Neutral Citation Number: [2025] EAT 63

Case No: EA-2023-000921-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 6 May 2025

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

CABLE NEWS INTERNATIONAL INC

Appellant

- and –

MS SAIMA BHATTI

Respondent

- -
- -

Mr Paul Nicholls KC (instructed by Squire Patton Boggs) appeared for the Appellant
Mr Paras Gorasia and **Mr Finnian Clarke** (Direct Access) appeared for the Respondent

Hearing dates: 25 and 26 March 2025

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JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is Tuesday 6 May 2025 at 10.30am. The version released for publication may be treated as authentic.

SUMMARY

TERRITORIAL SCOPE OF LEGISLATION; INTERNATIONAL JURISDICTION; FORUM

The British claimant of Pakistani heritage was employed from 2013 to the end of 2017 as a journalist by the respondent broadcast media organisation domiciled in Atlanta, Georgia, under a contract of employment governed by the law of Georgia, USA. The respondent had a subsidiary based in London, with which the claimant had dealings. She was paid under "play or pay" arrangements and worked on assignments from 2013 to February 2017, mainly but not entirely in Asia.

From March 2017 the claimant moved from her apartment in Bangkok and returned to London, seeking to become London based and while recovering from and receiving treatment for a foot injury sustained in 2014. The respondent declined her request to become London based and after she had worked for one day on an assignment in London in June 2017, instructed the London subsidiary not to deploy her on assignments without permission from the Atlanta headquarters.

The claimant was then dismissed with immediate effect in August 2017 at the London subsidiary's offices; her pass was withdrawn and she was escorted from the premises. She did not work for the respondent again. However, she was paid up to 31 December 2017 under her contract terms. She then brought claims for discrimination of various kinds, victimisation, unfair dismissal, equal pay and outstanding holiday pay.

The judge found that the claims were justiciable in England and Wales as they fell within the scope of the legislation conferring the statutory causes of action, but only in respect of alleged wrongs committed on or after 1 March 2017, when the claimant returned to London. The judge also held that the tribunal had international jurisdiction to determine the claims. On appeal, the respondent contended that the judge was wrong to hold that the claims fell within the territorial scope of the legislation and that the tribunal did not have international jurisdiction to determine them.

The judge had not erred in either respect. The conclusion that the claimant's employment had a sufficient connection with Great Britain from 1 March 2017 onwards was based on his evaluation of the evidence and he did not err in principle or adopt a wrong approach to the evaluative assessment of the evidence. His conclusion that from 1 March 2017, London had displaced the "territorial pull" of Bangkok, the claimant's base for over two years until the end of February 2017, was open to him.

Nor had the judge erred in deciding that the tribunal had international jurisdiction over the claims, in

so far as they were within the territorial scope of the legislation. The primary legislation conferred jurisdiction over the claims in so far as they were within the territorial scope of the domestic primary legislation enacting the causes of action and remedies in the tribunal. Rule 8 of the then Rules of Procedure provided that England and Wales, rather than Scotland, was the appropriate tribunal forum.

Further, the (then applicable) Brussels Regulation (EU No. 1215 of 2012) did not assist the respondent because it was not domiciled in the EU. The Regulation did not give a non-EU domiciled defendant the right to be sued in the courts of its non-EU domicile. Further, the judge was entitled to find that the claimant could proceed in London because (per article 21 of the Regulation) she last habitually worked there; and because (per article 20) the dispute arose out of the operations of the London subsidiary, a branch, agency or other establishment of the respondent.

The respondent was not entitled to avoid the international jurisdiction of the tribunal over the claims (in so far as they were within the territorial scope of the legislation) due to non-service of the claim documents on it. The claim documents were sent by the tribunal to the respondent's London subsidiary, which brought them to the attention of the respondent. There were few formal rules about service in the employment tribunal. The relevant rules of procedure made provision for delivery of documents. The respondent had received the claim documents and responded by challenging the tribunal's jurisdiction. There was no procedural irregularity.

THE HONOURABLE MR JUSTICE KERR:

Introduction

1. This appeal is from a decision of Employment Judge Klimov, sitting alone at London Central Employment Tribunal from 10 to 14 July 2023. His reserved judgment was dated and sent to the parties on 11 August 2023. He decided that the various claims of the respondent to the appeal (**the claimant**) against the appellant (the respondent below) (**the respondent**) were justiciable in this country, but only in respect of alleged wrongful acts from 1 March 2017 onwards. From then but not before, he decided, the claimant's employment had sufficient connection with Great Britain to come within the legislative grasp of her statutory causes of action. He also held that the tribunal had jurisdiction over the claims founded on alleged wrongs from 1 March 2017 onwards.

2. The respondent is known globally as "CNN", with headquarters in Atlanta, Georgia. It has a separately incorporated London bureau, responsible for Europe, Africa and the Middle East; and an unincorporated Hong Kong bureau, responsible for the Asia-Pacific region. The claimant is a British citizen and a Londoner, living in Epsom, of Pakistani heritage. Under a series of written contracts with the respondent from 2013 to 2017 (renewed annually and governed by the law of Georgia), she worked as a broadcast journalist covering stories in many countries, mainly in Asia. She was paid (in 12 equal monthly instalments) at an agreed daily rate for at least 150 days each year, irrespective of the amount of work done, including during periods off work for medical reasons. For work done over and above 150 days in a year, she was paid for each day's work at the daily rate.

3. On 29 August 2017, the claimant was informed at the London bureau by the head of the Hong Kong bureau that her contract would not be renewed. She was asked to return her pass and escorted from the premises. That last contract ended on 31 December 2017. In May 2018, she brought claims in the tribunal for discrimination of various kinds, victimisation, unfair dismissal, equal pay and

outstanding holiday pay. She also brought a High Court claim, which was settled in March 2020. The tribunal claims were stayed until after the settlement; hence the delay before the territorial scope and jurisdiction issues were eventually determined in August 2023, leading to this appeal.

4. The respondent contends that the judge was wrong to find that the claims from 1 March 2017 onwards fell within the territorial scope of the legislation conferring the statutory causes of action; and that he was also wrong to decide that the tribunal had jurisdiction to determine the claims, either as matter of domestic law or applying relevant principles of private international law and Regulation EU No. 1215/2012 (recast) (**the Brussels Regulation**). The claimant supports the judge's decisions and reasoning. There are seven grounds of appeal lettered from (a) to (g), some of which overlap with others. I will come to these later.

The Facts

5. The tribunal's findings of fact were detailed and carefully set out. I will omit much of the detail here. It was and is common ground that most of the claimant's work from 2013 to 2016 was done in Asia (Pakistan, Malaysia, the Philippines, Israel, South Korea, Hong Kong, Thailand, Indonesia) with occasional brief assignments in Europe arranged through the London Bureau (France, Belgium, the Netherlands). When not reporting abroad, she would return to London for holidays and was frequently at the London bureau from which she was sometimes deployed. She would pitch for stories, which did not count as work time; and apply for visas, which did count as work time.

6. Unfortunately, on 12 August 2014 a truck ran over the claimant's foot while she was reporting in Jerusalem. She continued working but from then on she needed periods of time off for medical treatment and recuperation in London. After her accident, the claimant was initially treated in Israel, then returned to London, worked two days at the London Bureau's request, went to Pakistan to report

on certain protests and then flew to Atlanta to discuss work and renewal of her contract. It was renewed on the same basis for the calendar year 2015.

7. From January 2015 to April 2017 she had a rented apartment in Bangkok and it is common ground that she spent most of her working time in Asia operating from that apartment which served as her Asia base, when working, for a little over two years. The judge's detailed findings included a chronological account of her deployments on each assignment. She reported about grave matters including terror attacks, protests, assassination and violent conflict. She continued to work mainly in Asia, frequently staying at the rented flat in Bangkok and travelling to report from elsewhere in Asia.

8. In April 2016 while in Hong Kong, the claimant visited the Hong Kong bureau and asked if she could travel less and become a news presenter from the London bureau. That request was not granted. From May to October 2016, she did not work and received treatment in London for her injury. In October 2016, her Atlanta manager, Tony Maddox, declined her request to work from London. He told her he wanted her to continue to work as before, sharing her time between London and Asia. She then resumed work from 9 November 2016, travelling to Thailand and reporting from Seoul and Malaysia up to February 2017.

9. From 1 March 2017, the claimant was in London receiving medical treatment for her foot injury. She told the respondent she was not available for travel and in April 2017 ceased renting the apartment in Bangkok. On 23 May 2017, she offered to cover the Manchester bombing story but this offer was declined by Atlanta and the London bureau. The London bureau was told by the Atlanta headquarters not to deploy the claimant because she was on medical leave and "we don't want to touch this".

10. However, the London bureau did deploy her on 4 June 2017 to cover the London Bridge

bombing. She worked for one day on that assignment and the bureau asked Atlanta if she could continue the next day, to which the answer was no. The Atlanta management made it clear to the London bureau that no one was allowed to deploy the claimant without permission from either Roger Clark, head of the Hong Kong bureau, or Mitra Mobasherat, director of coverage in Atlanta.

