Appeal No. UKEAT/0268/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 & 31 October 2017
Handed down on 19 January 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

PRESIDENT

MARIA BAMIEH — APPELLANT

(1) EULEX KOSOVO — RESPONDENTS
(2) FOREIGN & COMMONWEALTH OFFICE
(3) MR G MEUCCI
(5) MS C FEARON
(6) MR J RATEL

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR C MILSOM MR N ROBERTS (Of Counsel) Instructed by Bindmans LLP 236 Gray's Inn Road London WC1X 8HB
For the Respondents 1,3,5 & 6	MR S KEEN MS R SNOCKEN (Of Counsel) Instructed by Emmanuelle Raoult EU Legis Rond Point Schuman 6 Box 5, Office 416 1040 Bruxelles
For Respondent 2	MR B COLLINS (One of Her Majesty's Counsel) MS P NEVILL (Of Counsel) Instructed by Government Legal Department Employment Team One Kemble Street London WC2B 4TS

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

JURISDICTIONAL POINTS - Working outside the jurisdiction

VICTIMISATION DISCRIMINATION - Whistleblowing

Ms Bamieh was employed by the FCO at all material times and seconded by the FCO to work as an international prosecutor for EULEX in Kosovo. When her employment came to an end, she brought protected disclosure detriment and unfair dismissal claims under the Employment Rights Act 1996 against the FCO, EULEX and a number of individuals who worked in Kosovo for EULEX. The FCO accepted that the Tribunal has extraterritorial jurisdiction against it, but the other Respondents did not and a preliminary hearing to deal with the jurisdictional dispute took place.

By its judgment (challenged on appeal) the ET held that there was no jurisdiction to hear any of Ms Bamieh's claims against Respondents other than the FCO and all other claims were struck out. The main conclusions leading to that decision were in summary:
(i) EULEX, a multinational Rule of Law mission, established by an EU Council Decision under the Common Foreign and Security Policy of the EU (the Council Joint Action 2008/124/CFSP, "the Joint Action"), has no domestic legal personality and it was unnecessary to impute such a personality to it in order to give effect to EU law;
(ii) Even if EULEX has domestic legal personality, the Employment Tribunal has no territorial jurisdiction over acts done by EULEX or Mr Meucci (as Head of Mission). In common with other contributing countries, the FCO has no control over or relationship with EULEX, though it sends staff on secondment to EULEX;
(iii) The Employment Tribunal has no territorial jurisdiction in respect of the unlawful detriment claims against Mr Ratel and Ms Fearon, both seconded by the FCO to work for EULEX. The Tribunal left open the question whether the FCO could be vicariously liable for their acts or omissions in Kosovo done in the course of their employment by the FCO;
(iv) Neither EULEX nor its Head of Mission acted as agents of the FCO so as to make themselves liable under s. 47B(1A) ERA, or the FCO vicariously liable for their acts or omissions in Kosovo. Although the FCO contributed to the EULEX mission, it worked for the EEAS and not for the FCO at all. As Head of Mission, Mr Meucci had no role in relation to the FCO, and if he was agent for any country, it would have been Italy;
(v) Neither Article 6 or 10 of the European Convention on Human Rights give an extended right to a "European" remedy in Kosovo. Further, the EU Charter of Fundamental Rights cannot assist as there is no EU right to enforce in this case.

The Tribunal's decision to strike out the claims against all Respondents but the FCO was challenged on appeal by Ms Bamieh, and issue was taken with some (but not all) of the conclusions listed above. The arguments are wide-ranging.

Save for the conclusion at (iii) that the Employment Tribunal has no territorial jurisdiction in relation to whistleblowing detriment complaints against Mr Ratel and Ms Fearon, all grounds of appeal failed and were dismissed, substantially for the reasons given by Employment Judge Wade. The appeal was upheld in relation to extraterritorial jurisdiction in respect of Mr Ratel and Ms Fearon. There was an exceptionally strong connection between them and Great Britain and British employment law, and that was the only conclusion available so that claims against them should not have been struck out.

THE HONOURABLE MRS JUSTICE SIMLER DBE

Introduction

1. Following the war in the Western Balkans the UN Security Council deployed international personnel in Kosovo to help the country reach international standards and to achieve self-government. The Appellant on this appeal, Ms Maria Bamieh, was directly employed by the UN Mission in Kosovo (known as UNMIK) as an international prosecutor in 2007. When the UN withdrew in December 2007, the EU set up EULEX Kosovo (as a Rule of Law Mission - referred to below as "EULEX") to continue UNMIK's work. With effect from 24 November 2008, Ms Bamieh continued her work as an international prosecutor in Kosovo as an employee of the UK Foreign and Commonwealth Office ("the FCO") seconded to EULEX on annually renewable contracts.

2. Her annual contract was not renewed in November 2014 and her employment by the FCO came to an end. Ms Bamieh brought claims in the Employment Tribunal against the FCO, EULEX and a number of named individuals, based on alleged detrimental treatment for whistleblowing. Those claims have not been determined on their merits, and the full facts have not been found.

3. The issues raised by this appeal follow a six day preliminary hearing (in March 2016) before Employment Judge Wade directed at whether and to what extent the Employment Tribunal has jurisdiction over her claims for whistleblowing detriment; and/or unfair dismissal under s.103A Employment Rights Act 1996 ("the ERA"). The FCO concedes that the Employment Tribunal has jurisdiction to hear claims against it of unfair dismissal under s.103A ERA and whistleblowing detriment under s.47B(1) ERA (though it contests the extent of its vicarious liability for acts of those working in Kosovo), but EULEX and all individual named Respondents deny that any jurisdiction exists.

4. By a judgment promulgated on 16 June 2016 ("the Judgment"), EJ Wade held that there was no jurisdiction to hear any of Ms Bamieh's claims against Respondents other than the FCO and all other claims were accordingly struck out. The Judgment is clear and concise. Its main conclusions can be summarised shortly as follows:

(i) EULEX, a multinational Rule of Law mission, established by an EU Council Decision under the Common Foreign and Security Policy of the EU (the Council Joint Action

2008/124/CFSP, "the Joint Action"), has no domestic legal personality and it was unnecessary to impute such a personality to it in order to give effect to EU law;

(ii) Even if EULEX has domestic legal personality, the Employment Tribunal has no territorial jurisdiction over acts done by EULEX or Mr Meucci (as Head of Mission). In common with other contributing countries, the FCO has no control over or relationship with EULEX, though it sends staff on secondment to EULEX;

(iii) The Employment Tribunal has no territorial jurisdiction in respect of the unlawful detriment claims against Mr Ratel and Ms Fearon, both seconded by the FCO to work for EULEX. The Tribunal left open the question whether the FCO could be vicariously liable for their acts or omissions in Kosovo done in the course of their employment by the FCO;

(iv) Neither EULEX nor its Head of Mission acted as agents of the FCO so as to make themselves liable under s. 47B(1A) ERA, or the FCO vicariously liable for their acts or omissions in Kosovo. Although the FCO contributed to the EULEX mission, it worked for the EEAS and not for the FCO at all. As Head of Mission, Mr Meucci had no role in relation to the FCO, and if he was agent for any country, it would have been Italy;

(v) Neither Article 6 or 10 of the European Convention on Human Rights ("the Convention") give an extended right to a "European" remedy in Kosovo. Further, the EU Charter of Fundamental Rights ("the Charter") cannot assist as there is no EU right to enforce in this case;

(vi) No decision was made on whether EULEX and/or Mr Meucci have submitted to the jurisdiction;

(vii) The Joint Action is clear and determines the capacities of the Respondents. It did not intend that EULEX or Mr Meucci should be Ms Bamieh's employer.

5. The appeal seeks to challenge most of the conclusions summarised above and the Employment Tribunal's overall conclusion that there is no jurisdiction to hear claims against any of the Respondents but the FCO. It is resisted by all Respondents.

6. I refer to the parties as they are referred to in the Judgment for ease of reference. Mr Christopher Milsom appears on behalf of the Claimant, as he did below, assisted by Mr Nathan Roberts. For the EULEX Respondents (that is, the First, Third, Fifth and Sixth Respondents) Mr Spencer Keen appears as he did below, assisted by Ms Rosalie Snocken. Mr Ben Collins QC appears for the FCO (the Second Respondent) but did not appear below, and is assisted by Ms Penelope Nevill, who did. I am grateful to all counsel for their assistance.

7. There are five grounds of appeal set out in the Notice of Appeal dated 22 July 2016 as follows:

(i) Ground one: the Employment Tribunal erred in its conclusion that an Order in Council was required in order to bestow domestic legal personality upon EULEX and/or its reasoning was inadequate. Further, it failed to address the alternative cases advanced by the Claimant that EULEX should be regarded as an unincorporated association for conferring domestic legal personality on it and/or as an emanation of the EU pursuant to Article 47 of the Treaty of Lisbon.

(ii) Ground two: the Employment Tribunal erred in its approach to whether the Claimant had an "employment relationship" with EULEX under domestic law, by wrongly regarding Article 10(2) of the Joint Action (that established EULEX) as dispositive of the question: the focus should have been on the situation on the ground since an employment relationship was not precluded by Article 10(2) of the Joint Action, and the Employment Tribunal overstated the role of the National Contingent Leader so as to minimise the scope of an employment relationship with EULEX. Alternatively, if the Employment Tribunal was correct to find EULEX had no legal personality, it should have found that her employment relationship was with Mr Meucci, in his official capacity as Head of Mission.

(iii) Ground three: the Employment Tribunal erred in its conclusion that there was no jurisdiction over the conduct of EULEX: its reasons for concluding that there was no agency relationship are in error and inadequate, and conflict with the decision of the CJEU in *H v Council of Europe and ors* C-455/14. The Judgment has left uncertainty on the wider question as to legal attribution pursuant to the Joint Action, with which the Tribunal failed to engage.

(iv) Ground four: the Employment Tribunal erred in concluding that it had no territorial jurisdiction over the individual Respondents, Ms Fearon and Mr Ratel. The arguments raised under this ground are amplified below.

(v) Ground five: the Employment Tribunal erred in concluding that the Convention and/or the Charter had no territorial application. A number of arguments are raised under this heading and these are dealt with in more detail below.

8. There is a contingent cross-appeal pursued by the EULEX Respondents. They argued before the Employment Tribunal that the text of the relevant Joint Action (as amended) and judgments of the CJEU are clear and cannot be interpreted as conferring domestic legal personality on EULEX or jurisdiction in respect of the EULEX Respondents on the

Employment Tribunal. Those arguments were accepted by EJ Wade. In the event that the EAT takes a different view, they invite consideration of an alternative argument, that the interpretation of the Joint Action is a matter for the CJEU and a reference should be made to provide clarification as to whether: (i) the Joint Action confers domestic legal personality on EULEX for the purposes of a claim made by an international secondee in England; (ii) the Joint Action prevents EULEX or the EULEX Respondents from being made respondents to these claims; and (iii) and/or to what extent the decision of *H v Council of Europe and ors* C-455/14 (19 July 2016) supports the proposition that EULEX is the correct respondent in respect of acts (falling outside the jurisdictional exclusion zone of the Common Foreign and Security Policy) of a head of mission. The FCO resists the contingent cross-appeal, contending that the first two questions are outside the jurisdiction of the CJEU pursuant to Article 24(1) of the Treaty on European Union ("TEU") and Article 275 of the Treaty on the Functioning of the European Union ("TFEU"). So far as question (iii) is concerned, this is *acte clair* in light of *H v Council of the EU and ors*. The Claimant also resists the cross appeal, contending that the Joint Action does require the conferral of domestic legal personality and jurisdiction but in any event, the points cannot be *acte clair* against her and as a matter of last resort she too seeks a reference to the CJEU.

9. In addition to the grounds raised by the Notice of Appeal and Answers, a late application to amend to raise two additional grounds of appeal (on points not accepted as having been argued below) was made by Mr Milsom on the second day of the appeal hearing. The two additional grounds are:

(i) The Employment Tribunal further erred in failing to recognise that EULEX had domestic legal personality as a consequence of its submission to the jurisdiction through, inter-alia, active participation in proceedings including an application for privacy orders under the Employment Tribunal Rules 2013, resistance to costs applications and payment of a costs order.

(ii) The Employment Tribunal erred in concluding that the claims against EULEX were not within territorial scope. Following Day v Health Education England [2017] ICR 917 and the Employment Tribunal's findings at paragraph 25, EULEX was axiomatically the Claimant's co-employer pursuant to s.43K(1)(a) ERA 1996.

10. As to the first additional ground, Mr Milsom contends that this issue was ventilated at first instance and that it raises an issue of law only, and is in any event encompassed by the arguments about legal personality. In relation to the second additional ground, Mr Milsom

A contends that the s.43K point is referred to in the skeleton argument which the Respondents have had for at least one month. The findings of fact made at paragraph 25 of the Judgment are sufficient to found the s.43K argument and no further investigation of the facts is necessary. Furthermore, against a background of changing decisions (in particular Day) the objections raised by the Respondents are technical and the prejudice to them minimal. On the other hand, there will be significant prejudice to the Claimant if she is not permitted to pursue these arguments.

