THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs N Ravisy	**v**	**Simmons & Simmons LLP**
Mrs N Ravisy	**v**	**Mr C Taylor**

Heard at: London Central **On**: 8 – 10 November 2017

Before: Employment Judge Auerbach

Representation:

Claimant: Mr P Epstein QC

Respondent: Mr D Stilitz QC

JUDGMENT

1 The Tribunal does not lack international jurisdiction to consider the complaints against Simmons & Simmons LLP, nor, in view of that, to consider with them, the complaints against Mr Taylor.

2 However, the complaints against Simmons & Simmons LLP, and the complaints against Mr Taylor, all fall outside the territorial jurisdiction of the Tribunal.

3 Accordingly, all of the complaints, in both claims, against both Respondents, are dismissed.

REASONS

Introduction

1 The Claimant is a lawyer. In May 2013 she became a member of Simmons & Simmons LLP, which I will refer to as Simmons & Simmons, or the firm. She was based in the Paris office. Her membership of Simmons & Simmons came to an end by virtue of a notice of retirement served upon her in the summer of 2016, which took effect on 31 December 2016.

2 The Claimant presented two claim forms to the Tribunal. The Respondent to the first claim, presented on 20 December 2016, is Simmons & Simmons. The Respondent to the second claim, presented on 18 February 2017, is Christian Taylor. He is also a member of Simmons & Simmons, and was also based in the Paris office.

3 In summary, the Claimant seeks to complain of direct discrimination because of sex and race, and victimisation, in relation to the termination of her membership (and other conduct) by Simmons & Simmons, and of direct race and sex discrimination by way of alleged lack of support from Mr Taylor during the relationship and/or with respect to his role in the termination. She also seeks to bring an equal pay claim against Simmons & Simmons, comparing herself to Mr Taylor and to two other members who were also based in the Paris office, Yves Barette and Simon Ratledge.

4 In common with many LLPs which run law practices, members of the firm were thought of, and referred to, as partners; and the Claimant was the equivalent of what, in a partnership governed by the Partnership Act 1890, would be called an equity partner.[1] For convenience, hereafter, I will refer to members of the firm as partners.

5 It is common ground that the Tribunal cannot entertain a given complaint in respect of a given respondent unless it has both international jurisdiction and territorial jurisdiction in respect of that complaint. Mr Taylor maintains that the Tribunal lacks both international jurisdiction and territorial jurisdiction to consider the complaints against him. Simmons & Simmons accepts that there is international jurisdiction in respect of the complaints against it, but disputes territorial jurisdiction. The purpose of this preliminary hearing was for the Tribunal to determine these jurisdictional issues.

[1] As well as equity members, the firm has what it calls fixed equity members, but I was not concerned with the specific position in relation to them.

6 I should note that all the complaints, in both claims, are also resisted on their merits. Consideration of the merits formed no part of my task at this hearing.

7 I heard live evidence from the Claimant, and, for the Respondents, from Colin Passmore and from Mr Taylor. I had two witness statements each from the Claimant and Mr Taylor, and one from Mr Passmore. The Respondents also put before me an expert witness statement from Professor Sophie Robin-Olivier, concerning French law. The contents of this were not disputed and Mr Epstein told me that it was accepted, in light of it, that the Claimant would have an effective remedy available to her, in respect of all of her complaints, in France.

8 I also had a two-volume bundle of documents, supplemented by translations (from the original French) of some of them.

9 I also had written skeletons from both counsel, and heard oral closing submissions from them. I thank them both.

10 I took time to consider my reserved decision in chambers, which I now provide.

11 I set out, first, the essential facts that I found, bearing on what I had to decide.

The Facts

12 The firm is a limited liability partnership registered in England & Wales with its principal office in London. It has offices in the UK, Belgium, France, Germany, Spain and the Netherlands. There are also a number of other entities which run legal practices in other parts of the globe, which the firm owns or, in one case, co-owns. All of the offices of the firm and these various entities worldwide are branded as being part of the global law firm of Simmons & Simmons. The worldwide firm has around 210 partners and 24 offices.

13 Before converting to an LLP in 2010 the firm was what might be called an old-style partnership, governed by the Partnership Act 1890.

14 The governing constitutional document of the firm is referred to as the Members' Agreement. It is a contract to which all of the members of the firm, and the firm itself are party, and is expressed to be governed by English law.

15 The Members' Agreement describes the firm's management structure as having the following main elements: the Board, the International Executive Committee, a number of individual posts – including the Senior Partner, Managing Partner, International Practice Group Heads, National Practice Group Heads,

Country Heads and International Sector Heads – the Remuneration Committee (RAC) and the Membership Appraisal Committee (PAC).[2]

16 The Senior and Managing Partners are elected periodically. Any equity partner may be a candidate.

17 At the relevant times the Senior Partner was Colin Passmore and the Managing Partner Jeremy Hoyland. Both of them are based in London.

18 The firm also has a Finance Director, who is an employee but enjoys the same status as a partner.

19 The Board is responsible (among other things) for the firm's strategy and business plan. The Senior and Managing Partners, Finance Director and six elected members sit on it, three of whom must be from London and three from other offices.

