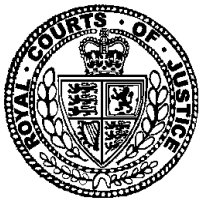

Neutral Citation Number: [2019] EWCA Civ 803

Case No: A2/2018/0726 A2/2018/0752

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
The Hon. Mrs Justice Simler
UKEAT/0268/16/RN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2019

Before :

LORD JUSTICE GROSS
LORD JUSTICE LEWISON
and
LORD JUSTICE SINGH

- -

Between :

(1) Foreign and Commonwealth Office **(2) Catherine Fearon** **(3) Jonathan Ratel**	**Appellants**
- and - **Maria Bamieh**	**Respondent**

- -
- -

Ben Collins QC and **Penelope Nevill** (instructed by **Deborah Lawunmi, Government Legal Department**) for the **1st Appellant**
Spencer Keen and **Rosalie Snocken** (instructed by **Emmanuelle Raoult, EU Legis)** for the **2nd and 3rd Appellants**
Christopher Milsom and **Nathan Roberts** (instructed by **Peter Daly, Bindmans LLP**) for the **Respondent**

Hearing dates : 26 and 27 March 2019

- -

Approved Judgment

LORD JUSTICE GROSS :

INTRODUCTION

1. Do the "whistleblowing" provisions contained in ss. 47B(1A) and 48(1A) of the *Employment Rights Act 1996* ("the ERA") apply extraterritorially in respect of a claim between co-workers seconded to the international *European Union Rule of Law Mission in Kosovo* ("EULEX"), in circumstances where each was (separately) employed by the Foreign and Commonwealth Office ("FCO")? That is the sole question on this appeal.

2. The Employment Tribunal ("ET") in its judgment, dated 14 June 2016 ("the ET judgment"), said no. Allowing the appeal of the then Claimant (and now Respondent) from the ET in this regard, the Employment Appeal Tribunal ("the EAT"), in its judgment, dated 19 January 2018 ("the EAT judgment"), said yes.

3. The FCO and the co-workers, Mr Ratel and Ms Fearon ("the co-workers") appeal to this Court from the decision of the EAT.

4. Considerations of the public interest are central to the concept of whistleblowing. A helpful working definition of whistleblowing is furnished by the *Council of Europe Recommendation* (CM Rec 2014/7 on Protection of Whistleblowers), Appendix A (cited in Lewis and others, *Whistleblowing: Law and Practice*, 3rd ed., at para. 1.12):

> "….any person who reports or discloses information on a threat or harm, to the public interest in the context of their work-based relationship…."

As explained in *Whistleblowing (ibid)*, there has been a sea change in the cultural perception of the value of whistleblowing. However, whatever the cultural shift domestically, it could not be said that there was an international consensus in this regard. Thus, at all material times, there has been no EU Directive on whistleblowing.

5. Insofar as material, the ERA provides as follows:

> "**47B Protected disclosures**
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done –
>
> (a) by another worker of W's employer in the course of that other worker's employment….
>
> on the ground that W has made a protected disclosure.

> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker –
>
> (a) from doing that thing, or
>
> (b) from doing anything of that description.
>
> **48 Complaints to employment tribunals**
>
> (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."

6. S.43B ERA, inserted by the *Public Interest Disclosure Act 1998* ("the PIDA"), contains the following definition of "protected disclosure":

> "**43B Disclosures qualifying for protection**
>
> (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur…..
>
> (f) that information tending to show any matter failing within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
>
> (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory."

It has not been suggested that the extraterritorial element contained in s.43B(2) assists in the resolution before us.

7. It may be noted at the outset that any "whistleblowing" claim between the Respondent and the co-workers would be non-contractual, rather than contractual.

THE FACTS

8. For present purposes, there is no or no significant dispute as to the facts. In large measure I gratefully take them from the ET and EAT judgments.

9. *(A) EULEX:* In a nutshell, following the war in the Western Balkans, the UN Security Council deployed international personnel in Kosovo to help the country reach international standards and to achieve self-government.

10. Subsequent to the UN's withdrawal in or about December 2007 and to continue the work of the United Nations Interim Administration Mission in Kosovo ("UNMIK"), EULEX was established on 4 February 2008 by the Council of the EU, as a Rule of Law Mission in Kosovo, through the *Common Foreign and Security Policy* ("CFSP"). This was done by way of *Council Joint Action 2008/124/CFSP* ("the Joint Action") and subsequent European Council Decisions. The Joint Action may be regarded as analogous to a treaty between member states (see, Simler P, EAT judgment at [16]).

