Appeal No. UKEAT/0041/17/JOJ

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 July 2017
Judgment handed down on 23 August 2017

**Before**

**HER HONOUR JUDGE EADY QC**

**(SITTING ALONE)**

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DR M T NICA — APPELLANT

(1) XIAN JIAOTONG LIVERPOOL UNIVERSITY
(2) MR D SADLER
(3) MR S SHAW — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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|---|---|
| For the Appellant | DR MIRCEA TRAIAN NICA<br>(The Appellant in Person) |
| For the Respondents | MR ANDREW HALPIN<br>(Solicitor)<br>University of Liverpool<br>Legal Department<br>Foundation Building<br>765 Brownlow Hill<br>Liverpool<br>L69 7ZX |

**SUMMARY**

**JURISDICTIONAL POINTS - Working outside the jurisdiction**

*Territorial jurisdiction*

The Employment Tribunal had found that the Claimant was employed by the First Respondent (a joint venture involving a Chinese University, based in China) and had worked in China, paid in Chinese currency and subject to a contract that was stated to be governed by Chinese law. In considering his claims under the **Equality Act 2010**, the ET held that it lacked jurisdiction to determine his complaints. The Claimant appealed, in particular contending the ET had erred in failing to find that it had jurisdiction to determine his claims under EU law (the **European Parliament and Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)** ("the Regulation")) and the **Equality Act 2010** ("the EqA").

Held: *dismissing the appeal*

**The Regulation** did not confer jurisdiction on the ET in these circumstances; it was concerned with the question which Courts should hear a claim; as such, it did not affect the content of the substantive law applicable to the claim itself (**Bleuse v MBT Transport Ltd and Anor** [2008] ICR 488 EAT applied). The approach to be adopted in determining whether the Claimant had an enforceable right under British law was laid down in the case-law of the higher appellate Courts, binding on the EAT (see **Bates van Winkelhof v Clyde & Co LLP** [2012] IRLR 992 CA and **R (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 975 CA). Given the ET's findings of fact, it had correctly concluded that it the Claimant had no right to bring a claim under the **EqA**.

**HER HONOUR JUDGE EADY QC**

**Introduction**

1. This appeal raises the question whether, in a case that had been found not to meet tests laid down in cases such as **Lawson v Serco Ltd** [2006] IRLR 289 HL, nevertheless jurisdiction was conferred on the Employment Tribunal by the **European Parliament and Council Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)** ("the Regulation"), that jurisdiction being conferred by virtue of the extra-territorial effect of the **Equality Act 2010** ("the EqA").

2. In this Judgment, I refer to the parties as the Claimant and Respondents, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the East London Employment Tribunal (Employment Judge Ross, sitting alone on 25 September and 22 December 2015, with an additional day in chambers on 5 January 2016; "the ET"), sent out on 13 January 2016. The Claimant represented himself below, as he does now; the Respondents were then represented by Mr Ryan, solicitor at the First Respondent, today Mr Halpin represents their interests.

3. By its Judgment, the ET held that it did not have territorial jurisdiction to hear the Claimant's various claims. The Claimant appeals and was permitted to do so by the Honourable Mr Justice Kerr, after a Rule 3(10) Hearing on 7 December 2016, albeit on only one of the original grounds pursued. The ground of appeal thus permitted to proceed to this hearing identifies the question of law as follows, whether:

(1) jurisdiction was conferred on the ET by **the Regulation**, and

(2) that jurisdiction was conferred by virtue of the extra-territorial effect of the **EqA**.

4. At the outset of the hearing before me, the Claimant made four preliminary applications. First, he asked that the hearing be recorded; second, that it be adjourned pending determination of his appeal to the Court of Appeal against the earlier ruling of Kerr J; third, that I should recuse myself, contending that by refusing the application for an adjournment I had evidenced the appearance of bias and/or had pre-judged the appeal; fourth, to be able to send in a written record of his submissions after the hearing. I refused each of these applications for reasons provided in separate Judgments on each given orally at the time each was made. In the case of the fourth application, I had initially refused the Claimant's request because I had hoped that I might be in a position to give my Judgment on the day of the hearing (the aspiration of the original listing). In the event, it became apparent that this would not be possible (not least because of the time lost in addressing the preliminary applications) and I therefore reviewed my decision in this regard and gave directions allowing the Claimant to lodge his written note of argument, along with further submissions on some additional authorities referenced by the Respondents, after the close of the oral hearing. He has done so and I have accordingly also had regard to those documents in the course of reaching my Judgment in this matter.