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11. The application to amend is opposed by all Respondents. EULEX does not accept that it submitted to the jurisdiction. All Respondents contend in summary, that the Notice of Appeal does not include the two additional points now raised and the application has not been made as soon as practically possible and could have been made much earlier. References to additional arguments in a skeleton argument are not a substitute for a properly drafted notice of appeal and not sufficient. This is a complex matter and counsel have had much to do in preparation for this appeal without being diverted by the two additional grounds. Moreover, there are factual matters that would have to be investigated both as regards the question whether EULEX submitted to the jurisdiction (which was not decided by EJ Wade) and in relation to the s.43K argument if they are permitted to proceed.

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12. In considering this application and the exercise of discretion inherent in it, I have adopted the approach identified in Secretary of State for Health v Rance [2007] IRLR 665. There is discretion to allow a new point of law to be argued in the Employment Appeal Tribunal but it is exercised only in exceptional circumstances: see Jones v Governing Body of Burdett School [1998] IRLR 521. It is even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated.

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13. I do not accept that the issues raised by either proposed amended ground are pure issues of law. Both raise questions of fact that have not been investigated by the Employment Tribunal and in respect of which no or inadequate factual findings have been made. Contrary to the submissions made by Mr Milsom, I do not consider that paragraph 25 of the Judgment is determinative of the factual issues raised by s.43K ERA, or that all necessary factual findings have been made. Significantly, the Respondents have not had the opportunity to investigate these issues or to adduce relevant factual material. The same is true in relation to submission to the jurisdiction. Moreover, in addition to the necessary factual material not being available,

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there has been no evaluation and assessment by the first instance Employment Tribunal. That is because in each case the point was not pursued before EJ Wade for deliberate reasons. Both points plainly require investigation by the Respondents and a further hearing in the Employment Tribunal would be necessary.

14. The Claimant has been represented throughout these proceedings. This is a complex appeal. The appeal has been case managed and the issues set out and clarified. The Claimant has already taken the opportunity to reply to the cross appeal and to amend her reply. The application to amend has not been made as soon as practically possible and could have been made earlier, and I agree with the Respondents that arguments in a skeleton argument are no substitute for a properly drafted amendment and are insufficient. Although I recognise the prejudice to the Claimant if she is not permitted to pursue these arguments, there is real (and not simply technical) prejudice to the Respondents if the points are permitted to be advanced in these circumstances. For all these reasons, I am not persuaded that a case has been made out that would justify this late amendment, raising fresh factual issues requiring investigation, evaluation and assessment. Permission to amend is accordingly refused in relation to both grounds.

The facts

15. The facts in summary can be taken from the findings made by the Employment Tribunal at paragraphs 6 to 37.

16. EULEX was set up on 4 February 2008 by the Council of the European Union as a Rule of Law mission in Kosovo through the Common Foreign and Security Policy ("the CFSP"). This was done by Council Joint Action February 2008/124/CFSP (referred to as the Joint Action) and the European Council Decisions of June 2010 and June 2012. The Joint Action is analogous to a treaty between member states so that the UK is obliged to give effect to it to comply with its international treaty obligations.

17. The European External Action Service ("the EEAS"), based in Brussels, is responsible for the planning and conduct of EULEX. However, EULEX is not a branch or part of EEAS and there is no direct relationship between EEAS, EULEX and/or the FCO.

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18. EULEX is based in Kosovo and the Employment Tribunal found that it had no other branch. Its mandate according to Article 2 of the Joint Action is:

> **"to assist the Kosovo Institutions, Judicial Authorities and Law Enforcement Agencies in their progress towards sustainability and accountability in further developing and strengthening an independent multi-ethnic justice system and… ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices."**

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19. A large number of contributing states send personnel on secondment to EULEX. The secondments are mainly from EU member states but significant numbers come from outside; for example, from the USA, Canada and Turkey. The UK cohort of seconded staff members

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was not particularly dominant.

20. In relation to the seconded staff members, EULEX has some powers but the main responsibilities of employer remain with the home state as provided for in Articles 8(6) and

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10(2) of the Joint Action as follows:

> **"8.6: the Head of Mission shall be responsible for disciplinary control over the staff. For seconded staff, disciplinary action shall be exercised by the National or EU Authority concerned…**
>
> **"10.2: the State… having seconded a member of staff shall be responsible for answering any claims linked to the secondment, from or concerning a member of staff. The State shall be responsible for bringing any action against the seconded person."**

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21. The Tribunal made reference to the Personnel Handbook and Operational Plan (the "OPLAN") of EULEX. The broad thrust of these documents was that the seconded staff

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members remained under the authority of their sending state throughout the secondment, but all staff members were required to carry out their duties following the

> **"Mission chain of command and shall act in the sole interest of the Mission".**

All staff members had an obligation to report cases of malpractice, corruption or incompetence

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through the Mission chain of command. In terms of disciplinary action, the EULEX Disciplinary Board makes recommendations for disciplinary measures regarding seconded staff members that are communicated to the sending state. Any decision to discipline or dismiss a seconded staff member is taken by the seconding authority (which usually accepts the recommendation of EULEX).

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22. The Claimant's first contract with the FCO was a one-year fixed term contract dated 20 November 2008. It provided that she would be "employed by the FCO and seconded to EULEX". The contract is governed by English law. The Claimant's permanent home is in London and she was London-based before going to Kosovo where she lived in temporary accommodation.

23. The Tribunal recognised that despite the FCO being the employer, there was a notable duality in the Claimant's engagement. In particular her employment contract with the FCO required her to report to and take lawful instructions from the manager appointed by EULEX Kosovo. In fact, the Claimant had a line manager and a second line manager in EULEX; but she also had a loose reporting line to the FCO through the National Contingent Leader. The OPLAN required each contributing state to appoint a National Contingent Leader to represent each national contingent in the Mission and to be responsible for contingent discipline.

24. At paragraph 25 the Tribunal held

> **"25. It was the role of the EULEX HoM to lay down local conditions of employment such as holiday entitlement and, as has already been explained, he was involved in selecting and also recommending the removal of employees to their seconding states. Ms Fearon confirmed that in practice the FCO did not "micro manage" so that secondees had very little contact with it although the National Contingent Leader did play a role and the Embassy convened information exchange meetings to senior FCO secondees which she attended."**

25. The Claimant's contract was renewed annually. She and other prosecutors within the Mission worked alongside local Kosovan employed prosecutors. The EULEX prosecutors had a high level of independence and focused on serious crimes including fraud, corruption and war crimes. They were allocated work by their EULEX line managers and also free to follow their own leads. Their managers were responsible for performance evaluation but were forbidden from instructing EULEX prosecutors in relation to their executive functions because of the importance of preserving their independence.

26. The Claimant's last contract was signed in November 2013 but was not renewed in November 2014. It is her case that the non-renewal was because of the protected disclosures she made. The FCO contends that the non-renewal was because the Mission was shrinking and some prosecutors had to be dismissed. The Claimant was placed in the bottom three of the UK

candidates for a continued role and she was accordingly selected. These issues have yet to be resolved.

27. So far as the three individual Respondents are concerned, the Tribunal made findings about them at paragraphs 28 to 31 and 34 to 35. I shall return to those findings when dealing with ground four below.

28. I shall set out the material conclusions reached by EJ Wade in light of those findings, in relation to the particular ground of appeal to which it relates. I will then summarise the arguments advanced and set out my conclusions.

The appeal

Issue 1: Domestic legal personality of EULEX

29. In relation to this issue, EJ Wade held:

> **"38. Whilst EULEX was set up by a Joint Action which is as binding on EU states as a Treaty, this does not mean that it has a personality such that this Tribunal has jurisdiction over its actions. I find the Second Respondent's alarmingly simple arguments to be correct:**
> **1. EULEX has no legal capacity for the purposes of the application of UK law because the UK has not made an order under the International Organisations Act 1968 conferring it;**
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> **2. This position is not "trumped" by EU law because under the European Communities Act 1972 section 1(2) which is the "route in" for EU legislation CFSP Joint Actions do not have direct effect in England**
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> **This is not surprising given the characteristics of EULEX, see paragraph 50 below.**
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> **39. The Claimant argues that in another EULEX case, *Laurent v De Marnhac*, being heard in Belgium, EULEX has not argued lack of personality so it should not be entitled to do so here; this is a sort of estoppel argument. However if there is no personality one cannot be created by a difference in legal opinion or assiduousness.**
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> **Necessity**
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> **40. The Claimant argues that it is necessary to impute a legal personality to EULEX in order to give effect to EU law. Further, EULEX has capacity as an employer under Article 15(a). This article did not change the landscape as far as the Claimant was concerned because:**
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> **a. The article was introduced long after she was employed and also after her last contract had begun;**
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> **b. It was not "required" that the status as secondee should change because article 10(2) clearly applied to her situation.**
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> **c. It was only Article 9(3), which applied to locally recruited staff, which needed some clarification. This said that "EULEX may also recruit, as required, international staff and local staff on a contractual basis" and the Council needed to**

be clear that it had capacity to do so rather than the HoM individually in his official capacity.

Thus Article 15(a) gives only limited capacity for specific purpose and it does not affect the secondment arrangements under 10(2). Therefore it is not necessary for EULEX to have a personality in order to give effect to the Joint Action. Further, a number of members of the EULEX mission will presumably give evidence at the full hearing so they will be accountable to that extend;

41. Further, with the application of Article 10(2) to the Second Respondent the Claimant is not left without any redress at all although she will not be able to bring to justice all those who she wishes to. Of the 48 alleged detriments FCO agrees that 18 fall within the scope of its potential liability (subject to Further and Better Particulars, no admission of liability etc). However, to say that the Claimant can litigate in respect of *only* 18 out of 48 gives the wrong impression in that as far as I can tell without hearing the evidence the detriments listed "salami slice" five main issues plus a few subsidiary ones and in respect of the main five FCO has at least some potential liability:

1. Detriment 1: Failure to conduct an investigation into the Claimant's concerns about corruption and criminal behaviour;

2. Detriments 5-14 (excluding D6): The parking investigation and recommendation of disciplinary action which FCO accepted;

3. Detriments 15-18, 20-23, 25-29: The restructuring process and its effect on the Claimant's dismissal by FCO;

4. Detriments 24, 30-37, 42-44 and 46: The issue around the alleged leaks by the Claimant to the media leading to the Claimant's suspension by FCO;

5. "Detriments" 39-40 and 47: The dismissal itself by the non-renewal of the Claimant's fixed term contract by FCO.

In policy terms, whilst whistle blowers should of course by protected this imperative needs to be weighed against the need to run multinational rule of law operations effectively.

30. Mr Milsom's submissions challenging those conclusions can be summarised as follows:

(i) the International Organisations Act 1968 was never intended to be the sole means by which an international organisation may gain domestic personality, so that the absence of an Order in Council creating domestic legal personality here is not determinative, as EJ Wade wrongly concluded. J H Rayner v Department of Trade and Industry [1990] 2 AC 418 at 476-477 does not determine this question. J H Rayner did not concern an EU entity created by way of the Joint Action adopted here, and is distinguishable on its facts. Furthermore, there was no consideration in J H Rayner as to the potential infringement of Convention or Charter rights. Mr Milsom relies on Arab Monetary Fund v Hashim (No 3) [1991] 2 AC 114 as demonstrating that the Order in Council route under the International Organisations Act is not the only means by which an international entity can obtain domestic legal personality in the UK.

(ii) The decision of the Belgian court in *Laurent De Marnhac* and the principle of comity confer domestic legal personality.

(iii) Alternatively, Article 15a of the Joint Action requires that domestic legal personality be conferred because it requires Member States to recognise the domestic personality of EULEX "to be party to legal proceedings as required in order to implement this Joint Action". The three cases relied on by the Respondents (as discussed below) do not undermine that conclusion.

(iv) Alternatively, EULEX derives domestic legal personality as an emanation of the EU pursuant to Article 47 of the TEU. Since the EU 'shall have legal personality' and EULEX is an emanation of the EU it too must be recognised as having domestic legal personality.

(v) Finally, if these arguments fail, EULEX as an unincorporated association is to be treated by UK courts as having domestic legal personality.

31. In order to determine whether EJ Wade erred in law in her conclusion that EULEX has no domestic legal personality it is necessary to address the arguments raised by Mr Milsom on behalf of the Claimant, not all of which were fully addressed by her.

32. As indicated, EULEX was established as a Rule of Law Mission in Kosovo by the Joint Action. The Joint Action and subsequent amending decisions are agreed and adopted by EU Member States under the CFSP provisions of Title V of the TEU. They are 'inter-governmental' in character and are (or are analogous to) treaty agreements between EU Member States.

33. As a matter of domestic constitutional law, the making of treaties is a matter for the Crown in exercise of its prerogative powers, and by virtue of the principle of parliamentary sovereignty, a treaty to which the UK is a party (on the international plane) does not become part of domestic law unless and until it has been incorporated into domestic law by legislation: J H Rayner v Department of Trade and Industry [1990] 2 AC 418 at 476-477. In the same way, international organisations created by treaty do not have domestic legal personality, standing or capacity in English law unless this has been conferred by some means in domestic law or for domestic law purposes. For the reasons set out below, it seems to me that EULEX does not come anywhere near to being a body with domestic legal personality in English law.