11. EULEX is solely based in Kosovo. According to Art. 2 of the Joint Action, its mandate is:

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

12. A large number of contributing states second personnel to EULEX, mainly but by no means exclusively EU member states. The UK cohort of seconded staff members was not particularly dominant.

13. Inevitably, as with any secondment, there is a degree of duality. Thus, as provided by the EULEX Personnel Handbook (para. 1.4) and Operational Plan ("the OPLAN", see para. 5.2.1), all staff members were obliged to carry out their duties following the:

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

However, while disciplinary control over staff rested with EULEX, disciplinary action would be exercised by, and the responsibilities of employer remained with, the seconding home state: OPLAN, para. 5.2.2. The Joint Action provided (in Arts. 8.6 and 10.2):

> "8.6: the Head of Mission shall be responsible for disciplinary control over the staff. For seconded staff, disciplinary action shall be exercised by the National or EU Authority concerned…

> 10.2: the State…having seconded a member of staff shall be responsible for answering any claims linked to the secondment, from or concerning a member of staff. The State shall be responsible for bringing any action against the seconded person."

14. A "*Code of Conduct and Discipline*" ("COC") was annexed to OPLAN. It was complementary to the obligations of staff members under international law and the law of the staff member's home jurisdiction: COC, para. 1.3. It was to be considered as a written order to all staff members, backed by disciplinary sanction for non-compliance. The COC provided that staff members would observe "the law applicable in the place of deployment" (para. 2.1); discrimination of any kind "based upon protected grounds under the law applied in Kosovo" was prohibited, as was behaviour that "may be construed as abusive, oppressive, condescending or likely to cause humiliation" (para. 2.2); so too, amongst other matters, sexual harassment, harassment and bullying were prohibited (paras. 2.3 – 2.7).

15. The COC addressed "Disclosure of Information" as follows (at para. 3.6):

> "Staff members will not improperly disclose confidential information obtained as a result of their work with the Mission…..
>
> Confidential information means all information that has been accorded an official EU classification level, as well as the identities of individuals, political information, operating procedures or any other information that may cause prejudice to the security of individuals, information that may cause public danger, disorder or crime, or information that may cause damages to the Mission or its reputation.
>
> Improper disclosure means disclosure that was not within a staff member's general delegated authority to disclose, or which was not expressly authorised by a superior officer.
>
> It is the obligation of staff members to report through the chain of command any cases of malpractice, corruption and incompetence.
>
> Statements by staff members to the press, newspapers, radio or television or any other media are not permitted, unless proper authorisation from the HoM or his designate has been obtained through the chain of command."

16. As provided by the COC (at para. 5), involvement in criminal acts constituted grounds for immediate repatriation or termination of contract; "criminal acts" were defined as including corruption and organised crime. The COC went on to deal (at para. 7) with reporting of violations of the Code of Conduct:

> "7.1 It is the right and obligation of all staff members to report cases of malpractice, misconduct, incompetence and criminal acts.
>
> 7.2 All alleged breaches of the COC…and other applicable rules and regulations must be reported, normally through the chain of command to the HoM, and if the source of information is a staff member, the report must be submitted in writing.
>
> If a staff member discovers information about another staff member that may be a breach of this Code…[or] other applicable rules and regulations, or that have serious implications for the Mission, he/she will not disclose that fact to any other person other than his/her direct supervisor or a member of the mission hierarchy that is entitled to deal with or give advice regarding the case in question….."

17. The COC contained detailed provisions as to Discipline (para. 8), including notifying the national authorities in the case of seconded staff members. The Deputy Head of Mission ("DHoM") was responsible for disciplinary control, including the initiation of investigations and the convening of disciplinary boards. An appeal lay to the Head of Mission ("HoM"), who was empowered to convene Appeal Panels to review appeals. After the expiry of any right/s of appeal, the DHoM would communicate any recommended disciplinary measures to the national authority of the secondee staff member in question. As recorded by Simler P (EAT judgment, at [21]) any decision to discipline or dismiss a seconded staff member would be taken by the seconding authority, which would usually accept the recommendation of EULEX.

18. *(B) The Respondent:* The Respondent is a British national. She was directly employed by UNMIK as an international prosecutor in 2007. With effect from November 2008, the Respondent continued her work, as an employee of the FCO, seconded to EULEX on annually renewable contracts.