20 The IEC consists of the Managing Partner, Finance Director and the four International Practice Group heads.

21 The PAC consisted, when the Members' Agreement was drawn up, of the Senior and Managing Partners, and six elected members, three of whom must be non-London members. Two fixed equity members have since been added to its constitution.

22 The RAC consists of the Managing Partner and four elected members, two of whom must be non-London members.

23 Equity members share in the overall annual profits of the firm, by way of having points in a lockstep pool and a contribution pool, the latter being based on the individual's annual performance. These are fixed annually by the RAC, to which performance assessments carried out by the local practice group head (see below) are fed in. The firm pays tax in each of the jurisdictions where it has a presence and makes reserves out of profit allocations to individual partners, in respect of the shares of such tax burdens as fall on them. Each of the partners files a personal tax return, and pays tax, in the jurisdiction in which they are each domiciled, by reference to their respective shares of profits and own circumstances. Double taxation arrangements ensure that the same tranche of profit does not bear tax in more than one jurisdiction.

24 The Membership Agreement contains an arbitration clause. This includes a requirement for all disputes between a member registered as an Avocat at the Paris Bar, and the LLP or another member, first to be referred to certain dispute resolution mechanisms established by the Paris Bar.

[2] The seemingly incongruous acronym is a hangover from the erstwhile title of this committee when the firm was an old-style partnership.

25 Each country has a partner within it who is the Country Head.

26 The firm has a sector structure and a practice group structure. The practice groups include Corporate & Commercial (CoComm). For each practice group there is an International Practice Group Head (IPGH), appointed by the Board, on the recommendation of the Managing Partner, after consultation with partners in that group. There are also, for each country, National Practice Group Heads (NPGH), appointed by the corresponding IPGH, after consultation with other partners in that national practice group and the relevant Country Head.

27 The London office is the firm's largest, with more than 100 partners.

28 The Paris office is the second largest in the firm by turnover. Within France it ranks as a substantial leading French law practice in its own right. It was founded in 1988. Plainly the numbers vary (and different witnesses and documents in my bundle gave different figures) but it has around 18 partners, more than 50 other lawyers and around 50 support staff. It has its own Country Head, Office and Finance Manager (Mme Lasfargue), Management Committee, and staff responsible for HR, IT, finance and accounting and marketing. The main language spoken in that office is French, and the first language of promotional materials is French, although most, if not all, of the partners, and many of the support staff, are also fluent in English. Since the Claimant left the Paris office has also acquired its own Senior Partner.

29 Pausing there, I consider it fair to say that the Paris office has all the trappings that, to clients and other third parties, would make it practically indistinguishable from an independent French law firm of similar size providing similar services, but with the added benefits of being part of an international firm.

30 At firm level, there was a firm-wide three-year business plan (for which the Board was responsible), and (relevantly to the Claimant) a CoComm business plan and a CoComm Paris business plan, the last of these being required to conform to the second, and the second to the first.

31 At the time when the Claimant joined the firm, the Country Head of France, and also the NPGH of the CoComm Group, Paris, was Thierry Gontard, who was based in Paris. The International Practice Group Head of the CoComm Group was Mark Curtis, a partner based in London.

32 Common platforms are used for infrastructure that exists firm-wide, such as time-recording software, email and so forth. The Paris office also has all the locally employed administrative staff additionally necessary to the running of that local office.

33 File opening for the firm is managed centrally in London, and conflict checks were managed centrally. That is (as I understand it) because, as a single entity

regulated by the Solicitors Regulations Authority (SRA), the firm as a whole has a professional duty to avoid conflicts arising with respect to any client activities anywhere.

34 I was presented with a great deal of evidence about the minutiae of different aspects of the operations of the firm as a whole, and of the Paris office, and the division of labour and/or interaction between the two. I consider that, for the purposes of what I have to decide, the position can be fairly captured in the following way.

35 The overall picture that the evidence presented to me was not at either end of the scale. The Paris office was not a wholly independent business that was merely affiliated to a separate international organisation. Nor was it merely an outpost or satellite presence of the firm, controlled and managed from London. It was an office that enjoyed the mixture of delegated autonomy and integrated control that I would perceive to be within the normal range for a substantial national office that is part of an international global law business of this size and complexity.

36 Partners in the French office were subject to exhortation, and, on occasion, direction, from elements of the firmwide management, on matters regarded as of concern to the firm as a whole, or in respect of which a common or consistent approach was regarded as necessary or desirable. Examples to which I were taken, or of which I heard, in evidence, included, from time to time, directives relating to the firm's business and client strategies, billing and debt collection, profitability and so forth. However, the day to day management, business and activities of the Paris office were plainly directed and run by its Country Head, local partners and local administration.

37 Mr Taylor is a solicitor. He is an English national, but has lived and worked in Paris for many years, and has been domiciled in France since 1998. He joined the firm's Paris office in 2005 and was registered as a foreign lawyer with the Paris Bar in 2006. He became a partner of the firm in 2009 (when it was an old-style partnership), and, when it became an LLP in 2010, a member from that date. In 2017 (since the Claimant left) he has become an Avocat. He became National Practice Group Head of the CoComm Group Paris in May 2016. As such, he became, in practice matters, the Claimant's line manager. He in turn had a reporting line to the International Practice Group Head for CoComm, Mark Curtis, a partner who is based in London.