11. The claimant kept in touch with Mr Clark, reporting on progress towards recovery from her injury and asking for the respondent's agreement that she should gradually return to work during rehabilitation. The respondent did not agree to that. Then on 29 August 2017, she was told her contract would not be renewed and escorted from the London bureau, as already mentioned. She was paid up to 31 December 2017, when her last contract expired.

The Law

12. The tribunal treated at length and in detail the law relating to whether the claimant's claims fell within the territorial scope of the legislation under which the claims were brought. The authorities are many and varied. Anyone who thought the law might be simple and easy to follow and apply must be disappointed. The parties did not disagree with the tribunal's Herculean account of the law, on which I cannot improve and much of which (omitting certain footnotes and passages) I set out *in extenso* as an appendix to this judgment, quoting from paragraphs 67-108 of the judge's decision.

13. The relevant law relating to the international jurisdiction aspects of the appeal was also stated in some detail by the judge later in the course of his judgment, but I think can more conveniently be covered when I come to consider the submissions of the parties and the reasoning and conclusions of the tribunal on that issue and the various sub-issues in the grounds of appeal arising with respect to international jurisdiction.

The Tribunal's Reasoning and Conclusions

14. On the territorial scope issue, the judge said the parties agreed that the claimant was a peripatetic employee but that the claimant contended her base was London, while the respondent argued that it was Bangkok. He summarised the parties' submissions. He found that the claimant was indeed peripatetic but that she had two work bases, Bangkok and London, from which she worked at various times. He rejected the respondent's submission that her visits to London were for non-work reasons and that her base remained Bangkok throughout.

15. In support of his conclusion that London as well as Bangkok was a work base at times, the judge cited evidence of work related activities the claimant performed while in London, such as, *inter alia*, making herself available for work, being frequently present at the London bureau, agreeing with Mr Maddox that she would divide her time between London and Asia, doing assignments in Europe arranged by the London bureau, doing a screen test in London in October 2014 and researching and pitching for stories to the London bureau. She was told by Mr Maddox, the judge noted, not to call herself a "Bangkok correspondent" but to say she just "happened to be in Bangkok".

16. The tribunal noted some contractual points: the governing law was that of Atlanta; she was paid monthly even when not working, including when on "medical leave"; applying for visas counted as work time but pitching for stories did not. He concluded that from 1 March 2017 onwards, but not before, London had displaced the "territorial pull" of Bangkok as the claimant's base. The judge went through the various causes of action and decided that they were all within the territorial reach of the statute, in so far as founded on conduct on or after 1 March 2017.

17. The judge then turned to what he called the international jurisdiction question. In broad outline, he noted that nothing in the legislation conferring the statutory causes of action made them

subject to the tribunal having international jurisdiction. He reasoned that the territorial reach of the statutes must therefore itself define the extent of international jurisdiction, as a matter of domestic law. It was inconceivable that that parliament could have intended that wrongs within the territorial reach of the statutes should be outside the jurisdiction of the tribunal, leaving the claimant with rights but no remedy, i.e. rights that existed in substance but could not be enforced.

18. He rejected any analogy with another kind of procedural bar to a person's ability to enforce a right, namely expiry of a limitation period. That was different because the person had the opportunity to bring the claim within time. He rejected the argument that a foreign court might be willing to determine a claimant's rights applying the law of this country, as happens quite often in commercial cases. Labour relations and labour laws being matters of public policy, the idea of a foreign court applying British employment law to a dispute instead of its domestic law appeared highly unlikely.

19. He drew support from the judgment of Underhill P (as he then was) in *Pervez v. Macquarie Bank Ltd (London branch)* [2011] ICR 266, at [19]-[22], rejecting a construction of rule 19(1) in the Schedule to the then Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 which would deprive a claimant of a remedy for a wrong within the territorial reach of the relevant statute; and accepting the need for a "strained construction" of the rule ([21]) to avoid that result.

20. In any case, the judge pointed out that subparagraph (d) had been added to what had become rule 8(2) in the Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, superseding rule 19 of the old 2004 Regulations. Subparagraph (d) provides that a claim may be presented in England and Wales where the tribunal has jurisdiction to determine it "by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales".[1]

[1] From 6 January 2025, rule 8 was replaced by rule 10 of the Employment Tribunal Procedure Rules 2024, in materially the same terms.

21. It was therefore, the judge reasoned, unnecessary to consider the rules relating to jurisdiction in the Brussels Regulation[2]. But he proceeded to do so anyway. He noted that recitals indicated that it was intended to resolve competing claims to jurisdiction as between the courts of different member states of the European Union. Where there was only one candidate, the ordinary national rules on international jurisdiction would generally apply, subject to the exceptions referred to in recital (14), stating that "to ensure the protection of consumers and employees [*inter alia*] … certain rules of jurisdiction … should apply regardless of the defendant's domicile".

22. Assuming the Brussels Regulation did apply, the judge held that the claimant could proceed against the respondent in England by virtue of articles 20 and 21 which applied to protect employees, because the respondent's London bureau was a "branch, agency or other establishment" in the United Kingdom out of whose operations the dispute arose (article 20(2)); and because London was the last place where the claimant habitually worked, i.e. "the place where or from where the employee habitually carries out his work or … the last place where he did so …" (article 21(1)(b)(i)).

23. The judge accepted that where the Brussels Regulation regime applies, in principle it prevails over national rules of jurisdiction. But he did not accept that if applying the regime to a non-EU domiciled defendant produced no EU state court with jurisdiction, all EU state courts were thereby denied jurisdiction. The Brussels Regulation would not in such a case oust the national rules of jurisdiction applicable in the relevant member state, the judge reasoned. It would be strange if it did, given that articles 20 and 21 were intended to protect employees.

24. The tribunal, finally, rejected an argument raised by the respondent that the respondent had not been served within the jurisdiction and there was therefore no good service at common law, the

[2] It was agreed that the claim had been presented before the applicability of the Brussels Regulation had been removed by the relevant Brexit related legislation.

default requirement in the absence of express service rules in the tribunal's rules of procedure. The respondent had been served with the ET 1 and grounds by delivering them to the London bureau, which brought the proceedings to the attention of the respondent and enabled it to respond, as it had done. Its reliance on common law rules of service was misplaced, the judge said.

25. He referred to the ET procedural rules governing delivery of documents and decided that delivery of the claim documents to the London bureau was sufficient: the rules did not say that permission to serve a foreign domiciled respondent out of the jurisdiction was required; nor that service on a respondent domiciled abroad was ineffective unless effected when the respondent happened to be in the jurisdiction (as in *Maharanee of Baroda v. Wildenstein* [1972] 2 QB 283). The respondent was made aware of the claim documents via the London bureau.

Issues, Reasoning and Conclusions

The territorial scope of the legislation

26. The respondent submitted that the judge was wrong to decide that the claimant was a peripatetic worker; he should have found she was an expatriate worker. This "issue of characterisation", as Mr Paul Nicholls KC for the respondent put it, "is a question of law". He had submitted below that the claimant was an expatriate worker and not peripatetic. It had not been "common ground" below that she was peripatetic. A peripatetic worker was one who moved from one place to another; but on the judge's findings the claimant's base was Bangkok until March 2017.

27. A peripatetic worker, by definition, has no principal place of work, Mr Nicholls submitted. As he put it in his skeleton argument, the claimant "did not at any point have the characteristics of a roving employee moving from place to place like an airline pilot". The claimant was, he said, "a

classic expatriate worker, a British person assigned to work in international locations". He accepted that these locations "changed from time to time", but she was assigned to places as was shown by her renting a flat in Bangkok for two years. Peripatetic workers "do not rent flats anywhere" because "tomorrow they will be other than where they were today".

28. The judge was therefore wrong, Mr Nicholls submitted, to apply the "base" test. An expatriate worker has a principal place of work. In the claimant's case, that was Bangkok from 2014 to early 2017. The judge's correct finding that there was nothing to counter the "territorial pull" of Bangkok during that period contradicted his description of the claimant's employment as peripatetic. It was very unlikely (per Lord Hoffmann in *Lawson v. Serco Ltd* [2006] ICR 150, at [37]) that an employee working abroad would fall within scope of the legislation unless she was working for a British employer carrying on business in Great Britain. Here, the claimant's employer was in the USA and its business was carried on in the USA.

29. Mr Nicholls went on to submit that, even if the claimant's work could be regarded as peripatetic, the judge misapplied the "base" test. He wrongly focussed on identifying the base as at the date of dismissal, in August 2017. The employment relationship had to be considered over time, not just during the concluding months of it. The claimant's presence in London from 1 March 2017 was not for the purpose of working, but to obtain medical treatment while not working. The base should not depend on "the fortuity of where she happened to be while taking sick leave … . Being on medical leave is not working."

30. Further, he submitted, even if the judge was right to focus on the date of dismissal, the evidence was that she was not to be permitted to work in London. When she did so for a single day due to an error made by the London bureau, the senior management in Atlanta instructed that it should not happen again without express authorisation. The judge should have taken into account the

evidence that before March 2017, the claimant spent most of her time in London either taking holidays or obtaining medical treatment, not working on assignments. Mr Maddox had not agreed to her request to work out of London. Nor does preparatory work and pitching for stories in London count as work; she must have done the same work in Bangkok and to a much greater extent.