19. The Respondent's first contract with the FCO dated 20 November 2008 was headed "CONTRACT FOR FCO SECONDMENT AS PROSECUTOR FOR …[EULEX]". The contract provided expressly that it was a "temporary appointment". For the duration of her appointment, the contract provided that she would be employed by the FCO and seconded to EULEX. As we understood it, her contract was annually renewed, on the same terms, until the termination of her employment. By cl. 2, the contract provided that the Respondent would:

> "…report to, and be obliged to, take lawful instructions from the manager appointed to you by …EULEX Kosovo."

The contract contained provisions as to the Respondent conducting herself in a manner "consistent with your position as a representative of Her Majesty's Government…". Cl. 18 provided that she was bound by the *Official Secrets Act 1989*. The Respondent was further bound by the provisions on Staff Conduct for full-time FCO staff, annexed to her contract. So too, EULEX Standards of Conduct for personnel was applied to the contract "on a contractual basis"; the COC was thus incorporated in the Respondent's contract. Cl. 27 stipulated that the contract was

governed by English law and was subject to the exclusive jurisdiction of the English Courts and Employment Tribunals.

20. It is to be noted that the Staff Conduct provisions for FCO staff prohibited the disclosure of official information without authority. FCO staff were required to "show undivided allegiance to the State". Further, staff members "should come forward" if, in the course of their duties, they became aware of "acts which appear to them to be unlawful, unethical or improper". Specific reference was made to the PIDA and its protections given to those exposing malpractice.

21. As helpfully summarised in the EAT judgment (at [23] and following), the Respondent had a EULEX line manager and second line manager. She also had a loose reporting line to the FCO through a "National Contingent Leader". The OPLAN required each contributing state to appoint a National Contingent Leader, to represent each national contingent in the Mission and to be responsible for discipline of the contingent.

22. The Respondent and other EULEX prosecutors worked alongside local Kosovan employed prosecutors. The EULEX prosecutors had "a high level of independence and focused on serious crimes including fraud, corruption and war crimes": EAT judgment, at [25]. In practice (ET judgment, at [25]), the FCO did not "micro manage", so that secondees had very little contact with it.

23. The Respondent's annual contract was not renewed in November 2014 and her employment by the FCO came to an end. The FCO says that the Respondent's contract was not renewed because EULEX was shrinking and some prosecutors had to be dismissed; the Respondent was amongst those dismissed, based on consideration of scoring carried out by EULEX which placed her in the bottom three of the UK applicants for a continued role. The Respondent submits that her contract was not renewed because she was a "whistleblower", so that this was, automatically, an unfair dismissal under s.103A, ERA.

24. *(C) The co-workers: Mr Ratel:* On 1 January 2013, Mr Ratel, a dual UK/Canadian national and (as already indicated) a FCO secondee to EULEX took over - from a predecessor who was not a FCO secondee - as the Respondent's line manager. Mr Ratel reported to Ms Novotna, who was Czech (thus not a FCO secondee); the Respondent says that both Mr Ratel and Ms Novotna were her line managers. Mr Ratel was employed by the FCO, pursuant to a series of secondment contracts, in broadly similar terms to the Respondent's contracts, save that he was engaged as "Head of Special Prosecutions in Kosovo" for EULEX. Mr Ratel's work was performed wholly outside the UK and wholly in Kosovo. At the material times, he was not resident in the UK for tax purposes; the ET held (in 2016) that he had spent very little time in the UK in the previous seven years.

25. *Ms Fearon:* As recorded in the ET judgment (at [29]), Ms Fearon, a British citizen, was seconded by the FCO to be Special Adviser to the HoM of EULEX, from 24 March 2013 – 31 August 2015. Ms Fearon has worked outside the UK from 2009, since when she has spent approximately six months in the UK; she had been recruited by the FCO while in Sudan. Giving the ET judgment, EJ Wade said this (at [30]):

> "She is a typical example of a worker in a pan-European environment. Her predecessor was French and her line manager was the HOM."

As found by EJ Wade, Ms Fearon had virtually no direct contact with the Respondent during their secondments, though she advised the HoM about the Respondent's "actions and behaviours" when issues arose in 2014 as part of her (i.e., Ms Fearon's) job and commented on how the situation might be perceived by the FCO. EJ Wade added this (*ibid*):

> "It was apparent…that she [Ms Fearon] saw herself as loyal to EULEX first and FCO second."

Ms Fearon too was employed by the FCO pursuant to a series of secondment contracts, on broadly similar terms to the Respondent's contracts, save that she was engaged as Special Adviser to the EULEX HoM. As with Mr Ratel, Ms Fearon's work was performed wholly outside the UK and wholly in Kosovo.

