Appeal No. UKEAT/0131/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 July 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR DAVID POWELL — APPELLANT

OMV EXPLORATION & PRODUCTION LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EDWARD LEGARD (of Counsel) Instructed by: Messrs Whitehead & Low Solicitors LLP 3 Market Place Bedlington NE22 5TN
For the Respondent	MR TRISTAN JONES (of Counsel) Instructed by: Messrs CMS Cameron McKenna LLP Mitre House 160 Aldersgate Street London EC1A 4DD

SUMMARY

PRACTICE AND PROCEDURE – Preliminary issues

JURISDICTIONAL POINTS – Working outside the jurisdiction

The Claimant worked 3 weeks in 4 in Dubai, spending the 4th as "rest time" at his home in the UK, under a contract made with a company registered in the Isle of Man, which provided that Manx courts would have sole jurisdiction and Manx law would apply. The company had no place of business in the UK, and administration of it was based in Austria (Vienna). An Employment Judge held that the company was domiciled in Austria within the terms of the Brussels 1 Regulation; and that since C did not habitually work in another Member State he could sue the respondent only in Austria. He was held entitled to come to these conclusions (though some of the factual basis for them was thin). That disposed of the appeal. The judge also found that the claim was outside the territorial scope of the **ERA 1996**, and was held entitled to do so: he had addressed the right test, permissibly applied it, and though he could have said more came to a conclusion he was entitled to reach.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Most of those cases which have considered the question whether a Tribunal may determine a claim brought under domestic employment legislation in the United Kingdom have concerned claimants in respect of whom there was no issue that the forum for the determination of that question was within the United Kingdom. Most, if not all, have concerned claimants whose employer was British. This case raises the questions of jurisdiction in a case in which neither of those characteristics are so.

2. The appeal is from a determination by Employment Judge Hesselberth in a Tribunal at North Shields on 11 December 2012 dismissing claims upon the basis that the Claimant had no entitlement to bring them in the Employment Tribunals in England, Wales or Scotland. The issues which he set out for his determination were whether or not the Tribunal had jurisdiction by reference to council regulation EC44/2001 (known as the "Brussels 1 Regulation") or, alternatively, whether the Claimant's employment was within the territorial scope of the **Employment Rights Act 1996**.

3. The issues to be determined have to bear in mind the distinction to which I drew attention in the case of **Simpson v Intralinks Ltd** [2012] ICR 1343 at paragraph 8, quoting Louise Merrett's article from page 355 and following in the *Industrial Law Journal* for 2010. She pointed out that in all cases where there is a foreign element the question arises whether the English court or Tribunal has jurisdiction to hear the case at all or whether it should be heard in a foreign court. That she described as an issue of private international law which she referred to as "international jurisdiction". If the Defendant is domiciled in a Member State of the European Union that question has to be determined by applying the rules of the Brussels 1 Regulation. She observed that the third sense in which jurisdiction was used, the second being

immaterial for present purposes, was whether the court or Tribunal had jurisdiction the Brussels 1 sense but the Tribunal had to consider whether the claim fell within the territorial scope of the relevant legislation; that she referred to as, "territorial scope".

4. So far as international jurisdiction is concerned section 5 of council regulation EC 44/2001 provides for determining jurisdiction over individual contracts of employment where the Defendant is domiciled in a Member State. The section, containing four articles, exclusively sets out the rules relating to such contracts; see **Glaxo Smith Kline & Anor v Rouard** [2008] All ER(D) 312 reporting the European Court of Justice's conclusion essentially to that effect.

5. Article 19 provides:

> **"An employer domiciled in a Member State may be sued:**
>
> **(i) in the courts of the Member State where he is domiciled or;**
>
> **(ii) in another Member State;**
>
> > **(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so or;**
> >
> > **(b) if the employee does not or did not habitually carry out his work in any one country in the courts for the place where the business which engaged the employee is or was situated."**

6. The Article only applies if the employer is domiciled in a Member State.

7. Article 60 provides for the meaning of domicile. It provides:

> **"(i) For the purposes of this regulation a company or other legal person or association of natural legal persons is domiciled at the place where it has its;**
>
> > **(a) statutory seat or;**
> >
> > **(b) central administration or;**
> >
> > **(c) principal place of business**

> **(ii) For the purposes of the United Kingdom and Ireland statutory seat means the registered office or where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place. …"**

8. Thus the Brussels 1 Regulation comes into force, as Mr Legard has submitted, only where there is liable to be a conflict between the claims of more than one Member State as to jurisdiction. If the employer is domiciled in no Member State then so far as United Kingdom is concerned regard must be had to ordinary principles of private international law.

