no matter what the applicable law of his contract, then he would be entitled to have his claims decided by the ET.

25. Counsel submitted that the fact that the claimant worked in London meant that he

fulfilled the requirements for territorial reach. She argued that there was no good reason why the general rule, which is the rule whereby the place of work is the essential matter, should be displaced. She argued that the employee actually working in Great Britain is the "standard, normal or paradigm case" of an employee who is within the legislative grasp of section 94 of **ERA**, under reference to Lord Hoffmann in **Lawson v Serco** at paragraph 25 and Lord Hope in **Ravat** at paragraphs 26 and 27. Counsel accepted that there will be difficult cases where an individual does not come within territorial reach because he is present in the UK on a casual visit. She made reference to the speech of Lord Hoffmann in **Lawson v Serco** at 27 as follows:

> **"The terms of the contract and the prior history of the contractual relationship may be relevant to whether the employee is really working in Great Britain or whether he is merely on a casual visit… but ordinarily the question should simply be whether he is working in Great Britain at the time when he is dismissed."**

Counsel reminded me that the Employment Judge had accepted that the claimant:

> **"may be said to have been 'working' in London between 16 January and 6 October 2012, in that he was spending a good part of his time in London and was carrying out a reasonable proportion of his duties in relation to the respondent's UK subsidiary at the offices in Paddington, of which he was titular Managing Director."**

Counsel pointed out that the description given above was correct, and that more than that could have been and should have been said by the EJ. She argued that the claimant was the UK managing director and ran the UK team. Of course he travelled as he had always done but his work was in London and he left from there and returned to there. He had a flat provided by the respondent for him in London. His presence could not be described in any sense as being a casual visit.

26. Counsel argued that the claimant's case was analogous to that of Mr Pervez in **Pervez v Macquarie Bank Ltd**. The claimant in that case had moved from Hong Kong to London under an international assignment. His secondment was terminated and he refused to resign. He was

dismissed. The EAT found that his situation came within the legislative grasp of the unfair dismissal provisions. She quoted Underhill J at paragraph 12 as follows:

> **"[Counsel for the employer] contended that the Claimant's case was different from that of the claimants in Crofts v Veta because he was only on secondment and his base remained Hong Kong… I think the Judge was right to say that the evidence showed that the Claimant was working in Great Britain at the material time, and specifically at the date of his dismissal. Whatever the precise expectations as to the length of his secondment, it is clear from the terms of the assignment letter, and from what happened in practice, that the Claimant was working in London on a settled (and indefinite) basis, as part of MBL's operation, reporting to its managers and paid by it. If that is right, I am not sure that it adds anything to say that he was 'based' in London: that concept only becomes important where the employee is peripatetic, which the Claimant was not. But if it is relevant I would also say that it was clear that his base was in London for the duration of the secondment. I should emphasise that my view is based on the circumstances of this particular case. 'Secondments' come in all shapes and sizes, and a different conclusion might be appropriate if the secondment were for a shorter time or the employee was less integrated into the business of the company to which he was seconded."**

Counsel argued that the claimant was in exactly the same position as Mr Pervez and the tribunal should have had no difficulty in holding that came within the legislative grasp of the unfair dismissal provisions of **ERA**.

27. Counsel argued that in any event it is not a necessary requirement for unfair dismissal protection that an employee works in Great Britain. She referred to the speech of Lord Hope in **Ravat** at paragraphs 26 to 29 where his Lordship said, quoting counsel's argument short, the following:-

> **"The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and of 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."**

Counsel argued that that had been put another way by Elias LJ in the case of **Bates** at paragraph 98 thus:-

> **"…where the applicant lives and/or works for at least part of the time in Great Britain…the circumstances need not be truly exceptional before the connection with the system of law in Great Britain can be identified. All that is required is that the tribunal should satisfy itself that the connection is, to use Lord Hope'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' "**

Counsel of course appreciated that both of those cases dealt with a person who had had an original connection with Great Britain and then was working overseas. The current case is the obverse in that the claimant came to Great Britain and is endeavouring to argue that the legislation applies to him because he was working in Great Britain.