38 The Claimant's country of origin is Madagascar. She moved to France in 1981 where she has lived ever since. She has dual Madagascan and French nationality. For many years she has lived in the environs of Paris with her family, and in her present home since 2003. She began her law studies in Caen in 1981 and later in the 1980s obtained two degrees in France. She was admitted to the Paris bar, and became an Avocat, in 1989. She has, throughout the time since then,

worked as a practicing lawyer based in France. She is not a solicitor and has no UK legal qualification. Her specialism is in M & A and private equity transactions.

39 Before joining Simmons & Simmons the Claimant was, from 2008, a partner in the Paris office of Nixon Peabody, an international law firm headquartered in Boston Massachusetts. However, in 2012 Nixon Peabody decided to close its Paris office, and the Claimant was in need of a new job.

40 The Claimant had at one time been in partnership at another firm in Paris with Patrick Bignon, a French lawyer who was by then in the legal recruitment business, and Jacques-Antione Robert, by then of Simmons & Simmons' Paris office. M Bignon contacted them both about whether there might be an opportunity for the Claimant (and, initially, two other colleagues) at Simmons & Simmons' Paris office. This led to her having a meeting at the Paris office at the end of November with the then Country Head of France, and Head of the Paris CoComm Group, Thierry Gontard and with Mr Taylor. She then returned to that office to meet other partners there in early December. She then visited London and met Mr Curtis and others.

41 In accordance with the firm's established processes she was then put forward for consideration by the PAC, with M Gontard acting as her so-called sponsor. He advanced a case as to how her expertise would contribute to the partner cohort and reputation of the Paris office. She then had a meeting in London in January 2013 with members of the PAC – Mr Passmore, Mr Hoyland and four colleagues. Three of them were based in overseas offices (in Holland, Italy and Hong Kong), and participated by video link. In the run up to that meeting she asked for assistance from the manager of the Paris office, Mme Lasfargue, about how to style her presentation to the PAC.

42 The PAC recommended the Claimant's candidacy, which the partnership approved. In February 2013 Mr Hoyland wrote to her offering her an equity partnership "based in our Paris office". She began working in the Paris office in February and formally joined the partnership in May. She signed a Deed of Adherence to the Membership Agreement and other deeds required of all partners, in relation to various aspects of the firm's affairs, including a bank guarantee and a property guarantee. All of these were governed by English law.

43 All partners in a UK registered LLP law firm are required to be registered with the Solicitors Regulation Authority. The Claimant so registered when she joined the firm. As part of that process she was required to provide a certificate of good standing.

44 The Membership Agreement expressly prohibits a given member from working outside what it calls their Territory of Origin. The Claimant's Territory of Origin for these purposes was France.

45 During her time with the firm, the Claimant's share of profits, and the release of payments thereof, were determined in accordance with the mechanisms provided for in the Membership Agreement. The firm also operates a system whereby partners make capital contributions through annual retention of an element of their profit share, and this applied to the Claimant during her time as a member.

46 The Claimant was paid in Euros to a French bank account, although she could have elected to be paid differently.

47 In common with others, the largest tax burden on the Claimant's share of profits during her time with the firm was in respect of UK tax. This was, broadly, a reflection of the fact that the UK accounted for the largest share of the firm's profits, and of the higher UK marginal tax rates than in some other relevant jurisdictions.

48 From May 2016 the Claimant sat on the PAC. She also served as a Trustee of the firm's charitable foundation.

49 During the whole of her time with the firm, the Claimant worked in and from the Paris office. She did not have a dedicated office in London or anywhere else. Her work covered transactions in France, other EU countries and parts of Africa. However, the vast majority of work on transactions for which she was the matter partner was done by her and other fee earners physically in, or from, the Paris office, and billed locally, although she sometimes contributed to other matter partners' transactions as part of a wider team.

50 The Claimant made visits to the London office every few months. She accepted in cross-examination that they could be described as infrequent, ad hoc, and generally short.

51 As already noted, in the summer of 2016 the Claimant was served with a notice of retirement which took effect on 31 December 2016. She invoked the firm's internal appeal mechanism in that respect, but her appeal was unsuccessful.

International Jurisdiction

52 The legal position is governed by the so-called **Recast Brussels 1 Regulation** (1215/2012).

53 The recitals include the following paragraphs:

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

54 Articles 4 and 5(1) provide:

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.

55 Article 21(1) provides:

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.

56 Given that the firm is domiciled in the UK, in light of Article 21(1) it was common ground that there is international jurisdiction for the firm to be sued in the UK, and hence, in this Tribunal.

57 However, Mr Stilitz submitted that the position was different in relation to Mr Taylor. Article 21(1) did not assist the Claimant in respect of him, because he is domiciled in France, not the UK. Accordingly, he argued, Article 4 applied so as to require that he be sued, if at all, in France.