The facts

9. The facts as found by the Judge were somewhat sparse. He found that the Claimant was employed by the Respondent, OMV Exploration and Production Ltd, as an Operations Readiness and Assurance Manager. That company was a wholly owned subsidiary of OMV Exploration and Reduction GmbH. That had a number of subsidiaries amongst which was OMV (UK) Ltd with which the Claimant had factually no connection. That conclusion has not been challenged.

10. The Respondent was incorporated not in the UK but in the Isle of Man. The Isle of Man is not itself a Member State of the European Union. The Judge found that although that company had its registered office in the Isle of Man, it was managed and operated from Vienna and had no connection with England, Scotland and Wales. The evidential basis for that finding is said by Mr Legard to be insufficient.

11. The Claimant applied for his job on a website which was not country specific. He was interviewed by two people who were in Vienna at the time for a post which was intended to place him as a resident in Sana in the Yemen, working three weeks of each month there with

one week off at home. He was to be paid in Euros and the Respondent was to account to the relevant tax authorities for the tax to be paid.

12. The Claimant lives in Yarm in the north of England. He was due to start work overseas on 14 November 2010 but he never did actually work in Yemen because of trouble in that country. Instead he went to and worked in Dubai where the Respondent subsequently developed its own office.

13. He supervised a team of about six or seven people, two of whom were based in England. During his time in this country, though supposedly on rest, he did do some work in Hull. In total over the period for which he was employed from November 2010 until February 2012, when his contract was terminated, he worked a total of 20 full working days in the United Kingdom. There may have been some additional voluntary overtime in the taking and making of telephone calls and emails to those whom he supervised.

14. The contract provided expressly that it was based and founded in Manx law and solely subject to the rules and regulations of the Isle of Man. It contained an exclusive jurisdiction clause which provided that the Isle of Man courts had jurisdiction.

15. Against that factual background, Judge Hesselberth found in paragraph 35 that the Respondent was domiciled in Austria. He did so in these terms:

> **"<u>Brussels 1</u>**
>
> **I am persuaded by the arguments put forward by (Counsel for the Respondent) namely that Article 19 does not confer jurisdiction on the Employment Tribunal in the UK. Under 19.1 the claimant may sue the respondent in a Member State in which the respondent is domiciled and I find that the respondent is domiciled in Austria. The respondent is certainly not domiciled in the UK and the UK is not the respondent's statutory seat nor the location of its central administration nor its principal place of business."**

16. At paragraph 36 he dealt with the alternative position for which Article 19(2)(a) provides. It is worth noting, as Mr Jones submits, that Article 19(2) provides another choice for the employee as to where the employee may sue his erstwhile employer. There are two alternatives to the place of domicile for which 19(1) provides. That in (2)(a) requires a finding as to the place where the employee habitually carries out his work or the last place where he did so. As to that Judge Hesselberth said:

> **"My finding is that under 19(2)(a) which provides that the claimant may sue the respondent in another Member State if such State is the place where he does, or did, habitually carry out his work. My finding is that the claimant habitually carried out his work in Dubai. That is where (eventually) he was contracted to work and he was managed there and his team was located there and he spent the majority of his working time there. The fact that he did some work in the UK when he was on leave does not persuade me that he carried out his work habitually in any other place than Dubai."**

17. Mr Legard complains that that finding of fact is a secondary finding, a conclusion which requires to be based upon primary facts, but that it is unclear which primary facts are relied upon. It is not appropriate, he argues, for negative facts to be relied on to produce a positive conclusion. The fact that the Respondent was, "certainly not domiciled in the UK" is no reason in itself for concluding, as he submits the Judge was here doing, that the Respondent was domiciled in Austria.

18. This conclusion by the Judge is a finding of fact. If, therefore, there is material which supports it and if the conclusion has been reached by an appropriate application of an appropriately identified test in law there would be no error of law in the Judge's conclusion unless in the circumstances it could be said to be perverse.