**The Relevant Background and the ET's Decision and Reasoning**

5. My summary of the relevant factual background to this case is taken from the ET's findings of fact; I note that the Claimant was not given permission to pursue any appeal against those findings and they must therefore form the relevant context to my Judgment.

6. The Claimant is a Romanian national. He is an academic and lecturer in mathematics, in which he holds a PhD. In or about 2008, the Claimant was granted a blue card, which allowed him to work as a teacher in the United Kingdom. In fact, the Claimant only ever worked in the UK for the second semester of 2009 (roughly from January to June 2009), when

A he worked for a further education college in Nottingham. Other than that period, the Claimant has never lived or worked in the UK.

B 7. It was, however, during that period of employment and residence in the UK that the Claimant applied and was interviewed (by telephone) for a post with the First Respondent. He was then employed by the First Respondent from September 2009 until 31 August 2014. The First Respondent is a university established in China as a joint venture with the University of C Liverpool. It is located in China (its headquarters is in Suzhou). The Claimant has told me that students of the First Respondent would have the opportunity to study at the University of Liverpool and it could therefore be seen as having a physical presence in the UK (it would use D the premises of the University of Liverpool). He also observes that the University of Liverpool would receive an income from the joint venture. The ET, however, made no findings of fact on these matters but did find that the Claimant's place of work was only ever in China, he was paid E in Chinese currency and his contract of employment was expressly stated to be subject to the labour laws of China. The ET further found that the Claimant never worked for the First Respondent in Great Britain and at no time was he employed by the University of Liverpool.

F 8. As for the other parties to the proceedings, the Second Respondent was an employee of the University of Liverpool, seconded to the First Respondent in 2010, taking up the position of Dean and entering into a separate contract of employment with the First Respondent until he G left in 2014. By the time of the hearing before the ET, the Second Respondent had returned to live and work in the UK, having taken up the position as Vice Principal (International Students) at Queen Mary, University of London. As for the Third Respondent, I understand from the H documentation (it is not entirely clear from the ET's findings) that he was and remains an employee of the First Respondent, based in China, albeit the Claimant tells me that the Third

Respondent is a national of the Irish Republic and "his domicile of origin is in Ireland". In any event, at the relevant time the Third Respondent was module leader and subsequently head of the maths department at the First Respondent, in China. For completeness I note that the Respondents have submitted to me that the Third Respondent has at all material times resided in China and continued to do so at the time of the ET hearing.

9. The Claimant's ET claims included complaints of unfair dismissal, race and age discrimination, and of detriments and dismissal by reason of his having made protected disclosures. His original grounds of complaint also included a claim that the First Respondent had failed to make certain payments to him (including pension contributions) such as to amount to a criminal breach of Chinese law. More generally, the Claimant complains that from their first meeting, after he started his employment in Suzhou, the Third Respondent made abusive and racist comments and then continued to discriminate against the Claimant by ignoring him and seeking to increase his workload. The Claimant says he raised concerns about the Third Respondent's conduct in the winter of 2009-2010, when he also made protected disclosures concerning the Third Respondent's work performance. He complains he was then subjected to detriment as a result. After the Second Respondent took up his position, the Claimant further complains there was a failure to promote him and various other detriments, continuing during his employment and culminating in his dismissal, which was explained to him as due to his age (he was over 60) and his status as a foreign member of staff.

10. As a preliminary issue, the ET considered whether it had territorial jurisdiction to determine the various claims pursued by the Claimant. In so doing, the ET reminded itself of the guidance provided in **Lawson v Serco Ltd** [2006] IRLR 289 HL, **Ravat v Halliburton Manufacturing** [2012] IRLR 315 SC, and **Bates van Winkelhof v Clyde & Co LLP** [2012]

IRLR 992 CA. It was satisfied Parliament had not intended the protections afforded by the unfair dismissal, protected disclosure or **EqA** jurisdictions should apply to a person in the Claimant's position.