58 Mr Epstein agreed with that, as far as it goes. But he relied on Article 8. This provides, in part:

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;

59 That, said Mr Epstein, precisely applied to this present case. Mr Taylor is one of two defendants (strictly, Respondents as they are still called in the Employment Tribunal). The other – the firm – is domiciled in this jurisdiction. Finally, he said, the

claims are plainly so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions.

60 Mr Stilitz had two lines of response to this. First, he argued that this was not a single claim with two Respondents. The Claimant had presented one claim against one Respondent and then, at a different time, another, separate, claim against a different Respondent. She could have presented one claim form against both Respondents, but had not done so. Although it had been agreed that it was sensible for the jurisdictional arguments in both cases to be considered together at one Preliminary Hearing, it was not clear that any Judge had actually (yet) directed that the full merits hearing, now listed for June 2018, was to be in both cases together.

61 Secondly, said Mr Stilitz, he did not suggest that the two cases were not so closely connected that it would not be expedient for them to be heard together in a single forum. But, if so, that forum should be in France. It is the place where the Claimant lives and habitually worked. Further, this is not just a formality for Mr Taylor. He has never employed the Claimant. Everything in issue relating to him occurred in France and that is where he lives and works. His nationality is irrelevant.

62 I reject both of these lines of argument. As to the first, on a strict construction of the wording of Article 8(1) it is not clear to me that it requires the defendants concerned all to have been co-defendants to a single action from the outset, only that the close connection test make it expedient for the claims against each of them to be heard together. Further, that reading is, in any event, consistent with the plain purpose of this provision (and the corresponding recital 21). If expediency dictates that two overlapping claims be heard together to avoid irreconcilable outcomes, it would be surprising if Article 8(1) could not bite, so as to achieve that result, even though the national court would have the power to order them to be heard together, merely because they had not been begun together. So surprising that it must be wrong.

63 As to the second argument, I agree with Mr Epstein's submission in reply that, where Article 8 applies, there is no power for the Tribunal to decline international jurisdiction simply on the basis that (if it indeed thinks so) it would be more desirable for the two claims to be heard together in the other jurisdiction, than heard together in the UK. As the word "also" in the preamble to Article 8 makes clear, there is, in such a case, international jurisdiction to hear the claims together in either of the two locations.

64 Accordingly, I conclude that the Claimant's various claims do not face the barrier of lack of international jurisdiction, whether as against the firm, or, hence, because of the application of Article 8(1), against Mr Taylor. I turn, then, to the question of territorial jurisdiction.

Territorial Jurisdiction

65 The **Equality Act 2010**, which provides the causes of action on which the Claimant seeks to rely in all of her complaints against both Respondents, contains no provision expressly addressing the question of territorial scope. Nor does the **Employment Rights Act 1996**, which gives certain employees the right to claim unfair dismissal, and confers other rights on employees and workers, as therein defined. Both statutes do, nevertheless, have territorial limits to their reach; and the test or tests to be applied have been expounded in a series of decisions of the higher Courts in recent years.

66 Two, linked, preliminary points may be made, which were common ground before me. Firstly, the test of territoriality in relation to claims of discrimination and the test in relation to unfair dismissal claims is the same: see **R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 975 (CA). So, the authorities concerned with claims under either statute were equally of potential assistance and relevance to this case. As a corollary to that, it was common ground that the outcome in relation to this question could not sensibly be different, say, in relation to the equal pay claim in this case on the one hand, and the claims of direct discrimination and victimisation on the other.

67 Secondly, Mr Epstein conceded in light of **Hottak** that it was not open to him to argue before me that the **Bleuse**[3] line of authority might require a different approach be taken to territoriality in a case where rights underpinned by Community law are being invoked. Accordingly, it was common ground that I need give no further consideration to that line of authority.

68 I turn then to the principal authorities, all now familiar to lawyers who practice in this field.

69 In **Lawson v Serco Ltd** [2006] ICR 250 the House of Lords heard conjoined appeals in three cases. All of them involved ex-employees who sought to claim unfair dismissal, two of whom had worked outside of Great Britain and one of whom (an airline pilot) was peripatetic. Lord Hoffman (with whom the other members of the House agreed), postulated (at paragraph 25) that the "standard, normal or paradigm case" to which the right to claim unfair dismissal would apply was that of an employee working in Great Britain. Further, the focus should be on where the employee was actually working at the time of dismissal, not on the historical position when the contract was made, or what the terms of the contract itself may have contemplated.

70 After considering the category of what he called peripatetic employees, he turned to what he called "expatriate employees" by which he meant those who work and are based abroad. Of that category he said this:

[3] **Bleuse v MBT Transport Limited** [2008] ICR 488. Mr Epstein did not rule out pursuing the point elsewhere should this matter find its way to a higher Court.

36. The circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. But I think that there are some who do. I hesitate to describe such cases as coming within an exception or exceptions to the general rule because that suggests a definition more precise than can be imposed upon the many possible combinations of factors, some of which may be unforeseen. Mr Crow submitted that in principle the test was whether, despite the workplace being abroad, there are other relevant factors so powerful that the employment relationship has a closer connection with Great Britain than with the foreign country where the employee works. This may well be a correct description of the cases in which section 94(1) can exceptionally apply to an employee who works outside Great Britain, but like many accurate statements, it is framed in terms too general to be of practical help. I would also not wish to burden tribunals with inquiry into the systems of labour law of other countries. In my view one should go further and try, without drafting a definition, to identify the characteristics which such exceptional cases will ordinarily have.

