EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr R Dabawala	**AND**	Assala Energy UK Limited

OPEN PRELIMINARY HEARING

Heard at: London Central **On**: 15 January and 3 February 2020

Before: Employment Judge Nicolle

Representation

For the Claimant: Mr G Baker, of Counsel
For the Respondent: Mr T Brown, of Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that it does have jurisdiction to hear the claims for unauthorised deductions from wages under s.13 of the Employment Rights Act 1996 (the "ERA") and for disability discrimination under the Equality Act 2010 (the "EqA") .

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REASONS

1. This Preliminary Hearing was listed to decide whether the Tribunal has territorial jurisdiction to hear the Claims pursuant to s.13 of the ERA and for disability discrimination under the EqA.

<u>The Claim</u>

2. By a Claim Form presented on 19 July 2019 the Claimant brought complaints of disability discrimination, harassment on account of his disability, victimisation as a result of a protected act in relation to his disability and for an unauthorised deduction from his wages pursuant to s.13 ERA. The Respondent argues that the Tribunal does not have jurisdiction to hear the claims under the EqA or the ERA.

3. The claims being pursued by the Claimant arise from an incident in Gabon on 7 January 2019 where he says he was exposed to an attempted military coup and as a result of the trauma from this incident then suffered ongoing ill health. Subsequent to the Claimant's return to the UK, and commencement of an ongoing period of sick leave on 7 March 2019, he claims that various acts and omissions of the Respondent in the UK are discrimination on account of what he says is a disability and that the Respondent made unauthorised deductions from his wages, to include the non-payment of benefits which have a pecuniary value.

4. Whilst the incidents referred to in support of the substantive claim are not in themselves matters I need to consider, they are to an extent relevant to the determination of the Tribunal's jurisdiction, given that the Claimant's argument in support of the Tribunal having jurisdiction is in part predicated on the handling of these events being evidence of a substantial connection with the UK as a result of decisions made by employees of the Respondent in the UK to include Caroline Sourt, Group Director for Corporate Affairs and Human Resources (Ms Sourt) and Joel Tobin, General Counsel.

5. At the commencement of the Hearing Mr Brown and Mr Baker agreed that the same test applied to determine the Tribunal's territorial jurisdiction under both the EqA and the ERA in relation to the application of UK law. Mr Baker said that in relation to the allegations of disability discrimination he would deploy an argument in the alternative that the Claimant benefits from the direct effect of rights derived from Council Directive 2000/78/EC (the "Employment Equality Directive"). Mr Baker said that he would place reliance on Bleuse v MBT Transport Limited [2008] ICR 488 EAT in which it was held that the EqA should be read to give effect to directly effective protections under EU law.

The Hearing

6. The Tribunal heard evidence on day one from the Claimant and on behalf of the Respondent from Ms Sourt and Gavin Kirkham, Chief Financial Officer (Mr Kirkham). There was an agreed bundle comprising 64 tabbed sections. I read the pages in the bundle to which I was referred. On day two I heard detailed submissions from Mr Baker and Mr Brown. I also read the skeleton arguments and relevant sections in the authorities provided.

Findings of Fact

7. I consider that my findings of fact will be most easily followed by setting them out in the following sequence:

a) the Claimant;
b) the Respondent Group;
c) chronology of relevant events;
d) summary of relevant contractual provisions; and
e) thematic summary of evidence relevant to the application of territorial jurisdiction otherwise than as covered in the sections above.

The Claimant

8. The Claimant is of Indian nationality but considers that the UK has been his principal place of residence for approximately 10 years. His children live and are educated in the UK. He owns a property in the UK which he regards as his home. I set out further details regarding the Claimant's nationality, immigration status, home residence, matrimonial and family below.

9. The bundle included a copy of the Claimant's CV. Whilst undated it would appear to have been created in 2017 prior to his being engaged by the Respondent.

10. His most recent position was with ADDAX in Gabon as Finance Director (as a consultant pursuant to a Gabonese contract) and prior to that with Shell split between Libreville in Gabon and London.

11. The Claimant's CV included details of his positions of employment and consultancies from 1991 to 2007 and his work life had been peripatetic with assignments in diverse locations, but primarily the Middle East. The Claimant has not had any positions of employment based solely in the UK.

The Respondent Group

12. The Respondent (otherwise referred to as Assala Energy or Assala UK) is an English company based at the Metro, 1 Butterwick, London.

13. Gabon S.A. ("Assala Gabon") is held 25% by the State of Gabon and 75% by a holding entity in Bermuda, Assala Gabon Holdings Limited (AGHL). AGHL is held wholly by Assala Energy Holdings Ltd (AEHL), a Cayman entity. AEHL holds 100% of Assala Energy. Assala Gabon and Assala Energy are therefore both subsidiaries of AEHL.

14. Assala Gabon is an oil exploration production company and is the second largest oil producer in Gabon. It employs over 400 Gabonese workers.

15. Mr Kirkham said that Assala Energy is a services company that provides advisory, oversight, technical and support services to the Assala Group (the "Group").

16. The only material source of revenue for the Group is from its oil and gas fields in Gabon. The Claimant says that the only substantive, as opposed to "paper" companies, are Assala Gabon and Assala Energy.

17. Mr Kirkham said that directors of AEHL (of which there are five with three based in Washington) need to approve the recruitment of senior personnel and any increase in head count.

18. For the issues I need to decide I do not consider that the Group structure is a material consideration given that it is acknowledged that the material corporate entities from an operational, revenue generation and engagement of employees and consultants perspective are confined to Assala Gabon and Assala Energy. Therefore, the focus of my decision is on the apportionment of legal, reporting and operational functions between Assala Gabon and Assala Energy particularly in the context of the Claimant's engagement, deployment, terms and conditions and reporting lines.

Chronology of relevant events

Recruitment of the Claimant

19. The Claimant was introduced to the Respondent both via an agency and also by a more informal recommendation via contacts at Shell.

20. Mr Kirkham sent the Claimant an email on 17 May 2017 asking whether he would be interested in an exploratory conversation regarding opportunities for working as part of the Assala team in Gabon.

21. Mr Kirkham met the Claimant for an informal discussion in London on 19 May 2017.

22. In an email of 5 June 2017 Mr Kirkham advised the Claimant that Assala had now started a formal recruitment process for the position of Financial Controller (Assala Gabon) via agencies in the UK and France. He attached a job specification that he had prepared for the Gabon FC role.

23. Yann Cherruau (Mr Cherruau) sent the Claimant an email on 19 July 2017 referring to their discussion earlier that day. Mr Cherruau set out financial details for the position and confirmed that the role of Financial Controller is an ex-pat position, where the company offers standard ex-patriate conditions. He advised the Claimant that the company would pick up his taxes in Gabon.