11. The Claimant had, however, also relied on **the Regulation**, which he contended applied regardless of national laws (superseding UK law) in respect of each of the Respondents in this case. The ET disagreed. It first noted that **the Regulation** had not been cited in **Lawson v Serco**, which would be surprising if it had the effect contended by the Claimant. In any event, the legislation was, on its face, territorial and it was inconceivable that Parliament had intended to confer rights upon employees working in foreign countries, having no connection with Great Britain. Further, the **Posting of Workers Directive 96/71/EC** would be unnecessary if jurisdiction was conferred by **the Regulation**. Addressing the Claimant's specific arguments, the ET reminded itself of the basic facts of this case:

> **"68. …**
>
> **68.1. he was employed in China;**
>
> **68.2. the torts alleged were committed in China;**
>
> **68.3. he was residing in China at the date of the alleged torts;**
>
> **68.4. he was a national of a Member State, other than the UK.**
>
> **69. The employment relationship in this case is fundamentally a Chinese one."**

The ET noted the evidential problems that would arise if it was considered that British Tribunals had jurisdiction to determine a claim where the evidence was based in another jurisdiction in this way. More generally it considered the place where the harmful event was alleged to have occurred would be the most appropriate place for deciding the case.

12. Considering the position as against each Respondent, the ET concluded as follows:

In respect of the First Respondent:

**"72. The First Respondent is not domiciled in a Member State. Thus, Articles 4(1) and 8(1) of the Regulation confer no jurisdiction on the Employment Tribunal to hear the complaints against it.**

**73. In my judgment, Articles 20 - 21 confer no jurisdiction either. If I am wrong about this analysis, I am convinced that, applying the facts found above, neither Article 20 nor Article 21 is capable of conferring jurisdiction.**

**74. In respect of Article 20, the First Respondent has no branch, agency or establishment in the UK. It cannot be deemed to be domiciled in the UK.**

**75. In respect of Article 21, applying Article 21(1)(b), the First Respondent may only be sued in the Employment Tribunal, if:**

> **75.1. the employee habitually carries out his work in the UK, or he habitually carries out work from the UK, or the last place where he did work was the UK; or**
>
> **75.2 the First Respondent was situated in the UK.**

**76. From my findings of fact, I conclude that the First Respondent was not situated in the UK for the purpose of Article 21."**

As for the Second and Third Respondents:

**"78. In respect of claims against an "employer", by Article 20(1), the general position as to jurisdiction is replaced by Section 5 (which includes Articles 20 - 21) in matters relating to individual contracts of employment. In my judgment, the discrimination complaints against Mr. Shaw and Mr. Sadler are brought against alleged individual perpetrators, not against an employer. Moreover, the discrimination complaints are complaints that statutory torts have been committed. Accordingly, Articles 20 and 21 are not relevant when considering whether there is jurisdiction to proceed against the Second and Third Respondents.**

**79. From Article 4(1) of the Regulation, and subject to the terms of the Regulation, persons domiciled in a Member State shall, regardless of nationality, be sued in the courts of that Member State. Article 8(1) confirms this general position, where a person domiciled in a Member State is one of a number of defendants, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.**

**80. Mr. Sadler is domiciled in the UK. I infer that Mr. Shaw is also domiciled in the UK or another [Member] State (the Claimant alleges Ireland), because it was not suggested by Mr. Ryan that he was domiciled elsewhere.**

**81. Article 7(2) applies to all actions which seek to establish the liability of a defendant and which do not concern matters relating to a contract within the meaning of Article 7(1): see the ECJ judgment in *Brogsitter* Case C-548/12 at paragraph 20, and the case-law cited there.**

**82. In *Holterman Ferho Exploitatie BV v Friedrich Leopold Freiherr Spies Von Bullesheim* Case C-47/14, the ECJ held, when referring to the score of what is now Article 7(2) (and was then Article 5(3) of Regulation No.44/2001), with my emphasis added:**