37. First, I think that it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary.

71 Lord Hoffman went on (at paragraphs 38 – 40) to give non-exhaustive examples of scenarios which might supply the “something more”: the foreign correspondent posted abroad by a British newspaper and the employee working in an extra-territorial British enclave in a foreign country. He acknowledged that there may be other examples that he had not thought of, but “they would have to have equally strong connections with Great Britain and British employment law.”

72 **Duncombe v Secretary of State for Children Schools and Families (no2)** [2011] ICR 1312 (SC) concerned a teacher employed at a school in Germany for children of parents working in certain European institutions. Baroness Hale of Richmond JSC, speaking for the whole Court, after considering **Lawson**, said:

8. It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law. There is no hard and fast rule and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples given, for they are merely examples of the application of the general principle.

73 In **Ravat v Halliburton Manufacturing Services Limited** [2012] 389 (SC) the claimant lived in Great Britain but worked for 28 days at a time in Libya for a company based in Aberdeen. The Employment Tribunal in Scotland held that it had jurisdiction to consider his claim of unfair dismissal, a decision which was, ultimately, upheld by the Supreme Court. Lord Hope DPSC (with whom the other members of the Court agreed), after considering **Lawson**, said:

27. Mr Cavanagh drew attention to Lord Hoffmann's comment in Lawson, para 37, that the fact that the relationship was "rooted and forged" in Great Britain because the respondent happened to be British and he was recruited in Great Britain by a British company ought not to be sufficient in itself to take the case out of the general rule. Those factors will never be unimportant, but I agree that the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.

28. The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them. The Page 13 expatriate cases that Lord Hoffmann identified as falling within its scope were referred to by him as exceptional cases: para 36. This was because, as he said in para 36, the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. 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 whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it 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. Mr Cavanagh 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 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 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.

74 Further on, he said this:

32. Lady Smith said in the EAT that the employment tribunal was wrong to take account of the proper law of the parties' contract and the reassurance given to the respondent by the appellant about the availability to him of UK employment law, as neither of them were relevant. The better view, I think, is that, while neither of these things can be regarded as determinative, they are nevertheless relevant. Of course, it was not open to the parties to contract in to the jurisdiction of the employment tribunal. As Mr Cavanagh put it, the parties cannot alter the statutory reach of section 94(1) by an estoppel based on what they agreed

to. The question whether the tribunal has jurisdiction will always depend on whether it can be held that Parliament can reasonably be taken to have intended that an employee in the claimant's position should have the right to take his claim to an employment tribunal. But, as this is a question of fact and degree, factors such as any assurance that the employer may have given to the employee and the way the employment relationship is then handled in practice must play a part in the assessment.

33. The assurances that were given in the respondent's case were made in response to his understandable concern that his position under British employment law might be compromised by his assignment to Libya. The documentation he was given indicated that it was the appellant's intention that the relationship should be governed by British employment law. This was borne out in practice, as matters relating to the termination of his employment were handled by the appellant's human resources department in Aberdeen. 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.

75 In paragraph 34 Lord Hope added that the fact that the claimant's home was in Great Britain could not be dismissed as irrelevant, as it was the reason why the employer gave him the status of commuter, with associated benefits.

76 **Bates van Winkelhof v Clyde & Co LLP** [2013] ICR 883 (CA)[4] the claimant was a solicitor and a member of a Limited Liability Partnership. She sought to bring sex and pregnancy discrimination and protected-disclosure-related claims. She worked principally in Tanzania but also spent 78 days of an eleven-month period working in the London office (as well as 22 other days in London) and had an office base and access to a secretary when in London. Elias LJ (Richards and Lloyd LJJ concurring), after considering **Lawson**, said that the Employment Judge had held that the burden was on the claimant to show "strong connections with Great Britain" such as to give the Tribunal jurisdiction. He continued:

86. The employment judge concluded that the connections were of that nature. She described them as "clear, firm, sound connections with Great Britain" which precisely echoes the language of the employment judge in *Wallis*. She identified, amongst other matters, the following ten factors establishing that link: (1) she worked at least partly in Great Britain; (2) the LLP Agreement was governed by English law; (3) she was a member of an LLP which resulted in her agreeing budgets with her partners in London; (4) she visited London, for work, on a regular basis; (5) she was mainly paid from London; (6) all her time recording was done on Clyde & Co's time recording system; (7) all invoices generated, whilst put through the Tanzanian law firm, Ako Law, were generated from Great Britain; (8) she was provided with administrative support from London (even though she had a secretary in Tanzania); (9) she appeared on the Law Society website list of solicitors as a member of Clyde & Co; (10) Clyde & Co's press releases detailed her as being a member of Clyde & Co.