31. Mr Nicholls also reproached the tribunal with attaching "no weight" (as put in the respondent's skeleton) to the fact that the law governing the contract was that of Georgia, while the authorities support the proposition that the governing law of the employment contract is a relevant factor to be considered. The judge should have treated the governing law as a factor pointing against a base in Great Britain; yet, said Mr Nicholls, for no good reason the judge ignored it.

32. For the claimant, Mr Gorasia submitted that it had been common ground below, as the judge rightly observed, that the claimant's duties were performed in various different locations in the world, mainly in Asia. It was in this sense that the respondent had not disputed below that the claimant's work activities were peripatetic. She was not an expatriate employee living and working abroad; her home remained London and even before March 2017, part of her work activity was carried out in London and regulated by the London bureau. The flat in Bangkok was the base from which she carried out her (peripatetic) work activities until the end of February 2017.

33. There is no fixed or rigid definition of a peripatetic employee, Mr Gorasia submitted. It is not a term of art. An employee may perform work in many jurisdictions, as in *Stena Drilling Pte Limited v Smith* [2024] EAT 57 (per Lord Fairley at [17]) and *Yacht Management Company Limited v Gordon* [2024] IRLR 559 (per Lord Fairley at [31]); or may never leave the jurisdiction and may work in many different locations within it, as in *Prior v. Commissioner of Police for the Metropolis* [2023] ICR 508, per Simler LJ (as she then was) at [58] and [83]. Further, an employee could be fully "expatriate" i.e. where all their work is done abroad; yet "peripatetic", i.e. working in many locations.

34. Mr Gorasia submitted that the examples given by Lord Hoffmann in *Lawson* at [28] - "airline pilots, international management consultants, salesmen and so on" – indicate that there are two elements to peripatetic employment: the employee must "travel regularly to changeable locations for their work" (as he put it in his skeleton argument); and they should have, or ordinarily have, a "base", i.e. a "place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas", (*Todd v British Midland Airways Ltd* [1978] ICR 959, per Lord Denning MR at 964, cited with approval in *Lawson*, per Lord Hoffmann at [29]-[30]).

35. Lord Hoffmann, Mr Gorasia argued, had presupposed that a peripatetic worker would have a base: "treating the base of a peripatetic employee as, for the purposes of the statute, his place of employment" ([29]) was a valid approach. Mr Nicholls had in closing submissions below used the word "launchpad" to describe Bangkok as the place from which the claimant worked and where she stayed to February 2017. In written submissions below, Mr Nicholls had said the claimant was:

> **"not a peripatetic employee, or at least not a UK based peripatetic employee…her travel was in Asia so to the extent that she can claim to be a peripatetic employee that was in Asia and with no connection to Great Britain … But in any event, even if she was a peripatetic employee, her base was not Great Britain".**

36. The judge had not misdirected himself or misunderstood the submissions, said Mr Gorasia. The claimant lived in Great Britain and part of her work was done there even when her base was Bangkok. The judge was entitled to find that from 1 March 2017 onwards there was a "connection between the circumstances of the employment and Great Britain and with British employment law [that] 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" (per Lord Hope in *Ravat v. Halliburton Manufacturing and Services Ltd* [2012] ICR 389, at [29]).

37. While it is a question of law whether the case falls within the scope of the legislation, it is also a "question of degree" (per Lord Hope at [29]); and the sufficiency of connection issue is one of fact.

Territorial application of the legislation is "a question of degree on which the decision of the primary fact-finder is entitled to considerable respect" (Lord Hoffmann in *Lawson* at [34]). The evaluation (per Eady P in *Partners Group (UK) Ltd v Mulumba* [2021] ICR 1501, at [45]):

> **"is a matter of law, albeit that it involves an exercise of judgment with which an appellate tribunal will not interfere unless '[the employment tribunal] took into account matters it should not have taken in to account or failed to take into account matters it should have taken into account or made some error or was otherwise wrong' see per Longmore LJ in *Jeffery v British Council* [2019] ICR 929, para 136."**

38. The judge was entitled to find that the claimant had two work bases and not one, Mr Gorasia submitted. She had, the tribunal recorded, agreed with Mr Maddox that she would not live and work wholly abroad. He recorded the claimant's evidence that she was "[b]ouncing between Bangkok and London and wherever else they want me to be". Further, the judge was entitled to find that the situation changed from the end of February 2017, when the "territorial pull" of Thailand ceased to operate. A peripatetic employee's base need not remain immutable throughout her employment.

39. I do not accept the respondent's submission that the issue of characterisation of a claimant's employment is a question of law. The question of law is whether or not the claimant's claims are within the territorial scope of the relevant legislation. The question of law is "[w]ho … is within the legislative grasp, or intendment, of the statute under consideration?" (per Lord Wilberforce in *Clark v. Oceanic Contractors Inc* [1983] 2 AC 130, at 152). Whether a worker is peripatetic or not is relevant to that question of law but is not itself a question of law.

40. The adjective "peripatetic" comes from the Greek "peripatetikos" (περιπατητικός) meaning "walking about" or "given to walking". Applied to an employee in the modern era (rather than to ambulatory philosophical discussions in ancient Athens), it describes an employee whose work takes her from place to place. It is not a complicated or sophisticated concept. I agree with Mr Gorasia that it is not a statutory defined term or a term of art. It is an ordinary Greek, and now English, word.

Lord Hoffmann's analysis in *Lawson* at [28]-[30] makes clear that a peripatetic worker will ordinarily have a "base", even if she spends much or all her working time away from the base.

41. I accept Mr Nicholls' submission that a wholly peripatetic worker has no principal place of work. But it does not follow that she has no base. I do not agree with him that peripatetic workers do not rent flats anywhere. The peripatetic police officers in *Prior v. Commissioner of Police for the Metropolis* had homes to which they went back between work shifts. They did not all live out of suitcases in hotels and guest houses. I accept Mr Gorasia's submission that a peripatetic employee may also be fully expatriate. These are questions of fact and degree in each case.

42. In my judgment, the judge was entitled to conclude on the evidence before him that until the end of February 2017, the claimant was a peripatetic employee working for a US employer primarily in Asia with her base in (at least from January 2015) Bangkok. As such, she fell into the class of employees who were "very unlikely" to fall within the territorial scope of the relevant legislation (per Lord Hoffmann in *Lawson* at [37]). The judge was not bound to find that, up to the end of February 2017, she was a fully expatriate employee whose principal place of work was Bangkok.

43. Next, it was in principle open to the judge to find that the claimant's position evolved over time. The strength of a connection with Great Britain is not necessarily immutable throughout the employment. The base of a peripatetic employee can change over time. No authority decides otherwise. For example, an Asia correspondent based in Singapore may become a Latin America correspondent based in Buenos Aires. The discussion in Eady P's judgment in *Partners Group (UK) Ltd v. Mulumba* at [60]-[66] makes this clear. Unlike in *Mulumba*, the judge below in this case made it very clear that the connection to Great Britain was not sufficient up to the end of February 2017.

44. The judge decided in this case at [123] that the claimant was a peripatetic employee with "not

one but two work bases – Bangkok and London, from which bases she worked at various times". In my judgment, he was entitled to find, evaluating the evidence, that from 1 March 2017 the main base became London and ceased to be Bangkok. Put simply, the claimant left Bangkok for good at the end of February 2017 and based herself from then on at her home in London and sought to relocate her work base to the London bureau, as well as obtaining medical treatment in London.

45. I can find no flaw in that reasoning or the conclusion the judge drew from it. The sufficiency of connection issue was an evaluative judgment. For the last 10 months of her employment, from 1 March to 31 December 2017, the claimant was not working out of Bangkok or anywhere else in Asia and had no work role in Asia. London was the only candidate to be her work base. It was no longer Bangkok, nor was it Hong Kong or Atlanta.

46. Next, I reject the submission that the claimant's base could not become London from March 2017 because she came to Great Britain for medical treatment and not to work. Although the expression "medical leave" appears in the decision and was used by the parties, the claimant was never on medical leave in the conventional sense of that expression. The contract terms (quoted in the decision at [22]) did not include sick leave terms, medical certification of unfitness to work, sick pay and the like. The claimant's remuneration method remained the same in sickness and in health. If medically unfit to take on assignments, she would still be paid up to the 150 day limit in one year.

47. Indeed, she worked on for years after receiving her foot injury and tried not to let it prejudice her employment position. She combined work assignments and medical treatment, interspersing the one with the other. To say that the claimant was on "medical leave" is in one sense not apt because it merely describes the reason for the claimant not being able to take on reporting assignments during a particular period. She was paid equal monthly instalments from 29 August 2017 to 31 December 2017, whether or not she was having medical treatment during that period.

48. Aside from medical treatment, the claimant did, on the evidence, go to London to work. Her objective was to work from a base in London, deployed by the London bureau, travelling less or not travelling at all. That was a work project undertaken by the claimant in furtherance of which she relinquished her base in Bangkok and sought to put down employment roots in Great Britain. She had some minimal success when on 4 June 2017 she was deployed for a day, until the Atlanta management prevented any further deployment without prior authorisation, which never came.