19. In response, Mr Jones submits that the Judge did not have purely the negative to rely on. At paragraph 7 the Judge said this:

> **"7. The respondent, OMV Exploration and Production Limited is a company incorporated in the Isle of Man but my finding on the evidence available is that the respondent had no**

> **resource in the Isle of Man, it was purely its place of registration and its management and operation was for the most part carried out in Vienna, Austria. In short, the respondent had no connection with England or indeed Scotland or Wales. Probably for tax reasons it was registered in the Isle of Man but controlled from Vienna, Austria."**

20. Prior to the hearing the Respondent had un-informatively said in its ET3 that the Tribunal had no jurisdiction. At a hearing in September 2012 it became apparent that the Respondent sought to argue that within the Brussels 1 regulation it was domiciled in Vienna. Accordingly, having no connection with the United Kingdom, it would be in Vienna that it could be sued under Article 19.1 unless the Claimant could establish a claim to a choice under 19(2)(a) or (b).

21. The matter was adjourned for some five weeks because the Claimant was simply not ready to face that particular argument. When it returned to the Tribunal he was met by evidence produced, and adopted in the witness box, by a Mr Groeschner, who was the general manager for OMV Exploration and Production GmbH. In paragraph 6 of his statement he said that the Respondent was fully controlled by Vienna. He then expressed hearsay evidence that he had been informed by the Head of Recruitment and Expatriate Services within OMV's human resources that:

> **"Although there is a general manager of OMV IOM all of the administration work, for example drafting of employment contracts and the setting up and management of the employment relationship is conducted through Vienna."**

22. No questions were asked of him about the evidence that the company was "fully controlled by Vienna" or the hearsay evidence that all of the management and operation was through Vienna.

23. To the contrary, the Claimant produced before the Tribunal, and waived privilege for, legal advice which he had received, which included the author's view (which he attributed to the Claimant himself) that the office in the Isle of Man was understood to be the registered

office for corporate administration purposes only, that the Claimant believed that the company had no bank account or other assets in the Isle of Man nor any staff based there, and added at paragraph 9:

> **"Mr Powell has advised us that the company's main office is in Vienna and that it also has offices in Aberdeen, London and Dubai."**

24. Mr Legard in an attractive argument submits this was an insufficient evidential basis. The burden of proof was on the Respondent; the Respondent did not, though it might have done, call evidence from a director or employee of the Respondent. The registered office being in the Isle of Man, one might have thought that determined domicile. There was no evidence, he submitted, to support a finding that its principal place of business was in Austria.

25. The words used in paragraph 35 demonstrated an approach which was in effect that if domicile was not the UK it had to be Austria without there being any particular proof of it; moreover, this was the section of the Judgment in which the Judge was supposed to set out his conclusions and the reader is left wondering what factual matters led the Judge to the conclusion that this Respondent was domiciled elsewhere than its registered office.

Conclusions

26. The question of jurisdiction may be answered by the burden of proof where there is truly no evidence, or evidence which in the Judge's view is so balanced as to admit of no probability one way or the other. Here there was some evidence though slight. A Judgment has to be read as a whole. It is rightly said that an Employment Tribunal Judgment is not to be read as finely honed piece of legal craftsmanship, but that some infelicities may be expected. Reading this Judgment as a whole with that in mind I read together the findings of fact at paragraph 7 and the views expressed in summary at paragraph 35.

27. I am not surprised as I might have been in this case by the absence of further evidence from the Respondent because, as Mr Jones points out, there was no clue on the papers that the applicability of the Brussels 1 Regulation was to be contested until the closing submissions of Mr Legard to the Tribunal. The point then was raised but the evidence had by then been heard.

28. The Judge indicated by using the words "on the evidence available" in paragraph 7 that he did not have the fullest assistance from factual material. Nonetheless, on the material which I have set out there seems to me sufficient to support the conclusion to which he came. The observation that the Respondent was "certainly not domiciled in the UK" is, as Mr Jones has pointed out and I accept, not a reason in itself for finding what was the domicile. It recognises that the question before the Judge was whether the UK Tribunal had jurisdiction or whether it did not. For the application of Brussels regulation it would of course have jurisdiction if the Defendant were domiciled in the UK.