77 After considering the earlier authorities he said this (at paragraph 98):

The comparative exercise will be appropriate where the appellant is employed wholly abroad. There is then a strong connection with that other jurisdiction and Parliament can be assumed to have intended that in the usual case that jurisdiction, rather than Great Britain,

[4] An appeal heard and decided by the Supreme Court was on a different point.

should provide the appropriate system of law. In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force. However, as paragraph 29 of Lord Hope's judgment makes plain, that is not necessary where the applicant lives and/or works for at least part of the time in Great Britain, as is the case here. The territorial attraction is then far from being all one way and the circumstances need not be truly exceptional before the connection with the system of law in Great Britain 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.".

99. I agree with the claimant that, showing remarkable prescience, this is in essence the question posed by the employment judge here. She asked whether there were "strong connections with Great Britain such that the Tribunal has jurisdiction to hear the [complaints]." Even if, contrary to my view, the question was not quite appropriately framed, His Honour Judge Clark was plainly entitled to conclude, as did Lord Hope in the different circumstances in *Ravat*, that had she asked the right question she would necessarily have come to the same conclusion.

78 Other authorities were cited to me in which, on the facts of those cases, various particular factors were said to be relevant, including where a claimant was recruited, in what currency they were paid and how they paid tax.

79 Pausing there, I conclude that, in principle (though, of course, application of this typology to the given facts may be tricky) cases can potentially, and to start with, be divided into three types:

(a) those in which (at the relevant time or during the relevant period), the claimant worked in Great Britain;

(b) those in which the claimant worked outside Great Britain; and

(c) those in which the claimant lived and worked for at least part of the time in Great Britain.

80 In cases of type (a) there will be territorial jurisdiction. In cases of type (b) the presumption is against jurisdiction unless there is something which puts the case in an exceptional category, such that the employment has much stronger connections both with Great Britain and British employment law than with any other system of law. This is a question of fact and degree. A non-exhaustive range of factors could be relevant. In cases of type (c) the case does not have to be “truly exceptional” for territorial jurisdiction to be established; and the comparative exercise called for in a type (b) case is not required. There merely needs to be a sufficiently strong connection with Great Britain and British law.

81 Which type of case is the present case? In my judgment it is plainly a case of type (b). The Claimant worked, and was based, at the Paris office. This was so throughout the period of her relationship with the firm. Her visits to London were not of a nature such as to place her in category (c), like Ms Bates van Winkelhof. They were too ad hoc, brief, and intermittent. She had no desk or other dedicated support when in London. Though they were made on firm business, and no doubt of value to the firm, I had no hard evidence that they were for the purpose of any fee-earning work (though she may have kept on top of her own client work while on a visit).

82 Accordingly, for the Employment Tribunal to have territorial jurisdiction in respect of the Claimant's claims in the present case, there had to be sufficient features to place this case into an exceptional category, such that the relationship had much stronger connections with Great Britain and British employment law than with (in this case) France and French employment law. That was the test I had to apply, looking at the matter as one of fact and degree, and in the round.

83 It was suggested to me that the following factual features all, as it were, weighed on the French side of the scale:

(a) the Claimant was recruited while living and working in France with the help of a French recruitment consultant through a connection with the Paris office, with a view to joining that office, and sponsored and supported by it;

(b) she is a French lawyer and has no English legal qualification;

(c) the great majority of work on her client matters was carried out by her and colleagues physically in the French office;

(d) her work was predominantly focussed on French law matters and French clients;

(e) she was prohibited by the Members Agreement from working other than in France, and I had no basis to find in fact that she did any, or certainly any significant, fee-earning work in London;

(f) she had no home of any sort in England.

84 Pausing there, the combined effect of these features, in my judgment, did create a picture of a strong connection with France.

85 I turn to some further features also relied upon by Mr Stilitz, in written or oral argument.

86 First, he referred to various aspects of French law which the expert report confirmed would have applied to the Claimant, such as in relation to matters of Health & Safety and Data Protection. Secondly, he referred to the fact that the

comparators she relied upon for the purposes of her equal pay claim were all based in the Paris office as well. I agree that these features add some general support to the Respondents' case, although the former, and to some extent the latter, are themselves simply consequences of the (important) fact that she was based in Paris, rather than independent additional features.

87 Secondly, Mr Stilitz submitted that the arbitration clause in the Members' Agreement, and the rule of the Paris Bar, required disputes between the Claimant, on the one hand, and Mr Taylor and/or the firm, on the other, to be submitted to the dispute-resolution mechanisms of the Paris Bar. While he, of course, accepted that such provisions cannot, as such, oust the Tribunal's jurisdiction (if it would otherwise have jurisdiction), they were nevertheless indicators that he relied upon as carrying weight on the French side of the territorial scales.

88 The Claimant's case was that the specific mechanisms referred to in the Members' Agreement in fact no longer existed by the time this dispute arose. Further, said Mr Epstein, Mr Taylor did not become amenable to the Paris Bar mechanisms until he became an Avocat, which was after the Claimant's departure. Mr Stilitz replied that, in any event, the material point was the spirit and purpose of these mechanisms.

89 I do not think what I have to decide is materially affected by who was, technically, right, about whether either of these mechanisms bit on these claims. That is because I consider this aspect, in any event, to carry little or any weight in its own right. If it is a fair view that these mechanisms were at least *intended* to apply to this case, then that will be because of other factual features of the underlying circumstances. Those underlying features might *also*, in parallel, support the Respondents' case on territorial jurisdiction. But, if so, the conclusion would simply be that these mechanisms go with the grain of the principles of territorial jurisdiction.