49. The judge spelled out the factors that led him to conclude that the base became London from March 2017. He was entitled to factor in the existence of some connection with London before then: her agreement with Mr Maddox that she would split her time between London and Bangkok ([124]); being a frequent visitor to the London bureau ([125]); having a pass and ID card to attend the London bureau at will ([126]); having a Blackberry device issued by the London bureau and being on its email distribution list ([127]); offering her availability when in London, being "on stand-by" ([128]); researching and pitching for stories when in London, albeit not on paid time ([132]); and being deployable directly by the London bureau until the Atlanta management intervened ([133]-[134]).

50. I do not accept that the judge committed the error of failing to take account of the choice of law clause in the contract of employment. The judge properly addressed that issue in his decision, at [136]. The weight to be given to that point in evaluating the degree of connection with Great Britain was a matter for the judge. He did not overlook the issue or misdirect himself. He was right to observe that the relevance of the choice of Georgia law was diminished by the fact that neither party was suggesting the employment was more closely connected to Atlanta than to Bangkok or London.

51. The judge then analysed the impact of his conclusions on each of the individual causes of action, at [137]-[175]. No particular criticism is made of that exercise. In my judgment, the decision

was an exercise of judgment with which this appellate court should not interfere. The judge did not take into account matters he should not have taken in to account or fail to take into account matters he should have taken into account or make some error or otherwise err. I therefore dismiss the challenge in this appeal to the decision that the statutory causes of action applied to the claimant's employment in respect of conduct from 1 March 2017 onwards.

International jurisdiction

(i) Primary domestic legislation as the source of international jurisdiction?

52. The respondent's first contention was that the judge erred in finding that there was no requirement for the tribunal to have jurisdiction under the Brussels Regulation or under any other rule of private international law. Mr Nicholls reminded me that (as the judge was aware, see the decision at [67]), Langstaff P's decision in *Simpson v. Intralinks Ltd* [2012] ICR 1343 at [8] is authority that whether an English court or tribunal has jurisdiction over the claim or whether it should be heard in a foreign court, must be considered separately from the issue of territorial scope.

53. Here, Mr Nicholls submitted uncontroversially, there is unquestionably a foreign element to the case not least because the respondent is domiciled in Atlanta, in the USA. He went on to submit that the judge was wrong to decide that the Brussels Regulation had no application to the case and that domestic jurisdiction over the claims was established by the claims falling within the territorial scope of the legislation, without more. Mr Nicholls said that was wrong: the rules of international jurisdiction found (at the material time) in the Brussels Regulation must be applied, he said.

54. His premise was that those rules apply whether or not the respondent is domiciled in an EU member state. It is common ground, to state the obvious, that the respondent is not. If it is right that

the Brussels Regulation applies here, as Mr Nicholls submits, the judge failed to apply it. That does not involve a denial of access to the court in this country, he argued. The claimant can bring a claim and seek her remedy but she will lose when she invokes that remedy. There is a potential remedy elsewhere in the world; for example, in Austria where the respondent was domiciled in *Powell v. OMV Exploration and Production Ltd* [2014] ICR 63, another decision of Langstaff P.

55. In response, Mr Gorasia for the claimant submitted that the judge correctly treated international jurisdiction as a separate and distinct issue from that of territorial scope. He submitted that the judge was right to look to the primary legislation enacting the statutory causes of action relied on as the source of international jurisdiction over the claim as a matter of domestic law, without the need for recourse to private international law rules such as those found in the Brussels Regulation.

56. No authority provides otherwise, said Mr Gorasia. "In a dualist state, no provision of private international law could override that clear domestic provision", he said in his skeleton. Each of the statutes conferring the statutory causes of action also includes a provision enabling a victim to present a claim to the tribunal and if the claim is well founded to obtain appropriate remedies in the tribunal. Those provisions conferring jurisdiction on the tribunal in this country are part of domestic law.

57. Mr Gorasia said no authority supported the respondent's proposition that a claim "where territorial jurisdiction is made out" could "nonetheless be held to fail on grounds of international jurisdiction in a case where the Brussels Regulation either assists the Claimant or does not apply at all". The only authority the respondent could point to where the Brussels Regulation had been held to bar jurisdiction in England was *Powell v. OMV Exploration and Production Ltd*, where the employer was domiciled in another EU state, Austria. The Brussels Regulation could operate to allocate jurisdiction as between EU member states but could not be used against a claimant with an otherwise good cause of action as an instrument of injustice, to deny her any remedy.

58. Contrary to the respondent's submission, Mr Gorasia submitted, the judge did not wrongly elide the question of territorial scope with that of international jurisdiction. Rather, he correctly decided that parliament cannot be taken to have granted a right without any forum in which to vindicate the right. Furthermore, though the judge rightly held that the enquiry could stop there, he went on to consider the provisions of the Brussels Regulation that would be relevant if, contrary to his primary decision, it did apply.

59. Turning to my reasoning and conclusions: the judge took as his starting point the domestic statutory provisions creating the relevant causes of action: sections 23 and 111 of the Employment Rights Act 1996, section 120 of the Equality Act 2010 and regulation 30 of the Working Time Regulations 1998. These, he reasoned at [179]-[182], conferred jurisdiction on employment tribunals in Great Britain by providing that an employee may present a complaint to a tribunal which the tribunal (absent any procedural bar such as the claim being out of time) must consider and determine.

60. He concluded at [181] that "the territorial reach of the Acts themselves … confers such 'international jurisdiction'". He then referred (at [183]ff) to what I would call the principle that where there is a right there should be a remedy (which used to be expressed as *ubi ius, ibi remedium*) and the support for that reasoning which he derived from *Pervez v. Macquarie Bank Ltd (London Branch),* in the context of interpreting procedural rules. Finally, he observed that his conclusion was consistent with Lord Hoffmann's dicta in ***Lawson*** at [1].

61. That was a reference to the passage quoted earlier in the judgment, at [75]. Lord Hoffmann said at the end of [1]:

> **"Putting the question in the traditional terms of the conflict of laws, what connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair? The answer to this question will also determine the question of jurisdiction, since the Employment Tribunal will have**

> **jurisdiction to decide upon the unfairness of the dismissal if (but only if) section 94(1) is the appropriate choice of law."**

62. The judge noted academic criticism of that formulation by Professor Louise Merrett in an article in the Industrial Law Journal (2010, at pp.355 et seq.); she had described Lord Hoffmann's words as "potentially confusing" because the issue is not choice of law in a private international law sense, but statutory interpretation. Nevertheless, it does seem to me that Lord Hoffmann was intending to say that where a claim is within territorial scope, the English statutory provision applies; it is the applicable law; and the tribunal necessarily has jurisdiction to try the case applying that law.

63. The reasoning is attractive; it has the virtue of simplicity. However, it is difficult to square with *Simpson v. Intralinks Ltd* in which Langstaff J at [8] accepted Professor Merrett's demarcation between, on the one hand, international jurisdiction and, on the other, territorial scope. The two would not be separate in any real sense if international jurisdiction followed automatically from the claim being within the legislative grasp. I discern a tension between Professor Merrett's approach and that of Lord Hoffmann.

64. Furthermore, if the Brussels Regulation applies and the respondent is domiciled in an EU state other than the United Kingdom, the Regulation can require the claimant to proceed in the courts of the domicile. In principle, that could be so even if the connection with Great Britain is strong enough to bring the claim within the legislative grasp of the relevant English statutory provisions. The Brussels Regulation (since superseded post-Brexit by added provisions in the Civil Jurisdiction and Judgments Act 1982 (**the 1982 Act**)) was directly effective and (pursuant to the now repealed European Communities Act 1972) equal in status with a domestic statute.

65. I am therefore diffident, despite the Olympian stature of Lord Hoffmann's dictum in *Lawson*, about aligning myself fully with the judge's proposition that "the territorial reach of the Acts themselves … confers such 'international jurisdiction'". I can accept that domestic statutes which

have territorial application to a claim do themselves confer international jurisdiction, but only if that jurisdiction is not displaced by the Brussels Regulation or some other principle of private international law with force equal to that of primary domestic legislation, such as the relevant provisions of the 1982 Act; cf. in *Stena Drilling Pte Limited v Smith*, per Lord Fairley at [13]-[14].

66. The judge was therefore right to go on to consider the Brussels Regulation. He did so starting at [196]ff. He quoted recitals (4), (6) and (21). He noted their purpose of ensuring uniformity and avoiding jurisdictional disputes as between member states of the EU, within the EU. He concluded that the Regulation applied to resolve competing jurisdictional claims of EU member states. Where there were no such competing claims, for example because the respondent is domiciled outside the EU, the national rules of jurisdiction of the court seised of the case would generally apply.

67. That was indicated by recital (14) and given effect to by article 6(1), but those provisions are supplemented by others intended to protect employees and consumers who are generally the weaker party in a dispute. In the case of employees, articles 21 and 20 are potentially relevant. The judge decided (see the judgment at [200]-[204]) that these could be relied on to assist an employee but could not be used to work injustice by ousting national rules of jurisdiction to the detriment of an employee, depriving her of any remedy.

68. In my judgment, the judge was correct in that interpretation of the relevant provisions of the Brussels Regulation. Article 21(2), read with (1)(b), provides that an employer not domiciled in an EU member state – such as, in this case, the respondent – may be sued in a court of the member state where she habitually worked or last habitually worked; or, if she does not or did not habitually work in any one country, in the courts of the place where the business which engaged her is or was situated.