29. There had been a suggestion during the course of the proceedings that the Respondent had conducted or did conduct some business in the United Kingdom but the Judge did not accept that. It follows that with evidence that this Respondent had a nominal presence, for registered offices purposes, in the Isle of Man and performed much of its operation or administration from Vienna, supported albeit by hearsay statement and by the apparent acceptance of the Claimant as reported to his Manx legal adviser, that is a sufficient basis to conclude that Article 60(1)(b) or (c) and probably (1)(b) has been identified. It would have been better if the Judge had specifically addressed and systematically approached each of the criteria (1)(a)(b)(c) in Article 60 and if he had reminded the reader of some of the material which underpinned his conclusion in paragraph 35, but reading this Judgment as a whole I have concluded he was entitled to reach the conclusion he did.

30. As both counsel agree, and **Simpson v Intralinks** affirms, Article 19 provides for a choice which is to be exercised by the employee, though an employer bringing proceedings against an employee has by contrast no choice; see Article 21. Therefore, if the Claimant could bring himself within Article 19(2)(a) then notwithstanding the fact that he could sue the Respondent employer in Austria, he would also be able to sue in the place where he habitually carried out his work so long as for the purposes the Brussels Regulation that was also in a Member State.

31. The question where an employee habitually works is like that of domicile, a question of fact and judgment. But here much depends upon the scope to be given to the word "habitually". In some contexts it is possible to think that work may habitually be done in more than one place as where, for instance, a peripatetic worker works in four or five separate locations in rotation around the country. It might be possible in that context, if that is the force to be given to the word "habitually", to say that he works habitually in each even though a sixth in which he had never or only rarely worked would not so qualify.

32. Accordingly, it is necessary to look to the assistance which the courts can give as to the approach to be taken to the word "habitually" in the context of Article 19. So far as that is concerned the Court of Justice gave its first ruling in 1993 in **Mulox IBC Ltd v Geels** Case C125/92 [1993] ECR 14075. It held that the Convention as it then was had to be interpreted as meaning that in the case of a contract of employment in pursuance of which an employee performed his work in more than one contracting State the place of performance of the obligation characterising the contract was the place where or from which the employee principally discharged his obligations towards his employer.

33. In **Rutten v Cross Medical Ltd** Case C383/95 [1997] ICR 715 the court took the view that the expression referred to the place where the employee had established the effective centre of his working activities. It was the place where or from which he performed the essential part of his duties, vis a vis his employer. Those are different phrases but all looking for one candidate in answer to the question where does the employee habitually work?

34. The case of **Koelzsch v Luxembourg** [2012] QB 210 case C29/10 concerned a heavy goods vehicle driver domiciled in Germany. He was engaged under a contract of employment with a company established under Danish law which had no offices in Germany. The lorries which he drove were registered in Luxembourg. His contract contained a clause conferring exclusive jurisdiction on the Luxembourg courts. When a claim was brought in Luxembourg the question arose, not for the purposes of the Brussels 1 Regulation but for the question of the Rome Convention, as to which system of law was the applicable law to apply to his contract of employment.

35. Article 6(2)(a) of the Rome Convention is in terms which are so similar linguistically as almost to be indistinguishable from the provisions in the Brussels 1 Regulation. Thus Article 6(2) which was then in consideration provided:

> **"Notwithstanding the provisions of Article 4** [immaterial for present purposes] **a contract of employment shall in the absence of choice in accordance with Article 3 be governed, (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country or, (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a whole that the contract is more closely connected with another country, which case the contract should be governed by the law of that country."**

36. Focusing upon 2(a) raises the question of the scope of "habitually". The court noted the submission of the Claimant, the Greek Government and the Commission that the words "habitually carries out his work" had been interpreted in **Mulox** and **Rutten** in the context of

Article 19 of the Brussels Regulation as being the place from which the employee mainly carried out his obligations towards his employer or had established the effective centre of his working activities.