26. *(D) The proceedings:* The Respondent brought claims in the ET against the FCO and the co-workers, based on alleged detrimental treatment for whistleblowing. The Respondent alleges (EAT judgment, at [98]) that the co-workers subjected her to unlawful detriments in the course of their employment by the FCO because she made protected disclosures; for example, Mr Ratel is said to have commenced a series of investigations into her conduct and Ms Fearon is said to have recommended her suspension, without an investigation. The co-workers, as already observed, were themselves FCO employees, seconded to EULEX.

27. The FCO has not contested jurisdiction before the ET in respect of (alleged) unfair dismissal and whistleblowing detriment. The FCO's alleged *vicarious liability* for the actions of the co-workers has been left over to the trial. The FCO's interest in pursuing this appeal "in parallel" with the co-workers was expressed as follows in its skeleton argument:

> "First, Ms Fearon and Mr Ratel are FCO secondees…and, furthermore, if they fall within scope the FCO as their employer may be vicariously liable for their acts and omissions. Second, the outcome has wider implications for other secondees from the FCO and other government departments, bodies, law enforcement agencies and armed services to rule of law or peacekeeping missions led by the EU and other international and regional organisations."

28. The substance of the Respondent's claims against the FCO and the co-workers has yet to be determined.

29. For completeness, apart from her claims against the FCO and the co-workers, the Respondent advanced claims in the ET against EULEX and a Mr Meucci (an Italian national, who became HoM on 15 October 2014). The claims against EULEX and Mr Meucci have been dismissed by the ET and the EAT on jurisdictional grounds (and, in the case of EULEX on questions of domestic legal personality) and there is no appeal before us from those conclusions.

THE ET JUDGMENT

30. With regard to the co-workers, EJ Wade's central conclusions were shortly expressed. At [53], EJ Wade said this:

> "….The inescapable fact is that although they were FCO employees, for the purpose of this mission they were not domiciled in the UK or based there for work purposes. They are more accurately described as 'citizens of the world' who happened to have British nationality and to be under contract to the FCO…."

31. The EJ (at [54]) accepted that the co-workers could claim against the FCO in this jurisdiction, pursuant to Art. 10.2 of the Joint Action. EJ Wade:

> "…was uncomfortable that they could be outside scope when they and the Claimant [i.e., the now Respondent] are all fellow employees of FCO but as individual respondents their base was in the international world that was EULEX not the territorial bubble of the UK."

Thus, the complaints against Ms Fearon arose because (at [55]) "…of her role as advisor to the Italian HoM and…she saw her role as supporting him and not as an instrument of the FCO". Her relationship with the Respondent was not founded on the fact that they were both FCO employees.

32. It would be "anomalous" EJ Wade said (at [56]) to hold some EULEX colleagues liable and some not, "for example one of the Claimant's line managers and not the other". For instance, the claim against Ms Novotna (the Czech national) had been withdrawn as the Respondent (correctly) conceded that there was no jurisdiction.

33. Another important point, in EJ Wade's view (at [57]) was that Art. 10.2 of the Joint Action did not appear to give the ET jurisdiction over individual respondents. Having a common employer, "…which is the UK government" was not enough to bestow jurisdiction.

34. Accordingly, EJ Wade concluded that the ET did not have jurisdiction to hear claims against the co-workers.

THE EAT JUDGMENT

35. As already foreshadowed, Simler P allowed the Respondent's appeal in respect of the co-workers and concluded (as recorded at [145] of the EAT judgment) that there was extraterritorial jurisdiction under the ERA in respect of the whistleblowing detriment claims pursued by the Respondent against them.

36. Simler P expressed her starting point as follows (at [109]):

> "The starting point in considering whether the Employment Tribunal has territorial jurisdiction in respect of claims made by the Claimant against her fellow FCO-seconded workers under the ERA is that ordinarily the statute has no application to work

> outside Great Britain. Parliament would not have intended the ERA to apply unless there was a sufficiently strong connection with Great Britain and British employment law. That starting point must therefore be displaced by the sufficiently strong connection said to exist before extraterritorial jurisdiction can …be established."

The "sufficiently strong connection" test was derived from a line of authority (referred to by Simler P at [104] – [108]) dealing with claims by employees against employers for unfair dismissal and to which I shall return below.