28. Counsel argued that the claimant had sufficiently strong connections with Great Britain, because he was not on a casual visit, to come within the legislative grasp of the protection provided by **ERA**. She argued that it was perverse of the tribunal to find to the contrary. She reminded me of the importance of the matter to the claimant, who suffered a substantial loss of earnings. She argued, however, that it was of more general significance. She argued that an individual on a long-term assignment, fully integrated into a host business in the UK, should have the protection that others working in this country have.

29. Counsel argued that the EJ had erred in law by taking into account the explanation given by the respondents that the claimant's assignment was too costly. Counsel stated that the reason for the dismissal was a matter of contention and at a preliminary stage the EJ should not have decided that the reason was as stated by one of the parties.

30. Counsel further argued that the EJ had erred by being distracted by three further considerations which were not material to the assessment of territorial jurisdiction. The first was the claimant's relationship with his partner in the USA. Counsel argued that the claimant and his partner are a gay couple who do not have children. The fact that his partner remained in Texas and that the claimant therefore did not "move his family to London" was a personal matter and immaterial. The EJ had, according to counsel, put some weight on that and had also noted that the claimant went direct from the United Arab Emirates to the USA rather than

returning to the UK. The fact that the claimant had done so was once again a personal matter and a matter for him; it was not, according to counsel, material as to the decision on the territorial scope on the legislation. The second matter argued by counsel to be irrelevant was the terms and conditions of employment which the EJ had found to be American in nature. According to counsel nothing can be taken from that, as those working in UK for USA companies will frequently be paid in US dollars and have other terms and conditions common in US contracts of employment. The fact that his work was similar was not relevant, counsel argued. Nor was his continuing connection the US, including his diversity work which he carried out there. Rather, she argued, the evidence showed that he was based in London and so had the necessary connection with this country. The third irrelevant matter according to counsel was that after he was told that his work in London was to cease he packed up his belongings and returned to the USA. She emphasised that he did no work in the US at that time. She referred to the case of **YKK Europe Ltd v Heneghan** [2010] ICR 611 as showing analysis of a similar situation.

31. Counsel for the claimant submitted that the test under section 103A of **ERA** did require some weight to be put on the public interest in protecting whistle blowers. She based her argument on the case of **BP v Elstone**. She argued that the legislation should be construed so as to give a remedy to whistle blowers if possible.

32. Counsel for the claimant argued that irrespective of the position under **ERA**, the ET was wrong in its decision on the territorial reach of the **Equality Act 2010**. She submitted that as sexual orientation is a core component of a person's identity, it would be surprising if there was no jurisdiction in an ET to deal with discrimination on that ground against a person who worked for about half of his time in this country. She argued that the **Employment Equality (Sexual**

Orientation) Regulations 2003 (SOR) would have enabled the claimant to bring his claim as **SOR** required only that a claimant work 'partly' in Great Britain. Counsel argued that the **Equality Act 2010** is silent on territorial scope, but that Parliament cannot have meant to restrict rights in enacting that legislation. There was no reason, according to counsel, to think that Parliament intended to take away rights which existed under **SOR**. She argued that the correct interpretation of the Act must be that working 'partly' in Great Britain will suffice.