34. In J H Rayner the House of Lords considered whether the International Tin Council ("the ITC"), an entity created by a treaty between the United Kingdom and other sovereign

states, had legal personality in the context of claims by the appellants (who had entered into contracts with the ITC which were subsequently breached) seeking to recover debts from the member states, owed to them by the ITC. No part of the treaty was incorporated into UK law but by Article 5 of the International Tin Council (Immunities and Privileges) Order 1972 (SI 1972 No. 120) the "legal capacities of a body corporate" were conferred on the ITC. Rejecting the argument that the Order did no more than recognise the ITC as an existing international entity so that contracts concluded in the name of the ITC were contracts by the member states, the House of Lords held that the Order conferred the legal capacities of a body corporate on the ITC in order to afford it legal personality in the UK and this had the effect of obliging UK courts to treat the activities of the ITC as if those activities were carried out by the ITC as a body incorporated under domestic UK law. Without the Order

> **"the ITC had no legal existence in the law of the UK and no significance save *as the name of an international body created by a treaty between sovereign states which was not justiciable by municipal courts"* (Lord Oliver at 510E) (emphasis added). (See also Lord Oliver at 506C, with whom Lords Keith, Brandon and Griffiths agreed at 476DE and 483CD)**

35. The International Organisations Act 1968 (as amended by the International Organisations Act 2005, together referred to as "the International Organisations Act") gives authority to the Crown to confer, by Order in Council, the legal capacity of a body corporate on bodies established under treaties. In relation to bodies established under the TEU, s.4B provides:

> ***4B Bodies established under Treaty on European Union***
> **"(1) This section applies to any body –**
> **(a) established under Title V (provisions on a common foreign and security policy) or Title VI (provisions on police and judicial cooperation in criminal matters) of the Treaty on European Union signed at Maastricht on 7 February 1992 as amended from time to time; and …**
>
> **(2) Her Majesty may by Order in Council make any one or more of the following provisions in respect of a specified body to which this section applies –**
> **(a) to confer on the body the legal capacities of a body corporate…"**

36. The EULEX Respondents argue that this provision is part of a statutory code for conferring English legal personality or capacity on EU entities formed under Title V (the CFSP) and although there may be other means by which this can be done, there is no other relevant means available here. The FCO contends that this statutory code is the only means of conferring legal personality. It is common ground that no Order in Council has been made in respect of EULEX under s.4B of the International Organisations Act. The issue is whether, in

A the circumstances of this case, such an order was required in order for EULEX to have domestic legal personality, or whether some other route is available for conferring domestic legal personality on EULEX here.

B 37. In Arab Monetary Fund v Hashim (No 3) [1991] 2 AC 114, the Arab Monetary Fund (or AMF) brought proceedings in England against Mr Hashim seeking recovery of misappropriated funds. Unlike the ITC which was created by a treaty to which the UK was a party and was accorded the legal capacities of a body corporate in English domestic law by statutory instrument, the AMF was an international organisation created by a treaty to which the UK was

C not a party, was not the subject of a statutory instrument or any other UK legislation and was not hosted by the UK in any way. The problem recognised in those circumstances was that there would be no reason for the UK to pass an Order in Council in relation to an entity to which the UK was not a member and which the UK did not host. In that context, Lord

D Templeman (with whom the majority agreed) held (at 166G to 167B):

> **"There is no uniform practice with regard to international organisations in this country. In some cases, as in the *Tin Council* case, the organisation is given corporate capacity by means of an Order in Council issued under the Act of 1968 or its predecessors. In other cases provisions of the treaty agreeing to the establishment of the international organisation are declared by Parliament to have the force of the law. This was done, for example. By the Bretton Woods Agreements Act 1945 and the Bretton Woods Agreements Order in Council 1946 (S R & O 1946 No 36). In**
>
> E **other cases, principally, but not exclusively, cases where the United Kingdom is not a party to the treaty, no legislative steps are taken in the United Kingdom but this does not debar Her Majesty's Government from recognising the international organisation as a separate entity by comity provided that the separate entity is created not by the treaty but by one or more of the member states. This is the position of the fund."**

F 38. Since the domestic law decree under the law of the United Arab Emirates conferred legal personality on the AMF, the House of Lords held that "the courts of the United Kingdom can therefore recognise the fund as a legal personality created by the law of the UAE" (Lord Templeman at page 162). The AMF was accordingly amenable to the jurisdiction in the UK as

G a matter of comity having regard to the UAE decree, and despite there being no Order in Council conferring domestic legal personality on it. It is important to emphasise however, that the decision in AMF v Hashim cast no doubt on J H Rayner, but simply added the possibility of recognition on grounds of 'comity', this concept being used not in its strict sense, but in the

H sense that a body given legal personality in country A may be recognised in England & Wales out of respect for the government (not the courts) of country A.

39. The facts of this case are quite different. EULEX is different from AMF because it is not incorporated anywhere. Its nature and functions are very different. It is also relevant that the UK is a party to the Joint Action, unlike the position in AMF v Hashim. I do not rule out the possibility that an Order in Council is required in this case but consider it unnecessary to decide the point on this appeal, and undesirable to do so in the absence of detailed argument on it. I therefore proceed on the assumed basis that the International Organisations Act is not the only means by which international organisations can acquire domestic personality in English law. However, the fundamental point remains that a treaty cannot alter English law and that English courts have no power to enforce treaty obligations. In the absence of an order in Council, the Claimant must at least identify an alternative means by which domestic legal personality has been conferred on EULEX, making it possible for UK courts and tribunals to recognise it as an entity that can be sued here.

40. As to that, Mr Milsom submits that there are three such sources. First, it has been accorded legal personality under Belgian law which must be recognised as a matter of comity in accordance with AMF v Hashim. Secondly it has submitted to UK jurisdiction in any event. Thirdly he relies on Article 15A of the Joint Action. I deal with each argument in turn, though the second argument depended on the successful outcome of his application to raise a new ground by way of late amendment, and as indicated at the outset, this application is refused. The question of submission to the jurisdiction depends on an investigation of the facts which has not been conducted. This was not pursued before the Employment Tribunal and I have not permitted it to be pursued on appeal in all the circumstances.

41. So far as the first argument is concerned, Mr Milsom does not rely on Belgian legislation conferring capacity on EULEX. Rather, he relies on a first instance decision of a Labour Court of Brussels in *Laurent De Marnhac* Case n.12/3600/A, where an employment claim was successfully pursued against both EULEX and the Head of Mission in that capacity, and they were ordered to pay €12,000. He submits that the effect of *Laurent* was to recognise the legal personality of EULEX for the purposes of employment litigation in a member state where EULEX has a "support element". Comity does not rest upon incorporation in another state: recognition by the state in which EULEX has a support element suffices by reason of Article 6 of the Joint Action (which refers to main headquarters of EULEX in Pristina). Comity therefore demands that the UK recognises the domestic personality of EULEX in just the same way as the House of Lords recognised the capacity of the AMF to sue in AMF v Hashim.

42. No evidence was produced to the Employment Tribunal or the Employment Appeal Tribunal as to the effect of this decision in either Belgian or French law. The Employment Tribunal was simply invited to follow the Belgian Labour court decision in the interests of comity (and the same approach was adopted in the EAT). In the circumstances, and understandably, the Employment Tribunal dealt with the point very shortly, at paragraph 39 (set out above) but adequately in my view.

43. I do not accept that the Employment Tribunal's conclusion was in error. In my judgment 'comity' in the sense used by Mr Milsom is quite different to the point made by Lord Templeman in AMF v Hashim about respect for a foreign government (not the courts) where a body is given legal personality in that country. That renders Mr Milsom's reliance on *Laurent* misconceived.

44. In any event, there is nothing in the Belgian Labour Court decision to suggest that EULEX has been accorded legal personality under Belgian law. The decision does not address the question of legal personality at all, but simply proceeds on the implicit basis that EULEX is capable of being sued in Belgium. Further, as Mr Milsom accepts, the decision in *Laurent* is not final. An appeal is pending in the Cour du Travail Francophone de Bruxelles. In the absence of any law or final determination conferring domestic legal personality on EULEX, I do not understand the basis on which it can be said that this decision has the effect of according EULEX legal personality under Belgian law. In those circumstances, I do not consider that the decision in AMF v Hashim (or the principle of comity) required the Employment Tribunal to treat EULEX as having domestic legal personality.

45. As to reliance on a "Brussels support element", the Employment Tribunal found that EULEX is in Kosovo only and has no other branch:

> **"12. It is important to emphasise, however, that EULEX is not a branch or part of EEAS. There are no direct relationships between EEAS/EULEX/FCO. I was struck by the ease with which the three Brussels-based witnesses described these complex relationships and did not seem to find them illogical or contradictory. It is not unusual for them to work with bodies operating complex cross-border arrangements which it is hard for an Employment Judge based in one jurisdiction only, to understand. Fortunately my focus was the application of the Employment Rights Act.**
>
> **"13. EULEX is based in Kosovo and has no other branch. The mission's main mandate, according to Article 2 of the Joint Action, is:**

'to assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.' "

The unchallenged evidence on which that conclusion is based is provided by Mr Marquardt at paragraph 22 of his witness statement as follows:

"22. EULEX does not reside in an EU Member State but undertakes its activities in Kosovo and has no branch or agency on the territory of EU Member States. As stated in Article 6 of the Joint Action, EULEX's Headquarters are in Pristina. Furthermore, the "Brussels support element" is only comprised of one liaison officer with no executive powers, but with the administrative task to coordinate secondment and contacts with the CPPC, the EEAS and the EU Member States."

46. Although there was a faint suggestion that the finding that EULEX has no branch in Brussels is perverse, it was not pursued with any enthusiasm and is simply unarguable in light of the evidence of Mr Marquardt. The question of recognition by the state in which EULEX has any sort of base simply does not arise on the evidence and material available.

47. Mr Milsom further submits that the introduction of Article 15a into the Joint Action (which he argues requires Member States to recognise the domestic personality of EULEX "to be a party to legal proceedings as required in order to implement this Joint Action") changes the landscape. On its proper construction, he submits that it confers personality *per se* in order to implement the Joint Action, and once conferred EULEX cannot then deny it. Article 15a is binding in its entirety (pursuant to Article 288 TFEU) and has direct effect: C-9/70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825. Alternatively, Mr Milsom submits that EULEX derives domestic personality as an emanation of the EU under Article 47 of the TEU: since the EU has legal personality, EULEX as an emanation of it must have legal personality too.

48. I do not accept these arguments for the reasons that follow.

49. As a measure taken under Title V of the TEU, the Joint Action "relates to or could be applied in relation to, the Common Foreign and Security Policy" and is excluded by omission from the definition of "the Treaties" in s.1(2) of the European Communities Act 1972 for the purposes of s.2 of the 1972 Act which implements those Treaties without further enactment in domestic law, giving them direct legal effect in UK law. Section 1(2) lists the treaties included within the definition of "the Treaties", but

(a) by s.1(2)(k) excludes by omission, Title V of the TEU, from the Titles of the TEU which fall within the definition of "the Treaties" for the purposes of the 1972 Act;

(b) by s. 1(2)(s) the Treaty of Lisbon (together with its Annex and protocols) was added to the list but it expressly excludes "any provision that relates to, or in so far as it relates to or could be applied in relation to, the Common Foreign and Security Policy";

(c) by s. 1(2)(v) the Protocol on the concerns of the Irish people on the Treaty of Lisbon (adopted at Brussels on 16 May 2012) was added together with provision for "any other treaty entered into by the EU (except in so far as it relates to, or could be applied in relation to, the Common Foreign and Security Policy), with or without any of the member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom…".

Section 1(1) of the 1972 Act is carried over into the European Union Act 2011 by s.18, and so has the same effect.

50. The clear intention of the European Communities Act 1972 (as amended in 2008) was accordingly to exclude measures in Title V, such as the Joint Action, from the definition of treaties implemented by it, and having direct effect. While s.2(1) of the 1972 Act implements certain EU treaties domestically, measures taken under the CFSP are not so implemented and are not directly effective in UK law; nor are bodies created under it bodies with legal personality in UK law absent a measure (such as an Order in Council) implementing them in UK law. Furthermore, the obvious mechanism for according EULEX domestic legal personality to give effect to the Joint Action (as a measure under Title V) was available domestically in s. 4B of the International Organisations Act which makes specific provision for conferring domestic legal personality on such bodies, but was not adopted here.

51. As a matter of EU law, the Joint Action and related Council Decisions do not have direct effect in domestic law unless provided for in the TEU or otherwise agreed by Member States. The Joint Action was made having regard to Articles 14 and 25(3) TEU (renumbered following the Lisbon Treaty as Articles 28 and 38) and the legal basis for introducing Article 15a of the Joint Action was Articles 28, 42(4) and 43(2) (as renumbered). These Articles do not provide for direct effect of acts adopted under them. Nor, apart from in the case of some limited exceptions that do not apply here, does the CJEU have jurisdiction over provisions relating to the CFSP or with respect to acts adopted on the basis of those provisions (see Article 24(1) TEU and the first paragraph of Article 275 TFEU).

52. Accordingly, Article 15a of the Joint Action does not have direct effect in English or EU law as Mr Milsom submits and cannot confer legal capacity on EULEX in English law. The case of *Franz Grad v Finanzamt Traunstein* [1970] ECR 825 referred to in writing by Mr Milsom (but not expanded upon orally) does not appear to have any application in the circumstances of this case.