69. Like the judge below, I can see no reason to interpret that as an exclusive jurisdiction clause

limiting jurisdiction to the court or courts mentioned in the article. That could make article 21 an instrument of injustice, contrary to the objective of protecting employees. The better view is that if the requirements of article 21(2) and (1)(b) are not met, the employee can sue in the court of a member state whose national rules of jurisdiction would, aside from the Brussels Regulation, be applicable to the claim and would confer jurisdiction over the claim.

70. I would interpret article 20 in the same way. Article 20(1) states that in matters relating to individual employment contracts, "jurisdiction shall be determined by this Section, without prejudice to Article 6 ….". Article 6(1) expresses the general rule that for defendants domiciled outside the EU, jurisdiction of each member state shall be determined by the law of that member state. Without prejudice to that general rule, article 20(2) then creates, in addition, a deemed EU state domicile for disputes arising out of the operations of a branch, agency or other establishment in that state. This may give the employee an additional option but I do not think it is an exclusive jurisdiction provision.

71. I therefore consider that the judge was right to decide that the Brussels Regulation does not assist the respondent. It does not confer on a non-EU domiciled defendant the right to be sued exclusively in the courts of its non-EU domicile, even if the dispute does not arise out of the operations of a branch, etc, located within an EU member state. It follows that there was nothing in this case to prevent the primary legislation provisions applicable to the claimant's claims from also conferring international jurisdiction on the English tribunal to determine them.

(ii) Rule 8 of the 2013 Rules of Procedure

72. Next, the respondent says the judge wrongly treated rule 8 of the tribunal's 2013 Rules of Procedure as a rule about international jurisdiction. The empowering statute for rule 8 is section 7 of the Employment Tribunals Act 1996. That provision makes no reference to any power to make rules

about international jurisdiction. The purpose of rule 8 is merely to allocate cases as between tribunals in, respectively, England and Wales, or Scotland where the tribunal has jurisdiction to determine a claim: *Jackson v. Ghost* [2003] IRLR 824 (dealing with the equivalent predecessor, rule 19 of the 2004 Rules of Procedure) per Judge Peter Clark at [79].

73. Mr Nicholls insisted that *Pervez v. Macquarie Bank Bank Ltd (London branch)* is not authority that rule 8 conferred international jurisdiction in this case. In *Pervez*, Underhill P referred to *Jackson v. Ghost* (and to the same effect, *Financial Times Ltd. v. Bishop*, UKEAT/0147/03/ZT) but noted that the issue in *Pervez* was different. It was about the territorial scope of the legislation in a case where the respondent was domiciled in Hong Kong and did not rely on arguments based on its domicile there, such as those relied on here concerning application of the Brussels Regulation; nor on the argument (considered below) that the respondent was not served in this country.

74. In response, Mr Gorasia said rule 8 must be given its natural meaning: that a claim may be presented to a tribunal in England and Wales where it has jurisdiction over the claim because territorial jurisdiction is made out. That explains the use of the language of territorial scope in the words "by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales". The connection to Great Britain is the "sufficient connection" derived from cases such as *Ravat*. If it was an error to find jurisdiction conferred by a procedural provision in secondary legislation, the error was not material because (among other reasons) the relevant statutes enact in primary legislation the right to present a claim to a tribunal.

75. In my judgment, rule 8(2)(d) (now rule 10(2)(d) in the 2024 Procedure Rules, in materially the same terms) does not confer international jurisdiction on the tribunal. I do not accept that a rule of procedure can itself confer jurisdiction where otherwise there is none. Rule 8 is merely a procedural rule directing a claimant whether to present the claim in England and Wales (rule 8(2)) or

in Scotland (rule 8(3)). In international jurisdiction cases, that depends on whether the sufficient connection is with England and Wales, or with Scotland.

76. The connection must be sufficient for the claim to be within the territorial scope of the legislation; and the tribunal must have, independently of rule 8(2)(d) (or 8(3)(d) for Scotland) international jurisdiction to determine it. I therefore do not fully support the reasoning of the judge at [189]-[190, but I agree with Mr Gorasia that to the extent that the judge erred in reasoning that rule 8(2)(d) could itself have conferred international jurisdiction, if such was his reasoning (which is not very clear), the error is not material because the tribunal had international jurisdiction anyway.

(iii) Brussels Regulation article 21: habitual place of work or last habitual place of work

77. The respondent's next argument is that the judge should not have found that, if the Brussels Regulation is to be applied, jurisdiction was conferred on the tribunal by article 21 because London was where the claimant last "habitually" worked. Mr Nicholls submitted, first, that the judge did not, as he should have done, ask himself where the claimant "habitually" worked; he applied the wrong test by asking himself where was the "last place" where she habitually worked.

78. According to the respondent, the "last place" test is only to be applied if there is no place where the employee "habitually worked". Mr Nicholls pointed out that the "last place" test did not appear in the original Brussels Convention, at the time when *Rutten v. Cross Medical Ltd* [1977] ICR 715 (a dismissal case) was decided by the Court of Justice. It did by the time the Court of Justice decided *Nogueira v. Crewlink Ireland Ltd* [2018] ICR 344 (another post-termination case).

79. While accepting that the question where the claimant habitually worked was one of fact and that the claimant did do a single day's work in London before her dismissal, Mr Nicholls submitted

that the judge misconstrued the concept of habitual work or reached what he called in his skeleton an "impermissible conclusion", also described as a "perverse conclusion", because he failed to appreciate that the claimant was in London for medical reasons and was not there for work purposes.

80. Mr Gorasia countered that the twin tests in article 21 (place of habitual work and last place of habitual work) are equal in status and neither has primacy; it is sufficient if one or other of the tests is met. Therefore, it was sufficient that the judge properly found the last place of the claimant's habitual work was Great Britain. As Eady P pointed out in *Partners Group (UK) Ltd v Mulumba*, the sufficiency of the connection between an employee's employment and a particular jurisdiction can evolve over time and the decision about that is an evaluative one.

81. It was unnecessary and would have been futile for the judge to consider the issue of the claimant's habitual place of work throughout her employment, going back to 2013, Mr Gorasia submitted. It was clear from his findings in relation to the territorial scope of the legislation that from March 2017 onwards the judge found the claimant's habitual place of work was London and that London was also her last habitual place of work. Those findings were not perverse and must be respected. It could not be said that they were findings no reasonable tribunal could reach.

82. The judge's reasoning on this issue ([215]-[218]) followed his earlier findings about the circumstances of the dismissal on 29 August 2017. He referred to *Nogueira v. Crewlink Ireland Ltd*. He referred back to his findings about the claimant's work related activities in London during 2017 before her dismissal, her attempts to secure a permanent transfer to London, her attendance at the London bureau, her offer to be deployed from it and her continuing pay up to the end of 2017.

83. In my judgment, nothing in this appeal turns on any distinction between the employee's habitual place of work and the employee's last habitual place of work. The latter will nearly always

be the same as the former and in this case, if London was the latter then London was also the former. I was not shown any *travaux* leading up to the amendment to add the reference to the "last" place of habitual work. It may well have been added to pre-empt and prevent an absurdist argument that a dismissed employee has no habitual place of work for the respondent.

84. I think the judge's finding that London was the last place of habitual work was properly open to him and not perverse, for the reasons he gave. The question was one of fact for him, as Mr Nicholls accepted. I agree with Mr Gorasia that it is sufficient – at any rate in a dismissal case - to identify the "last" place of habitual work and that there was no point in tracing the claimant's work patterns and practices back to 2013 in order to decide the issue. I do not find merit in this point which, in any case, is not necessary to establish international jurisdiction unless the reasoning above is wrong.

(iv) Brussels Regulation article 20: deemed domicile of non-EU domiciled employer where claim arises from operations of a branch, agency or other establishment in a member state

85. The respondent then challenged the judge's further finding that jurisdiction under the Brussels Regulation was made out under article 20, providing that an employer domiciled outside the EU is deemed to be domiciled in a member state where it has "a branch, agency or other establishment" and the dispute is one "arising out of the operations of the branch, agency or establishment".

86. Mr Nicholls submitted that the London bureau was a separate subsidiary company but was not appointed by the respondent as its agent. It was not "a kind of decentralised office with essentially the same ability to conduct business as the principal undertaking" in the member state concerned (*Blanckaert v. Luise Trost* [1982] 2 CMLR 1, at pp. 8-9, in the opinion of Reischl A-G). Nor was the London bureau cloaked with actual authority to act on behalf of the respondent in relation to the claimant's employment (*CNP sp v Gefion Insurance A/S* [2022] 1 WLR 2105, judgment of the Court

of Justice at [52]).

87. The London bureau was a subsidiary company which did not conduct the respondent's business, Mr Nicholls submitted. It was its own entity and conducted its own business. Furthermore, it had separate legal personality, which was fatal as indicated by comments of three Advocates-General: Reischl A-G in *De Bloos v. Bouyer SA* [1977] 1 CMLR 60, at 78-79; Mayras A-G in *Somafer v. Saar-Ferngas AG* [1979] 1 CMLR 490, at 498; and Mengozzi A-G in *Mahamdia v. People's Democratic Republic of Algeria* [2013] ICR 1, at [43].