> **"72. In that regard, it should be recalled that Article 5(3) of Regulation No 44/2001 must be interpreted independently and strictly ([judgment] in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 37 and the case-law cited). As regards the place where 'the harmful event occurred or may occur' in Article 5(3) of Regulation No 44/2001, it must be recalled that that expression is intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the applicant, in the courts for either of those places ([judgment] in *Coty Germany*, C-360/12, EU:C:2014:1318, paragraph 46).**
>
> **73. According to settled case-law, the rule of special jurisdiction laid down in Article 5(3) of that regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred or**

> **may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings ([judgment] in *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraph 39 and the case-law cited)."**
>
> **83. The effect of Article 7(2), as interpreted by the ECJ in *Holterman*, is that the Employment Tribunal has no jurisdiction to hear the complaints of the statutory tort of discrimination against either the Second or the Third Respondent. Article 4(1) and Article 8(1) must be subject to the specific rule laid down for complaints of tort set out in Article 7(2).**
>
> **84. I have considered whether my approach furthered the aims of the Regulation as set out in its preamble. I conclude that it does so, not least because I have applied the reasoning of the ECJ above.**
>
> **85. It is true that the Regulation attempts to take into account the party in the weaker bargaining position in respect of insurance, consumer and employment contracts: see paragraph 18 preamble. This stated aim does not alter the terms of the Regulation, or mean that the express words of it can be overlooked, at the choice of the employee in a dispute. Moreover, the preamble to the Regulation also makes it clear that the rules of jurisdiction should be highly predictable."**

## The Relevant Legal Principles

13. Although given permission to proceed with his appeal on the basis of the potential scope of the **EqA**, the Claimant's submissions have focussed on the application of **the Regulation**. That said, he has made clear that he does not agree with the approach that has been adopted in domestic case-law as to the determination of the territorial scope of the **EqA** (in particular, he does not consider it to be compatible with the approach of the ECJ under **the Regulation**). It is therefore helpful to start by reminding myself of the approach laid down by the higher appellate Courts, before turning to the Claimant's arguments on this appeal.

14. The **EqA** is silent as to its territorial scope, leaving it to ETs to determine whether it is to apply in any particular case; an approach consistent with that adopted in the **Employment Rights Act 1996** ("the ERA"). In cases in which the higher appellate Courts have had to consider the question of territorial jurisdiction under the **EqA**, it has further been held that the same approach is to be adopted as under the **ERA** (as laid down in cases such as **Lawson v Serco** and **Ravat v Halliburton**), see **Bates van Winkelhof v Clyde & Co LLP** [2012] IRLR 992 CA (**Bates van Winkelhof** went to the Supreme Court on the question of worker status but the issue of territorial jurisdiction was not before the Court) and **R (on the application of**

**Hottak) v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 975 CA. I am bound to follow the approach laid down by the case-law of these higher appellate Courts and thus to apply the comparative strength of connection test, appropriate where - as here - the complainant's employment has been found to have been carried out wholly outside the UK.

15. Turning then to **the Regulation**, this is the recast form of **Council Regulation (EC) 44/2001** and is concerned with the question which Courts should hear a claim. As such, it does not affect the content of the substantive law applicable to the claim itself, see per Elias J (as he then was) in **Bleuse v MBT Transport Ltd and Anor** [2008] ICR 488 EAT, at paragraph 46:

> **"46. … The … Regulation is concerned with which courts should hear a claim; it does not affect the content of the substantive law applicable to the claim itself. … the fact that the English courts have jurisdiction does not alter the scope of the rights conferred by English law itself. …"**

16. With that context in mind, I set out the provisions of **the Regulation** to which reference has been made on this appeal:

> **"CHAPTER II**
>
> **JURISDICTION**
>
> **SECTION 1**
>
> ***General provisions***
>
> **Article 4**
>
> **1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.**
>
> **2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.**
>
> **Article 5**
>
> **1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.**
>
> **…**
>
> **Article 6**
>
> **1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.**
>
> **2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in**

**particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.**

**SECTION 2**

***Special jurisdiction***

**Article 7**

**A person domiciled in a Member State may be sued in another Member State:**

**(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;**

**…**

**(2) in matters relating to tort, … in the courts for the place where the harmful event occurred or may occur;**

**…**

**(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated;**

**…**

**Article 8**

**A person domiciled in a Member State may also be sued:**

**(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;**

**…"**

17.

