Appeal No. UKEAT/0085/18/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 & 30 November 2018

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MRS N RAVISY — APPELLANT

(1) SIMMONS & SIMMONS LLP
(2) MR C TAYLOR — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS APPEAL

APPEARANCES

For the Appellant	MR PAUL EPSTEIN QC (of Counsel) Instructed by: LCS Practice Ltd 14A Redington Road London NW3 7RG
For the Respondents	MR DANIEL STILITZ QC (of Counsel) Mayer Brown International LLP 201 Bishopsgate London EC2M 3AF

SUMMARY

JURISDICTIONAL POINTS – Working outside the jurisdiction

The employment judge had not erred in deciding that claims for equal pay, direct sex and race discrimination, and victimisation, brought by a French lawyer against a United Kingdom based international law firm and one of its partners, should be adjudicated in France not England.

The judge had correctly decided that the English tribunal had "international jurisdiction" over the claim, but had also correctly decided that the claims fell outside the territorial jurisdiction of the English tribunal and should have been brought in France, where the Claimant and her work were based.

THE HONOURABLE MR JUSTICE KERR

1. This appeal and this cross-appeal are about whether claims for equal pay, direct sex and race discrimination, and victimisation, brought by a French lawyer against a United Kingdom based international law firm and one of its partners, should be adjudicated here in England, or whether the claims must be litigated in France.

2. There is an appeal by the Appellant (the Claimant below) with a cross-appeal by the Second Respondent below (Mr Taylor) against decisions made in two claims, one against each Respondent below. The decision was made by Employment Judge Auerbach, sitting alone in the employment tribunal at London (Central) following a hearing from 8 to 10 November 2017. His decision was reserved and was dated 14 December 2017 and sent to the parties three days later.

3. The decision was made in both claims, which were heard together. The employment judge decided that the tribunal did not lack "international jurisdiction" to consider the complaints against the First Respondent nor those against the Second Respondent. However, he decided that the complaints against both Respondents fell outside of the territorial jurisdiction of the tribunal and accordingly he dismissed all the claims in both applications to the tribunal.

4. The appeal and a cross-appeal by the Second Respondent are brought with leave of the President. I will call the Appellant the Claimant, as she was below, and the Respondents I will refer to as the First and Second Respondent, as they were below.

5. The Claimant is a lawyer qualified in France. She specialises in mergers and acquisitions ("M&A") and private equity deals. The First Respondent is a substantial limited liability

partnership ("LLP") of solicitors registered in the United Kingdom with operations in London, Paris, and elsewhere. It has a total of 24 offices, either operated directly, or owned, or co-owned in countries across the world.

6. The Claimant was from May 2013 an equity partner of the First Respondent who worked at the Paris office until she was required to retire with effect from the end of 2016. The Second Respondent lives in France. He is also a French lawyer, qualified in France. Since May 2016 he has been an equity partner of the First Respondent and National Practice Group Head at the Paris office. He too specialises in M&A.

7. The Claimant brought two claims. The first was brought in December 2016, shortly before the Claimant's enforced retirement took effect. It was brought against the First Respondent only and was for race and sex discrimination, equal pay, and victimisation. In her particulars of claim she alleged that from at least early 2016 the Second Respondent had sought to persuade colleagues that the Claimant ought to be retired. She referred in her particulars to the process leading to her enforced retirement, against which she appealed, unsuccessfully.

8. In the equal pay claim, her comparators were three fee earning lawyers all based at the Paris office. She further alleged that in France the First Respondent did not fairly allocate work to women as compared with work allocated to men. Her claims were that her forced retirement constituted direct race and sex discrimination; that the unequal pay of the Claimant compared to that of her comparators was a breach of the sex equality clause implied into her contract; and that she was directly discriminated against on the grounds of race and sex in the matter of her enforced retirement and victimised by reason of having done a protected act, namely the making of allegations of discrimination in the course of her appeal against enforced retirement.