53. Mr Milsom accepts that before the amendment to include Article 15a, EULEX was not accorded domestic legal personality by Council Joint Action 2008/124/CFSP but contends that its introduction changed the landscape in that this article obliged member states to recognise the domestic legal personality of EULEX *per se*, as necessary in order to implement the Joint Action. I do not accept this submission.

54. European Council Decision 2014/349/CFSP of 12 June 2014 amended the Joint Action by introducing Article 15a. No amendment was made to Article 10(2), and successive versions of the Council Joint Action 2008/124/CFSP have made no amendments to this Article. The two Articles read as follows:

(a) Article 10 provides:

> **"Status of EULEX KOSOVO and of its staff**
>
> **1. The status of EULEX KOSOVO and its staff, including the privileges, immunities and further guarantees necessary for the completion and smooth functioning of EULEX KOSOVO, shall be agreed as appropriate.**
>
> **2. The State or EU institution having seconded a member of staff shall be responsible for answering any claims linked to the secondment, from or concerning the member of staff. The State or EU institution in question shall be responsible for bringing any action against the seconded person.**
>
> **3. The conditions of employment and the rights and obligations of international and local civilian staff shall be laid down in the contracts between the Head of Mission and the members of staff."**

(b) Article 15a provides:

> **"Legal arrangements**
>
> **EULEX KOSOVO shall have the capacity to procure services and supplies, to enter into contracts and administrative arrangements, to employ staff, to hold bank accounts, to acquire and dispose of assets and to discharge its liabilities, and to be a party to legal proceedings, as required in order to implement this Joint Action."**

55. Article 10(2) does not merely determine forum as the Claimant asserts. It addresses the question of status and attributes responsibility to different parties. Consistently with the absence of legal personality accorded to EULEX by the Joint Action, and with other Articles in the Joint Action attributing strictly limited responsibility and capacity to the Head of Mission (among other things) for exercising command and control and implementing budgets under supervision, but allocating responsibility differently for local and seconded staff (see for example Articles 8(6) and 9(2)), Article 10(2) attributes responsibility and confers rights of action in relation to seconded staff members either to the state or the EU institution which seconded that staff member. The first sentence deals with claims linked to the secondment that are made by, or concerning, the seconded member of staff. The second sentence deals with actions against the seconded member of staff. Claims brought by, or concerning, a member of staff must be answered either by the sending State or the relevant sending institution. The second sentence deals with who is responsible for bringing any action against a seconded member of staff, and allocates responsibility on a mandatory (not a permissive) basis to the seconding state.

56. In *Chatzianagnostou v EULEX Kosovo* T383/13 the CJEU dealt with the proper interpretation of Article 10(2) of the Joint Action (albeit referring to a ruling of the General Court (Ninth Chamber) of 10 July 2014 in *H v Council and others*, T-271/10, which was subsequently set aside by the Grand Chamber on other grounds) and held as follows:

> **"36. This provision should be interpreted in the meaning that on the one hand only the authorities of the State which authorised the secondment have jurisdiction to take any decisions relating to national agents seconded to Eulex Kosovo and on the other hand that only the authorities of the Union have jurisdiction over matters relating to agents of the Union seconded to Eulex Kosovo…**
>
> **37. Likewise, only national jurisdictions are competent in any matters relating to the secondment of national agents, while the Union court is competent with regard to seconded Union agents…"**

57. So far as Article 15a of the Joint Action is concerned, there is nothing in its wording that requires the UK (or any of the other 27 Member States) to confer legal personality *per se* for domestic purposes on EULEX in order to implement the Joint Action. The Joint Action provides for staff to be seconded by member states (Article 9(2)) and for the state seconding the staff member to "be responsible for answering any claims linked to the secondment" (Article 10(2)). The Claimant was never employed by EULEX and at the time each of her fixed term contracts with the FCO was entered into, EULEX did not have the legal capacity under the

A Joint Action to employ staff at all. It would have been surprising for the Joint Action to require the conferral of domestic legal personality on EULEX in 28 different Member States; and to do so without saying so expressly would be all the more surprising.

B 58. Article 15a confers limited legal capacity on EULEX for specific purposes identified (procuring services and supplies, entering into contracts and administrative arrangements, employing staff, holding bank accounts, acquiring and disposing of assets, discharging its liabilities and being a party to legal proceedings) but only to the extent required to implement the Joint Action. In other words, where it is necessary for the purpose of implementing the C Joint Action, Article 15a enables EULEX to enter into legal relationships and conduct relevant commercial transactions, or employ locally contracted staff in Kosovo; and in consequence, to be made party to legal proceedings. In light of the tasks EULEX is required to undertake (as set out in Article 3 of the Joint Action) in order to fulfil the Mission Statement in Article 2 of the D Joint Action, it is clear that Article 15a concerns activities of EULEX in Kosovo.

59. It is not necessary for EULEX to have domestic legal personality in any Member State in order to implement or give full effect to Article 10(2) (or any other Article) of the Joint Action. The Joint Action makes express provision for the secondment of staff by Member E States (Article 9(2)), who are required to pay for those staff, and be responsible for disciplinary action in relation to them. It is the sending Member State (or the EU institution) that is expressly required to answer claims made by seconded staff, and to take action against seconded staff where that is necessary: those bodies *shall be responsible for answering any* F *claims linked to the secondment from or concerning a member of staff*. Article 10(2) does not require EULEX to answer such claims or take action in respect of seconded members of staff.

60. For these reasons, in agreement with EJ Wade, I do not consider that Article 15a confers domestic legal personality on EULEX in the UK. The Joint Action is an agreement on the G international plane and is not directly effective. It does not confer domestic legal personality here, and in any event, has not been implemented domestically. (The Claimant's contention that the UK would be in breach of its obligation to implement Article 15a of the Joint Action under article 27 of the Vienna Convention on the Law of Treaties 1969 if the absence of an H Order in Council is regarded as determinative is in any event misplaced. Treaty obligations must be enacted before they can confer rights or obligations on individuals. A breach of article 27 would be a breach of international law operating on the international plane and the Claimant

would have no standing to rely on such a breach and nor would the employment tribunal have jurisdiction over such a claim).

61. The situation here is quite unlike the different factual position in *Sogelma v European Agency for Reconstruction* T-411/06, [2008] ECR II-2771 (relied on by Mr Milsom). The European Agency for Reconstruction ("the EAR") did not fall within the CFSP, but was created under the TFEU and belonged to the "Community pillar". More significantly, Article 3 of Council Regulation 2667/2000 provided that the EAR "shall have legal personality. It shall enjoy in each of the Member States the most extensive legal capacity accorded to legal persons under their laws…" It was not accorded the limited legal capacity for specific purposes conferred by Article 15a.

62. Further, I agree with Mr Keen that the attribution of responsibility in Article 10(2) either to the Member State or to the EU institution concerned is consistent with the broad approach of the CJEU to the Joint Action (and other similar joint actions) in three cases against international missions, including two against EULEX itself (*Elitaliana SpA v EULEX Kosovo* C439/13, *Chatzianagnostou v EULEX Kosovo* T383/13, and *H v Council of the European Union & The European Commission and the European Union Police Mission in Bosnia and Herzegovina C455/14*). These cases all pre-date the amendment introducing Article 15a, but, for example in *Elitaliana* the CJEU held that EULEX Kosovo:

(1) "could not be regarded as having legal personality, since Joint Action 2008/124 classified that entity as a Mission and since, in political and strategic matters, the Mission was under the authority and control of the Council and the High Representative while, in budgetary and financial matters, the Head of Mission exercised his powers under the supervision and authority of the Commission." (paragraph 58)

(2) "Accordingly …. EULEX Kosovo did not have legal personality and… was a Mission, of limited duration, which could not be a 'body, office or agency' within the meaning of the first paragraph of Article 263 TFEU." (paragraph 59)

(3) The measures adopted by EULEX Kosovo in the public procurement process that was challenged in this case, were attributable to the Commission. On that account EULEX Kosovo did not have legal capacity to be a defendant.

63. A similar approach was adopted in the other two cases. In *Chatzianagnostou* the relevant articles of the joint action identifying the chain of command were considered: article 6

described EULEX as a CFSP Mission with headquarters in Kosovo and administrative support in Brussels; article 7 provided that the Director of the EU's Civilian Planning and Conduct Capability Directorate (part of the EEAS Directorate) is the Civilian Operation Commander who acts under the authority of the EU's Political Security Committee ("PSC") and the overall authority of the High Representative for Foreign Affairs and Security Policy; article 11 shows that the EULEX chain of command is the Council and the High Representative with the PSC exercising political and strategic control; while article 11(5) provided that the Head of Mission exercised command and control at theatre level, reporting to the Civilian Operation Commander. Those articles were held by the CJEU to demonstrate that EULEX had no legal personality because it was a Mission. It could not therefore have personality or be an organisation or institution of the Union.

64. In *H*, which concerned a claim by a seconded staff member of the European Union Police Mission (EUPM) established by Council Joint Action in Bosnia and Herzegovina, with a similar chain of command structure, and identically worded provision in relation to seconded staff as provided for by Article 10(2) of the Joint Action, the CJEU (Grand Chamber) set aside the order of the General Court (T-271/10) on appeal. It held (contrary to the holding of the General Court) that the derogation from the rule of general jurisdiction conferred on the CJEU by Article 19 TEU, in Article 24(1) TEU and Article 275 TFEU was to be narrowly construed and did not extend to exclude the jurisdiction of the CJEU to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of the mission at theatre level (see paragraphs 55 and 59). In the course of its decision to refer the case back to the General Court, the CJEU considered the attribution of responsibility for acts of the EUPM, considering the chain of command. The CJEU did not suggest that the Mission itself could be a proper party to the remitted claim, and the claim against the Mission was in fact dismissed. The action was held to be admissible only insofar as it was directed against the Council.

65. These cases support the conclusion that EULEX does not have domestic legal personality for purposes of answering claims made by seconded staff members in their sending state; and is not the proper respondent to claims brought by seconded staff members. The amendment adding Article 15a does not affect that conclusion in light of my conclusions set out above. Further, I am not persuaded that anything said in the two Advocate General Jaaskinen Opinions in *Elitaliana SpA v Eulex Kosovo* dated 4 December 2014 and 21 May 2015 alters this

conclusion. While Article 15a undoubtedly confers some capacity on EULEX to be a party to legal proceedings, it is a limited legal capacity for specific purposes: it is relevant only to staff who are not seconded or local business transactions/procurement in Kosovo. There is nothing to support a conclusion that full legal personality for the purposes of answering claims in 28 different Member States was intended to be and was conferred. Such an approach is simply unnecessary in light of Article 10(2). For similar reasons, I do not consider that *Bitiqi and Ors v (1) European Commission, (2) European External Action Service (EEAS) (3) Eulex* [2014] Case T-410/13 supports that conclusion as Mr Milsom suggests.

66. For all these reasons, I am satisfied that the Joint Action is *acte clair* and does not confer personality for the purposes of English law nor jurisdiction on the English courts. I do not consider that a reference to the CJEU is required.

67. I also reject the alternative submission advanced on behalf of the Claimant that EULEX derives domestic personality as an emanation of the EU pursuant to Article 47 of the TEU and/or Article 335 TFEU which confer personality on the EU.

68. Article 47 provides that "the Union shall have legal personality." Article 335 TFEU provides that the EU shall be represented by the "institutions" in matters relating to their respective operation. The "institutions" referred to are defined by Article 13 TEU as: the European Parliament, the European Council, the Council, the EU Commission, the Court of Justice, the European Central Bank and the Court of Auditors.

69. EULEX is not an institution of the EU and neither Article 47 of the TEU nor Article 355 TFEU have the effect of conferring personality on EULEX either for the purposes of EU law or English law. Further, the practice of the EU Council in conferring limited legal personality on EULEX by way of Article 15a does not support this legal proposition. There would have been no need for this provision if the Claimant's proposition were correct.

70. The fall-back argument advanced by Mr Milsom is that if not a body corporate with domestic legal personality, EULEX is to be equated with an unincorporated association (with Mr Meucci as its head) and that there is no reason in law or policy why Mr Meucci should not be sued in his representative capacity on this basis. EJ Wade did not address this argument but since I do not consider it to be correct, that failure is immaterial.

71. In J H Rayner Lord Templeman referred to a submission made by the appellants that if there had been no Order in Council the courts would have been compelled to deal with the ITC as though it were a collective name for an unincorporated association (see page 478G). He held that the rights of the creditors of the ITC and the powers of the courts of the UK "must depend on the effect of the Order of 1972" which could not be construed as if it did not exist. He continued: "An international organisation might have been treated by the courts of the United Kingdom as an unincorporated association if the Order of 1972 had not been passed. But the Order of 1972 was passed.…" (page 478H). The point was not accordingly considered further, although at 507D Lord Oliver held that it was "idle to enquire what the position would have been if the member states had chosen to engage in activities as an unincorporated association… They did not do so or, to be more accurate, it is certainly not demonstrated that they ever did at any time material to these appeals." Lord Templeman did not decide (as Mr Milsom suggests) that an international organisation *should* be recognised as an unincorporated association in the absence of an order in Council (or other legislation) creating it as a legal entity, and his speech does not support the Claimant's contention that EULEX must be regarded as an unincorporated association here.