**"SECTION 5**

***Jurisdiction over individual contracts of employment***

**Article 20**

**1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6 … in the case of proceedings brought against an employer, point 1 of Article 8.**

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

**Article 21**

**1. An employer domiciled in a Member State may be sued:**

**(a) in the courts of the Member State in which he is domiciled; or**

**(b) in another Member State:**

**(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or**

**(ii) 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.**

**2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.**

**Article 22**

**1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.**

**…**

**SECTION 7**

***Prorogation of jurisdiction***

**…**

**Article 26**

**1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction …"**

18. **The Regulation** is expressly intended to facilitate the reciprocal recognition and enforcement of judgments of Courts and Tribunals; it is considered necessary to that end to further provide for a common means of determining the international jurisdiction of the Courts and Tribunals of the contracting states (see the Preamble to **the Regulation** and the observations of the ECJ in **Owusu v Jackson and Ors** Case C-281/02). **The Regulation** does not purport to bestow substantive legal rights but addresses the question of the appropriate place where disputes concerning those rights are to be determined. As Langstaff P observed in **Simpson v Intralinks** UKEAT/0593/11/RN, there is a distinction to be made between each of three matters: "(a) the territorial scope of a domestic statute; (b) the applicable law relating to a contract or tort; and (c) the place (forum) where a case is determined" (see paragraph 5; and see the fuller explanation of this distinction made by Louise Merrett in her article "*The Extra-Territorial Reach of Employment Legislation*" in the Industrial Law Journal 2010 (pp 355 et seq), cited by Langstaff P in **Simpson** at paragraphs 8 to 9).

**Submissions**

*The Claimant's Case*

19. It is the Claimant's case that **the Regulation** must take pre-eminence over and above domestic case-law. Thus the ET had erred in first applying the national rule laid down in **Lawson v Serco** and on that basis declining jurisdiction (see **Owusu v Jackson and Ors** Case C-281/02). Moreover, the test laid down in the line of cases that included **Lawson v Serco** and **Ravat v Halliburton** had been the subject of academic criticism and did not provide the uniformity required by **the Regulation**.

20. Turning to the cases of the three Respondents to the present proceedings and first addressing the case of the Second Respondent, the Claimant relied on Article 4(1) of **the Regulation**: the Second Respondent was domiciled in the UK, a Member State of the EU and thus Article 4(1) meant that the ET had jurisdiction to hear and determine this case. In the alternative, Article 26(1) allowed parties - subject to certain limits - to agree (explicitly or implicitly) on the competent Court: although he had entered an appearance in the proceedings, the Second Respondent had been quiet with respect to the question of the ET's jurisdiction and could thus be taken to have accepted that the ET had jurisdiction to determine the claim against him. The ET had erred in finding that the Second Respondent had contested jurisdiction; it had relied on the fact that the Respondents were jointly represented (paragraph 86) but this was *after* the Second Respondent had entered an appearance in the proceedings.

21. Turning then to the position of the Third Respondent, the Claimant relied on Article 8(1), which permitted claims against a person domiciled in one Member State to be sued in a different Member State where a co-defendant was being sued in that other Member State. The Third Respondent was a national of Ireland (his domicile of origin) but was a co-defendant to

A the Claimant's claims brought in the UK. Accepting that the claims in question (so, those against the Third Respondent and those against the other Respondents) should be so closely connected that it was expedient to determine them together so as to avoid irreconcilable judgments resulting from separate proceedings (see **Kalfelis v Bankhaus Schroder** C-189/87 at paragraph 13), the Claimant submitted that, from the pleadings, it was clear that, at least between 2010 to 2014, the offences alleged against the Third Respondent were supported by the First and Second Respondents (in particular, given that the Second Respondent had promoted him and had been his direct administrative superior).