9. That was the first claim. In the second claim, she claimed against the Second Respondent. That claim was brought in mid-February 2017. It relied, essentially, on the same factual matters as those relied on in the first claim, save that in the second claim there was no claim for equal pay or victimisation. The claim against the Second Respondent was to the effect that he directly discriminated against the Claimant on the grounds of race and sex by causing or contributing to her enforced retirement and failing to offer her support and guidance. Such was the second claim brought by the Claimant.

10. The Respondents denied jurisdiction and a preliminary hearing was arranged and held from 8 to10 November 2017 to determine issues relating to jurisdiction. In the resulting reserved decision of Employment Judge Auerbach, he decided as follows. After setting out the background introductory facts identifying the parties, he made detailed findings of fact.

11. First, he addressed the structure, international operations and machinery of governance of the First Respondent, both in the UK and internationally. He examined the position of its partners, which included the Claimant. He noted the balance struck on membership of the First Respondent's governing organs which, broadly speaking, guaranteed participation by non-UK partners, but with a majority of UK partner participation.

12. He then described the process and method of profit sharing among partners, which was unremarkable and similar to that used by many large partnerships of solicitors. He noted that each partner filed a personal tax return and paid tax in the jurisdiction of their domicile by reference to their respective profit shares and own circumstances, while the firm itself paid tax in each jurisdiction where it had a presence.

13. He observed that the membership agreement to which the Claimant, and other partners, were party included a dispute resolution clause which in the case of the Claimant and any other member registered as an advocate of the Paris Bar that provided for disputes to be referred to the dispute resolution mechanisms of that Bar. He commented on the relative size of the various offices. London was the largest with more than 100 partners; Paris, the second largest by turnover with about 18 partners and about 50 other lawyers and 50 support staff.

14. Having made those findings, in more detail than I have just set out, he said this at paragraph 29:

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

15. He then went on to consider the firm-wide business plan, common infrastructure, platforms, and what he called "a great deal of evidence about the minutiae of different aspects of the operations of the firm as a whole, and of the Paris office, and the division of labour and/or interaction between the two" (paragraph 34).

16. Drawing the threads together, he then said this at paragraph 35:

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

17. The judge then went on to trace the domicile and career path and the circumstances, particularly work circumstances, of the Claimant and of the Second Respondent, both of whom were French qualified lawyers working at the Paris office. He noted that all partners in any

United Kingdom registered LLP are required to be registered with the Solicitors Regulation Authority and that the Claimant was so registered.

18. The membership agreement contained, he noted, a prohibition against working outside what was called the "territory of origin", in the Claimant's case that territory being France. He observed that the members make a capital contribution, as the Claimant did, through annual retention of an element of their profit share, that she was paid in euros to a French bank account, although she could have elected to be paid differently. He noted that whilst she made occasional infrequent visits to the London office every few months, in connection with her work, she accepted that they were ad hoc, infrequent, and generally short.

19. The judge then went on to set out the relevant law in uncontroversial terms. He considered first the question of international jurisdiction by reference to what is called the **Recast Brussels 1 Regulation** (Regulation EU/1215/2012). After setting out the submissions of the parties on the issue of international jurisdiction, he accepted those of the Claimant and rejected those of the Respondents. He decided that the claims did not face the barrier of lack of international jurisdiction as against either Respondent.

20. Turning to consider the question of territorial distinction he set out in some detail citations from relevant case law. First, it was common ground that the scope of territoriality of the relevant statutory provisions was the same in the case of the claims founded on sex discrimination and equal pay, as it would be if the claims were for unfair dismissal; see **Regina (Hottak) v Secretary of State for Foreign and Commonwealth Affairs** [2016] ICR 975 CA per Sir Colin Rimer at [48].