72. I do not understand how it is said or on what basis and by what legal mechanism principles of English law relating to the governance of unincorporated associations can be said to apply to a relationship based entirely in Kosovo; nor how domestic legal personality would be conferred on EULEX as a result. These points are not addressed by Mr Milsom. Nor has he identified who, as a matter of English law, the members of the unincorporated association "trading as EULEX" are, why the head of mission is the appropriate respondent for the purposes of bringing proceedings against such an association, nor what the implications are for the members of such an unincorporated association. If EULEX is required to comply with the law of 28 seconding states, it would be impossible to run this Mission.

73. In this regard, I agree with the Respondents that the facts are critical: they do not support an analysis based on EULEX as an unincorporated association. In particular, as EJ Wade held, the EU set up EULEX as a vehicle to continue the work carried out by UNMIK, as a multinational rule of law mission. The senior staff are largely seconded to it from EU states but with significant numbers from the USA, Canada and Turkey. EULEX had some powers over those staff but the key responsibility as employer remained with the sending state or

institution. EJ Wade was entitled and correct to be satisfied that "the objective of the signatories of the Joint Action was that EULEX would not be the employer, de facto or legally, of its seconded staff" (see paragraph 19 of the Judgment).

Ground 2: Relationship of employment between the Claimant and EULEX

74. In light of my conclusion above that ground one fails and EULEX has no domestic legal personality, this ground of appeal cannot assist the Claimant. I deal with it briefly.

75. EJ Wade did not reach express conclusions as to whether the Claimant and EULEX had a worker/employer relationship within the meaning of s.43K ERA because (as Mr Milsom acknowledges) she was not invited to do so in light of the Employment Appeal Tribunal's decision in Day v Lewisham and Greenwich NHS Trust, which was subsequently over-turned by the Court of Appeal ([2017] ICR 917). Section 43K ERA extends protection in respect of detrimental treatment for whistleblowing to a wider group of workers than those who satisfy the definition of 'worker' in s. 230(3) ERA and who would not otherwise be covered by the ERA. The extended definition covers agency and other workers employed by a supplying organisation who work in a host organisation. Where the terms on which the worker works are substantially determined by both the supplier and the host organisation, both may be 'employers' within the meaning of the ERA with liability for whistleblowing detriment. Section 43K accordingly, has nothing whatsoever to do with jurisdiction.

76. However, although she reached no express conclusion on the nature of the relationship between the Claimant and EULEX under the ERA, EJ Wade made a number of relevant findings of fact, some of which are referred to above. In addition, in short summary:

(i) There are no direct relationships between the FCO, EULEX, and the EEAS (para 12);

(ii) EULEX is based in Kosovo and has no other branch (paragraph 13);

(iii) EULEX has three employment regimes: international secondment, international contract and local contract (para 14). In relation to members of staff on international secondment, EULEX had some powers "but the key responsibilities of the employer remained with the home state, see Articles 8(6) and 10(2) of the Joint Action…" (para 16);

(iv) The Personnel Handbook clearly states "while the seconded staff remain under the authority of their sending states, all staff members shall carry out their duties following the mission chain of command and shall act in the sole interest of the Mission" (para 17);

(v) The OPLAN provides that "for seconded personnel, disciplinary action will be exercised by the National Authority of EU Institutions concerned. To this end, each contributing state should appoint a National Contingent Leader to represent each national contingent in the mission, responsible for contingent discipline" (para 18);

(vi) While the FCO contributed to the Mission, the Mission did not work for the FCO, but worked for the EEAS. The National Contingent Leader was the FCO's agent in Kosovo (para 62);

(vii) The "SOP" for investigating alleged breaches of the code of conduct makes clear that for seconded staff members, recommendations are made by the Deputy Head of Mission to the relevant sending authority, in this case the FCO. Accordingly, the final decision to dismiss or suspend a seconded member of staff was the responsibility of the sending authority (para 19).

77. EJ Wade's findings also make clear that the Claimant's contracts of employment were, throughout, with the FCO; and that English law applied. That by itself does not preclude a finding that there was also a worker/employer contract between the Claimant and EULEX under the ERA. However, EJ Wade made no express finding of any express or implied contract with EULEX notwithstanding the fact that at paragraphs 24 and 25 EJ Wade recognised the duality of the engagement the Claimant had in Kosovo, holding:

> **"24. Despite FCO being the employer in the contract the duality of the engagement is notable. The contract says "You will report to, and be obliged to, take lawful instructions from the manager appointed to you by … EULEX Kosovo". The Claimant had a line manager and a second line manager in EULEX but there was also a loose reporting line to the FCO through the National Contingent Leader.**
>
> **25. It was the role of the EULEX HoM to lay down local conditions of employment such as holiday entitlement and, as has already been explained, he was involved in selecting and also recommending the removal of employees to their seconding states. Ms Fearon confirmed that in practice the FCO did not "micro manage" so that secondees had very little contact with it although the National Contingent Leader did play a role and the Embassy convened information exchange meetings for senior FCO secondees which she attended."**

78. Mr Milsom submits that the finding reflected above at paragraph 25, that EULEX laid down local conditions is sufficient for the Claimant and supports a conclusion that the terms on which she was engaged were in practice substantially determined by EULEX with the consequence that EULEX is a classic s.43K employer for the purposes of the ERA. I do not accept this argument. First, the point was not in issue and was not therefore properly investigated or addressed by the Respondents in their evidence and submissions, as it would

have been addressed had the point been properly raised as an issue to be decided. It is for that reason that I refused leave to amend to pursue this additional ground.

79. Secondly, and in any event, as the Court of Appeal made clear in Sharpe v The Bishop of Worcester [2015] EWCA Civ 399 (per Arden LJ) although s.43K(1) ERA was enacted primarily to protect agency workers, there must be a contract between the two parties for the extended definition of worker under s. 43K(1)(a) or (b) ERA to apply. EJ Wade made no finding that there was a contract of any kind between EULEX and the Claimant; and the findings of fact do not obviously support an inference that there was one, still less an inevitable inference. The Joint Action sets out the chain of command, the responsibility for day-to-day management of the Mission etc. The Claimant was obliged to comply with directions from her line managers in Kosovo (etc) but that was as a consequence of her contract with the FCO which required her to do so. In those circumstances, it seems on the face of things to be unnecessary to imply any contract between the Claimant and EULEX (or Mr Meucci).

80. In fact, the sole challenge made in the Notice of Appeal under this ground is that EJ Wade wrongly regarded Article 10(2) of the Joint Action as dispositive of the question whether EULEX was the de facto or legal employer of seconded staff members (paragraph 19 of her Judgment), in circumstances where it is submitted, Article 10(2) of the Joint Action does not preclude EULEX from becoming a party to a dispute in the sending state. Mr Milsom contends that the proper approach was to consider: (i) the question as a matter of domestic law focussed on the "situation on the ground"; (ii) the fact that the Joint Action does not bar an employment relationship between the Claimant and EULEX and (iii) the reality of the National Contingent Leader's role which was very limited and ought not to have been relied on to minimise the scope of an employment relationship with EULEX.

81. I do not consider that any error of law is made out in relation to this ground. First, I do not understand why employment fell to be considered as a matter of domestic law in relation to EULEX and/or Mr Meucci as Head of Mission. The relationship between them and the Claimant was based entirely in Kosovo and there is no evidence or finding of any contract between them, still less a contract governed by English law. The Claimant has not begun to address this point. Secondly, I consider that Article 10(2) of the Joint Action is plainly material to this issue; but on a fair reading of paragraph 19 of the Judgment, do not consider that Article 10(2) was regarded on its own as dispositive. It formed part of the relevant context and

reflected the intention of the signatories to the Joint Action that EULEX should not be the employer, de facto or legally, of its seconded members of staff. However, EJ Wade made careful findings of fact about the "situation on the ground" as summarised above, that were unarguably open to her on the evidence and the case advanced below; and reveal no error of law. These included findings that the governing instruments (the Joint Action, the OPLAN and the SOP) expressly allocate specific roles and responsibilities to the Head of Mission on the one hand and the seconding state or EU institution on the other in relation to instructions to staff, day-to-day management, decisions to commence investigations and disciplinary procedures. Although EJ Wade recognised the duality of the engagement, and that the FCO did not micromanage seconded members of staff in Kosovo and had little contact with them, she nevertheless held that the critical responsibilities as employer (the decision and authority to issue warnings or impose other disciplinary action including renewal or non-renewal of fixed term appointments) remained with the sending state with whom the staff member had his or her employment contract. That finding was open to her and not arguably perverse. There is no basis in the findings of fact to support a conclusion that EULEX and/or Mr Meucci was the Claimant's employer.

82. The faint challenge (not pressed orally by Mr Milsom) to the nature of the National Contingent Leader's role is a pure perversity challenge in circumstances where the high hurdle for perversity is simply not met. There was evidence to support the finding made in respect of this role and the Claimant cannot go behind it.

83. In any event, EJ Wade concluded that there was no territorial jurisdiction in relation to EULEX as a mission established outside Europe and based in Kosovo, which is neither EU controlled or partly controlled (para 50 of the Judgment). She also concluded that if Mr Meucci was the Claimant's employer (which for the purposes of the Joint Action he was not) he too was outside territorial scope as an Italian national with no physical or legal links to Great Britain or British employment law (para 51 of the Judgment). It seems to me, in agreement with the Respondents in those circumstances, that unless those conclusions can be challenged, the arguments directed at challenging the employment relationship issue cannot assist the Claimant in any event.

Ground 3: Territorial jurisdiction over EULEX

84. The challenge under this ground is to EJ Wade's conclusion that if EULEX has domestic legal personality, there is no territorial jurisdiction in relation to EULEX. At paragraphs 49 and 50 of the Judgment she held;

> **"49. A problem in relation to claims against all the respondents apart from FCO is that they are not domiciled in England and Wales nor do they carry on business there or in an EU country which was not the case with the Respondents in all the well known cases. This is a *sine qua non* for jurisdiction according to Baroness Hale in *Duncombe* (paragraph 16).**
>
> **50. If EULEX has a personality there is no territorial jurisdiction. Eulex is based only in Kosovo, it is a multinational Rule of Law mission with staff drawn from many different countries. It was established under the CFSP, it is a mission with the characteristics of a military peacekeeping mission and it does not operate under the legal system of any one country. In common with the other contributing countries FCO has no control of or relationship with EULEX though it may send staff.**

85. The grounds of appeal directed at this conclusion are as follows:

> "17. The ET's judgment has left considerable uncertainty in a number of areas. These include the extent to which the conduct of EULEX is attributable to the FCO. Agency was one matter advanced by the Claimant and addressed at [62]-[63]. There was a wider question, however, as to legal attribution pursuant to the Joint Action with which the ET failed to engage.
>
> 18. The evidence of EULEX was that where – as here – a Head of Mission suspends an FCO secondee that should be adjudicated upon in the courts of the seconding state. "This is supported by the case law of the ECJ that the head of mission only has delegated powers from the seconding authority. It (the decision to suspend) is made on behalf of a seconding state…Disciplinary control is transferred directly to the heads of mission – he does it on behalf of the seconding state."
>
> 19. To the extent that the ET's conclusions on agency [62]-[63] considered otherwise, these were inadequately reasoned and erroneous in law, not least because this approach would conflict with the ECJ decision of C-455/14 *H v Council of the EU and ors.* In the event conduct is not attributed to the FCO there would remain a gap in protection which is counter to the Joint Action, the Convention and the Charter".

86. I agree with Mr Collins QC that it is not clear from these paragraphs what criticism the Claimant makes of EJ Wade's conclusion about territorial jurisdiction in relation to EULEX, though it is clear that there is no attack on the findings at paragraphs 49 and 50.

87. No doubt recognising the difficulty presented by his Notice of Appeal, Mr Milsom sought to argue in relation to this ground, that the Tribunal's approach, both to Article 10(2) and territoriality, was flawed in circumstances where, in a s.43K scenario (where a worker is supplied by his or her employer to a host organisation) the claim against the supplying employer is within territorial scope so that the same must also apply to the claim against the so-called host-entity, producing an obviously sufficiently close connection to the UK and UK employment law.

88. It is simply not permissible in an appeal to the EAT to treat the Notice of Appeal and grounds as a moving target in this way. This is a complex appeal with all sides legally represented. A detailed Notice of Appeal was prepared by counsel. The EULEX Respondents' Answer to the Notice of Appeal takes the point expressly that there is no appeal against the finding that the Tribunal has no territorial jurisdiction over EULEX (see paragraph 17). A series of responses to the EULEX Respondents' Answer was prepared. The issues were clearly identified in advance of the appeal hearing. No amendment application was made at any stage to raise any argument directed at paragraphs 49 and 50 of the Judgment and in the circumstances, it seems to me that Mr Milsom is simply not entitled to pursue any challenge to this conclusion which has not been appealed.

89. As for the points expressly taken in the Notice of Appeal, in relation to attribution, as I understand the point, the Claimant contends that if EULEX has no domestic legal personality, conduct taken by EULEX (including disciplinary action) must be attributed to the FCO and Article 10(2) of the Joint Action, correctly construed, demands no less: see *H v Council of the EU and others* (T-271/10 the General Court decision at paragraphs 50 and 51) which is unaffected by the subsequent appeal. The Tribunal did not address this point but was compelled to conclude as a matter of law that the conduct of EULEX is attributable to the FCO if EULEX cannot be sued, otherwise there will be a gap in protection for the Claimant.