88. Furthermore, Mr Nicholls submitted, the dispute did not arise out of the operations of the London bureau. No part of the alleged wrongs put in issue the conduct of the London bureau. The pleaded wrongs are directed against the respondent, not its London subsidiary; namely, applying provisions, criteria or practices which put the claimant at a disadvantage; failing to make reasonable adjustments; subjecting her to a detriment; victimising her; treating her unfavourably for a reason related to her disability; subjecting her to race discrimination; failing to grant her equal pay; unfairly dismissing her; and failing to pay her holiday pay.

89. The claimant's answer to that was that the respondent had cherry-picked statements of Advocates-General apparently supporting its position but had overlooked the authority cited to and by the judge: *Sar Schotte GmbH v Parfums Rothschild Sàrl* [1989] ECC 431, at [11]-[17], where the Court of Justice accepted the functional test proposed by Slynn A-G (as he then was). The court held at [15] that:

> **"third parties doing business with the establishment acting as an extension of another company must be able to rely on the appearance thus created and regard that establishment as an establishment of the other company even if, from the point of view of company law, the two companies are independent of each other".**

90. Mr Gorasia submitted that in his decision at [220] and [221], the judge correctly applied the

interpretation of article 20 favoured by the Court of Justice in *Sar Schotte GmbH*. The London bureau took its cue from the respondent and acted in accordance with the latter's instructions in its dealings with the claimant in 2017. The judge's findings were not impeachable, said Mr Gorasia.

91. He submitted further that the finding at [225] that the claimant's case arose out of the operations of the London bureau cannot be faulted. There must be "such nexus between the branch and the dispute to render it natural to describe the dispute as one which has arisen out of the activities of the branch": *Anton Durbeck GmbH v Den Norske Bank ASA* [2003] QB 1160, per Lord Phillips MR at [40]. In a claim based in tort, the answer to the question "must depend on the facts of the individual case" ([41]). The judge made no error in applying that test, Mr Gorasia submitted.

92. Like the judge below, I prefer the submissions of Mr Gorasia and the authority he cited, *Sar Schotte GmbH*, stating the test at [15] cited above (and in the decision at [222]) derived from a judgment of the Court of Justice, rather than from opinions of Advocates-General. The judge was entitled to find that the London bureau satisfied the requirement that "third parties doing business with the establishment acting as an extension of [the respondent] must be able to rely on the appearance thus created and regard that establishment as an establishment of the other company …".

93. He was also, in my judgment, entitled to find that the nexus between the London bureau and the dispute was such as to render it natural to describe the dispute as one that had arisen out of the activities of the branch. At [225] the judge set out his reasons for deciding that the London bureau was "not a mere 'innocent bystander' in this dispute". It had deployed the claimant on paid assignments where she claimed the rate paid was discriminatory. It had been the scene of the dismissal in August 2017. A member of its HR staff had been present to escort the claimant off the premises. The London bureau chief had decided not to use the claimant's services after June 2017. To work from the London bureau on a phased return to work was a reasonable adjustment sought.

94. These are points entitling the judge to find that the requirements of article 20 were met, if they needed to be met. Again, I do not find merit in this point and, in any case, article 20 is only needed to establish international jurisdiction if the reasoning above is wrong.

(v) Service of the claim form

95. Finally, the respondent contended, the judge was wrong to conclude that, if (contrary to his conclusion that articles 21 and 20 of the Brussels Regulation, if the latter is applicable, conferred jurisdiction) then jurisdiction was conferred in domestic law by sending the claim documents to the respondent, which received them via the London bureau. Mr Nicholls agreed with the judge that the procedural rules of the tribunal do not include any rules about service out of the jurisdiction; but said he was wrong to find that compliance with the rules relating to delivery of documents was sufficient.

96. Mr Nicholls' argument was that since the tribunal's procedural rules make no provision for service out of the jurisdiction, the common law rule that service must be effected within the jurisdiction applies as a default position (as in *Maharanee of Baroda v Wildenstein* [1972] 2 QB 283, CA). As he put it in his skeleton, "the common law route is the only available route and must apply in the absence of any other provision".

97. Mr Nicholls pointed out that while the employment tribunals are a creature of statute, common law doctrines apply to them and to other statutory tribunals; for example, the principles of *res judicata* and issue estoppel, the rule against actual or apparent bias and the obligation to give intelligible reasons for decisions. These are rules and principles that apply across the spectrum of judicial decision making in both courts and tribunals, without the need for express statutory provision.

98. In oral argument, Mr Nicholls drew my attention to a provision in one of the practice directions supplementing CPR Part 6, namely PD 6B, at paragraph 3.1, subparagraph (20), providing:

> **"Service out of the jurisdiction where permission is required**
> **3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where—**
> **…**
> **Claims under various enactments**
> **(20) A claim is made—**
> **(a) under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph."**

99. Mr Nicholls suggested that an application could have been made *ex parte* to a King's Bench Master, as the proceedings in this case are brought under the "various enactments" relied on. Such an application is made under rule 6.36 and (by rule 6.37) must set out that the claimant believes the claim has a reasonable prospect of success (rule 6.37(1)(b)). The court must not grant permission unless satisfied that England and Wales is the proper place to bring the claim (rule 6.37(3)). However, in written closing submissions below, Mr Nicholls submitted that "the CPR … cannot be relevant as those rules do not apply to the tribunal".

100. Mr Gorasia, for the claimant, pointed out that the tribunal referred to rule 91 of the 2013 Rules of Procedure, providing that a tribunal may treat a document as delivered to a person notwithstanding any non-compliance with rules 86 to 88 (the rules about delivery of documents), if the tribunal is satisfied that the document in question or its substance has in fact come to the attention of the person. That was straightforwardly the position here, he said. There is no place for common law rules about service, nor for confining service on a foreign based respondent to service within the jurisdiction.

101. The tribunal addressed this issue at [226]-[230]. The judge was considering the version of the old 2013 Rules of Procedure then in force. Since then, the 2024 Procedure Rules have supervened and the numbering has changed, but the substance has not. I agree with both parties that there were few formal rules about service of documents in the tribunal's procedural rules. The 2013 Rules of

Procedure did make reference to "[s]ubstituted service" (rule 89) and "[i]rregular service" (rule 91). Otherwise, the term used was "delivery" of documents (rules 85-92). I note that in the 2024 Procedure Rules, use of "service" is avoided and replaced by "sending" documents (rules 83-91).

102. I think the judge was right to reject the respondent's contention that the tribunal had no jurisdiction over the claim because the respondent was "served via CNIL [the London bureau]" ([226]). There is no requirement for leave to serve out of the jurisdiction and no provision that service of a foreign domiciled respondent abroad is other than effective. The system for ensuring, as a matter of procedural fairness to a respondent, that it is properly made aware of the claim and given the claim documents in writing, is briefly as follows.

103. Rule 8(2) and 8(3) in the 2013 Rules of Procedure, as already noted, tell the claimant whether to present the claim in England and Wales, or in Scotland. By rule 8(1), the claim is presented by sending the necessary prescribed documents to the tribunal. There are then various grounds on which the claim may be rejected before it ever reaches the respondent. Among them (rules 10-12) are "substantive defects" (rule 12).

104. By rule 12(1) "[t]he staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be … (a) one which the Tribunal has jurisdiction to consider; or … is otherwise an abuse of process". That is the safeguard against a claim by a would-be claimant who (for example) has a great admiration for British justice but is working in Indonesia for an Indonesian employer which carries on business exclusively in Indonesia and has no connection with this country.

105. If the claim with an international element survives scrutiny under rule 12(1), the tribunal sends it to the respondent under rule 15, with the usual information about how and by when to respond.

Needless to say, the response may include a challenge to the tribunal's jurisdiction. The rules about delivery of documents to parties are in rule 86 (now rule 84). Rule 91 (now rule 89) allows the tribunal to treat as delivered a document they are satisfied has come to a person's attention, even if there has been non-compliance with rules about sending documents.

106. That was the position here, as the judge pointed out. The respondent was aware of the claim and received the claim documents. It was able to resist jurisdiction and to instruct Mr Nicholls to do so at the hearing. The Civil Procedure Rules are, as Mr Nicholls rightly submitted below, not relevant. Rules 6.36 and 6.37 of the CPR do not apply to employment tribunal proceedings: see CPR rule 2.1. Practice Direction 6B is irrelevant. There is no requirement in the tribunal's procedure rules for permission to serve out of the jurisdiction where a respondent is domiciled abroad. There was no procedural irregularity in the proceedings below.

Conclusion and Disposal

107. For those reasons, I dismiss the respondent's appeal. The claims are justiciable and should proceed to a determination on their merits. I would like to add that I found the judgment of Employment Judge Klimov impressive. It was thorough, careful and mostly clearly expressed. The reasoning was clear and sound in most respects material to this appeal. I am also very grateful to counsel for the depth of their researches and for their detailed and helpful submissions.