Offer Letter

24. Under cover of an email of 25 July 2017 Mr Cherruau sent the Claimant an offer letter signed by the CEO of Assala Energy, together with the ex-patriate T&Cs. Mr Cherruau explained that Assala would not have any direct employees until closing of an acquisition of certain assets from Shell in Gabon and until such date the Claimant would be working under a day rate of £700.

25. The offer letter dated 28 July 2017 from David Roux (the "Offer Letter") was on the letter head of Assala Energy and said that on behalf of Assala Energy (the "Company") that he was offering the Claimant the position of Financial Controller with Assala based in Gabon on the terms set out in this letter. Relevant provisions are:

a) you will report to the Finance Manager – Gabon;
b) based in Libreville unaccompanied status and will be full-time in Gabon;
c) details set out of the ex-patriate salary package to include a 45% uplift with figures all in Euros;
d) Income tax levied in UK, France or Gabon, on your ex-patriate salary and any benefits provided by the Company in relation to your assignment in Gabon, will be met by the Company providing that the level of such tax is not increased by any other personal income accruing to yourself;
e) the letter enclosed a copy of the Assala ex-patriate terms and conditions;
f) for the purposes of leave travel entitlement, your home country will be the UK and your home city London; and
g) your assignment to Gabon is conditional upon the satisfactory completion of immigration formalities with the Gabon authorities.

Consulting Agreement

26. The Claimant initially provided his services to Assala Energy pursuant to a consulting agreement via an intermediary service company owned by him, Culp Vrux Limited dated 28 July 2017 (the "Consulting Agreement").

27. Relevant provisions of the Consulting Agreement are:

a) the role is intended to be London-based, with travel overseas as required by the business;
b) the period of engagement shall commence on 14 August 2017;
c) status as independent contractor;
d) paid a pre-tax daily rate of £700; and
e) governing law was to be that of England and Wales.

The Claimant's movements

28. On 8 October 2017 the Claimant travelled to Gabon to represent Assala in the transfer and handover from Shell Gabon Finance to Assala Energy prior to acquisition.

29. In late October/early November 2017 the Claimant travelled from Libreville via London to Bangalore. Assala Energy has outsourced various finance functions to Accenture who have approximately 15 staff in Bangalore assigned to Assala and the Claimant was there for 10 or 11 days. The Claimant then returned to Gabon via London.

Iota manpower services agency

30. Assala's acquisition from Shell Gabon was completed on 31 October 2017. All Gabon based assignees became contractors of a manpower services agency (Iota) pending the attaining of work permits and this arrangement applied until 1 April 2018.

31. Therefore, the Claimant's provision of his services to Assala Energy via the Consultancy Agreement ceased with effect from 31 October 2017 and he was remunerated via Iota from 1 November 2017 until 1 April 2018.

32. On 4 January 2018 a Gabonese work permit was obtained for the Claimant.

Negotiation of contractual terms

33. On 18 January 2018 Mr Cherruau sent the Claimant an email attaching the UK ex-patriate employment contract with Assala Energy and the letter for his assignment to Gabon.

34. In an email to Mr Cherruau of 30 January 2018 the Claimant asked a series of questions which included:

- please clarify if the attached contract is a standard UK contract with same terms and conditions for all ex-patriate staff with UK as the base country?

- the original offer was agreed net of UK and Gabon tax kindly confirm this is the case.

35. Mr Cherruau replied to the Claimant later on 30 January 2018 and stated that the contract was a template prepared by Carlyle and their lawyers. He said that all ex-pats will be employed by Assala UK and seconded to Gabon.

36. The Claimant returned to the UK between 2 and 17 February 2019.

The Assignment Letter

37. The Claimant was sent a letter by Ms Sourt dated 16 April 2018 and headed "Assignment to Assala Gabon". The letter was signed by the Claimant on 22 May 2018 (the "Assignment Letter").

38. Ms Sourt said that it represents the standard letter for assignees. Relevant provisions are:

a) Currently, you are an employee of Assala Energy in the United Kingdom.

b) Upon acceptance of the international assignment (and for the duration of the international assignment) you will be working for the Company in Gabon.

c) She attached a copy of the Assignment Policy.

d) You shall remain employed by the Employer (which meant the Respondent) during the assignment and your current terms of employment shall remain unchanged, save as set out in this letter. In particular, your period of continuous employment will remain unbroken.

e) For purposes of allowing for full compliance with certain formalities in Gabon, you shall sign an employment agreement with the Company (meaning Assala Gabon) under the terms and conditions in force in Gabon for similar job positions.

f) The execution of the above-mentioned employment agreement is an essential condition for carrying out your assignment to the Company, being required by the applicable Gabonese labor and immigration laws. The employment agreement has the purpose of allowing compliance with certain formalities before the Gabonese authorities, notably the securing of the mandatory work permit and residence card, without prejudice to the validity and effectiveness of the employment agreement signed with the Employer.

g) The Employer will conduct any appraisals and pay reviews in the usual way.

h) The Employer shall continue to pay your salary in the normal way.

i) Your reference pay will remain the same as set out under “said agreement” and the home jurisdiction laws of the UK.

<u>The UK Contract of Employment</u>

39. The Claimant commenced employment under a contract of employment with Assala Energy backdated with effect from 1 April 2018 (the "UK Contract of Employment"). It was signed by Ms Sourt on behalf of Assala Energy on 16 April 2018 and by the Claimant on 21 May 2018. I set out relevant provisions of the UK Contract of Employment below.

40. The Claimant returned to the UK between 27 April 2018 and 14 May 2018 and 14 June 2018 and 21 August 2018 wholly, or primarily, as a result of health issues.

Signing of the Gabonese Employment Contract

41. There is a dispute between the parties as to when the Gabonese employment contract (the "Gabon Contract") was first presented to the Claimant. The Respondent's position is that it was in January 2018. However, Ms Sourt was unable to provide specifics as to how this was affected, and by whom, but rather referred to the general practice she understood applied at Assala Gabon. The Claimant denies receipt of the Gabon Contract until June 2018. I find that in the absence of any documentary or witness evidence of earlier presentation that the Gabon Contract was presented to the Claimant in June 2018. In reaching this finding I also take account of the lack of any chasing emails seeking the Claimant's return and signature of the contract prior to that sent by Ndama Traore (Mr Traore) on 29 June 2018. This email stated that the Claimant's return of his "local contract" was urgently needed as Assala Gabon had an appointment the following Tuesday with the Labor Ministry for legalization.

42. Later that day the Claimant responded to Mr Traore stating that he was currently out of Gabon but would return it when he returned. A sequence of emails then followed regarding the signature and return of the Gabon Contract. The Claimant said he had left the contract in Gabon and asked for a further version to be sent to him electronically. This was done by Mr Traore under cover of an email of 29 June 2018.