33. Counsel then argued that even if territorial scope was restricted by the terms of the Act, the claimant had rights under EU law, and the principle of effectiveness required that any territorial limitation be read so as to enable him to seek a remedy in the ET. She argued that freedom from discrimination on grounds of sexual orientation is a fundamental principle of EU law. She relied on the Framework Directive and on article 21 of the Charter on Fundamental Rights. She argued that in light of the cases of **Mangold v Helm** [2006] IRLR 143 and **Kukukdevici v Sewdez** [2010] IRLR 346 the Framework Directive is capable of horizontal direct effect. She argued that the preamble makes clear that the provisions apply to the nationals of third countries. Thus, provided that the claimant was not in some way excluded from protection, he was entitled to require the UK tribunal to give effect to his rights by proper construction of domestic legislation. She relied on the case of **Bleuse** at 57, and the case of **Wallis** at 51 to 53. Counsel also relied on the dicta of Mummery LJ in **Duncombe (no 2)** to the following effect:-

> **"…I am persuaded that the Bleuse principle applies to the case of unfair dismissal [on the expiry of a fixed term contract] as to the case of wrongful dismissal. The principle of effectiveness in EC law is fundamental and forceful. I would go so far as to say that it requires that the implied territorial limitation in domestic law, as identified in Lawson v Serco [2006] ICR 250, on the right not to be unfairly dismissed should be modified to permit such a claim to be made where that is necessary for the effective vindication of a right derived from EC law."**

Counsel argued that the protection of the Directive applies to all people within the territory of a

member state. She referred to a text book, Ellis and Watson, *EU Anti-Discrimination Law* (2nd edition 2012) at pages 728-9, where the authors argued that in light of the importance of the principle of equality, the directive should be engaged whenever there is a factual link between employment and a member state. Were that to be so, then the claimant would come within the scope of the directive. Counsel referred to the cases of **Boukhalfa** and **Petersen** as examples. She also referred to the case of **Walrave v Union Cycliste Internationale** [1975] 1 CMLR 320, taking from that case the proposition that "the rule of non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the Community." Counsel argued that the principle had been held to apply in relation to the Commercial Agents Directive, in the case of **Ingmar v Eaton Leonard Technologies** C-381/99 [2001] 1 CMLR 9, and in relation to the operation of TUPE in the case of **Holis Metal Industries Ltd v GMB** [2008] ICR 464. Counsel argued that the case of **Hasan v Shell International Shipping Service Pte Ltd** UKEAT/0242/13/SM did not affect her submission.

34. Counsel submitted that the ET decision was plainly wrong. She argued that the appeal should be allowed and the case remitted to the ET for case management directions.

Submissions for the Respondents

35. Counsel for the respondents argued that the ET had found that the claimant's work in London and elsewhere in Europe and Africa and the United Arab Emirates was not such as to show that he was no longer based in the US. Thus the question which the ET had to answer, as set out by Lord Hope in **Ravat**, was whether the whole circumstances of his employment were such as to enable it to be said that the connection with Great Britain and British employment law was sufficiently strong to enable it to be said that it would be appropriate for the claimant to

have a claim in Great Britain. Counsel emphasised that this was a question of degree, and submitted that Lord Hoffmann made clear in **Lawson v Serco** that the decision of ET is entitled to considerable respect. That view was echoed by Lord Hope in **Ravat**, and set out thus by Mummery LJ in **Ministry of Defence v Wallis**:-

> **"The appeal can only succeed if there was an error of law in the employment tribunal's judgment. It correctly stated the jurisdiction over unfair dismissal claims laid down by the House of Lords in Lawson v Serco Ltd. The appeal turns on whether the employment tribunal erred in law in its application of Lord Hoffmann's case (iii) of expatriate employees to the facts of the case. On that aspect of its decision the employment tribunal used its specialist expertise in making an informed and reasoned assessment of the strength of the connection of the claimants' employment to Great Britain and its unfair dismissal law"**

Counsel argued that the appellant's arguments involved paying little regard to the fact finding and analysis of the ET. He argued that the decision was reasoned and showed no error in law.