APPENDIX

THE TRIBUNAL'S ACCOUNT OF THE LAW RELATING TO THE TERRITORIAL EXTENT OF EMPLOYMENT LEGISLATION

'67. In *Simpson v Intralinks* [2012] ICR 1343 at [8], Langstaff J (President of the EAT, as he then was) referred to an article by Louise Merrett in the Industrial Law Journal 2010 (pages 355 et seq.) explaining that the word "jurisdiction" can be used in three different contexts:

"***First, in all cases where there is a foreign element, the question arises as to whether the English court or tribunal has jurisdiction to hear the case at all or whether it should be heard in a foreign court … this is an issue of private international law and will be referred to as international jurisdiction. If the Defendant is domiciled in a Member State of the European Union, the question of international jurisdiction must be determined by applying the rules of the Brussels I Regulation …*** *Secondly, [words omitted]…* ***Thirdly, even if the court or tribunal has jurisdiction to hear the claim in both the senses described above, and English law applies, in the case of statutory employment rights the Claimant must show that he falls within the scope of the relevant legislation … most statutory rights have either express or implied territorial limits which must be satisfied … this last issue … will be referred to as territorial scope.***" ***(my emphasis)***

68. The Jurisdiction Issue I need to decide comprises of two of the above elements: third meaning – the Territorial Reach Question, and the first meaning - the International Jurisdiction Question. Dealing with the Territorial Reach Question first.

69. It was accepted by the parties (and I agree) that on the relevant authorities there was no difference in the test the Tribunal must apply in determining the territorial reach of the ERA and the EqA. In other words, if it is found that the Claimant's claims under the ERA fall within the territorial reach of the ERA, the same conclusion must follow with respect to her EqA claim and vice versa[4].

> [Fn. 4:] For the sake of brevity, I shall refer in this judgment to the ERA only or, when considering all three (ERA, EqA and WTR) - to the Acts.

70. The explanatory note 15 to the EqA states: "*As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the Employment Rights Act 1996, 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*". See also, *Bates van Winkelhof v Clyde and Co LLP and anor* 2013 ICR 883, CA, and *R (on the application of Hottak and anor) v Secretary of State for Foreign and Commonwealth Affairs and anor* 2016 ICR 975, CA.

71. Equally, there should be no difference in the territorial reach test with respect to various rights in the ERA (in this case s.94(1) and s.13 ERA) – see *Lawson v Serco Ltd* 2006 ICR 250, HL at [14], *Bleuse v MBT Transport Ltd and anor* 2008 ICR 488, EAT and *British Council v Jeffery and another case* 2019 ICR 929, CA).

72. The current version of the ERA does not contain any provisions dealing with the territorial reach of the Act. In *Lawson v Serco* [2006] UKHL 3, [2006] ICR 250, at [7] - [9] Lord Hoffman recounted the history of the legislation concluding that by repealing section 196 of the Act (which stated that the Act did not apply "*to any employment where under his contract of employment the employee ordinarily works outside Great Britain*").

"*Parliament was content to accept the application of established principles of construction to the substantive rights conferred by the Act, whatever the consequences might be*".

73. At [6] Lord Hoffman explained the relevant rules of construction citing Lord Wilberforce in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152, where he said that it

"*requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?*"

74. It is a well-established principle that Parliament is supreme and can legislate on any issue, including extraterritorially. As Sir Ivor Jennings famously wrote in 1959 "*the British Parliament could legally ban smoking on the streets of Paris…*", however, as Lord Hoffman said in **Lawson** at [6]:

"*The general principle of construction is, of course, that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world. Some international crimes, like torture, are an exception. But usually such an exorbitant exercise of legislative power would be both ineffectual and contrary to the comity of nations.*"

75. In the same judgment at [1] he said that

"*It is inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with Great Britain*",

and went on to formulate the relevant question as:

"*Putting the question in the traditional terms of the conflict of laws, what connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair?*[6] ***The answer to this question will also determine the question of jurisdiction, since the Employment Tribunal will have jurisdiction to decide upon the unfairness of the dismissal if (but only if) section 94(1) is the appropriate choice of law." (my emphasis)***

> [Fn 6:] Louise Merrett, in the aforementioned article, criticised this formulation as "potentially confusing" because the issue is not of choice of law in a private international law sense, but of statutory interpretation.

76. While stating at [9] that he did not think

"*that any inferences can be drawn from the repeal of section 196 except that Parliament was dissatisfied with the way in which the express provisions were working and preferred to leave the matter to implication. Whether this would result in a widening or narrowing of the scope of the various provisions to which section 196 had applied is a question upon which, in my opinion, the decision to repeal it throws no light*",

at [11] Lord Hoffman said:

"*The repeal of section 196 means that the courts are no longer rigidly confined to this single litmus test.* ***Nevertheless, the importance which parliament attached to the place of work is a relevant historical fact which retains persuasive force" (my emphasis).***

77. Lord Hoffman then went on to formulate the relevant principles, emphasising that these were principles and not rules. At [23] he said:

"*In my opinion the question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements.* ***This is a question of the construction of section 94(1) and I believe that it is a mistake to try to formulate an ancillary rule of territorial scope, in the sense of a verbal formula such as section 196 used to provide, which must then itself be interpreted and applied****. That is in my respectful opinion what went wrong in the Serco case. Although, as I shall explain, I think that there is much sound sense in the perception that section 94(1) was intended to apply to employment in Great Britain, the judgment gives the impression that it has inserted the words "employed in Great Britain" into section 94(1). The difference between Lord Phillips of Worth Matravers MR and the majority of the court in Crofts v Veta Ltd was about how these words should be construed. But such a question ought not to arise, because the only question is the*

construction of section 94(1). ***Of course this question should be decided according to established principles of construction, giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme. But this involves the application of principles, not the invention of supplementary rules." (my emphasis)***

78. He went on at [24] to say:

"*On the other hand, the fact that we are dealing in principles and not rules does not mean that the decision as to whether section 94(1) applies (and therefore, whether the Employment Tribunal has jurisdiction) is an exercise of discretion. The section either applies to the employment relationship in question or it does not and, as I shall explain later, I think that is a question of law, although involving judgment in the application of the law to the facts.*"

79. At [34] Lord Hoffman said:

"*…. In my opinion therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect. …*".

80. In *Ravat v Halliburton Manufacturing and Services Ltd* 2012 ICR 389, SC, Lord Hope said at [29]:

"*But it does not follow that the connection that must be shown in the case of those who are not truly expatriate, because they were not both working and living overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree."*

81. In *British Council v Jeffery and another case* 2019 ICR 929, CA, the Court of Appeal considered how the above dicta by Lord Hope in **Ravat** could be reconciled with what Lord Hoffman said in **Lawson** at [34]. While the Court did not come to the same view on this question, all judges agreed that there must be evaluation of whether a particular employment has the sufficient connection with Great Britain and British Employment Law before the question of the territorial reach of the Act can be answered. As Underhill LJ put it at [41]

"*In the typical case, however, the answer to the former question [whether s.94 ERA applies] will depend entirely on the answer to the latter [whether the sufficient connection requirement is satisfied],* ***with the result that in practice the dispositive issue is one of fact….***" ***(my emphasis)***.

Peripatetic employees

82. In **Lawson** at [28 – 33], Lord Hoffman considered the application of the concept of employment in Great Britain to peripatetic employees, such as mariners, airline pilots, international management consultants, salesmen and so on. In his judgment, he cited with approval the dicta by Lord Denning MR in *Todd v British Midland Airways Ltd* [1978] ICR 959, 964:

"***A man's base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas****. I would only make this suggestion.* ***I do not think that the terms of the contract help much in these cases****. As a rule, there is no term in the contract about exactly where he is to work.* ***You have to go by the conduct of the parties and the way they have been operating the contract. You have to find at the material time where the man is based.***"***(my emphasis)***[8]

> [Fn 8:] This was a notable departure from an earlier decision by the Court of Appeal in *Wilson v Maynard Shipbuilding Consultants A.b.* [1978] I.C.R 376, where the Court held that the correct approach was "*to look at the terms of the contract express and implied […] in order to ascertain where, looking at the whole period contemplated by the contract the employee's base is to be*". [at 387 F]. Furthermore, the Court said that one must look at the contract terms at the time of the making of the contract, and subsequent conduct of the parties cannot be used as an aid in construing the contract terms. That was pursuant to the longstanding principle on construing contract terms (see *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583, applied to

employment contracts in *Keeley v Fosroc International Ltd* [2006] EWCA Civ 1277), however since doubted as being correct on a number of occasions – see, for example, *BCCI v Ali* [2002] 1 A.C. 251 at [31]).