43. The Claimant, for whatever reason, delayed in undertaking this exercise necessitating Mr Traore sending a chasing email on 5 July 2018. It was not until 8 July 2018 that the Claimant finally signed and returned the Gabon Contract.

44. I set out the relevant terms of the Gabon Contract below. The Claimant said he "signed it blind" and regarded it as a "box ticking exercise". He said that he had been advised to this effect by Ms Sourt.

Subsequent events

45. The Claimant returned to the UK between 14 September 2018 and 1 October 2018.

46. The Claimant returned to the UK again on 8 February 2019 and has not subsequently returned to Gabon. He has been on sick leave from 7 March 2019.

47. On 4 April 2019 the Claimant submitted a grievance. For the purposes of the issue of territorial jurisdiction, it is not necessary to consider the matters giving rise to the grievance, save that the Claimant says his grievance, and grievance appeal, were dealt with by employees of Assala Energy in London.

48. Ms Sourt sent the Claimant an email on 28 March 2019 in which she stated:

> Since 1 November 2018, you should have had around 148 days of work, but instead, due to medical or other reasons, you have manged to work only 75 days, a mere 49% of the time.

49. The Claimant was sent a letter dated 19 December 2019 by Jean-Charles Rolago, HR Manager of Assala Gabon which stated that the Gabon Contract would expire on 5 January 2020 as result of the two-year work permit issued to the Claimant expiring. The letter included the following:

> Termination of the assignment and non-renewal of the local contract of employment with the Company does not impact on your employment contract with the Assala Energy.

50. Mr Rolago went on to state:

> As you are employed by Assala Energy, you remain eligible for Permanent Health Insurance.

Summary of relevant contractual provisions

UK Employment Contract

51. Relevant provisions of the UK Employment Contract are:

a) Employed as a Financial Controller Gabon.

b) Report to Finance Manager in Gabon.

c) Commencement date 1 April 2018.

d) The Claimant warrants that he is legally entitled to apply for a work permit and residence card in Gabon.

e) The Claimant warrants that he has the unrestricted right to work in the UK without any additional immigration approvals.

f) Place of work stated to be Assala offices in Gabon but shall cover all the territory of the relevant country of assignment.

g) In the event of sickness absence, the Contract provides that the Claimant should inform his Line Manager and the HR manager. Clause 10.3 refers to an entitlement to a statutory sick pay which means SSP in the UK. There is no reference to sickness absence or sick pay in the Gabon Contract.

h) Any grievance to be in writing to the HR Manager (Ms Sourt). Any appeal against a disciplinary decision to the CEO (confirmed to be of Assala Energy).

i) Stated to be the entire agreement between the Company and the Claimant and between any Group Member and the Claimant and supersedes all prior agreements.

j) Subject to the exclusive jurisdiction of the law and the Courts of England and Wales.

k) Refers to UK legislation and regulation and specifically the ERA, Working Times Regulations 1998 and the Contracts (Rights of Third Parties) Act 1999.

The Assignment Policy – (Ex-patriate Workers)

52. It is on the headed paper of Assala Energy and is undated. Relevant provisions are:

a) Described as the main policy principles applicable to Assala Energy employees assigned to Assala companies.

b) Ex-patriate Employee defined as: *Employee hired by Assala outside the Host Country and seconded under an international assignment to the Host Country.*

c) Home Country defined as: *Normal country of residence of the Ex-patriate*.

d) Host Country defined as: *The place where the Ex-patriate Employee is seconded to for his/her International Assignment. There are 2 Host Countries for Ex-patriate purposes namely Gabon, with 3 different locations and United Kingdom, London.*

53. Ms Sourt said that Assala regarded an ex-patriate's Home Country as where their home is.

54. The ex-patriate employee will be repatriated to the Home Country prior to the end of employment.

55. The Claimant's Home Country was the UK. The Host Country for the assignment was Gabon.

Gabon Contract of Employment

56. The Contract provided to the Claimant was in French. It was translated by a professional translator on behalf of the Respondent for the Tribunal proceedings.

57. Relevant provisions of the Gabon Contract are:

a) Fixed term of two years taking effect 5 January 2018.

b) The Contract had retrospective effect given that it was not signed by the Claimant until 8 July 2018.

c) Social Security contributions and taxes provided for by law (referring to Gabonese law) shall be deducted. The Claimant said that he never paid these from his salary, but that Gabon Assala was responsible for all such payments.

d) The Company to provide accommodation for the Employee.

e) The Company shall cover the travel expenses of the Employee, his spouse and minor children for the first trip to Gabon, for travels on leave, as defined in the ex-patriate's leave policy and for the return journey to the place of recruitment at the end of the employment contract.

f) Subject to the provisions of the Labor Code in the Gabonese Republic.

Status of and rationale for the Gabon Contract

58. The Claimant says that the requirement for the Gabon Contract was a formality to comply with Gabonese legal and immigration requirements. He says all material terms of his employment remained as stated in the UK Employment Contract. He says this was stated to him by Ms Sourt. He further stated that whilst he spent significant time negotiating the terms of the UK Employment Contract he was indifferent to the terms of the Gabon Contract, and indeed was not aware what these terms were, given that the Contract was in French which he is not familiar with.

59. I find that the Claimant was largely indifferent to the terms of the Gabon Contract but that by his conduct demonstrated a reluctance to sign and return the Contract which was arguably indicative of a reluctance to risk compromising the contractual primacy of the UK Contract of Employment.

The inter relationship between the contracts

60. There are 28 employees solely on UK employment contracts. They are all based in Assala Energy's Hammersmith office.

61. There are between 65 and 70 ex-patriate employees in Gabon. Only four of them (to include the Claimant) have the UK as their Home Country. The others come from a variety of locations to include Mexico, Canada and Argentina. Notwithstanding their designated Home Country, the employees all have the same UK employment contract and also have Gabonese employment contracts.

62. Gabon law requires that ex-patriate employees should not be paid more generously than Gabonese nationals.

63. There would be difficulties with a provision of pensions to ex-patriate employees absent a UK contract of employment. Ms Sourt said that it is

extremely difficult to extract money invested into a Gabonese pension fund. A further issue relates to health coverage.

64. Ms Sourt said that the suite of contractual documents used by Assala was very common in the oil and gas industry.

Thematic summary of evidence relevant to the application of territorial jurisdiction otherwise than as covered in the sections above.

Reporting lines and management structure

65. The Claimant reported to Olivier Clinckemaillié, the then Gabon Finance Manager (Mr Clinckemaillié). The Claimant was responsible for managing a team with approximately 10 employees with two direct reports into him.