90. I do not consider that attribution falls to be dealt with as a matter of law; or that EJ Wade erred in this regard. As far as I can see, the question of attribution, like the question of vicarious liability (referred to below in relation to ground four), was not one of the issues identified for decision at the preliminary hearing. This is unsurprising. Which (if any) delegated acts or omissions are to be attributed to which actor is a fact sensitive question that depends on the nature of the particular act, by whom it was delegated, and whether and by

whom it was adopted. There was no error by EJ Wade in leaving this question open in the circumstances.

91. Insofar as the Notice of Appeal challenges the Employment Tribunal's decision on agency (at paragraphs 62 and 63) two points are made. First it is argued that the conclusions on agency are in error of law because they conflict with the decision of the CJEU in *H v Council of the EU and others* (T-271/10 the General Court decision) and if conduct is not attributed to the FCO there would be a gap in protection which is counter to the Joint Action, the Convention and the Charter. Secondly it is said that EJ Wade's conclusion is inadequately reasoned.

92. At paragraphs 62 and 63 EJ Wade held:

> **"62. It is argued that EULEX and/or its HoM are FCO's agent and so themselves liable under 47B(1A) and capable of making the Second Respondent vicariously liable under 47B(1B). I do not agree because that was not even partly their raison d'etre; whilst FCO contributed to the mission, the mission worked not for the FCO but for the EEAS. The National Contingent Leader was FCO's agent in Kosovo.**
>
> **63. EULEX did not identifiably work for FCO in that when the Claimant was in Kosovo:**
>
> **1. Some of the alleged detriments she suffered were at the hand of non-FCO employees and some of FCO employees.**
>
> **2. It would not be appropriate for any employee with a British connection to bring a claim against EULEX as agent because EULEX cannot be expected to comply with the Employment Rights Act when working exclusively in Kosovo. If it was obliged to it would also have to comply with the employment law of every other contributing country.**
>
> **3. Whilst being closely associated with discrimination law the ERA protection of whistle blowers is British law and it is not giving effect to EU principles with which other countries are familiar or bound.**
>
> **4. EULEX had its own systems for regulating the conduct of secondees and did not run these processes on behalf of FCO.**
>
> **This is all best illustrated by the fact that Mr Meucci as HoM had no role as an agent of FCO; if he was an agent of any country it was of Italy.**

93. As discussed above, the General Court's decision in *H* was overturned by the CJEU (Grand Chamber). I do not consider that there is any conflict between the conclusions reached by EJ Wade (as set out above) and the decision of the CJEU (Grand Chamber) in *H*. The case concerned an Italian magistrate seconded to the Mission by Italy and based in Bosnia and Herzegovina. She challenged a decision adopted by the Head of Mission transferring her to another office and brought claims for damages against the Mission (the EUPM), the Council of the European Union and the European Commission in Italy and in Europe. The Council and the

Commission both argued that the claim in Europe was inadmissible. The Mission did not respond at all. The CJEU concluded, overturning the decision of the General Court T-271/10 in this regard, that acts of staff management fall within the jurisdiction of the CJEU and are not excluded from review by Article 24(1) TEU and Article 275 TFEU merely by virtue of there being an operational aspect to the activities undertaken that falls within the CFSP.

94. Having reached that conclusion, it was unnecessary to consider the additional grounds of appeal. Instead, the CJEU referred the case back to the General Court. Importantly however it dismissed the action against the Mission as inadmissible and referred the case back only in respect of actions directed against the Council of the EU. So far as the Council of the EU was concerned, at paragraphs 65 – 68, the CJEU set out the precise basis on which attribution arose: the contested decisions were adopted by the Head of Mission appointed by the Political and Security Committee (the PSC); by virtue of express provisions of the relevant joint action the PSC exercised political control and strategic direction of the Mission under responsibility of the Council; on that basis the contested decisions were attributable to the Council. The question whether those decisions were unlawful or capable of giving rise to damages from the Council was described as raising complex questions of fact on the basis of matters which had not been examined by the General Court and not debated before the CJEU and so had to be referred back.

95. Nor do I accept that there was any other error of law in the conclusions at paragraphs 62 and 63 of the Judgment as the Claimant asserts. None has in fact been identified. Mr Milsom has not explained why English law applies in the absence of extraterritorial jurisdiction in relation to Mr Meucci. In any event, EJ Wade permissibly held that while the FCO contributed to the Mission by sending staff to it, the Mission worked for the EEAS and not for the FCO (or the other 27 Member States).

96. This ground accordingly fails.

Ground 4: Territorial jurisdiction over the individual named Respondents

97. This ground is directed at challenging the Tribunal's conclusion that there is no territorial scope in relation to the two individual Respondents, Ms Fearon and Mr Ratel, seconded by the FCO to work for EULEX in Kosovo.

98. The claims against them are pursued under s. 47B(1A) and s. 48(1A) ERA. The former affords a qualifying worker, W, the right not to be subjected to detrimental treatment done "(a) by another worker of W's employer in the course of that other worker's employment" on the ground that W has made a protected disclosure; the latter gives W the right to present a claim to a tribunal against the other worker on this basis. Anything done by the worker complained of is also treated as done by the worker's employer: see s. 47B(1B). Complaints in respect of detriments can be pursued by a worker against both the fellow worker and the employer of that worker. The Claimant alleges that Ms Fearon and Mr Ratel subjected her to unlawful detriments in the course of their employment by the FCO because she made protected disclosures. For example, Mr Ratel is said to have commenced a series of investigations into her conduct and Ms Fearon is said to have recommended suspension of the Claimant without any investigation.

99. In this regard EJ Wade held as follows:

> **"53. It is new territory to decide whether there is jurisdiction against individual Respondents who happen to be FCO employees. The inescapable fact is that although they were FCO employees, for the purpose of this mission they were not domiciled in the UK or based there for work purposes. They are more accurately described as "citizens of the world" who happened to have British nationality and to be under contract to the FCO. I did not ask whether some of the FCO secondees were not UK citizens but this seems theoretically possible.**
>
> **54. As Respondents their stronger connection was to EULEX but this is of secondary importance because the "stronger connection" test relates to claimants based overseas and not respondents. This means that the fact that they are respondent FCO secondees over whom the Tribunal has no jurisdiction does not directly conflict with fact that Ms Bamieh as claimant has a sufficiently strong connection with the same organisation, although at first glance to situation seems very odd. Indeed as claimants they could do the same as Ms Bamieh because of Article 10(2). I was uncomfortable that the could be outside scope when they and the Claimant are all fellow employees of FCO but as individual respondents their base was in the international world that was EULEX not the territorial bubble of the UK.**
>
> **55. To illustrate this it can be seen from the Particulars of Claim that complaints against Ms Fearon arise because of her role as advisor to the Italian HoM and that she saw her role as supporting him and not as an instrument of FCO. There is an email in which she talks about how the FCO will probably go along with a decision if it is correctly presented. Whilst they were both workers of FCO her relationship with the Claimant was not founded up on this.**
>
> **56. Further, it would be anomalous to make some individual EULEX colleagues liable and some not, for example one of the Claimant's line managers and not the other; the claim against Ms Novotna was withdrawn as quite rightly the Claimant concedes that there is no jurisdiction.**
>
> **57. Another important point is that Article 10(2) does not appear to give this Tribunal jurisdiction over individual respondents in any event. It says "The state…Having seconded a member of staff shall be responsible for answering any claims". Individual Respondents are not in scope and since jurisdiction is derived from Article 10(2) claims against the Second Respondent only can proceed. Having**

a common employer which is the UK government is not enough to bestow jurisdiction.

100. Having dealt with the liability of these individuals as principals and concluded that they were outside territorial scope as named Respondents, EJ Wade addressed the possibility of the FCO being vicariously liable for their actions nonetheless, at paragraphs 58 to 61, but reached no conclusions on this issue. Instead she directed that this argument should be dealt with at the full merits hearing once the facts had been found.

101. Mr Milsom is critical of the Employment Tribunal's approach to the question of vicarious liability. In my judgment his criticisms are misplaced. As EJ Wade observed, the FCO's argument that it cannot be vicariously liable for anything but the legal wrongs of a co-worker or agent may well be defeated by the terms of s.47B(1B) ERA which provides that where a worker is subjected to detriment by

> **"*anything done as mentioned in subsection* (1A) [the right not to be subjected to detriment by another] that *thing* is also treated as done by the worker's employer" (emphasis added).**

The question of vicarious liability is highly fact sensitive and the question of statutory construction raised by the FCO's argument was not the focus of the preliminary hearing. In the circumstances, I consider that EJ Wade was both entitled and correct to adjourn consideration of this fact-sensitive issue to the full merits hearing where the facts will be found and the question of vicarious liability can be addressed in their proper factual context. Mr Milsom's criticisms are accordingly not further addressed.

102. The Notice of Appeal challenges EJ Wade's conclusions (at paragraphs 53-57) on the basis that once it is accepted that the Claimant's claims against the FCO are within territorial scope, the same must apply as regards claims against her colleagues. Their contracts impose enforceable obligations in the UK and there is no alternative jurisdiction. That is why Article 10(2) of the Joint Action provides that all claims arising from the secondment must be heard in the seconding state. Further, it is said that the Tribunal erred in failing to apply by analogy the comparative test on jurisdiction, namely whether the link to the UK is stronger than any other jurisdiction. Had it done so it could only have reached the conclusion that any claim against the Claimant's fellow workers could only have been heard in the UK. There are three further points relied on as indicating that the Tribunal mischaracterised the evidence and failed to take account of relevant considerations (see paragraph 23 of the Notice of Appeal).

103. Mr Milsom has identified no supporting authority for the proposition that once the Claimant established her claim against the FCO as within territorial scope, the same must follow in respect of claims against her fellow workers as a matter of law and without applying a fresh territorial test. His alternative argument, that the Claimant satisfies the territorial test in relation to the individual Respondents has more legs and proceeds on the basis of conventional principles.

104. I start with the conventional principles for addressing the territorial reach of the ERA, recognising that they have been developed and applied in relation to 'employer' respondents and not co-workers of the same employer who have potential liability for detriments on the grounds of protected disclosures under s.47B(1A) ERA.

105. The conventional principles are not in dispute. In Lawson v Serco Ltd [2006] ICR 250 Lord Hoffmann explained that the ERA contained no geographic limitation but it was inconceivable that Parliament intended it to confer rights on employees working abroad and having no connection with Great Britain. Since legislation is prima facie territorial, some territorial limitation had to be implied. The paradigm case for the application of the ERA is an employee working in Great Britain, so that the circumstances in which British labour law would apply to an employee working and based abroad would have to be unusual.

106. The principle underlying the unusual or exceptional cases identified in Lawson, was described by Baroness Hale JSC in Duncombe v Secretary of State for Children Schools and Families (No 2) [2011] UKSC 36 as follows:

> **"8. It is therefore clear that the right [to claim unfair dismissal under the ERA 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."**

107. In Ravat v Halliburton Manufacturing and Services Ltd [2012] ICR 389, in the context of an unfair dismissal claim by a British national and resident individual working for a British company in Libya, the Supreme Court reiterated the relevant principles, restating the starting point that the ERA has no application to work outside Great Britain and is intended to cover

A employment in Great Britain only unless there is a sufficiently strong connection with Great Britain and British employment law to enable it to be said that Parliament would have regarded it as appropriate for a British employment tribunal to deal with the claim. In a case where the individual works wholly abroad, Lord Hope held that:

> **"27. …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 just 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 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 the 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….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 one of degree. …… 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."**

108. In Duncombe this test was applied in the context of teachers employed by the British Government to teach in an international enclave abroad in order to fulfil the obligations which the Government had undertaken to other EU states under the Statute of the European Schools. The Supreme Court concluded that this was an exceptional case where the employment had such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it was right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal:

> **"16.In our view, these cases do form another example of an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal. This depends upon a combination of factors. First, as a sine qua non, their employer was based in Britain; and not just based here but the Government of the United Kingdom. This is the closest connection with Great Britain that any employer can have, for it cannot be based anywhere else. Second, they were employed under**

contracts governed by English law; the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Although this factor is not mentioned in *Lawson v Serco*, it must be relevant to the expectation of each party as to the protection which the employees would enjoy. The law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by Parliament in order to fill a well-known gap in the protection offered by the common law to those whose contracts of employment were ended. Third, they were employed in international enclaves, having no particular connection with the countries in which they happened to be situated and governed by international agreements between the participating states. They did not pay local taxes. The teachers were there because of commitments undertaken by the British government; the husbands, in *Wallis* and *Grocott*, were there because of commitments undertaken by the British government; and the wives were there because the British government thought it beneficial to its own undertaking to maximise the employment opportunities of their husbands' dependants. Fourth, it would be anomalous if a teacher who happened to be employed by the British government to work in the European School in England were to enjoy different protection from the teachers who happened to be employed to work in the same sort of school in other countries; just as it would be anomalous if wives employed to work for the British government precisely because their husbands were so employed, and sacked because their husbands ceased to be so employed, would be denied the protection which their husbands would have enjoyed

17. This very special combination of factors, and in particular the second and third, distinguishes these employees from the "directly employed labour" of which Mrs Bryant was an example. ….."