21. He went on to cite, quite extensively, from four cases and I record that they were, as one would expect, **Lawson v Serco Limited** [2006] ICR 250 in the speech of Lord Hoffmann at paragraphs 36 and 37; **Duncombe v Secretary of State for Children Schools and Families (No 2)** [2011] ICR 1312 SC per Baroness Hale speaking for the whole court at [8]; **Ravat v Halliburton Manufacturing and Services Ltd** [2012] ICR 389 SC per Lord Hope DPSC with whom the other members of the court agreed at [27]-[29] and [32]-[34], and **Bates van Winkelhof v Clyde & Co LLP** [2013] ICR 883 CA per Elias LJ (Richards and Lloyd LJJ concurring) at [86] and [98]-[99]. He observed, correctly, that in the case of **Bates van Winkelhof v Clyde & Co LLP** [2013] ICR 883, CA, an appeal to the Supreme Court was heard and decided on a point unrelated to the issues before him.

22. After that review of the case law, the judge went on to state as follows at paragraphs 79-80 of his reasons:

> **"79. Pausing there, I conclude that, in principle (though, of course, application of this typology to the given facts may be tricky) cases can potentially, and to start with, be divided into three types:**
>
> **(a) those in which (at the relevant time or during the relevant period), the claimant worked in Great Britain;**
>
> **(b) those in which the claimant worked outside Great Britain; and**
>
> **(c) those in which the claimant lived and worked for at least part of the time in Great Britain.**
>
> **80. In cases of type (a) there will be territorial jurisdiction. In cases of type (b) the presumption is against jurisdiction unless there is something which puts the case in an exceptional category, such that the employment has much stronger connections both with Great Britain and British employment law than with any other system of law. That is a question of fact and degree. A non-exhaustive range of factors could be relevant. In cases of type (c) the case does not have to be "truly exceptional" for territorial jurisdiction to be established; and the comparative exercise called for in a type (b) case is not required. There merely needs to be a sufficiently strong connection with Great Britain and British law."**

23. The judge went on to state that this was, in his judgment, clearly a type (b) case. He considered what he called factors weighing on the French side of the scale. He set out a number of features which reflected his findings of fact, and which I need not repeat here.

A

24. He went on to consider whether there were exceptional features bringing the case over to the British side of the frontier, and within the broad reach of the reasoning in the case of **Bates van Winkelhof v Clyde & Co LLP**. Again, those reflected his findings of fact and they centred, not surprisingly, on those elements of the case with the strongest connection to London: namely the membership agreement, the registration of the Claimant in London, the governance arrangements, in particular the Claimant's liability to meet obligations as a partner of the firm arising under guarantees and the like governed by English law.

B

C

25. The judge went on to consider whether those factors were sufficient to satisfy the "exceptionality" requirement for a type (b) case; he held that they were not. Accordingly, he decided that there was no territorial jurisdiction over the claim against the First Respondent. In the case of the Second Respondent, he considered the claim of territorial jurisdiction to be weaker still. The Second Respondent's connections to London were more tenuous than those of the UK registered First Respondent.

D

E

26. Accordingly, he decided that he had no territorial jurisdiction over the claims against either Respondents and he dismissed all the claims. In the Claimant's appeal, she contends that the tribunal erred in law in concluding that it did not have to have "territorial jurisdiction" over the two claims. By deciding that it lacked territorial jurisdiction, the employment judge was deciding that the domestic statutory causes of action relied on, underpinned by EU law, did not apply to the claims made.

F

G

27. In the cross-appeal, the Second Respondent appealed against the finding that the employment judge had "international jurisdiction" over the claim against him; i.e. that the tribunal was competent to hear and determine the claim against the Second Respondent. He

H

A argues, in the cross-appeal, that he was entitled to be sued in France and that the employment judge ought to have declined jurisdiction on the ground that France is the correct forum for the claims against him.

B

28. I will address the cross-appeal first, as the judge did. The Second Respondent submits that in relation to him, the judge erred in law and he should have declined jurisdiction on the basis that the correct forum was France, not England.