66. Mr Clinckemaillié is employed by Assala Gabon. He reports to Jean-Yves Grall, Assala Gabon's Managing Director.

67. The bundle contained organigrams dated 29 June 2018 for the Assala Gabon Finance Team and the Assala Gabon Leadership Team. In relation to the Leadership Team organigram the Claimant said that the Gabonese management was solely for local and legal purposes and that the managers all had functional reporting lines to Assala Energy.

68. The Claimant says that in reality he was managed by Mr Kirkham. Mr Kirkham had weekly meetings (some of which would be undertaken remotely) with him and Mr Clinckemaillié.

69. The Claimant contends that his appraisals were ultimately undertaken by a Mr Kirkham whereas the Respondent says that day-to-day line management responsibility for the Claimant rested with Mr Clinckemaillié.

70. The Claimant says that the Senior Leadership Team consisting of the CEO, COO, CFO, Sub Surface Director, Corporate Affairs, HR Director and Head of SSE are all based in London. He says that the Group's assets are in effect managed from London, including all important decision making and signoffs.

71. I find that whilst the Claimant reported on the day-to-day matters to Mr Clinckemaillié that he also had regular contact with Mr Kirkham to include the weekly meetings or calls. Given that virtually the entirety of the Respondent Group's senior management are located in London it would be inevitable that the Claimant would communicate with, report to and take instructions from London based managers in respect of any substantial issues, whether relating to the performance of his duties or under the terms of his employment contracts together with the Assignment Policy.

Global Role

72. The Claimant says that he undertook duties for the wider Group and that his role was not confined to Gabon. The Respondent says that his role was exclusively in Gabon save for his visit to Bangalore in late October/early November 2017 (and of that the Respondent says that it was 90% related to Gabonese financial issues), the annual E&Y audit and some post completion due diligence undertaken by PWC subsequent to Assala's acquisition of businesses and assets from Shell in Gabon.

73. The Claimant says that a significant percentage of his time was dedicated to managing Assala Energy corporate work scopes to include Group management systems such as risk management, governance, insurance, post-investment reviews, Group consolidations, managing outsourcing contracts, Group audits, SAP management and governance, supporting RBL financing and financial reporting to the Carlyle Group.

74. I find that the overwhelming majority of the Claimant's duties were undertaken in respect of Assala Gabon. This was the role he was appointed to. Mr Kirkham said that it was essential that the Claimant's role was undertaken in Gabon and it would not have been possible for him to undertake his duties in London. Further, given that the majority of the Group's employees, whether local or ex-patriate, are based in Gabon, it is where the Group's assets are situated, its operations are undertaken and revenue derived it is inevitable that the overwhelming proportion of the Claimant's duties would be in relation to Gabon.

I therefore find that any duties undertaken by the Claimant for the wider Group were incidental to the principal purpose of his employment.

Pay and Tax

75. The Claimant's salary was paid pursuant to the UK Employment Contract. Whilst his salary was stated to be in Euros it was converted to UK Sterling and paid to a UK bank account.

76. The Claimant was regarded as UK resident for tax purposes and the over whelming proportion of deductions for tax and national insurance contributions from his salary were made in the UK.

77. The Claimant was sent payslips to his UK address in Harrow on the Hill starting from 26 April 2018. These showed deductions for tax and national insurance contributions.

78. Whilst I was not provided with any evidence as to deductions made from the Claimant's salary for tax and social security contributions in Gabon, I find that these would have been relatively peripheral and accounted for directly by Assala Gabon. The Claimant remained a UK resident for tax purposes.

Benefits

79. The Claimant's benefits, to include medical insurance and permanent health insurance, were provided by Assala Energy and documented in the UK Employment Contract. Further, whilst Assala Energy did not make contributions to a pension scheme on the Claimant's behalf he received a pension allowance at a monthly figure of £799 as shown on his monthly payslips.

80. The Claimant was entitled to and received statutory sick pay in the UK.

The Claimant's Family

81. When cross examined by Mr Brown on his marital and family status the Claimant was reluctant to provide answers given what he considered to be the personal nature of the questions. I assured him that these were relevant questions in the context of his connection with the UK.

82. The Claimant's first wife is Portuguese. They divorced on 6 March 2017. His youngest child went to live with his former wife and his eldest is at university.

83. The Claimant married his second wife on 16 February 2019 in Winchester. He then went to India for approximately 10 days as a result of his father's ill health and it was only possible to have a two-day honeymoon in the UK.

84. It had been the intention for his new wife to relocate to Gabon. She intended to sell her property in Basingstoke. This has now been deferred.

The Claimant's Home

85. The Claimant owns a property in Harrow. He lived there with his first wife until she had vacated in 2014. The property was partially, and then fully let out, by a local estate agency from April 2017. The Claimant is currently living with his second wife at her property in Basingstoke.

86. I find that for the duration of his engagement, and then employment, with the Respondent Group that the Claimant regarded the UK as his home, as well as being the Home Country for the purposes of the Assignment Policy. I make this finding given that the UK is where the Claimant owns property, the location to which he predominantly returns between jobs or assignments and periods of leave whilst on assignment and it being the country in which his first and second wives and dependant children live and attend academic institutions.

The Claimant's Immigration Status

87. The Claimant originally came to the UK pursuant to a tier one work permit. This subsequently converted to his having a UK residency right as a result of his

family status, presumably by his Portuguese wife and children being based in the UK.

88. The Claimant was asked by Mr Brown why on his CV he described himself as “British” when this is not the case. The Claimant says that he wanted to make it clear to a prospective employer that he had the right to work in the UK. He ultimately hopes to obtain British citizenship.

89. As a first step towards British citizenship the Claimant wishes to acquire indefinite leave to remain in the UK (“ILTR”). He describes his normal place of residence as being the UK.

90. The Respondent places considerable emphasis on the Claimant’s immigration status in the UK and his avowed wish to obtain ILTR. His current residency permit expires on 28 March 2020.

91. Mr Brown contended that had the Claimant remained in Gabon he would have lost the ability to apply for IDLR in June 2020 because it is likely that he would have been away from the UK for more than 18 months in the last 10 years and/or for longer than 6 months at any one time, and thereby broken his continuous residence in the UK.

92. Mr Brown referred me to relevant extracts from the Home Office rules on eligibility to apply for IDLR as a parent. It is apparent from Sections D – LTRPT and E – ILRPT that the relevant eligibility criteria for the Claimant to obtain IDLR include a continuous period of at least 120 months in the UK.

93. Mr Brown also referred me to the Home Office Guide on Long Residence dated 28 October 2019 which provides that continuous residence is considered to be broken if the applicant has:

a) been absent from the UK for a period of more than 6 months at any one time; or
b) spent a total of 18 months outside the UK throughout the whole 10-year period.