109. The starting point in considering whether the Employment Tribunal has territorial jurisdiction in respect of claims made by the Claimant against her fellow FCO-seconded workers under the ERA is that ordinarily the statute has no application to work outside Great Britain. Parliament would not have intended the ERA to apply unless there was a sufficiently strong connection with Great Britain and British employment law. That starting point must therefore be displaced by the sufficiently strong connection said to exist before extraterritorial jurisdiction can be said to be established.

110. The primary factual feature relied on by EJ Wade as leading to the conclusion that territorial scope was not established in respect of Ms Fearon and Mr Ratel, was the fact that they were "not domiciled in the UK or based there for work purposes" (paragraph 53). EJ Wade concluded that they had a stronger connection with EULEX but regarded this as of secondary importance, because the "stronger connection" test relates to claimants based overseas and not respondents.

111. Leaving aside EJ Wade's reference to 'domicile' (which was introduced by the Respondents who appear wrongly to have treated it as synonymous with where the individual is based) and focusing on her apparent conclusion that a foreign base was dispositive of the territorial question, I consider this to reflect an error of law both because this is not dispositive as a matter of law and because their base abroad is not determinative as a matter of fact. Although the "stronger connection" test has hitherto been applied to claimants based overseas and not to respondents, it seems to me that the same test must be applied by analogy. A foreign base and employment, though usually decisive can be overcome where the connection with

Great Britain and British employment law is sufficiently strong. I therefore reject the arguments advanced by Mr Keen and Mr Collins that an individual "must be domiciled in the UK to be made a party to proceedings"; and that merely because none of the individual Respondents were based in the jurisdiction when the claim was presented, no claims under the ERA can be brought against any of them. (In any event and to the extent relevant, given her reference to domicile in the context of determining where Ms Fearon and Mr Ratel had their base, I am not confident that she approached the question of their base correctly. Domicile is different from residence, and harder to shed. Individuals can live (and be resident) for many years outside the country of their birth and domicile, without changing that domicile at all. Although resident abroad, both Mr Ratel and Ms Fearon retained their British citizenship and passports; both worked for the UK government and both quite possibly retained their English domiciles.)

112. Although Baroness Hale referred to the Duncombe claimants' employer's base in Britain as a "sine qua non" at paragraph 16, I do not read her judgment as identifying this as a proposition of law; nor did she treat it as dispositive or even the only consideration in that case. Indeed she held at paragraph 9:

> **"9. ……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."**

113. Likewise, Lord Hoffmann in Lawson v Serco held that it would be "*unlikely* that someone working abroad would be within the scope [of the ERA] unless working for an employer based in Great Britain", but did not state that this would be dispositive or elevate this to a principle of law. In the context of an exercise that involves questions of fact and degree that would have been surprising. As Ravat (at para 29) makes clear, the question whether a case falls within the scope of the ERA is a question of fact and degree. Here, it is not in dispute that both Ms Fearon and Mr Ratel had a British-based employer in common with the Claimant. The question in their cases was whether the fact of their employment and residence abroad was decisive.

114. In my judgment, the question of the territorial reach of the detriment provisions in s.47B(1A) ERA required an assessment of the sufficiency of the connections between each

individual Respondent and Great Britain and British employment law by analogy with the approach required to be adopted where the employer is the only respondent. The question was not conclusively determined by reference to their base; and nor was it relevant to consider the individual Respondents' connections to EULEX (as opposed to another system of law and jurisdiction such as Kosovo). For the same reasons as those just given, I reject Mr Milsom's argument that as a matter of law once territorial jurisdiction is established in relation to the FCO, it follows as a matter of law that there is territorial jurisdiction in relation to the FCO co-workers. These are, as already stated, questions of fact and degree that require careful assessment, and no single factor is determinative.

115. The consequence of EJ Wade treating her conclusion that the FCO employees were not domiciled or based in the UK for work purposes as dispositive is that she did not conduct the assessment required of the extent and sufficiency of the connections between them and Great Britain and British employment law. That is the assessment that should have been carried out. The Claimant contends that had she done so, the only available conclusion is that territorial jurisdiction extends to the Claimant's claims against them, just as it does to the FCO.

116. It seems to me in light of the facts found that the following factors are relevant to this assessment. First, both Ms Fearon and Mr Ratel were at all material times working pursuant to a series of secondment contracts with the FCO in Kosovo. Their own contracts of employment were with the UK Government (a factor described in Duncombe so far as employer is concerned, as the closest connection there could be with Great Britain because the employer could not be based anywhere else). They were required to conduct themselves consistently with their position as representatives of Her Majesty's Government. They were bound by the terms of the Official Secrets Act 1989. They were, and were required to be, UK passport holders. Secondly, they were employed under contracts governed by English law, described as a relevant factor in Duncombe, because relevant to the expectation they would have had as to the application of provisions in the ERA to them. In particular, just as the Claimant is entitled to the protection of the ERA in relation to her employer the FCO because of her sufficiently close connections with Great Britain and British employment law, Ms Fearon and Mr Ratel would be entitled to that same protection if subjected to treatment capable of being challenged under the ERA. It is difficult to see why their expectation would or should be different in relation to claims made against them under the ERA. Thirdly, it seems to me there is an analogy or at least a strong similarity between EULEX and the international enclaves in which

the Duncombe claimants were employed, which had no particular connection with the countries in which they happened to be situated and were governed by international agreements between the participating states. Just as in that case (and on the assumption that their contracts were in materially identical terms to the Claimant's contracts with the FCO), Ms Fearon and Mr Ratel were treated differently from locally employed members of staff. They were paid by the FCO and remained under the authority of the FCO albeit required by their FCO contracts to carry out their duties following the Mission chain of command and to act in the sole interest of the Mission (see paragraph 17 of the Judgment). Disciplinary action against them was to be exercised by the FCO, with the National Contingent Leader sent by the FCO representing FCO seconded staff in the Mission and responsible for their discipline (see paragraph 18 of the Judgment). The final decision to dismiss or suspend in their cases would be taken by the FCO (see paragraph 19) and although obliged (again by their FCO contracts) to take lawful instructions from managers appointed in respect of the FCO seconded staff by EULEX, there was also a loose reporting line to the FCO through the National Contingent Leader (paragraph 24). Fourthly, Article 10(2) of the Joint Action itself recognises the connection between seconded members of staff and their sending state, attributing or maintaining responsibility for answering claims linked to the secondment, from or concerning the seconded member of staff, in the sending state.

117. On the other hand, the work carried out by both Mr Ratel and Ms Fearon was carried out wholly outside the UK and wholly in Kosovo. Neither Mr Ratel nor Ms Fearon were resident in the UK. Ms Fearon had worked outside the UK since 2009, albeit spending some months in the UK. Mr Ratel spent very little time in the UK in the last seven years. EJ Wade found that Ms Fearon was paid in sterling and paid national insurance contributions but was not UK resident for tax purposes (see paragraph 29 of the Judgment). EJ Wade did not make findings in this regard in relation to Mr Ratel.

118. Three other features are identified by EJ Wade as supporting her conclusion that there was no territorial scope in relation to these two individuals. For the reasons given below, I do not consider that they provide the support she identified:

(a) EJ Wade considered it relevant that although both Ms Fearon and the Claimant were workers of the FCO, the Claimant's relationship with Ms Fearon was not founded on this (see paragraph 55 of the Judgment). To the extent that this reflects her understanding that the question to be asked was whether the employment relationship

between Ms Fearon and the Claimant had an especially close connection to Great Britain and British employment law for it to be said that Parliament would have regarded it as appropriate that claims against Ms Fearon should be brought in the UK (as suggested at paragraph 76 of the EULEX skeleton), I disagree. The individual Respondents are not sued by virtue of their employment relationship with the Claimant under s. 47B (1A) ERA but as co-workers of the FCO in the course of their employment by the FCO. There is no other system of law with which either can be said to be connected, still less closely connected. If as a result of their own especially strong connections with the Great Britain and British employment law it can be said that Parliament would have regarded it as appropriate for an employment tribunal to deal with claims against them under the ERA, that is sufficient to displace the general rule that the place of employment is decisive in determining territorial jurisdiction under the ERA in those circumstances.

(b) EJ Wade considered that it would be anomalous for some individuals working in EULEX Kosovo to be within the scope of the ERA while others (like Ms Novotna) were not (see paragraph 56 of the Judgment). I do not see any anomaly. The factors I have identified above at paragraph 115 plainly distinguish Ms Fearon and Mr Ratel from locally employed staff members (no doubt employed under local employment law and paying local taxes) or staff seconded by other Member States (with a closer connection to their own Member State accordingly), who cannot begin to expect to enjoy the same protection or anticipate having the same obligations under British employment law as those working in Great Britain.

(c) EJ Wade also appeared to consider that claims could only proceed against the FCO "since jurisdiction is derived from Article 10(2)" and Article 10(2) did not give the Tribunal jurisdiction over the individual respondents accordingly (see paragraph 57). I do not agree. Article 10(2) does not give the Tribunal jurisdiction at all. It attributes responsibility for seconded staff members to the sending state. What gives the Tribunal jurisdiction, if at all, is the ERA in the exceptional circumstances of this case notwithstanding the fact that the work done by the individuals concerned is performed wholly outside Great Britain.

119. The assessment in Duncombe turned on a "very special combination of factors" and in particular that the contracts were governed by English law and that the teachers were employed in "international enclaves, having no particular connection with the countries in which they

were situated …" (see [17]). These were facts that distinguished the cases from those where the British national is employed and works at all times outside the UK on local terms and conditions and paid at local rates in the country where the work is done. Just as the fact that the Claimant's employment was wholly abroad, the work she performed was done under the direction of another body and in another country does not displace the overwhelmingly strong connections with UK employment law in relation to the Claimant herself (as is conceded by the FCO here) it seems to me that the same is true in relation to Ms Fearon and Mr Ratel. All three were employed by the UK Government to discharge the UK's obligations in European law. EULEX was the means by which those obligations were managed and controlled. Their relationship with EULEX was predicated on their contracts of employment with the UK Government.

120. The same special combination of factors is present in the cases of Ms Fearon and Mr Ratel. Having regard to the factors identified above, this is an exceptional case in which the special combination of factors at paragraph 116 connecting Ms Fearon and Mr Ratel with Great Britain and British employment law are especially strong and no other system of law is, in reality, available. Though they themselves work wholly abroad in Kosovo, their employer is the British Government. It is difficult to see, from the findings of EJ Wade or the material provided to me, what other legal system is available to govern the relationship between the Claimant and her co-workers. EULEX does not operate within Kosovan law and as Mr Milsom submits, s. 4 of the UNMIK Regulation 2000/47 states that UNMIK and KFOR contractors "shall not be subject to local laws or regulations in matters relating to the terms and conditions of their contracts."

121. Although as the Court of Appeal made clear in Dhunna v CreditSights Ltd [2014] EWCA Civ 1238 at [40]-[41], the relative merits of any competing systems of law have no part to play in the enquiry because it is not the object of the exercise to decide which system of law is more or less favourable, but rather to decide whether there is an exception from the general rule, the comparative assessment does typically involve comparing the connections with the locations and systems of law which are in play. No alternative system of law is available here. Nor is it suggested that any other jurisdiction governs the relationship between the parties. As EJ Wade found "it does not operate under the legal system of any one country" (para 50 of the Judgment). However, to regard these co-workers as "citizens of the world" (as EJ Wade did at paragraph 53 of the Judgment) with a base "in the international world that was EULEX not the

territorial bubble of the UK" (paragraph 54 of the Judgment) is to exempt them from any legal system at all. That is not to impose liability on individuals with no connection with the UK as Mr Keen submits. Nor can it be said that English law cannot have been contemplated by them as the jurisdiction most likely to be available for pursuing their own employment rights arising under or in consequence of their contracts of employment with the FCO; and if the situation arose, for answering employment claims made against them arising under or consequent on those contracts. No other jurisdiction can seriously have been contemplated by them in the circumstances of this case and in light of the facts found by EJ Wade.

122. For all these reasons, I agree with Mr Milsom that the only available conclusion in this case is that territorial jurisdiction under the ERA extends to the Claimant's claims against Ms Fearon and Mr Ratel as individual named Respondents to her unlawful detriment claims. This ground of appeal accordingly succeeds.

Ground 5: The Convention and Charter

123. The relevant provisions of the Convention relied on by the Claimant in this case are Articles 6 and 10. I do not understand there to have been any dispute before the Tribunal that it was under a duty to interpret the ERA and any other applicable legislation compatibly with Convention rights where applicable. Article 6 provides:

> **"1. In the determination of his civil rights and obligations… Everyone is entitled to a fair and public hearing… by an independent and impartial tribunal established by law…"**

There can be no dispute that where it applies, Article 6 implicitly confers a right of access to a court to determine a dispute and not just a right to have it tried fairly. However that right is not absolute and may be restricted where restrictions prescribed by law pursue a legitimate aim by proportionate means that do not impair the essence of a litigant's rights: see Benkharbouche v Embassy of the Republic of Sudan [2017] UKSC 62 (Lord Sumption JSC at [14]).