37. The court observed at paragraph 41:

> **"41. The court has also been guided by those principles in the interpretation of the rules of jurisdiction relating to those contracts which are laid down by the Brussels Convention. It has held that in a situation in which, as in the main proceedings, the employee carried out his working activities in more than one contracting state, it is necessary to take due account of the need to guarantee adequate protection to the employee as the weaker of the contracting parties …**
>
> **42. It follows that insofar as the objective of Article 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must be understood as guaranteeing the applicability of the law of the state in which he carries out his working activities rather than that of the state in which the employer is established. It is in the former State that the employee performs his economic and social duties, and as was noted by the Advocate General in … her opinion it is there that the business and political environment affects employment activities. Therefore compliance with the Employment Protection Rules provided for that country must, so far as is possible, be guaranteed.**
>
> **43. Consequently, in the light of the objective of Article 6 of the Rome Convention it must be held that the criterion of the country in which the employee "habitually carries out his work" set out in Article 6(2)(a) thereof must be given a broad interpretation while the criterion of "the place of business through which the employee was engaged" set out in Article 6(2)(b) thereof ought to apply in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out.**
>
> **44. It follows from the foregoing the criterion in Article 6(2)(a) of the Rome Convention can apply also in a situation such as that at issue in the main proceedings where the employee carries out his activities in more than one contracting State if it possible for the court sees to determine the State with which the work has a significant connection."**

38. It then returned to paragraph 45 to cite the Court's case law, to which I have already referred, and at paragraph 47:

> **"47. It follows from the foregoing that the referring court must give a broad interpretation to the connecting criterion laid down in Article 6(2)(a) of the Rome Convention in order to establish whether the claimant habitually carried out his work in one of the contracting States and, if so, to determine which one.**
>
> **48. Accordingly in the light of the nature of work in the international transport sector such as that at issue in the main proceedings, the referring court must … take account of all the factors which characterise the activity of the employee.**
>
> **49. It must in particular determine in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work and the place where his work tools are situated. It must also determine the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks.**
>
> **50. In those circumstances the answer to the question referred is that Article 6(2)(a) of the Rome Convention must be interpreted as meaning that for the situation in which the employee**

carries out his activities in more than one contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer."

39. Although this authority relates to the Rome Convention and the question at issue before me relates to the Brussels Regulation neither counsel contends that the approach should be any different as between those two instruments because of the slightly different context they address. Moreover, there was considerable attention paid by the Advocate General in her opinion to the question whether there should be a different approach and the conclusion was that there should not.

40. Accordingly, just as **Mulox** and **Rutten** were relevant to help determine the outcome in **Koelzsch** so in my view it is appropriate to regard **Koelzsch** as appropriate authority in determining the scope of habitually carrying out work in the current case.

41. Mr Legard argues that **Koelzsch** demonstrates a width of approach, given the recitals to the Regulation, in particular recital 13 which calls for the weaker party to be protected by rules of jurisdiction more favourable to his interests than provided for by the general rules, a recital which is specifically linked to employment contracts. The court seized of determining where an employee habitually carries out his work should give proper weight to where the interests of the employee lay. The response by Mr Jones is that in the recitals the need for predictability was expressly recognised (see recital 11). The section relating to jurisdiction over individual contracts of employment laid down specific situations; an employee had to come within Article 19(2)(a) or (b) if the employer was domiciled in a Member State if he were to escape the need to sue the Member only in the courts of the State where the employer was domiciled. Here, he submitted, the finding of fact was for the Judge. The Judge approached "habitually" looking for one country alone. That was entirely consistent with **Mulox** and **Rutten** and **Koelzsch**. It

is implicit in the wording of Article 19 itself with its reference in 19(2)(b) - "If the employee does not … habitually carry out his work in any one country" - to one country, and required a Tribunal applying the tests identified in those authorities to focus upon the main or effective place of work. Here he asserted that was and could only on the facts have been Dubai. I accept those submissions.

42. The Judge set out in the last two sentences of paragraph 36 a number of reasons for the finding he reached; they are a sufficient basis for the finding. Accordingly, I am of the view that the Judge was entitled to hold that the Respondent employer was domiciled in Austria and that the Claimant did not habitually work in another Member State within the meaning of the regulations. It follows that the Judge was right to hold as he did that the Tribunal had no jurisdiction over the claim.

43. Nonetheless he turned in any event to whether the claims made would have fallen within the territorial scope of the jurisdiction. He concluded that they would not. He said so again for reasons which are tersely expressed.