C

29. The grounds of appeal were that as an individual domiciled in France, he was entitled under article 4(1) of **Recast Brussels 1** to be sued in the courts of France, and that the claim

D against the Second Respondent had been issued separately from the claim against the First Respondent. The two claims had never been consolidated, though they were heard together on the preliminary issues of jurisdiction; thus, it would not have been appropriate to hear the claim

E against the Second Respondent in England, applying article 8(1) of **Recast Brussels 1.** That regulation superseded, as is well known, the un-**Recast Brussels 1** Regulation enacted in 2000.

30. The Respondents accepted below that, as against the First Respondent, articles 20 and 21

F of **Recast Brussels 1** applied. Those form part of section 5, headed "jurisdiction over individual contracts of employment". By article 20(1):

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

G

By article 21(1):

> **"An employer domiciled in a Member State may be sued:**
>
> **(a) in the courts of the Member State in which he is domiciled; or**
>
> **(b) in another Member State:**
>
> **(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts of the last place where he did so; …".**

H

31. Although the Claimant was a partner rather than a conventional employee of the First Respondent, both Respondents accepted below that as against the First Respondent article 21(1)(a) applied and that as the First Respondent was domiciled in London, the Claimant could bring her claims against the First Respondent in England.

32. The Second Respondent, represented by the same legal team as the First Respondent, argued that although the tribunal had international jurisdiction as against the First Respondent, it did not as against the Second Respondent. The judge rejected that. The argument below, and now, is to the following effect.

33. Article 4(1) of **Recast Brussels 1** falls within Section 1, "General provisions" and provides, so far as material:

> **"1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."**

34. I should record, for the sake of clarity, that during the argument in the tribunal below the claim as against the Second Respondent was, like that against the First Respondent, treated as a claim falling within the words "matters relating to individual contracts of employment" within article 21(1). There was no mention by either side of the claim against the Second Respondent possibly falling under the rubric of other provisions, such as article 7(1)(a) ("in matters relating to a contract, in the courts for the place of performance of the obligation in question") or article 7(2) ("in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred").

35. The issue before the employment judge and before me on the cross-appeal concerns the scope of article 8(1), which appears within section 2, "special jurisdiction" and provides:

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

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

36. It was common ground that if that provision applied, it meant that the Second Respondent could be sued in England in these claims; Mr Daniel Stilitz QC realistically accepted that there would be a risk of irreconcilable judgments if the claims were determined on a "split forum" basis, as against the First Respondent in England and as against the Second Respondent in France. It is now common ground that notions of *forum conveniens* or *non conveniens* do not feature in the analysis according to the regime in **Recast Brussels 1**, whose purpose is to achieve a high degree of predictability through fixed rules.

37. However, Mr Daniel Stilitz QC argued that article 8(1) did not apply here because the Second Respondent was not "one of a number of defendants in the courts for the place where any one of them is domiciled" within article 8(1). He said that because the claims were brought separately, one against each Respondent, article 8(1) did not apply; it only applied where there were multiple defendants in the same application to the tribunal (I will call such an application an "action" for short).

38. Mr Daniel Stilitz QC contended that article 8(1) does not apply where there are multiple defendants in more than one action, even if as in this case the issues in two separately brought actions are closely interlinked. He argued that it would be unjust for the Second Respondent to face a substantial claim in what is to him a foreign jurisdiction; while the claims against each Respondent could have been in the same action, they were not.

A 39. Although he accepted that the point is technical, since the claims could have been brought in the same action or, indeed, the first action could have been amended to add the Second Respondent as an additional party, that had not happened. Mr Stilitz pointed out that the preliminary issues in both actions were heard together by agreement; the actions had never been B "consolidated". The Second Respondent was, consequently, entitled to the protection of article 4(1) of **Recast Brussels 1** and thus entitled to be sued in his home court, in France.

C 40. Mr Paul Epstein QC for the Claimant argued that the judge was right to reject that construction of article 8(1); it required reading in words that are not there, as if the words "one of a number of defendants" read "one of a number of defendants *in the same action*". There is D no basis, he argued, for introducing the qualification that the defendants must be defendants in a single action. It would lead to the very risk of irreconcilable judgments which article 8(1) is there to prevent.