22. The ET's approach to Article 8(1) had distorted its spirit and meaning; it had read Article 8(1) as subject to Article 7(2), which, the ET concluded, meant that it had no jurisdiction to determine the claims against the Third Respondent as the torts alleged had not occurred within Great Britain. That, however, gave rise to an error of law. Article 7(2) was an exception to the generality of Article 4 and thus was to be given a restrictive interpretation; it was concerned with torts occurring within the borders of Member States and was thus silent in respect of conduct which had occurred in China, outside the borders of the EU - that implied that the issue of jurisdiction in these circumstances was to be determined by another relevant provision.

23. Then addressing the position of the First Respondent, the Claimant relied on Article 21(2) of **the Regulation** (which reproduced Article 6 of the **Rome Convention**). In truth, the First Respondent was just an international scam in the area of education, involving three actors: the University of Liverpool, the Chinese entity (the Xi'an Jiaotong University) and an American entity (Laureate Inc), as shown by the joint venture agreement; 50% of the profit generated by the Claimant's activity went to the University of Liverpool; he had been in the UK

A when he applied for the position and was interviewed and he had signed the contract in the UK - having no real idea who he worked for in China, the contract being offered on a take it or leave it basis (the choice of jurisdiction was chosen by the employer); in reality all instructions came from the University of Liverpool and the Chinese University was just a mask; and the First Respondent's students could go on to study in the UK, based at the University of Liverpool, the premises of which were effectively being used as a base in the UK. On the true facts, the situation was different from that appearing from the terms of the contract (see **Voogsgeerd v Navimer** C-384/10 at paragraph 65); more generally, the ET's finding that the Claimant was not employed by the University of Liverpool was disputed.

D 24. When thus determining where the employee habitually carried out his work, that was to be understood broadly as referring to the Courts for the place with which the employment had the most significant link (see **Voogsgeerd** and **Rutten v Cross Medical** C-383/95) and in this case that was - contrary to the conclusion of the ET - Britain (for all the reasons relied on by the Claimant in his preceding submissions.

*The Respondent's Case*

F 25. On behalf of the Respondents, Mr Halpin contended that no error of law by the ET had been identified. The Claimant was seeking to go behind the ET's findings of fact, in particular as to the identity of his employer (albeit he had on three occasions during the material period G accepted that the First Respondent was his employer). **The Regulation** could not confer jurisdiction on the ET where there was no substantive right under domestic law (**Bleuse**). In any event, it was apparent that **the Regulation** gave the ET no jurisdiction over the First Respondent: Articles 4 and 8 could confer no jurisdiction and Article 20(2) could not help the H Claimant as the ET had not found that the First Respondent had a branch, agency or other

establishment in the UK. Similarly, Article 21(2) of **the Regulation** did not assist the Claimant, given he had never worked for the University of Liverpool and had habitually carried out work in China. The ET could thus have no territorial jurisdiction regarding the claims against the First Respondent.

26. As for the Second and Third Respondents (both employees of the First Respondent at the relevant time - the Second Respondent having been seconded to the First Respondent and having a contract with it for a five year period; the Third still being an employee of the First), the ET had correctly interpreted the law in this regard, applying **Holterman Ferho Exploitatie BV v Leopold Freiherr Spies Von Bullesheim** Case C-47/14, in which the ECJ had held that **the Regulation** was intended to cover the place where act complained of had occurred.

27. The ET had correctly applied the "close connection" test laid down by domestic law (see **Lawson v Serco**), which had been held to apply to claims under the **EqA** (**Bates**; **Hottak**) and was binding on the EAT. On the ET's findings of fact, the Claimant had been unable to show the necessary connection.

**Discussion and Conclusions**

28. There is a basic confusion at the heart of the Claimant's case as to what is meant by "jurisdiction". His submissions have focussed on the question of jurisdiction addressed by **the Regulation**; that is, which country has the appropriate jurisdiction to determine his claims? That, however, does not address the separate question, whether the Claimant falls within the territorial scope of the legislation upon which he relies to pursue his claims - specifically, in respect of this appeal, within the scope of the **EqA**.