94. Mr Brown questioned the Claimant regarding his position on an application for ILTR in June 2020. Mr Brown says that it would have been potentially compromised if the Claimant had been out of the UK for more than 18 months in the last 10 years and/or for longer than 6 months at any one time and thereby broken his continuous residence in the UK. Mr Brown asked the Claimant what his position was given that the intention under the Letter of Assignment was that he would have been in Gabon for all but 35 days' leave per year in the period of two years from 5 January 2018. The Claimant was unable to provide an answer.

95. The Respondent argues that the Claimant's probable awareness of the adverse, and potentially fatal, implication of his assignment to Gabon on his application for IDLR would have been a significant issue for him. Further, Mr Brown says that grounds exist to infer that the Claimant may, at least in part, have been motivated by a wish to protect his "continuous residence" status for the purposes of this application in his returning and remaining in the UK from February 2019.

The Law

General position

96. It is for the Claimant to show that the Tribunal has territorial jurisdiction, not for the Respondent to show that it does not.

97. I have confined sections quoted from judgements to what I consider relevant and have applied the same abbreviations and spellings for consistency to the rest of this Decision.

98. It is agreed by the parties that the Tribunal's territorial jurisdiction is the same under the EqA and the ERA.

99. Following the repeal of s.196 in October 1999, the ERA contains no generally applicable geographical limitation. The EqA is also silent on

mainstream questions of territorial scope and leaves the gap to be filled by the courts. The Explanatory Notes (paragraph 15) to the EqA says as follows:

> As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the ERA, the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain.

100. Hottak and anor v Secretary of State for Foreign and Commonwealth Affairs and anor 2016 ICR 975, CA demonstrates that the scope of the EqA is narrower than that of previous discrimination legislation, since it appears to exclude those recruited in Britain for a British business but who work outside Great Britain unless their circumstances constitute a connection with Great Britain that is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim. However, such circumstances will be rare.

Lawson v Serco

101. Following Lawson v Serco [2006] IRLR 289 an analysis of the factual matrix is required. Lord Hoffman gave guidance as to what sort of employee would be "within the legislative grasp" of the ERA by reference to three examples:

- the standard case (working in Great Britain);
- peripatetic employees; and
- ex-patriate employees.

102. Lord Hoffmann 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:

- 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

- where he or she works in a "British enclave" abroad.

103. In respect of peripatetic employees, the House of Lords in Lawson v Serco agreed with the common-sense approach adopted by the Court of Appeal in Todd v British Midland Airways 1978 ICR 959, CA. Peripatetic employees do not perform their services in one territory, owing to the nature of their work. Lord Hoffmann held that in such cases, the employee's base, the place at which he or she started and ended assignments, should be treated as his or her place of employment. Determining where an employee's base is requires more than just looking at the terms of the contract; it is necessary to look at the conduct of the parties and the way they operated the contract in practice.

104. The basic rule is that the ERA only applies to employment in Great Britain. However, in exceptional circumstances it may cover working abroad. As summarised by the Court of Appeal in Bates van Winkelhof v Clyde and Co LLP and anor 2013 ICR 883, CA:

> "where an employee works partly in Great Britain and partly abroad, the question is whether the connection with Great Britain and British employment law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim"

105. Where an employee works and lives wholly abroad, it will be more appropriate to ask whether his or her employment relationship has much stronger connections both with Great Britain and with British employment law than with any other system of law — Duncombe v Secretary of State for Children, Schools and Families (No.2) 2011 ICR 1312, SC.

106. In Ravat v Halliburton Manufacturing and Services Ltd 2012 ICR 389, SC

the Supreme Court said that the resolution of territorial jurisdiction will depend on a careful analysis of the facts of each case, rather than deciding whether a given employee fits within categories created by previous case law. If an individual lives and/or works partly in Great Britain they need only to show that there is a sufficient connection to employment in the UK in order to establish jurisdiction.

107. In Ravat, Lord Hope stated that 'the case of those who are truly ex-patriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law.'

108. Underhill LJ's judgement in Jeffery v British Council [2019] ICR 929 included:

a) As originally enacted, section 196 of the ERA 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 ERA has contained no express provision about the territorial reach of the rights and obligations which it enacts.

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

c) In the generality of cases Parliament can be taken to have intended that an ex-patriate 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 ERA or EqA. 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 ERA to apply if they are based in Great Britain.

d) 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.

109. The decisions of the Supreme Court in Duncombe and Ravat make it clear that the correct approach was not to treat the Lawson categories as fixed, 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.

110. Where the worker is "truly ex-patriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting ex-patriate", 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/European Union-funded international schools considered in Duncombe.

Choice of Law

111. In Jeffrey, the employers argued that an express choice of English law as the law of the contract was immaterial. Underhill LJ disagreed, and held that the Court of Appeal was bound by the Judgment of the Supreme Court in Duncombe No 2: [2011] ICR 1312, in which the Court "expressly took account of the existence of an English choice of law clause in considering the sufficient connection issue".

112. In Duncombe No. 2, Lady Hale noted that:

"The claimants 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."

113. Underhill LJ in Jeffrey also noted that Lord Hope had made similar observations in Ravat, in which the Supreme Court was faced with the situation of a "commuting ex-patriate". Lord Hope held as follows:

> "Lady Smith said in the EAT that the employment tribunal was wrong to take account of the proper law of the parties' contract and the reassurance given to the claimant by the employer about the availability to him of UK employment law, as neither of them were relevant. The better view, I think, is that, while neither of these things can be regarded as determinative, they are nevertheless relevant. Of course, it was not open to the parties to contract into the jurisdiction of the employment tribunal. The question whether the tribunal has jurisdiction will always depend on whether it can be held that Parliament can reasonably be taken to have intended that an employee in the claimant's position should have the right to take his claim to an employment tribunal. But, as this is a question of fact and degree, factors such as any assurance that the employer may have given to the employee and the way the employment relationship is then handled in practice must play a part in the assessment".

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

points quite strongly to British employment law as the system with which his employment had the closest connection.

115. Mr Baker referred me to the recent decision of the Scottish EAT in Hexagon Sociedad Anonima v Mr Neil Hepburn UK EATS/0018/19/SS. The claim arose from conduct on a vessel moored in the territorial waters of Equatorial Guinea. The Employment Tribunal had held that it had jurisdiction to consider the claim and this decision was in part predicated on the claimant's contract of employment which prorogated the jurisdiction of the Courts and Tribunals in Scotland. The Scottish EAT considered that the insertion of a prorogation and choice of law clause to match the individual's UK passport suggested that the parties thought that Scotland was the correct jurisdiction for an employment dispute. In upholding the original decision of the Employment Tribunal, the Hon Lord Summers stated at paragraph 20 of the judgment:

> "It appears to me that Lady Hale's judgment in Duncombe permits regard to be had to the expectation of an employee provided the expectation is consistent with other relevant connections".