E 41. Mr Paul Epstein QC referred me to the case of **Profit Investment Sim SpA (in liquidation) v Ossi and others** [2016] 1 WLR 3832, a decision of the Court of Justice of the European Union on a reference from an Italian court. It was a multiple defendant case where F defendants were domiciled in different member states, Mr Paul Epstein QC contended. However, I do not think the case of **Profit Investment Sim SpA (in liquidation) v Ossi and others** assists me since it appears that in that case the various claims, which included a third party claim, were G probably brought (under the applicable Italian rules of procedure) in a single action, rather than in more than one action.

H 42. Turning to my reasoning and conclusions on the cross-appeal: in my judgment the employment judge was correct to decide that article 8(1) applied even though the claims had been

brought in separate actions and not in the same action. Mr Stilitz's construction requires words of limitation to be read into article 8(1) without warrant, thereby unnecessarily undermining the policy of suppressing the risk of irreconcilable judgments.

43. Article 8 is a high level European Union law instrument operating on EU wide basis. It does not descend to addressing the detail of procedural rules applicable in the various member states. These are likely to differ from state to state, but all no doubt share the common procedural law concepts, found in article 8, which are sure to feature in the procedural law of every member state, albeit the detail is likely to differ from state to state.

44. Thus, article 8(2) refers to "third party proceedings"; article 8(3) to counterclaims "arising from the same contract or facts on which the original claim was based"; and article 8(4) refers to "combined" actions against the same defendant arising in contract and also *in rem* rights over immovable property.

45. It is plain on a common sense reading of article 8(1) that its application should not be dependent on the mechanics of procedural law provisions applying in an individual member state, such as the detailed rules on joinder of additional parties, multi-defendant claims, consolidation of claims, and the like. I think the correct reading of article 8(1) is that where the defendants are parties to a claim or claims raising the same issues in the same factual matrix, such that a risk of irreconcilable judgments arises, the article bites.

46. The argument that an injustice to the Second Respondent arises from imposing an English forum on him has no traction: he concedes that he could be sued in the English employment tribunal if the claims against him in this case had been brought in the same action and not in two

A separate actions. Moreover, he shared the same legal representation as the First Respondent and the latter conceded international jurisdiction as against it, the LLP, on the basis that the First Respondent fell to be treated as the Claimant's employer.

B

47. The Second Respondent did not dispute that proposition in relation to the First Respondent although he could well have done (albeit with separate representation). He was clearly content to litigate with the benefit of the First Respondent's legal team. Given that a split

C forum was always unrealistic, if he felt it was unjust for him to face English justice rather than French, he would surely have argued for that proposition to apply to the First Respondent as well as to himself.

D

48. I therefore dismiss the cross-appeal and turn to the appeal against the finding that the employment tribunal lacked the territorial jurisdiction in respect of the claims against both Respondents. With one exception to which I am coming, there was no real dispute between the

E parties about the content of the applicable law, either before the employment judge or before me on appeal.

F

49. It is unnecessary for me to cite extensively from the authorities, as the employment judge did, since the Court of Appeal has very recently encapsulated the relevant propositions of law in seven propositions set out in Underhill LJ's judgment in two appeals heard together after the

G decision of the employment judge in the present case; **British Council v David Jeffery and Jonathan Green v SIG Trading Ltd** [2018] EWCA Civ 2253 at paragraph 2:

> **"(1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then the Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94(1) of the Act); nor is there any such provision in the Equality Act 2010.**

H

(2) The House of Lords held in *Lawson* that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the Act in the cases where an employee works overseas.

(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker – that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer – will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case-law as "the territorial pull of the place of work". (This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended the Act to apply if they are based in Great Britain.)

(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".

(5) In *Lawson* Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a "British enclave" abroad. But the decisions of the Supreme Court in *Duncombe* and *Ravat* made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.

(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what *Ravat* was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/EU-funded international schools considered in *Duncombe*.