29. On this question, I consider the law is clear, having been clarified in the case-law of the higher appellate authorities binding on the EAT; the test thus requires the ET to determine the comparative strength of connection - only if it finds that the strongest territorial connection is with Great Britain will the would-be complainant have a cause of action under the **EqA** (**Bates van Winkelhof v Clyde & Co**; **R (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs**). The Claimant has criticised that test as being uncertain but it is the test that must be applied by both the ET and the EAT and, doing so, the ET was clear in its conclusion that the closest connection in this case was with China.

30. Recognising the difficulty of that finding for his argument, a large part of the Claimant's submission on this appeal has sought to challenge the ET's findings as to the identity of his employer and the circumstances of his employment. These are not, however, points on which the Claimant has been given permission to appeal and I am bound to approach the case before me on the specific grounds permitted to proceed to a Full Hearing and not on some other basis. I understand that the Claimant is unhappy with this approach and is seeking to appeal against Kerr J's Order dismissing his other grounds of appeal. Should he be successful in his application before the Court of Appeal in that regard, the Claimant's challenges to the ET's findings of fact can be heard; at this stage, however, I remain bound by those findings and have determined the grounds of appeal before me on that basis.

31. Doing so, I am unable to see that the ET did other than reach a permissible conclusion that the rights conferred by the **EqA** did not apply to a person in the Claimant's position. It had found his place of work (as a matter both of contract and fact) was China and he was employed by the First Respondent; he was, further, a Romanian national who had only lived and worked in the UK for a brief period preceding his employment with the First Respondent; his contract

of employment had incorporated Chinese regulations and he was paid in Chinese currency; moreover, the acts of which he complained had all taken place in China. On the basis of those primary findings of fact, the ET was entitled to conclude that the Claimant had no strong connections with Great Britain or UK employment law at any relevant time.

32. That is sufficient to dispose of this appeal: the Claimant having no enforceable right under the **EqA**, **the Regulation** cannot confer jurisdiction upon the ET: it is concerned with the question which Courts should determine the rights of EU citizens; it cannot grant a substantive right where there is none.

33. Even if that were not the case, however, I am not persuaded that **the Regulation** would assist the Claimant in this instance. Whilst reluctant to make *obiter* observations in this regard given that it is unnecessary to dispose of the appeal, I cannot see how **the Regulation** would apply to the First Respondent given that it was not domiciled in any EU Member State and the ET made no finding that it had any branch, agency or other establishment in a Member State. It equally did not find that the Claimant had entered into a sham contract and there is nothing in the ET's findings that would support a conclusion other than that his contract with the First Respondent - governed by Chinese law - had been freely entered into by the parties and remained binding upon them at all material times. The ET's findings of fact would similarly contradict any suggestion that the Claimant had habitually carried out his work other than in China and that this was the place where the business which had engaged the Claimant was situated. As for the claims against the Second and Third Respondents, I note that the ET proceeded on the basis that these could not be employment claims for the purpose of Section 5 of **the Regulation**: the claims being brought against these Respondents as individuals and not against an employer. If that is so, the legal basis for the claims is simply unclear: even if no

issue of territorial jurisdiction arose, if not related to the Claimant's contract of employment (his position as an employee of the First Respondent) how would the ET derive jurisdiction under the **EqA** for such a claim?

34. The difficulty in addressing the Claimant's arguments based on individual provisions of **the Regulation** is that they confuse the identification of a substantive right with the choice of appropriate national jurisdiction in which that right should be determined. There is no exact correlation between the approach taken to jurisdiction under the **EqA** and the individual provisions of **the Regulation** because they are addressing different issues. Whether the provisions of **the Regulation** might suggest that the Courts or Tribunals of a particular Member State should have jurisdiction to hear claims brought against a particular entity or individual does not establish that there is in fact any claim to be pursued: **the Regulation** provides the means of identifying where a claim should be brought; it does not provide the substantive cause of action that would found the claim.

35. That being so, it is thus necessary to return to the **EqA** and the guidance that has been provided as to how its territorial scope is to be determined. Doing so, and applying that guidance, it is apparent that the ET made no error of law. Accordingly the appeal must be dismissed.