116. The Respondent referred me to the decision in YKK Europe Ltd v Heneghan [2010] ICR 611 which sets out relevant factors to be taken into account in determining eligibility to bring a claim for unfair dismissal where an employee had been absent from work in the period prior to dismissal. Relevant factors to be taken into account include:

a) why the employee was absent from work;

b) where the employee was ordinarily working, or based, and for how long, before his absence from work began; and

c) whether the tribunal would have had territorial jurisdiction as at the date on which the claimant became absent from work.

European authorities

117. The EqA is the measure adopted by the United Kingdom which gives effect to the Employment Equality Directive, which provides at Article 5 that:

> In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

118. In Bleuse v MBT Transport Ltd and anor 2008 ICR 488, EAT, B, a German national, was employed by a company registered in England but he lived in Germany and worked solely in mainland Europe. His unfair dismissal claim failed because, as the EAT held, although he worked for a company based in the UK, he did not operate out of the UK and had virtually no connection with it. It made no difference that his contract provided that it was to be governed by, and construed in accordance with, English law as s.204 ERA makes it plain that the law of the contract of employment is 'immaterial'. The only issue was whether, as a matter of fact, the employee was based in the UK and neither the terms of the contract nor its applicable law determined that question. The EAT did allow B's claim under the Working Time Regulations 1998.

119. The Bleuse principle provides that the Lawson guidance ought to be modified in its application to UK law where necessary to give effect to directly effective rights derived from EU law. Since most discrimination laws are so derived, it is arguable that a wider test should apply to claims brought under the EqA. Furthermore, ECJ decisions such as Mangold v Helm 2006 IRLR 143,

ECJ, and Kücükdeveci v Swedex GmbH und Co KG 2010 IRLR 346, ECJ, suggest that the principle of non-discrimination is a general and fundamental principle of EU law, which can be relied on against private individuals as well as against the state.

120. Further, in Ministry of Defence v Wallis and another [2011] I.C.R. 617 Elias LJ held that:

> "Indeed, in my judgment once a claimant is seeking to enforce a directly effective EU right, it matters not which national law is applicable to the right in question, provided at least that it is the law of a Member State. This is because whichever system of law within the European Union is the appropriate state law to apply, either it gives effect to the EU right when appropriately construed, or it must be disapplied to the extent that it does not. So, once the British court is properly seized of the issue, it would be obliged to give effect to the directly effective right one way or another, irrespective of which body of national rules applies. I suspect that in most cases at least it would involve the denial of an effective remedy to require the claimant who is properly before the British courts to go elsewhere to enforce the right, particularly if other claims are properly before the court".

121. The judgment of the ECJ in Boukhalfa v Germany (C-214/94) [1996] ECR 1-2253 suggests that the implied territorial scope of Community Law may reach beyond those who work in the EU, who nonetheless have EU employment law rights because, on the facts, there is a sufficiently strong connection between their employment and the EU or the EU system of law. the Court held that:

> "The Court has consistently held that provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community.
>
> In the present case, it is clear from the documents before the Court that the plaintiff's situation is subject to rules of German law in several respects. First, her contract of employment was entered into in accordance with the

> law of the Member State which employs her, and it is only pursuant to that law that it was stipulated that her conditions of employment were to be determined in accordance with Algerian law. Secondly, that contract contains a clause giving jurisdiction over any dispute between the parties concerning the contract to the courts in Bonn and, ultimately, Berlin. Thirdly, the plaintiff in the main proceedings is affiliated for pension purposes to the German State social security system and is subject, though to a limited extent, to German income tax".

122. I was also referred to the decision of the Scottish EAT in Wittenberg v Sunset Personnel Services Ltd and others UK EATS/19/13 and the judgement of Lady Stacey. At paragraphs 63 and 64 she made the following comments:

> "The question still remains, why should legislation emanating from the EU have territorial reach all over the world? It seems to me that it must be limited in its application, just as UK law is limited to its own territory and those other situations where the Court finds that Parliament must have intended there to be territorial reach".

She went on at paragraph 64 to state:

> "I find that by parity of reasoning, rights which exist because of EU Directives are rights to which effect must be given inside the EU. I am not persuaded that there is any reason why the territorial reach of such rights should automatically extend beyond the EU".

Identity of the Claimant's employer

123. In the judgment of Mann LJ in Clifford v Union of Democratic Mineworkers [1991] IRLR 518:

> "A question as to whether A is employed by B or by C is apparently a question of law for it is a question as to between whom there is the legal relationship of employer and employee. The resolution of that question is

> dependent upon the construction of the relevant documents and the finding and evaluation of the relevant facts. Where the only relevant material is documentary in nature then the question is not only apparently, but it is also actually, a question of law. Where, however, the relevant material is an amalgam of documents and facts then the apparent question of law is often said to be a mixed question of law and fact. The present case is one where the relevant material is an amalgam of documents and facts and it can thus be described as a case of mixed law and fact. This description does not, however, in my judgment mask the reality that the answer to the question is determined by the determination and evaluation of the relevant material".

124. In the judgment of Morrison P in Secretary of State for Education and Employment v Bearman & Others [1998] IRLR 431:

> "The correct approach would have been to start with the written contractual arrangements and to have inquired whether they truly reflected the intention of the parties"

125. In Dynasystems v Moseley (unreported, EAT, 25 January 2018), Langstaff J held that it was permissible for a tribunal to look at the dealings between the parties and who carried out what functions during the employment in order to decide who the real employer was. It was permissible for the Tribunal to use the judgment of the Supreme Court in Autoclenz to determine who the real parties to the contract were which includes:

> "After all, if the parties to an agreement have indeed agreed X but they behave as if they have agreed Y, that would be surprising. If, however, they have agreed Y it is entirely to be expected. To behave as if they have agreed Y is therefore some evidence that they have indeed done".

Conclusions

Employing Entity

126. The Claimant argues that the Gabon Contract was a "sham" and should be disregarded. Mr Baker referred me to Snook v London and West Riding Investments Ltd [1967] 2 QB 786 and Autoclenz v Belcher [2011] ICR 1157 in support of the Claimant's argument that the Gabon Contract was a sham and did not represent the true agreement between the parties. He argues that in accordance with Diplock LJ's judgment in Snook a sham contract exists where it has the intention of the appearance of rights and legal obligations between the parties different from the actual legal rights and obligations.