(7) The same principles have been held by this Court to apply to the territorial reach of the 2010 Act: see *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438, [2016] ICR 975,"

50. For his part, the employment judge, without the benefit of Underhill LJ's summary, identified the three broad categories of case as types (a), (b) and (c) as already noted. Neither of the experienced leading counsel appearing below and before me criticised the judge's formulation of the three types as a useful guide. I respectfully agree that it is; and I consider it in no way inconsistent with Underhill LJ's more detailed subsequent formulation of the applicable principles.

51. He emphasised that he did not intend his propositions to be regarded as a comprehensive summary of the effect of the decided cases. Nonetheless, it is very useful and may in future

obviate the need to cite extensively in tribunals from the jurisprudence of the appellate courts from cases such as **Lawson v Serco Limited**; **Duncombe v Secretary of State for Children Schools and Families (No 2)**, **Ravat v Halliburton Manufacturing & Services Ltd** and **Bates van Winkelhof v Clyde & Co LLP**.

52. For the Claimant, Mr Epstein submitted, first, that the question of territorial jurisdiction was one of law for the Appeal Tribunal; albeit that the tribunal below had the function of undertaking an "evaluative judgment" to which in practice considerable deference would be accorded; and second, that the Appeal Tribunal would only overturn a decision below if it formed the view that the evaluative judgment was flawed by error of law, in disregarding a relevant consideration or taking account of a relevant one "or was otherwise wrong" (per Longmore LJ at paragraph 136 in **British Council v David Jeffery and Jonathan Green v SIG Trading Ltd**.

53. As Mr Epstein pointed out, Longmore LJ and Peter Jackson LJ formed a majority in favour of this view, described by Peter Jackson LJ at paragraph 140 as "a relatively restrained substantive review"; while he described Underhill LJ's approach as "a relatively generous rationality review". Underhill LJ, indeed, at paragraph 45 concluded that "the issue should be treated as one of law" in the light of the analysis of Lord Hope JSC in the case of **Ravat v Halliburton Manufacturing and Services Ltd.**

54. Earlier, at paragraph 41, Underhill LJ noted that in **Ravat v Halliburton Manufacturing and Services Ltd** at [29] Lord Hope had authoritatively stated:

> **"… The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree. … The 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."**

55. On the substance of the appeal, Mr Epstein contended that the judge had drawn the wrong conclusion from the facts; he should have found that (as he put it in his skeleton argument) there was "no sufficiently strong connection with Great Britain and English employment law to overcome the pull of France and French employment law".

56. In support of that contention, he relied, essentially, on the same factual points as he had before the judge below. Too little weight had been placed on the following features of the case: the Claimant's status as what would in an old-style partnership be called an equity partner, i.e. a partner paid at least in part from a share of the firm's profits and thus a joint owner of the First Respondent's business; the presence and registration of the LLP in England; the Claimant's registration with the Solicitors' Regulation Authority, though as a practicing French *avocate*; and her liability under guarantees of the First Respondent's obligations with respect to its two London office premises and its borrowing.

57. Mr Epstein argued that these features went beyond the facts in the case of **Bates van Winkelhof v Clyde and Co LLP** where the connection with Great Britain was found to be sufficiently strong to withstand the pull of Tanzania, where Ms Bates van Winkelhof worked part of the time, and Tanzanian law; and whereas the Claimant here was principally based in Paris, she did albeit infrequently visit London for work purposes. More importantly, events leading to her enforced retirement as a partner in the First Respondent were centred in London and her appeal against termination took place there.

58. He took me to the ten features of Ms Bates van Winkelhof's case identified by the employment judge in that case as sufficiently connecting her to Great Britain, identified at [86] in Elias LJ's judgment in that case. Although in the present case the degree of presence in London

was less than in **Bates van Winkelhof**, the similarity was such that, Mr Epstein submitted, the judge ought to have found that the Claimant's work fell on the same side of the line as that of Ms Bates van Winkelhof. He sought to argue (by reference to Elias LJ's judgment at [95]) that the Appeal Tribunal judge in that case, His Honour Judge Peter Clark, had indicated that the same factual features would have sufficed to establish a sufficient connection with this country even if the case had been a "purely expatriate" case.