36. In support of his argument counsel submitted that the ET had correctly found that the place of employment was the US. The ET however appreciated that the question before it was not to be answered by mechanistic application of fixed rules; rather it was to apply principles. The ET considered whether Parliament could have intended the claimant to be within the territorial reach of the legislation despite the employment being in the USA and came to the conclusion it could not. The circumstances of the claimant were, he argued, very different from the claimants in the cases in which the House of Lords or Supreme Court had found that there was territorial reach. He described the claimant's circumstances as being the opposite of those other claimants. His home was in the US; his salary was paid in US dollars; his contract provided that any disputes which could not be resolved internally would be sent to the American Arbitration Association to be resolved; his search for alternative posts was organised within the US. During the assignment, the claimant worked in places other than London as well as working there. Even though the majority of his time was spent in London, that did not show that he was based there or had made his home there. The ET was entitled to find that the

connection with the US was much stronger than the connection with anywhere else. Thus the ET decision was not perverse. In any event, counsel argued that the claimant sought to litigate claims of unfair dismissal and discrimination rather than a claim about termination of his assignment.

37. Counsel referred to the case of **British Telecommunications plc v Sheridan** [1990] IRLR 27 as authority for the proposition that the weight given to matters of fact is for the ET and should not be subject to reconsideration by the EAT. He argued that counsel for the claimant had invited me to revisit the facts. The ET had been entitled, he argued, to find that the claimant did much the same work before and after his assignment started, the difference being of emphasis only. It was entitled to place weight on the terms and conditions of the employment contract. It was entitled to find that the claimant's home was in the USA and to regard that as important in making the decision about the intention of Parliament. Counsel argued that the ET was entitled to regard the claimant's relationship with his partner as part of the factual matrix to which it had to have regard, as was the fact of his continuing diversity work. The ET had noted that the respondents' position was that the decision to terminate the assignment was due to restructuring, seeking to place a local employee in London which would be less expensive. Counsel for the claimant had argued that this was an error of law as the reason for the action by the employer was in dispute. In refutation of that argument, counsel for the respondent submitted that it confused the termination of the assignment with dismissal; and in any event was simply a narration of the respondents' position and did not indicate any adjudication on the merits. Thus counsel argued that there was no error in law in the ET finding that the section 94(1) **ERA** claim was not in territorial reach.

38. Counsel for the respondent argued that there was no different test for section 103A than for unfair dismissal. He referred to the case of **BP plc v Elstone** on which the claimant relied, and argued that while there was dicta to the effect that that legislation should be construed so to as to advance the purpose of protecting whistle-blowers it was only, according to the judgment, "so far as there is room". He contrasted it with the case of **Bates** in which Elias LJ at paragraph 101 said that it was desirable for there to be uniformity of application across all the rights under **ERA**, and saw difficulty in identifying in practical terms what looser test could be adopted unless perhaps the principle adopted was that it would suffice for the employer to be in Great Britain irrespective of where the employee worked.

39. With regard to the ground of appeal to the effect that even if there was no territorial reach in **ERA**, there was a different test under the **Equality Act 2010**, counsel took on the argument from counsel for the claimant to the effect that under **SOR** the test was apparently different from that applicable under **ERA**. He submitted that the obvious difficulty for the claimant in respect of that argument is that the same issue and arguments arose in the case of **Bates** but the Court of Appeal clearly applied the same approach to territorial jurisdiction under the **Equality Act 2010** as to territorial jurisdiction under **ERA**. He submitted that the Court of Appeal decision is binding on me. In any event he argued that when Parliament passed the **Equality Act 2010**, it would have been aware of the approach of the courts, including the decision in **Lawson v Serco**. Parliament made no express provision within the **Equality Act 2010** for territorial reach, and had repealed the provision in **ERA**. It was therefore reasonable to assume that Parliament intended that the question would be decided by the courts, applying the same principles to the facts of the cases coming before it under each piece of legislation.

40. Counsel then turned to the application of EU law. He submitted that there are three questions as follows:-

1) Are EU rights engaged at all?

2) If EU rights are engaged, whether pursuant to the **Marleasing** principle, the domestic legislation could be construed so as to give effect to the EU right.