127. The Respondent says that the Gabon Contract constituted an important real-world contract.

128. I find that the Gabon Contract was not a sham. I make this finding for the following reasons:

a) it represented a legal requirement for the employment of non-local employees in Gabon. In other words, without this Contract it would not have been possible for the Claimant to remain employed by the Respondent and assigned to work in Gabon;

b) it was legalised by the Gabon Labor Department;

c) it included provisions for the deduction of social security contributions and taxes in Gabon, albeit these were relatively nominal and not directly paid by the Claimant; and

d) it provided for some material benefits for the Claimant, to include the provision of accommodation in Gabon and the payment by Assala Gabon of the travel expenses of the Claimant and his family to Gabon in accordance with the expatriate leave policy.

Connection with Great Britain

Approach taken to determine the issue

129. I have been referred to a substantial number of case law authorities, and there are many more decisions to which I could have been referred. I have approached my decision by determining whether the Claimant's employment with the Respondent has a connection with Great Britain that is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the Tribunal to deal with the claim.

130. I consider that the scenarios set out by Lord Hoffman in Lawson v Serco are illustrative, and not exhaustive, and in accordance with the principles enunciated in cases such as Bates van Winkelhof and Ravat the test I need to apply is whether the connection with Great Britain and British employment law is sufficiently strong for a tribunal to hear the claim. This involves undertaking a careful analysis of the facts of the case, rather than deciding whether any given claimant fits within categories created by previous case law.

131. Whilst I have carefully considered the specific factual and legal scenarios in the authorities provided to me, to include the Respondent's analysis of the "sufficiently close connection" cases, I do not consider that attempting to categorise the specific factual and legal circumstances of the Claimant's position, as to whether he falls within or outside any given case law authority, or group of authorities, is the most appropriate way of determining this issue. I reach this conclusion for the following reasons:

a) the majority of the authorities cited involve decisions of the EAT or Higher Courts as to whether a first instance Employment Tribunal's decision was one open to it, rather than being guiding principles on how subsequent cases should be decided; and

b) the reported cases are a relatively small subset of the total cases determined by tribunals, which have not been appealed. Whilst they provide useful guidance as to the applicable criteria for determining territorial jurisdiction, they do not provide a complete picture of all decided

cases. Each case is inevitably dependent on its own specific legal and factual matrix and should be decided by the tribunal based on the relevance of the particular facts in the case before it.

132. In reaching my determination I am of course mindful of, and give weight to, the guidance provided in the relevant authorities.

133. I need to consider what Parliament would have intended the territorial application of the ERA and EqA to be, and whether in accordance with the principles enunciated in Ravatt, the Claimant's employment had a "sufficiently close connection" with Great Britain. In assessing this question, I need to evaluate the relationship between the parties objectively.

134. The determination of the territorial jurisdiction of the Tribunal in this case is a complex exercise, with a multiplicity of relevant factors, some of which point towards the Tribunal having jurisdiction and others against.

135. During the hearing I was referred to hypothetical scenarios to include what the position would have been:

a) in relation to expatriate employees from Home Countries other than the UK;

b) had the Claimant not returned to the UK on account of ill health; and

c) if the Claimant were to be dismissed in the UK as a result of having undertaken a "protected act".

136. I do not consider it beneficial to speculate as the position in respect of different scenarios, to include those above, but rather to focus on the identifiable factors that existed in the Claimant's case when his Claim Form was presented on 19 July 2019.

A sufficient level of connection with Great Britain

137. Having carefully considered the balance of factors in favour of, and militating against, the existence of territorial jurisdiction, I find that the Claimant has a sufficient level of connection in his employment with Great Britain.

138. I find that whilst the Claimant's position does not fall neatly within the scenarios identified by Lord Hoffman that the circumstances of his recruitment, assignment, the interrelating suite of contractual documents and his ongoing property and family connections with the UK mean that his situation is most aligned to that of an ex-patriate employee recruited in the UK but assigned to a foreign location, in this case Gabon. Whilst the Claimant's previous career history was undoubtedly peripatetic his employment with the Respondent was not.

139. I set out below my analysis and findings in respect of those factors I consider point towards a sufficient level of connection with Great Britain.

Factors showing a sufficient connection with Great Britain

<u>The suite of contracts</u>

140. I find that the Claimant's employment was governed by an interrelating suite of documents comprising the UK Contract of Employment, the Gabon Contract and the Letter of Assignment. Whilst I have rejected the Claimant's argument that the Gabon Contract was a "sham" I nevertheless find that it was subsidiary and subservient to the UK Contract of Employment. I reach this finding for the following reasons:

a) the UK Contract of Employment was signed on 16 May 2018 whilst the Gabon Contract was not signed until 8 July 2018 albeit both had retroactive effect;

b) the principal terms on the Claimant's substantive remuneration, benefits and legal obligations are in the UK Contract of Employment and not the Gabon Contract;

c) the Gabon Contract was in French which the Claimant does not understand; and

d) the primacy of the UK Contract of Employment over the Gabon Contract is consistent with the parties' conduct and expectations when the Claimant's employment terms were negotiated. The Claimant says that he regarded the Gabon Contract as a "box ticking" exercise and signed it "blind". He relied on the assurance of Ms Sourt that the the Gabon Contract was a legal formality to ensure compliance with the Respondent's legal obligations in Gabon.

141. I find that the parties' conduct was consistent with this interpretation. I reach this finding for the following reasons:

a) any financial benefits paid, and Gabon tax and social security deductions, pursuant to the Gabon Contract were of no materiality to the Claimant;

b) the Claimant had been working in Gabon for a significant period prior to the Gabon Contract being executed on 8 July 2018 and the pressure from the Respondent for the Claimant to sign the Contract was as a result of a need for his employment in Gabon to be legalised rather than any uncertainty regarding his contractual terms of employment;

c) the UK Contract of Employment has an Entire Agreement provision;

d) notwithstanding the termination of the Gabon Contract on 4 January 2020 the Claimant continues to be employed under the UK Contract of Employment; and

e) the Claimant's salary has been paid pursuant to the UK Contract of Employment, and whilst calculated in Euros, is paid to him in a UK bank account.

142. Whilst I do not find that the contractual position in itself would have been sufficient to give jurisdiction to the Tribunal, I find it to be a factor in support of the Claimant's position.

143. I accept the Respondent's position that the suite of contractual documents was a common template used for all expatriate employees save for variation in the designation of Home Country. I do not find this means that the Claimant cannot rely on the terms of the UK Contract of Employment as a factor pointing to a connection with the UK. Further factors exist which point to such a connection, which would not necessarily have existed in the hypothetical case of the expatriate from Mexico who entered into the same suite of contracts, but where the UK was merely a conduit for their employment, rather than a location where they had any pre-existing or ongoing connection.

Governing law and jurisdiction

144. It is relevant that the UK Contract of Employment provides for the exclusive jurisdiction of the laws and Courts of England and Wales. I find that the Claimant was anxious to ensure that the principal documentation relating to his employment was subject to a UK law rather than that of Gabon.