90 A further feature which Mr Stilitz argued weighed on the French side of the scale was the agreed fact that French law offers the Claimant rights and remedies in respect of her complaints, in respect of which the relevant French courts would have jurisdiction (as against both Respondents). Mr Epstein submitted that this could not properly be regarded as a relevant consideration. Specifically, in **Dhunna v CreditSights Limited** [2015] ICR 105 (at 122E-123A) the Court of Appeal rejected the proposition that that what is required, for the purposes of deciding territorial jurisdiction, is a comparison of the *merits* of the local employment law of the employee's workplace at the relevant time with that applicable in Great Britain.

91 Mr Stilitz, in reply, accepted that the undisputed fact that the Claimant's rights, and potential remedies, in France would be no less favourable or effective than those offered by English law, is, as such, irrelevant. But he submitted that the fact, as such, that the French Courts *do* have territorial jurisdiction, is not. However, I do not agree. If that were correct, the converse would follow: a claimant based in a country which offered no rights or remedies at all could rely on that fact in support of

their case, even though one who could obtain some local remedy, but a very meagre one indeed, could not. Rather, the reasoning in **Dhunna** must surely render the availability of a foreign remedy, as such, irrelevant, as well.

92 Pausing there, this case is of a type in which there is a presumption against jurisdiction unless there is something which puts the case in an exceptional category, such that the employment has much stronger connections both with Great Britain and British employment law than with any other system of law. Even discounting entirely the further features relied upon by Mr Stilitz that I have referred to at paragraphs 86 – 91 above, the other features relied upon by him, referred to in the earlier paragraphs, paint a compelling picture of a strong connection with France and/or French law. It would require a yet more strongly compelling set of features pointing the other way, to establish much stronger connections with Great Britain and British law, and hence to put this case into an exceptional category, such that territorial jurisdiction applies.

93 Features that it was suggested to me might be said to support that exceptional case were as follows:

(a) the management structures of the firm were under the control of a UK majority;

(b) the actual decision to recruit the Claimant, and the decision to terminate the relationship, were both taken by the firm;

(c) the Membership Agreement and other instruments relating to the Claimant's status as a member of the firm were all governed by English law;

(d) being a member of the firm involved the Claimant in significant commitments, including the investment of capital, and the giving of bank and property guarantees, governed by English law;

(e) the Claimant shared in the profits of the firm as a whole. The Managing Partner (as he was entitled, under powers conferred on him, to do) withheld the flow of profit distributions as a means to exert discipline over billing and cash collection;

(f) the CoComm practice was ultimately managed from the London office;

(g) the firm exercised significant oversight and direction, or centralised control, in relation to the strategy, finances and support functions affecting the Paris office;

(h) the London office carried out other headquarters functions, such as administration of partnership elections and marketing support;

(i) a high proportion of the tax borne on the Claimant's profit share was UK tax.

94 Mr Epstein submitted that this was a powerful concatenation of features. He drew attention to what he said were a number of very similar features which were found properly to have weighed with the Judge below in the **Bates van Winkelhof** case, in support of the conclusion that there was, in that case, a strong connection with Great Britain. Whilst he did not seek to suggest that the present case was fully on all fours with **Bates**, the Court of Appeal's decision in that case was a general indicator, it was suggested, that such features could (and should) properly win the day for a member of a London-based international LLP such as the Claimant.

95 However, **Bates van Winkelhof** was found to be what I have called a type (c) case. So the claimant in that case merely had to establish that there was a strong enough connection with Britain and British law; it was not necessary for the Tribunal to have found that hers was an exceptional case in which there was found to be a stronger connection with Great Britain than a rival jurisdiction, in a comparative exercise. But that is what must be found in the present case. In any event, it appears that there was a range of factors which the Tribunal regarded as significant in **Bates van Winkelhof**, a number of them having no factual counterpart in the present case. For all of these reasons, the Court of Appeal's upholding of the Tribunal's decision in that case did not, therefore, have the persuasive force that Mr Epstein suggested.

96 I turn then, to consider whether the features relied upon by the Claimant supported her case that the connections with Great Britain and British law were comparatively stronger than the connections with France and French law, so as to satisfy the exceptionality test.

97 I observe that all of these features were incidents of the Claimant's membership of the firm and/or arose from, or were connected with, the fact that the Paris office was part of an international firm headquartered in and (so it was argued) controlled from the UK. As to that, factually, it is certainly clear that the firm is registered and domiciled in the UK, it is headquartered in London, a significant element of management control is exercised from there and the English practice is far and away the largest. That said, Mr Stilitz reminded me of the factual features, which, he submitted, also show that this is a truly international firm, both in terms of the role which non-UK partners are entitled to, and do play, constitutionally, and in terms of its global presence and reach.