> **"38. Turning out of the territorial scope I find that the Tribunal does not have jurisdiction to hear the claimant's claim. I have carefully considered the case of *Lawson v Serco* which I think is now somewhat overtaken in the finding in *Ravat v Halliburton*.**
>
> **39. For the sake of completeness applying *Lawson v Serco* the claimant was not working in the UK at the time of his dismissal and the exceptions to the usual rule do not apply namely that he was not a paid peripatetic employee nor employed by a British employer for the purposes of business conducted in the UK or in an extra-territorial British enclave.**
>
> **40. Following the *Ravat v Halliburton* case and accepting that the claimant had his home in the UK it is clear that the respondent's business was not based in the UK when the claimant was recruited by the respondent, run out of Austria, engaged to work in Yemen initially but actually in Dubai. In reality there were almost no factors connecting the claimant's employment to the UK."**

44. Counsel for the Claimant has invited me to give my views, notwithstanding it is legally unnecessary for the determination of this appeal to do so as to this finding; Mr Jones maintains a neutrality upon instructions. I doubt that I shall be capable of adding much to the learning

which has come from three Supreme Court decisions and may yet be eliminated by a fourth when **Clyde v Bates Van Winkelhof** is heard by the Supreme Court though I am unsure as to the precise scope of the petition. Nonetheless I shall say a few words about it, bearing Mr Legard's well taken point that the form of employment which the Claimant had here has in these recent years of global enterprises become a much more regularly adopted pattern. He was not a peripatetic employee as identified as a class by Lord Hoffman in **Lawson v Serco** [2006] UKHL 3 nor was he an expatriate employee in the sense of working abroad virtually full-time, with limited time spent back in the home country on furlough. His employment pattern was very similar to that addressed in **Ravat v Halliburton** as something of an international commuter.

45. The pattern of working some of the time in one country and much of the time in another country brings with itself particular problems, not least in knowing what employment law should be applicable to the situation.

46. The test which the Judge sought to apply was identified by him in paragraph 33 of his decision as being a "'sufficiently strong connection'/principle", a "pattern which points quite strongly to British employment law as a system with which (the claimant's) employment had the closest connection." There are two strands there: one is that of "closest" connection, the other is "sufficiently strong" connection. A distinction was drawn in the speech of Lord Hope, was most clearly identified as such in the judgments in **Clyde & Co v Bates Van Winkelhof**, between the classes of exceptional expatriate cases which Lord Hoffman had first identified in **Lawson v Serco**. As Lord Hope said at paragraph 28:

> **"28 It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.**

> **29. But it does not follow that the connection that must be shown in the case of those who are not truly expatriate because they were not both working and living overseas must achieve the high standard that would enable one to say that their case was exceptional. The question of whether on given facts a case falls within the scope of section 94(1) (Employment Rights Act) is a question of law but is also a question of degree. The fact that the commuter has his home in Great Britain with all the consequences that flow from this for the terms and conditions of his employment makes the burden in his case of showing that there was a sufficient connection less onerous. Counsel for the employer said that a rigorous standard should be applied but I would not express the test in those terms. The question of law is whether section 91(4) applies to this particular employment, the question of fact is 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."**

47. This test is one of sufficiently strong connection. It was repeated in paragraph 33 in which Lord Hope was influenced by the intention of the parties that the relationship should be governed by British employment law and by the practice which the employer adopted, summarising:

> **"This all fits into a pattern which points quite strongly to British employment law as the system with which his employment had the closest connection."**

and in paragraph 35 in which he accepted a test of substantial connection but thought it better if the Judge had asked himself whether the connection was:

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

48. The emphasis on the exceptionality of cases which Lord Hoffman might be seen to stress in **Lawson v Serco** may be appropriate therefore for the type of case with which that appeal was concerned. The international commuter case, such as **Ravat v Halliburton** requires the approach which Lord Hope adopted, providing at any rate that the commuter commutes from Great Britain, as did the Claimant here. None of the leading authorities though considered a factual case in which the employer was non-British.

49. In **Duncombe & Ors v Secretary of State for Children, Schools & Families** No. 2 [2011] UKSC36, [2011] ICR 1312 Baroness Hale adopted the principle later expressed by Lord Hope in **Ravat** at paragraph 8 observing:

> **"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 for the application of the general principle."**

But later at paragraph 16, dealing with the combination of factors which then inevitably had to be addressed she said at page 1317 D to E, "First, as a sine qua non, their employer was based in Britain …"

50. Neither counsel before me argued that that was stating a proposition of law. It would be surprising given the circumstances in which she had adopted a test in the application of which cases were examples to be determined on their own facts if she had intended it to be taken in that way. As Mr Legard points out, an employer may be German but a subsidiary of a company which is UK based which itself may be part of a wider international conglomerate. There is no short and easy route to determining the question of application of the domestic statute in a situation where all the factors have to be considered. That said, there are always going to be some cases in which very little needs to be said because the case so obviously falls either within (or more probably without) the scope.