145. The Claimant's position is analogous to that of Mr Hepburn in the decision of the Scottish EAT in Hexagon Sociedad Anomia v Mr Hepburn. The existence of a clause in Mr Hepburn's contract of employment providing for the exclusive jurisdiction of the "Scottish Courts and Tribunals" was a significant factor pointing to a close connection with Britain and the territorial jurisdiction of the tribunal.

146. I find that the Claimant had a reasonable expectation that any disputes relating to his employment with the Respondent would be dealt with in the UK courts and tribunals. In reaching this finding I take account of the following:

a) the Offer Letter stated that the Claimant's Home Country would be the UK and his Home City London; and

b) Mr Cherruau advised the Claimant in a letter dated 30 January 2018 that all ex-pats would be employed by Assala UK and seconded to Gabon.

The Claimant's home and immigration status

147. The parties made submissions as to the potentially different implications of place of ordinary residence, nationality and citizenship. Whilst I consider that these classifications are on a graduated scale from ordinary residence to citizenship and nationality, and are indictive of an enhancing level of connection with a country, I do not find the absence of citizenship or nationality, is in itself a determining factor militating against territorial jurisdiction. It is, however, a factor to be considered as part of a multifactorial analysis.

148. I find it significant that the Claimant could demonstrate a substantial connection over a protracted period with the UK. Whilst the Claimant had not been physically employed in the UK in any material sense, the UK had been his home location for approximately 10 years. This is where his first and second wives primarily reside together with his dependant children. He owns a property in Harrow and now lives with his second wife at her home in Basingstoke.

149. I therefore find that if anywhere was the Claimant's home base it was the UK. Whilst he remains a national of India there is no evidence that he has any substantial on-going connection with India, save for it being the home of his parents, whether in terms of employment, property ownership or residency.

150. I find it significant that the Claimant has commenced a process to apply for IDLR in the UK. Whilst I acknowledge that his acceptance of an assignment to Gabon was potentially inconsistent with this, I nevertheless consider that this express wish, even if not one necessarily capable of fulfilment, to be indictive of a substantial level of connection with the UK.

The Respondent's Group structure

151. In terms of operations, employment and revenue generation I find that the only substantive, as opposed to intermediary or holding companies, within the Group are Assala Gabon and Assala UK. This is not to question the legitimacy of the Group structure, but merely to highlight what constitute the significant corporate entities for the purposes of determining whether the Claimant's connection with the UK was sufficient for the Tribunal to have jurisdiction.

152. Whilst I find that the Claimant was recruited solely to perform the FC role in Gabon, I nevertheless find that he retained a significant level of connection with Assala UK throughout his employment, and not solely after his return to the UK in February 2019. I make this finding for the following reasons:

a) the Group's most senior managers are all based with Assala UK in London;

b) the Claimant had regular contact with Mr Kirkham throughout his employment to include weekly meetings; and

c) the Claimant communicated with Ms Sourt, or others, in London regarding all significant HR matters.

Global role

153. I find that the Claimant exaggerated the extent to which his role was global. I do, however, find that the Claimant performed some roles which had a benefit for Assala UK as well as Assala Gabon, for example his attendance in Bangalore to liaise with finance staff employed by Accenture. Nevertheless, I do not find that an attempted apportionment of the Claimant's role between functions for the benefit of Assala Gabon and Assala UK is a significant factor and, in any event, this would constitute an artificial exercise given that delineation of functions, and employment of managerial employees, between Assala Gabon and Assala UK is to a large extent itself somewhat artificial given that they are the two principal operating companies within a single group structure.

Reason for the Claimant's return to the UK

154. The Respondent relies on the factors identified in the YKK case as being relevant. Mr Brown's submission is that the unilateral act of the Claimant in returning to the UK should be considered in assessing what weight to be given to matters in the UK subsequently. He refers to a sequence of events where the Claimant took leave, married, went to India to look after his father and then went off sick. He says that this sequence of events should be seen in conjunction with the eligibility requirements for the Claimant's application for IDLR.

155. Whilst I consider the above factors to be relevant, I find that even at the date upon which he returned to the UK in February 2019, the Claimant would have had a sufficient level of connection with the UK for jurisdiction to exist. I do not find that the Claimant's return to the UK was motivated primarily to protect his UK continuous residency. In any event this would have been inconsistent with the Claimant's evidence that he, and his new wife, had intended to relocate to Gabon.

156. I consider the factors in YKK, whilst potentially relevant, are more applicable in a case of unfair dismissal where an employee returned to the UK for a relatively short period prior to dismissal. This is not the situation with the Claimant who has now been in the UK, more or less continuously, for a period of 12 months and his employment with Assala UK is ongoing.

157. I find that this is not a case such as Ravat where the claimant's status is truly expatriate because they not only work, but also live outside Great Britain, as I have found that the Claimant retained a sufficient level of connection with the UK in terms of his contractual employment status and home and family connections.

EqA and nationality

158. Whilst not directly relevant to my decision I address the Claimant's argument that as the purpose of the EqA is to combat discrimination on account of race or nationality that it would be inconsistent for the Claimant's Indian nationality to be a factor depriving him of a protection under the EqA. I do not accept this analysis. I find that what is protected under the EqA is not indicative of who is protected by it. This represents a separate question. The Claimant's argument would in effect mean that all employees working anywhere in the world for a UK registered company would have a protection under the EqA regardless of their level of connection with the UK. This would be inconsistent with the criteria for determining territorial jurisdiction set out in the relevant authorities.

European case law authorities

159. Whilst my decision that the Claimant has a sufficient connection with the UK for the Tribunal to hear his claims under the ERA and EqA means that it is not strictly necessary for me to consider the Claimant's further argument that he benefits from the direct effect of rights under the Employment Equality Directive for his claim of disability discrimination, I will nevertheless provide short findings on this issue.

160. The parties concurred with me that notwithstanding the UK's departure from the EU at 11pm on 31 January 2020, that during the transitional period until 31 December 2020, EU law continues to apply.

161. I find that in accordance with Bleuse the EqA should be read to give effect to directly effective protections under EU law, in this instance rights concerning disability under the Directive. I make this finding for the following reasons:

a) British courts and tribunals have been properly seized of the issue given my findings above;

b) this is not a case where the rights to be determined would necessarily fall outside the geographical reach of the Directive given that I have found that

the Claimant had a sufficiently strong level of connection with Great Britain;

c) I do not find that the Claimant not being an EU citizen is, in itself, sufficient to deprive him of the application of rights under the Directive; and

d) I have found that English law applies to the Claimant's employment and this points to a close connection to EU law.

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Employment Judge Nicolle

Dated: **21 February 2020**

Sent to the parties on:

24/02/2020

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For the Tribunal Office