59. Other relevant factors were also given too little weight by the judge, according to Mr Epstein: the management and governance of the First Respondent was characterised by UK majority control; the First Respondent exercised significant "oversight and direction" of the Paris operation, in relation to strategy, finances and discipline, including the withholding of profit distributions as a means of exerting discipline over billing and cash collection; and the various agreements signed by the Claimant, including guarantees, all governed by English law.

60. As for the Second Respondent, Mr Epstein argued that his position was likely to be the same as that of the First Respondent; although the Second Respondent was based in France and there was local management of the Paris office where he worked, he too was subject to the same regime of centralised control and supervision from London.

61. For the Respondents, Mr Stilitz emphasised that Lord Hope in **Ravat v Halliburton Manufacturing and Services Ltd** at [28] had observed: "It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive". He submitted in his skeleton argument that "the question of territoriality was one for the Employment Tribunal to determine as a factual question on the evidence before it …". It was for the tribunal to "assess on the facts the degree of connection

between [the Claimant's] employment and (on the one hand) France and French employment law and (on the other hand) Great Britain and British employment law".

62. Mr Stilitz accepted that under our rules of precedent, if it were necessary to choose between the different approaches canvassed by the Court of Appeal judges in **British Council v David Jeffery and Jonathan Green v SIG Trading Ltd**, I am bound to follow the approach of the majority, which treats the issue as one of law; however, he submitted that on the facts here it made no more difference than it had in the two appeals in **British Council v David Jeffery and Jonathan Green v SIG Trading Ltd**; applying either approach, the judge's decision was plainly correct and the case was not close to the borderline.

63. Mr Stilitz emphasised that this was, in the judge's categorisation and as he had correctly found, a type (b) case where the Claimant worked abroad all the time; not a type (c) case like that of Ms Bates van Winkelhof. The Claimant's visits to London were irregular and rare and she was prohibited under her terms of work from doing fee earning work in this country. Therefore, something exceptional would have had to be shown to connect her work sufficiently with Great Britain.

64. The features relied on by Mr Epstein below and in the present appeal do not come near to showing something so exceptional as to displace the pull of France and its law, said Mr Stilitz. The Claimant's submissions amounted to no more than a reassertion of the weak Anglocentric elements of the work arrangements, to which the judge rightly gave limited weight and which deserve no more weight now, on appeal.

65. There were also, said Mr Stilitz, yet other factors beyond those primarily relied on by the judge which ought to weigh in the scales more heavily on the French side than perhaps he found: the arbitration clause providing for dispute settlement under the auspices of the Paris Bar (which I am told engages the daunting services of *M le Bâtonnier* or *Mme la Bâtonnière*), rather than the Law Society of England and Wales or any other United Kingdom institution. The Claimant was paid in euros and paid into a French bank account (though she could have elected to have been paid differently); and she paid tax in France and not the United Kingdom.

66. Finally, argued Mr Stilitz, the Claimant had effective remedies for her causes of action under French law. While the efficacy of those remedies compared to those available under English law was rightly treated as irrelevant to the judge's assessment, he might have given some weight to the availability of those remedies as a factor affecting the strength of ties between the Claimant's work and the Republic of France and its laws.

67. I come to my reasoning and conclusions on the appeal. On the difficult question of the frontier that divides fact from law when a court or tribunal determines the territorial scope of a statute, I can add little to what the more senior appellate judges have already said on the subject. I would start from the proposition, from my part, that the primary facts are for the tribunal to determine in the usual way and, unless the findings are perverse, they are unassailable on appeal since a challenge to non-perverse findings raises no point of law.