124. Article 10 provides:

> **"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.**
>
> **2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the**

reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

125. It is not in dispute that where it applies, Article 10 provides for a qualified right to freedom of expression that has been held to extend to protect workers who make responsible whistleblowing complaints: see *Kudeshkina v Russia* Application no 29492/05, judgment of 26 February 2009, which held the state to be under a positive obligation to ensure that the right of freedom of expression is protected as between private sector employee and employer: *Fuentes Bobo v Spain* (2000) 31 EHRR 1115 at [38]; and also *Heinisch v Germany* [2011] IRLR 922 at [44] and [63]; *Matuz v Hungary* [2015] IRLR 74 at [26] and [31]-[34] and *Rubins v Latvia* [2015] IRLR 319.

126. The Claimant also relies on the following Charter rights:

"Article 11: Freedom of expression and information
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."
…

Article 47: Right to an effective remedy and to a fair trial
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
…

Article 52: Scope of Rights and Principles
3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

127. Mr Milsom accepts that although the Charter was given direct effect by the adoption of the Lisbon Treaty, it only binds member states when they are implementing EU law: see article 51(1). However, the phrase "implementing EU law" is to be interpreted broadly and in effect, means, whenever a member state is acting "within the material scope of EU law": see RFU v Viagogo Ltd [2012] UKSC 55 (Lord Kerr at [27-28]).

128. Mr Milsom contends that the Charter is engaged by the Claimant's case for two reasons: first, the Employment Tribunal was acting "within the material scope of EU law" when interpreting the Joint Action (an EU Council decision). Secondly, in light of the application of Article 10 of the Convention which is a fundamental right and freedom, in circumstances where a derogation from a fundamental right or freedom is put in place by a member state, it must be regarded as "implementing EU law" and acting within the material scope of EU law

accordingly: see *ERT AE v DEP* Case C-260/89 and the AG Opinion in *Pfleger* Case C-390/12 at paragraphs 44 and 46.

129. In light of the principles summarised above, it is the Claimant's case that Article 10 of the Convention has wide application and the rights which it guarantees are to be exercised "regardless of frontiers". It requires positive state protection for whistle-blowers and affords her a right to an effective remedy against all Respondents in this case for unlawful, detrimental treatment following her whistleblowing complaints. To the extent that domestic law is limited territorially or otherwise, so as to prevent her from pursuing claims under the ERA against any of the Respondents, she claims that the relevant legislation can be interpreted compatibly in accordance with the strong interpretive obligation under s. 3 of the Human Rights Act 1998, so as to afford her a right to a remedy in each case. Alternatively, where the law operates as a bar to any of her claims being pursued without consideration of their merits, this constitutes a breach of Article 6 (and Article 47 of the Charter). Any such bar must be justified by reference to a legitimate aim to which the infringement is proportionate. Although Mr Milsom acknowledges that questions of legal personality cannot be regarded as identical to questions of immunity, he submits that they must nevertheless be justified where they amount to a bar to proceedings. In the absence of justification, disapplication is open given that the implementation of the Joint Action amounts to implementation of EU law in the sense described in Benkharbouche.

130. In relation to the Convention and the Charter, EJ Wade dealt with these points shortly:

> **"64. In the light of the above neither articles 6 or 10 give the Claimant an extended right to a "European" remedy in Kosovo. Also the EULEX respondents are not contracting parties to the ECHR. The Charter cannot assist as there is no EU right to enforce.**
>
> **65. I can understand why EULEX does not have a more robust internal disciplinary system, it is a mission and not an institution, but this has left holes and given rise to ironies which arguably should have been avoided".**

131. Mr Milsom submits that these conclusions provide no coherent answer to the Claimant's case that Convention and Charter rights apply and reflect a number of errors of law. These were not freestanding claims of contravention of those rights and it was unnecessary for the Claimant to establish that Kosovo is a protectorate or part of the EU for the interpretive obligations to apply. Moreover, so far as the territorial scope of either right fell to be considered, EJ Wade erred in law and misapplied the principles established in *Al Skeini* (2011)

53 EHRR 18 (as applied in Smith v MoD [2013] UKSC 41). Further, the Tribunal set a number of thresholds for the application of the Charter and Convention (such as a requirement for the EULEX Respondents to be signatories and concluding that there was no EU right to enforce) which are unsustainable in law.

132. The conclusions I have reached above, that the ERA affords a cause of action in domestic law that extends to the actions of Ms Fearon and Mr Ratel in addition to the FCO, were reached without reference to Convention or Charter rights. Since I have concluded that the whistle blowing provisions of the ERA extend extraterritorially in their cases, it is unnecessary to consider the domestic legislation in light of the Convention and/or the Charter in relation to these Respondents. I note however that in light of the decision in Ravat that it is a question of fact and degree whether an individual working abroad has a sufficient connection with Great Britain to entitle the individual to claim under the ERA, there is no obvious justification for introducing a more generous test of extraterritoriality in cases involving whistleblowing, and respectfully agree with the conclusions reached by Langstaff J in Smania v Standard Chartered Bank [2015] ICR 436 on this point (rejecting similar arguments as those pursued by Mr Milsom on this appeal).

133. The position is different in relation to EULEX (and/or Mr Meucci in his representative capacity as Head of Mission). As a matter of domestic law EULEX has no legal personality as a Mission and the unchallenged finding of EJ Wade is that there is no territorial jurisdiction in respect of EULEX which is based only in Kosovo and staffed by people drawn from many countries. Here, the Claimant's argument cannot be about the state infringing her right to freedom of expression: the UK state has not done so. It has only allegedly failed to provide her with a particular remedy in the sense of a cause of action. The argument raises the question whether the Convention and/or the Charter can be relied on to extend the Tribunal's territorial jurisdiction to cover acts or omissions of EULEX in Kosovo thereby affording the Claimant a cause of action that she would not otherwise have.

134. It is common ground that the jurisdiction of the Convention is primarily territorial and that Kosovo is outside Convention territory. Exceptional circumstances are required to found a non-territorial jurisdiction for Convention rights. To date a number of exceptions to this principle have been recognised and developed in the Strasbourg jurisprudence: see *Al Skeini v United Kingdom* (2011) 53 EHRR 589 (paragraphs 131 to 137) where the ECHR held that as an

exception to the principle of territoriality, a contracting state's jurisdiction under article 1 of the convention may extend to acts of its authorities which produce effects outside its own territory. This may occur where diplomatic and consular agents present on foreign territory in accordance with provisions of international law exert authority and control over others. It may occur where, through the consent, invitation or acquiescence of the government of the other territory, a contracting State exercises all or some of the public powers normally exercised by that government. It may occur where the use of force by a state agents operating outside its territory brings the individual under control of the state's authorities into the state's article 1 jurisdiction.

135. In Smith v MoD [2013] UKSC 41, having discussed the principles summarised above as established by *Al Skeini*, Lord Hope continued in relation to the judgment in *Al Skein*:

> **"36. The following words are set out at the end of para 136 which sum up the essence of the general principle:**
>
> **"The court does not consider that jurisdiction in the above cases arose solely from the control exercised by the contracting state over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question."**
>
> **37. The description of the category of state agent authority and control concludes with an important statement in para 137. It is in these terms:**
> **"It is clear that, whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under article 1 to secure to that individual the rights and freedoms under section 1 of the convention that are relevant to the situation of that individual. In this sense, therefore the convention rights can be "divided and tailored"."**
>
> **I do not read the first sentence of this para as adding a further example to those already listed in paras 134 to 136. No further cases are cited in support of it, which the court would have been careful to do if that were the case."**

Lord Hope explained (at paragraph 49) that the concept of "dividing and tailoring" goes hand-in-hand with the principle that extraterritorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual. He explained that the court need not now concern itself with the question whether the state is in a position to guarantee Convention rights to that individual other than those it is said to have breached.

136. On this appeal, the Claimant relies solely on the state agent authority and control principle as regards the role of EULEX in parts of state activity, namely the conduct of criminal trials, apparently (correctly) accepting that EULEX and Mr Meucci are not diplomatic or consular agents of the UK, and nor are Ms Fearon or Mr Ratel such agents. She contends that Kosovo ceded control over the conduct of criminal trials and its "supervised independence" was monitored by the EU which retained "executive responsibilities" over the administration of justice. Since that was the arena in which the Claimant's Convention rights were engaged that was sufficient to engage the Convention rights relied on.

137. This argument is misconceived. As was made clear in *Al Skeini*, the mere involvement of state agents is not enough. What they do must amount to the exercise of authority and control, and what is decisive in such cases is the exercise of physical power and control over the person in question. The effective control of an area as the foundation for an extension of the territorial jurisdiction of the Convention cannot arise unless the member state acting outside the legal space of the Convention has such a degree of control of an area or over the person that it acquires the capacity to determine or control events there or is in a position to secure the relevant Convention right relied on. I can see no basis for the submission that Kosovo ceded control over the conduct of criminal trials to the UK or the EU, but even if it did, the Claimant is not the subject of a criminal trial in Kosovo so that even if control over the conduct of criminal trials has been ceded to the EU (or the FCO) through EULEX, it is unclear how that relates to the exercise of control over the Claimant herself. No state control is being exercised. The FCO does exercise some limited control over the Claimant as employer but the argument is unnecessary in relation to the FCO, and to the extent that EULEX exercises day to day line management over the Claimant, that is not state control and is insufficient.

138. In any event, these are questions of fact and degree and compelling evidence would have been required to establish that either the FCO or the EU exercised the required authority and control in Kosovo. The Tribunal's findings of fact do not provide any support for this argument. For example, EJ Wade found that Kosovo, despite its desire for a closer connection with the EU, was not an EU controlled territory (paragraph 9 of the judgment); the EEAS was responsible for the planning and conduct of EULEX but EULEX is not a branch or part of the EEAS and there is no direct relationship between EULEX and the EEAS (or the FCO) (paragraphs 11 and 12); EULEX is based in Kosovo and has no other branch and its staff are drawn from outside the EU (paragraphs 13 and 15); the mandate of EULEX as set out at Article 2 of the Joint Action makes clear that its main mandate is to assist the Kosovo institutions in their progress towards a sustainable, independent multi-ethnic justice system and police and customs service and not to take over and operate or control a Kosovan state activity (paragraph 13); the objective of the signatories of the Joint Action was that EULEX would not be the employer, de facto or legally of its seconded staff (paragraph 19).

139. On those findings (which were open to EJ Wade and not arguably perverse) it is clear that there is no sufficient factual basis for a conclusion that state agents of the UK or the EU

(through EULEX) were in a position to secure the Claimant's Article 10 rights in Kosovo or exerted control and authority over the Claimant to a sufficient extent so as to engage their Convention obligations in Kosovo. In those circumstances, I can see no proper basis for concluding that EJ Wade's decision that Kosovo was not under the state control of the UK was in error of law or perverse. The Claimant did not establish that either the FCO or the EU (through EULEX) exercised the required authority over Kosovo or the Claimant.

140. This conclusion means that the Claimant has no cause of action against EULEX in Kosovo in respect of which Article 6 rights can bite, and it is therefore unnecessary to deal with arguments raised by reference to Benkharbouche which do not arise.

141. Mr Milsom concedes that if the Convention does not apply in Kosovo then the Charter cannot assist. He is correct to do so. The jurisdictional reach of Article 11 of the Charter is not greater than Article 10 of the Convention. In light of my conclusion that the Convention does not apply to extend jurisdiction extraterritorially to Kosovo, and since the Charter does not extend the scope of Convention rights, reliance on the Charter cannot confer jurisdiction where none would otherwise exist under domestic law: see to this effect Zagorski v Secretary of State for Business Innovation And Skills [2011] HRLR 6.

142. The absence of a right and remedy within Kosovo is not a basis for extending the Convention obligations of the UK or the EU to Kosovo. In any event, the Claimant is not without a remedy. Domestic legislation in the ERA provides her with protection from detriment (including a remedy for unfair dismissal) for whistleblowing and the FCO and Ms Fearon and Mr Ratel are all within its territorial scope.

143. For all these reasons, I do not consider that EJ Wade erred in law in concluding that neither the Convention nor the Charter assist the Claimant in this case.

Conclusion

144. In the course of lengthy written and oral argument all sides made many legal points and referred to many authorities. This is an already over-long judgment, but I have sought to deal with what I consider to be the principal points raised in relation to the many points taken in relation to the grounds of appeal and cross-appeal. All sides can be assured that I have

considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

145. For the reasons given above:

(a) Ground 1 is dismissed: EULEX has no domestic legal personality and cannot be sued in this jurisdiction accordingly.

(b) Ground 2 is dismissed: EJ Wade made no error of law in concluding that EULEX is not the Claimant's employer.

(c) Ground 3 is dismissed: EJ Wade made no error of law in concluding that there was no jurisdiction in the Tribunal over EULEX and/or Mr Meucci as agent of the FCO.

(d) Ground 4 is allowed: there is extraterritorial jurisdiction under the ERA in respect of the whistleblowing detriment claims pursued by the Claimant against Ms Fearon and Mr Ratel.

(e) Ground 5 is dismissed: the Convention and the Charter do not assist the Claimant in this case.

146. Save to the extent set out at paragraph 145 (d), the appeal is dismissed. The claim against the FCO, Ms Fearon and Mr Ratel can now proceed to a hearing in the Employment Tribunal.