51. The starting point which must not be forgotten in applying the substantial connection test is that the statue will have no application to work outside the United Kingdom. Parliament would not have intended that unless there were a sufficiently strong connection. "Sufficiently" has to be understood as sufficient to displace that which would otherwise be the position.

52. The factual features here relied upon by the Claimant are that the Claimant himself resided in Yarm and was domiciled in the UK. He was recruited and interviewed whilst he was in the UK. He was obliged to have a medical examination for the purposes of employment, that too was in the UK. The Respondent though not incorporated in the United Kingdom was incorporated in the Isle of Man which is a British crown dependency, and self-evidently very closely geographically and socially related to the main island. The Claimant had supervisory responsibilities for two UK based personnel. He paid tax and national insurance to the UK tax authorities as well as, to an extent, those abroad. His home country as defined in the Respondent's tax guidelines was the United Kingdom. He spent some time working within the United Kingdom.

53. The Claimant submitted therefore that it was simply inappropriate for the Judge to be so dismissive of those factors which might argue that there was a sufficiently strong connection. The contrary argument put by Mr Jones was that the Judge was right to hold that there were almost no factors connecting his employment to the UK. The Respondent's business was not based in the UK, but as the Tribunal found in Austria and abroad. He was engaged to work in Yemen initially but actually worked in Dubai. That was described as his working time whereas his time in this country was rest time. The contract was expressly governed by Manx law. The remuneration was paid in Euros, not in Sterling. Exclusive jurisdiction was given to the Manx courts. He was described and treated as an expatriate.

54. Given these considerations there are, as it seems to me, two questions: first whether the Judge was entitled to come to the conclusion he did and secondly whether he sufficiently expressed his reasoning for doing so. There is, having said that, no formal **Meek** claim before me.

55. As to the first of those two questions, I note the opening words of the penultimate paragraph of Lord Hope's speech in **Ravat**:

> **"As the question is ultimately one of degree considerable respect must be given to the decision of the employment tribunal as the primary fact finder."**

56. Secondly, here there is no criticism of the terms in which the Employment Judge addressed the test he was to apply. Thirdly, there was ample material which was capable of justifying the Judge's conclusion, in particular insofar as the judgment of Lord Hope calls for a court to examine the connection, (a) with the United Kingdom and, (b) with United Kingdom employment law. It is clear that the employer here was not a British company: though I accept that that factor is not conclusive it is nonetheless highly material. Secondly, the work was performed abroad by agreement, and largely so in practice. Thirdly, the Judge was, as I have found, entitled to conclude that the essential work performed by the Claimant was performed extra-territorially. Fourthly, the Judge did refer to a number of factors in paragraph 40. He made essentially the points which I have just made.

57. If his focus had been upon the second limb of Lord Hope's approach, the question of connection with English/British employment law, the Judge would have been bound to take account of the fact that the parties had agreed that that law would not apply to the contract. They had agreed that the courts of the UK would have no jurisdiction. Those are relevant considerations.

58. It will also be relevant in an appropriate case for a Tribunal to consider whether the parties seriously contemplated that some other foreign State whose systems may not have been well known or appreciated by either would have jurisdiction, and whether the Claimant could

effectively pursue his employment rights arising under the contract or consequent upon it in that jurisdiction.

59. But all that said and, despite the shortcomings of the Judgment in setting out detail, I would conclude that the Judge was entitled to come to the conclusion he did. There is no obvious error of law in his conclusion. It certainly cannot be said in this context to be a perverse conclusion.

60. It follows that for those reasons, though expressed a little bit more shortly than they might have been because this is a further head of appeal which it is unnecessary to resolve, I would have upheld the Judge's conclusion on this point too.

61. The grounds of appeal have not, as formulated, been answered in terms by this Judgment but Mr Legard indicates that I have dealt with all the points which he would have wished to raise. Despite, as I have said, the attractive way in which the argument was put, this appeal must be and is dismissed.