68. Second, I would say that in a territorial jurisdiction case such as this, the court is deciding whether the reach of the statute extends to the Claimant's work or not. That depends on how close is the connection between the Claimant's work and this country (usually referred to as "Great Britain" in the authorities). That is the "sufficiency of connection" issue.

69. The primary findings of fact, determined by the tribunal, inform the conclusion of the tribunal on whether the connection is sufficiently close or not. For my part, if the issue were free from authority, I would have difficulty with the proposition that the sufficiency of connection issue is one of fact. I think it is better described as a conclusion of law drawn from primary facts than as a conclusion of fact. The sufficiency of the connection is what determines the territorial reach of the statute, which must be a matter of law, for the court is deciding what the statute means.

70. If the sufficiency of connection issue were (contrary to my instincts) to be treated as one of ordinary fact, the threshold for interference by this Appeal Tribunal would, presumably, be the normal high threshold of perversity. If, on the other hand, one adopts the approach of the majority in the case of **British Council v David Jeffery and Jonathan Green v SIG Trading Ltd** case, the threshold looks very like the familiar, slightly lower threshold encountered in statutory appeals to the High Court from disciplinary bodies, to which CPR Part 52 applies.

71. In such cases, aside from cases of serious procedural irregularity, the appellate court must be satisfied that the decision below is "wrong". The threshold is not the same as perversity; see e.g. Ward LJ in the case of **Assicurazioni Generali SpA v Arab Insurance Group** [2003] 1 WLR 577 at paragraph 197:

> **"… the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she had been called upon to make it in the court below. Something more is required than personal unease and something less than perversity has to be established. …"**

72. In the context of a decision about the territorial extent of a statute, if the matter were free from authority, I would not regard that test as suitable for determining the issue of sufficiency of connection between a claimant's work and this country and its law. If the issue is treated as one

of law, as I believe it should be, the tribunal below either gets the law right or gets the law wrong. Deference to its expertise, experience and closeness to the facts cannot extend to upholding a conclusion of law, reached by applying the facts, with which the appellate tribunal disagrees.

73. That said, I return to the facts and I bear in mind that the issue is not free from authority and that the approach I am required to take is that of the majority in **British Council v Jeffery and Green v SIG Trading Ltd**, as Mr Stilitz accepts. Accordingly, I do so but in any case, I accept his submission that in the present case it makes no difference to the outcome even if the lowest possible threshold for appellate interference is applied.

74. I can express my conclusions on the substance of the appeal briefly. I agree with Mr Stilitz that the case is not close to the borderline and that the judge's assessment of the sufficiency of connection issue was correctly carried out. In short, this is one of those cases where I can say in the time honoured but I fear indolent phrase that I agree with the decision of the judge below for the reasons he gave. Had I been the tribunal in the first instance and of fact, I would have reached the same conclusion, essentially for the same reasons.

75. The judge's close analysis of the detailed facts and his weighing in the scales of the features pointing to, respectively, England and France, fully justified his conclusion that the balance comes down firmly on the French side. To reach the contrary conclusion, you would have to place far more weight on the ownership structure of the First Respondent and on the extent of control and supervision from London, than those features ought properly to bear.

76. I agree with Mr Stilitz that the case should be regarded as one where the Claimant worked outside Great Britain. The occasional visits to London rightly counted for little. They did not

bring the case into the type (c) category of a peripatetic employee or, as Mr Stilitz called them, "commuting expatriate" cases. There was no balance between working in England and working in France; the Claimant worked in France to the virtual exclusion of England. The facts are quite unlike the balance between England and Tanzania in **Bates van Winkelhof**.

77. If the assessment of the competing factors by the judge was a matter for him as an evaluative judgment, to be accorded a high degree of deference, then I do so and I decline to interfere with his assessment as I am very far from satisfied that it is wrong. If it is permissible for me to carry out the assessment myself in order to determine whether the conclusion drawn from it below - that the connection with Britain was insufficient - then my assessment respectfully mirrors that of the judge and leads to the same conclusion.

78. On either basis, the appeal must fail and I dismiss it, together with the cross-appeal.