98 But even leaving aside that international dimension, here the Claimant's case comes up squarely against what Lord Hoffman said in **Lawson** at paragraph 37 of his speech (above). Where the employee works abroad, neither the fact that an employer is based in Great Britain, nor the fact (if, in the given case, fact it be) that the employee was recruited in Great Britain would be sufficient to establish territorial jurisdiction. The argument that the relationship is "rooted and forged" in the UK is not in itself sufficient to displace the general rule that place of employment is decisive. The point is reiterated in **Dhunna** (above, at 123F-G) where the Court observed: "The fact that Mr Dhunna was engaged under an English contract of

employment by a company incorporated in England and Wales might be thought to be a compelling factor in his favour. But it is not; Lord Hoffmann made it clear in *Lawson,* at [27], that what counts is whether or not the employee was working in Great Britain at the time of his dismissal, rather than what was contemplated when his employment contract was made …".

99 This does not mean that these factors should be regarded as contributing nothing at all. That this would also be the wrong approach is clear from what Lord Hope said in **Ravat** at paragraph 32 of his speech (above). But I do not regard them as sufficient to establish a case of exceptionality by themselves; and I consider that the weight that they contribute on the Claimant's side of the scales in the comparative exercise is, at best, limited. There has to be a "something more" present, and which, as it were, does the principal heavy lifting in that regard, for her case to prevail.

100 Mr Epstein sought to draw also on *factual* features of **Ravat**. As to that, true, it is, broadly speaking, that both the Claimant before me and Mr Ravat had appeals against their termination considered in the UK. But there were a number of other material distinguishing features. Mr Ravat had his home in the UK, and was found to have been sent to work in Libya, on periodic assignment, on the implicit understanding that he would enjoy the protection of English law. It was in light of all these features that, according it the "considerable respect" to which it was, as "the primary fact finder" entitled (**Ravat** at 35), the Tribunal's conclusion, in Mr Ravat's case, that there was territorial jurisdiction, was one that it had been entitled to reach. The *outcome* in **Ravat** does not, I conclude, point the way to the outcome of the present case.

101 However, all this being said, the following feature of the present case was relied upon by Mr Epstein as being of particular significance. This is that the Claimant was not merely an *employee*, or Employment Rights Act-style *worker* of the firm. She was a member, and, in effect, an *equity partner*. Her adherence to the various agreements that she signed on joining the firm reflected the fact that she herself had rights of participation in the affairs of the firm, and a significant financial and legal relationship with it (and third parties in respect of it), which a mere employee working in the Paris office did not have.

102 As to that, in **Bates van Winkelhof**, the fact that the claimant was a member of the firm was among the features, which the Tribunal below relied upon as relevant to the establishment of territorial jurisdiction. But that was still only one factor; and I refer to the other points I have already made about that decision. One certainly cannot draw out of that decision, any proposition to the effect that being an equity partner in a UK-based firm is a decisive, or even a powerful feature, when considering, as here, an overseas-based Claimant, who is seeking to establish exceptionality.

103 In my view, while the fact that the Claimant was a member and effective equity partner of the firm means that the other aspects relied upon by her carry *some* more weight on her side of the argument than they otherwise would, they still only add limited weight in support of her case for exceptionality. As well as for the reasons I have already explained, that is also because these features only gain such traction as they do, by operating *in harness* with the fact of the firm itself being headquartered in, and much managed from, London. But that, in turn, in my view, only carries limited weight.

104 In particular, it seems to me that the tenor of Lord Hoffman's approach, and, though non-exhaustive, of his examples, is that, given that the general rule is that territoriality is determined by current place of work, it is in those cases where there is a feature which means that the fact that the claimant works abroad should *itself* be viewed in a different or exceptional light, that the hurdle of exceptionality has the best chance of being surmounted. I do not say that this is a necessary condition for a case of exceptionality to be made out (I accept, per Baroness Hale in **Duncombe**, that there are no hard and fast rules); but nor do I think that I am bound to regard this consideration as necessarily irrelevant to my appreciation of the picture painted by the facts of the case before me.

105 In the present case I do not think that the features relied upon by the Claimant are such as to cause the basic fact that she was based in, and worked out of, the Paris office, to be viewed in a significantly different light.

106 Nor, in any event, do I think that the overall picture presented by these features is otherwise sufficient to show the stronger connection with Great Britain and British law, than with France and French law, that would be needed to satisfy the exceptionality test.

107 For all of these reasons I conclude that there is no territorial jurisdiction in the Tribunal to consider the Claimant's complaints against the firm.

108 The Claimant's case in respect of territorial jurisdiction against Mr Taylor is, inevitably, weaker than it is against the firm. The fact that he, like her, was based in the Paris office, and that the conduct of which he is accused effectively occurred there, adds even more strength to the case, in respect of the claims against him, that the stronger territorial link is with Paris. Further, her points which turn on the firm being headquartered in London, and aspects of management and control being exerted from London, cannot be asserted in the same way personally against him. I conclude that there is also no territorial jurisdiction in the Employment Tribunal to consider the claims against Mr Taylor.

Outcome

109 For all the foregoing reasons, while I conclude that international jurisdiction is, ultimately, not lacking in either case, territorial jurisdiction is lacking with respect both to the claims against Simmons & Simmons and the claims against Mr Taylor.

110 Accordingly, all of the complaints in the respective claims against each of the Respondents are dismissed.

Employment Judge Auerbach on 14 December 2017