3) Whether the principle of effectiveness required domestic legislation to be read in a manner that gives effect to those rights.

He pointed out that the **Bleuse** line of authority addresses the second and third questions and not the first. Counsel argued that the tribunal was right to ask first of all whether EU rights were capable of being engaged by this claimant at all. The ET was right to conclude that they were not engaged. He argued that the test as to whether EU law rights are engaged is whether there is a sufficiently close nexus with the EU and, in particular, whether there is a sufficiently close link with the employment relationship on one side and the law of a member state on the other. In **Boukhalfa** that link was furnished by the fact that the claimant who was a national of a member state (Belgium); was working for the German Embassy in Algiers; and was subject to the rules of German law. Counsel argued that there was a great contrast between that and the instant case. He emphasised that in this case the claimant is a US citizen recruited in the US, dismissed in the US and based in the US with a contract governed by US law, with no substantive link with the UK social security system, in which the forum for resolution of disputes was the American Arbitration Association. There was no reason to suppose that it was intended that EU law would apply to employees of US employers who were based and working in the US and whose connections with the US were stronger than with the UK simply because they spent some periods of time working in the UK. That was in complete contrast to the **Bleuse** line of cases because in that case all the individuals were working in an EU member

state with contracts governed by the law of a member state. He explained the import of the cases in the following way:

> 1) **Bleuse**. The claimant was a German national living in Germany and working in Europe with a contract governed by English law and with English courts having exclusive jurisdiction over any disputes. Thus English law was the applicable law of the contract. The court had to give effect to directly effective rights derived from EU law by construing the relevant English statute if possible in a way which was compatible with the right conferred. The rights under EU law operated as part of the system of domestic law and therefore the territorial scope of the legislation had to be extended to ensure that the principle of effectiveness was not undermined.
>
> 2) In **Ministry of Defence v Wallis** the claimant's contracts of employment were governed by English law although the work was done in Belgium and the Netherlands in international schools. No matter what the applicable law was, it was at least the law of a member state; that would engage EU rights.
>
> 3) **Duncombe.** The relevant employment contracts were governed by English law and the English Courts were to have exclusive jurisdiction.

Therefore counsel argued that the claimant in the instant case could not engage EU rights whether pursuant to the applicable law of the contract, article 9 of Rome I or otherwise.

41. Counsel then addressed the argument that the ET had failed to place appropriate weight on the public interest in determining discrimination claims, and had failed to use a less stringent test for such claims. Counsel argued that there was no such requirement. He submitted that the

Court of Appeal in the case of **Bates** had applied the same test; that decision was binding.

Discussion and decision

42. This case illustrates the importance of careful fact finding in matters related to territorial reach. It is clear from **Ravat** that all the circumstances of the individual must be considered. These include, but are not limited to, the terms of the contract, the applicable law, the place of performance of the work, and the living arrangements of the employee. Only once these facts have been ascertained can the ET stand back and consider what connection if any there is to Great Britain, and importantly, with British employment law. Only then can the ET decide if Parliament can reasonably be said to have intended the territorial scope of the legislation to include the situation of the claimant. In this case the EJ has found facts which are not in dispute; the dispute concerns the inferences to be drawn from the facts. I do not accept that the EJ erred in law by considering the claimant's domestic arrangements. Counsel for the claimant was correct to assert that the fact that the claimant is in a gay relationship and has no children is not itself relevant. What is relevant is whether he moved to UK and gave up his base in the USA. The EJ found the he did not. She found that his contract stated he was based in the USA. She found that the contract provided for the cost of 2 trips to UK each year for his partner. She was entitled to make these findings. She did not consider irrelevant matters. I do not accept that she erred in finding that the respondents' position was that they decided to restructure their business. The question which the ET had to decide was whether the strength of any connection the claimant had not only with Great Britain but with British employment law. Her findings were that the claimant entered into an employment contract which had an overwhelmingly close connection with the USA. Therefore it did not have the required connection with British employment law. There was no suggestion that the contract had been overtaken by events when the claimant began his assignment. It had been negotiated between parties with a view to

the assignment taking place. Thus the reality of the situation was as described in the contract.