83. Referring to that dicta, at [30], Lord Hoffman said:

"Lord Denning's opinion was rejected as a misguided obiter dictum by the Court of Appeal in Carver's case and it is true that the language of section 196 and the authorities such as Wilson's case insisted upon more attention being paid to the express or implied terms of the contract. ***But now that section 196 has been repealed, I think that Lord Denning provides the most helpful guidance.***"***(my emphasis)***

84. At [31], Lord Hoffman continued:

" *…… Unless, like Lord Phillips of Worth Matravers MR, one regards airline pilots as the flying Dutchmen of labour law, condemned to fly without any jurisdiction in which they can seek redress,* ***I think there is no sensible alternative to asking where they are based. And the same is true of other peripatetic employees***". ***(my emphasis)***

85. In *Partners Group (UK) Ltd and another v Mulumba* [2021] I.C.R. 1501, at [46] and [47] the EAT held:

"*46* ***In cases where the employee moves between different countries, the employment tribunal's evaluation may need to recognise a change in the relevant circumstances. In some cases - such as that of Mr Fuller – the connection may remain with the original base (in Mr Fuller's case, the US); in others, the position may change. The assessment must, however, be of the position at the time of the matter of which complaint is made*** *(and see Dhunna v CreditSights Ltd [2015] ICR 105, para 43, per Rimer LJ).* ***In particular, if the relevant act, omission or decision fell within a period of employment outside the territorial reach of British employment law, it will not subsequently fall within scope as a result of the employee later establishing the requisite connection with Great Britain and the statutory protections afforded within this jurisdiction****. …. [words omitted]*

47 ***Moreover, the fact that the complaint might relate to what is alleged to have been "conduct extending over a period" (for the purposes of section 123(3) of the EqA) does not change this position: it might be part of the relevant background to later matters, which do fall within the territorial scope of the statutory protection, but that cannot confer jurisdiction on the employment tribunal retrospectively*** *(see per Bean J at para 19 of Tradition Securities" (my emphasis)*.

Employees based abroad

86. In **Lawson** at [36] Lord Hoffman while accepting that

"*[t]he circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation*" said that "*there are some who do*", and:

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

87. Lord Hoffman then went on to offer examples of such exceptional cases, first stating that:

"*….it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless*

he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country, ***should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary****." **(my emphasis)***

88. The examples he gave where "*[s]omething more can be provided*" were an employee posted abroad by a British employer (at [38]) and "*an expatriate employee of a British employer who is operating within what amounts for practical purposes to an extra-territorial British enclave in a foreign country*" (at [39]). However, at [40] he emphasised that these were just two examples that he could think of and there might be others.

89. Subsequent case law evolved in a way that the Territorial Reach Question was looked at by considering the strength of connection of a particular employment to Great Britain and British employment law, and the two examples given by Lord Hoffman were treated as relevant factors in that assessment and not as fixed categories of exceptions (see *Duncombe v Secretary of State for Children, Schools and Families (No.2)* 2011 ICR 1312, SC, and *Ravat v Halliburton Manufacturing and Services Ltd* 2012 ICR 389, SC).

90. In other words, it is necessary for the employee to show that despite working outside Great Britain, particular features of his or her employment relationship with the employer created that connection, which was sufficiently strong to overcome what Underhill LJ described in ***Jeffery*** at [2(4)] as "*the territorial pull*" of the place of work.

91. Underhill LJ described that approach in ***Jeffery*** as "*the sufficient connection question*", that essentially determines the question of territorial reach of the ERA (see paragraph 81 above).

92. In ***Duncombe*** Lady Hale stated at [8] ***(my emphasis)***:

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

93. In ***Jeffery*** at [2(5) and (6)] Underhill LJ, summarising the relevant legal principles, said:

"*(5)….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….".

94. It appears that the evolution of case law created the situation where the question of statutory construction (i.e., whether the ERA applies to a particular case) essentially became the question of whether an employee, who does not ordinarily work in Great Britain, can discharge the burden of showing that his or her employment relationship with the employer had sufficiently strong connection with Great Britain and British employment law.

95. Whilst that appears to be somewhat at odds with the relevant principle of statutory construction formulated by Lord Hoffman in ***Lawson*** (see paragraphs 73 and 77 above), nevertheless all these subsequent cases are binding authorities on this Tribunal.

96. I also note that while in ***Duncombe*** Lady Hale said at [8] that

"*the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law*",

in ***Jeffery***, Underhill LJ appears to be treating these two terms as largely interchangeable and referring to the same concept (see paragraph 81 above).

97. Therefore, it appears that if an employee, who is not ordinarily based in Great Britain, can establish factors showing that his or her employment has "*much stronger*" connection with British employment law than with "*any other system of law*", that should be sufficient for the Territorial Reach Question to be decided in his/her favour. In other words, having shown that such "*much stronger*" connection with British employment law exists, the employee is not required to take the second step and show that his/her employment has also "*much stronger*" connection with Great Britain as a country. Of course, often it will be the territorial connection of the employment to Great Britain that creates that "*pull factor*", but not necessarily. See, for example, ***Jeffery***.

98. Conversely, just because an employee, who ordinarily works abroad, has strong personal connections to Great Britain outside their employment relationship with the employer (e.g. because he/she happens to be a British citizen, was born and bred in Great Britain, his/her family and friends are in Great Britain, regularly comes to this country for holidays, maintains a home here, etc.) that is very unlikely to be sufficient to overcome the territorial pull of the place of work. The same must be true even if such foreign-based employee with strong personal connections to Great Britain, occasionally comes to Great Britain on short business trips organised by their employer. The "*sufficiently strong connection*" factor must be evaluated through the "prism" of employment relationship.

99. Additionally, … [*words omitted*]

Governing Law

100. The governing law of the contract is a relevant factor in the analysis (see ***Duncombe*** at [16]), although this creates some tension with the wording of s.204 ERA, as acknowledged by the Court of Appeal is ***Jeffery***.

101. In ***Duncombe*** at [16] Lady Hale said the governing law was relevant because it creates "***the expectation of each party as to the protection which the employees would enjoy***". At [17] she also emphasised that people employed locally by a British employer in a foreign country

"*do not expect to enjoy the same protection as an employee working in Great Britain,* ***although they do expect to enjoy the same protection as an employee working in the country where they work. They do, in fact, have somewhere else to go***" ***(my emphasis).***

Repeal of s.196 ERA

102. As observed above, the key principle established in ***Lawson*** is that the Territorial Reach Question is one of construction of the statute, "*giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme*".

103. In that regard I think it is of some assistance to briefly consider the relevant background leading up to the repeal of s.196 ERA. In *Wilson v Maynard Shipbuilding Consultants A.b.* [1978] I.C.R 376, the Court of Appeal, when grappling with the meaning of the words "*ordinarily works outside Great Britain*" (see footnote 8 above) in the predecessor to s.196 ERA, said at [386 C]:

"*Frankly, we do not think that those who were responsible for this legislation realised the existence of this problem. But we have to try to give guidance how such cases, of which the present case is one, ought to be approached so as to give effect, as sensibly as is possible, to the words of paragraph 9(2). … [*words omitted from quoted passage*] If amendment or clarification is required, paragraph 11 (2) and (3) of Schedule 1 to the Act of 1974 provides a relatively simple procedure. Let it not be said that the Employment Appeal Tribunal or this court is frustrating the intention of the legislature when both those courts are urging that, if their*

interpretation of the words used should not give effect to the intention of the legislature, the legislature should be invited urgently, by a simple procedure, to clarify its intention."

104. There was no immediate legislative response, but some years later s.196 ERA was repealed by Parliament by s. 32 and Schedule 9 (9) of the Employment Relation Act 1999. The explanatory note to this section reads:

"*32:* ***Employment rights outside Great Britain***

298.Section 32 repeals section 285(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 and section 196 of the Employment Rights Act 1996. These provisions limit the application of certain employment rights, broadly, to those who ordinarily work in Great Britain. The repeal will remove these limitations."

105. Whilst in ***Lawson*** Lord Hoffman thought that the repeal of s.196 "throws no light" on the Territorial Reach Question (see paragraph 76 above), I note that [*references to parliamentary materials, Hansard and Pepper v. Hart omitted*] …

106. It is, of course, debatable whether the repeal of s.196 ERA has achieved the intended simplification of the legislation. However, it appears that at the time the mischief the repeal was seeking to address was the narrow interpretation of the meaning of the phrase "*ordinarily works outside Great Britain*" in s.196 ERA adopted by the courts by looking solely at the contract terms at the time of the making of the contract ("***the contract test***") without considering the reality of the situation ("***the function test***") (see *Wilson v Maynard Shipbuilding Consultants A.b.* [1978] I.C.R 376). Hence the reference to *Carver v Saudi Arabian Airlines* [1999] I.C.R. 991, in which a flight attendant was unable to pursue a claim for unfair dismissal against her employer despite working the last six years before dismissal out of Heathrow. In that case the Court of Appeal affirmed *the contract test* and dismissed Lord Denning's dicta in ***Todd*** (see paragraph 82 above), which the Court said had laid the foundation of the function test, as obiter because "*enlargement of the* ***Wilson*** *principles was unnecessary for the decision in Todd*". However, as noted above (see paragraph 83) in ***Lawson*** Lord Hoffman expressly approved Lord Denning's dicta and notably, linked it to the repeal of s.196 ERA. The EAT decision in ***Mulumba*** (see paragraph 85 above) appears to confirm that the function test should now be used.

107. I think this background is relevant to the question of statutory construction, because otherwise to "giv[e] effect to what Parliament may reasonably be supposed to have intended" when Parliament said nothing on the subject appears to be a nearly impossible task. [*words omitted*]

108. This means that in deciding the Territorial Reach Question I must consider where at the material time the Claimant's place of work (or "base") was as a matter of the reality of the situation, and not simply by looking at what her contract terms said about what her place of work/base was or should be when the contract was made by the parties.'