43. The EJ applied the law to the facts she found, and the question is whether she has erred in law in doing so. I have decided that she has not. She has made a careful judgment, succinctly expressed, in which she has decided that the claimant has not given up his base in the USA despite carrying out some work in the United Kingdom and in other countries. In light of the evidence which she heard she was plainly entitled to come to that view. It could not be said in light of those facts that the claimant's employment was closely related to Great Britain and British employment law. In my opinion it is necessary to recognise that the connection requires to be with both Great Britain and British employment law. That being so, the ET was entitled in law to hold that the situation in which the claimant found himself was not within the territorial reach of the **ERA** or the **Equality Act 2010**.

44. According to counsel for the claimant this was a very stark case and she presented it as one in which it was obvious that the Employment Judge was wrong in what she decided. In my opinion that is incorrect. The case is difficult. It may be thought to be odd that a person working in this country does not have the protection of discrimination laws applicable to those who may work in the same office as he does. I agree with counsel that many people might argue that an employer who requires his employees to spend considerable time working in Great Britain should thereby be subject to legislation enacted by the British parliament. Nevertheless, in light of the findings in fact concerning the nature of the contract and the claimant's initial and 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. I accept as argued by the counsel for the respondent

that the dismissal was carried out in the USA. I note that the Employment Judge took a mature and considered view of that by finding that there were reasons why the claimant was told in the USA that his secondment was to finish before he had travelled away from his home. That itself rather emphasises the finding that the EJ was making, which was that he was very much based in the US. There was no finding by her that the dismissal in the way in which it was carried out was a sham. The assignment did finish before the employment finished even if one did not take into account the extension that was granted to the claimant. Therefore, on any view of it, he was a person who worked in the US and who was dismissed there. In the circumstances it does not seem to me in the least plain that there should be territorial reach regarding **ERA** or the **Equality Act**. Nor was I persuaded that counsel for the claimant was right when she said that the test ought to be different for section 103A or indeed for the **Equality Act 2010**. There does not seem to be anything in the legislation or case law to indicate such a difference.

45. I do not agree with counsel for the claimant that EU law is engaged. The difficulty for the claimant is that the employment relationship, as indicated above, is an American relationship. I do not accept that because some of the claimant's work was carried out in the UK, that his contractual relationship with his employer is subject to EU law.

46. Parliament could have provided that all British employment law should extend its reach to any claimant who could show that he worked partly in Great Britain, or it could have provided that part of the **Equality Act 2010** applied in that situation. It did not do so. For the most part the **Equality Act 2010** is silent on territorial reach, as is **ERA**. Provision is made, however, for seafarers, as set out in the case of **Hasan**. That suggests that for other employees, such as the claimant, Parliament intended that the courts would decide on the question, in light of all the circumstances, as they are required to do so by **ERA**. I accept the argument for the

respondents that there is no basis on which to argue that a less stringent test was intended. I agree with counsel for the claimant that it may seem odd that the **Equality Act 2010** restricts rights available under **SOR**. I prefer to reserve my judgment on whether she is correct to say that anyone working partly in the UK would have been able to bring a claim and that those rights have been restricted as I was not fully addressed on this. It may be that a person who had carried out some work in Great Britain would still have been held not to have had sufficient connection. In any event, it is clear that what is now required is a sufficient connection with Great Britain and British employment law; if that is a restriction then that appears to be the clear effect of the legislation.

47. In essence the ET found that this employment relationship was overwhelmingly American in nature and that the work carried out in the UK did not alter that. In light of the evidence the EJ was entitled to find as she did. The ET did not err in law. Consequently this claim is dismissed.