37. In Simler P's view (at [110] – [111]), EJ Wade had fallen into error by treating jurisdiction as not established because the co-workers were not domiciled in the UK or based there for work purposes. The ET judgment had erred in law as these considerations were neither dispositive as a matter of law nor determinative as a matter of fact. The "stronger connection" test was to be applied by analogy. In any event, domicile was different from residence "and harder to shed" (at [111]). The co-workers had retained their British citizenship and passports; both worked for the UK government and "quite possibly retained their English domiciles".

38. The question of whether a case fell within the scope of the ERA was one of fact and degree ([113]) and in Simler P's judgment (at [114]):

> "…the question of the territorial reach of the detriment provisions in s.47B(1A) ERA required an assessment of the sufficiency of the connections between each individual Respondent [i.e., co-worker] and Great Britain and British employment law by analogy with the approach required to be adopted where the employer is the only respondent. The question was not conclusively determined by reference to their base; and nor was it relevant to consider the individual Respondents' connections to EULEX (as opposed to another system of law and jurisdiction such as Kosovo)."

Because EJ Wade had treated the co-workers' domicile and base as dispositive, she had not conducted (at [115]) "…the assessment required of the extent and sufficiency of the connections between them and Great Britain and British employment law".

39. As to that assessment, the relevant factors were these (at [116]):

i) First, that the co-workers were working in Kosovo pursuant to a series of secondment contracts with the FCO, on the terms already set out.

ii) Secondly, those contracts were governed by English law. Just as the Respondent was entitled to the protection of the ERA in relation to her employer, the FCO, because of her sufficiently close connections with Great Britain and British employment law, so the co-workers would be entitled to that same protection if subject to treatment capable of being challenged under the ERA. It was, Simler P said, "…difficult to see why their expectation would or should be different in relation to claims made against them under the ERA".

iii) Thirdly, the position of EULEX was analogous to an international enclave which had no particular connection with the country in which it happened to be situated. The Respondent and the co-workers were treated differently from locally employed members of staff. In this regard, Simler P highlighted their links to the FCO.

iv) Fourthly, Art. 10.2 of the Joint Action itself recognised "the connection between seconded members of staff and their seconding state".

40. Although there were pointers the other way (set out at [117]), Simler P differed from EJ Wade with regard to other features which the ET judgment had regarded as supporting the conclusion that there was no "territorial scope" in relation to them; thus (at [118]):

> "....The individual Respondents are not sued by virtue of their employment relationship with the Claimant under s.47B(1A) ERA but as co-workers of the FCO in the course of their employment by the FCO. There is no other system of law with which either can be said to be connected, still less closely connected. If as a result of their own especially strong connections with…Great Britain and British employment law it can be said that Parliament would have regarded it as appropriate for an employment tribunal to deal with claims against them under the ERA, that is sufficient to displace the general rule that the place of employment is decisive in determining territorial jurisdiction under the ERA…."

Simler P did not regard it as anomalous that the co-workers came within the scope of the ERA whereas others (such as Ms Novotna) did not. Moreover, further differing from EJ Wade (*ibid*), it was not a question of Art. 10.2 of the Joint Action only conferring jurisdiction for claims against the FCO. Art. 10.2 did not give the ET jurisdiction at all; it attributed responsibility for seconded staff members to the seconding state. The basis for the ET having jurisdiction with regard to the co-workers turned (*ibid*) on "the exceptional circumstances of this case notwithstanding the fact that the work done by the individuals concerned is performed wholly outside Great Britain".

41. Here (at [119]), the co-workers (and the Respondent) were employed by the UK government to discharge the UK's obligations in European law – and EULEX "…was the means by which those obligations were managed and controlled". The relationship between the Respondent and the co-workers and EULEX was "predicated on their contracts with the UK Government". For all these reasons, this was (at [120]) "an exceptional case". It was difficult to see what other legal system was available to govern the relationship between the Respondent and the co-workers. EULEX did not operate within Kosovan law. This was not (at [121]) a matter of straying into territory forbidden by authority of comparing the relative merits of competing systems of law; no alternative system of law was available here. No other jurisdiction could "seriously have been contemplated by them in the circumstances of this case and in light of the facts found by EJ Wade".

THE RIVAL CASES

42. For the *FCO*, Mr Collins QC submitted that the key relationship was that between the Respondent and the co-workers – not the employment contracts which each (separately) had with the FCO. It was a happenstance that each had a contract with the FCO and so was seconded from the UK rather than elsewhere. The question to be posed was the connection between the co-worker relationship and the legal systems in question; in Mr Collins' submission, there was a closer connection between that relationship and EU law, or even Kosovan law, than to the law of Great Britain. It was important to underline that there was no international consensus on whistleblowing; thus it was neither here nor there that there might not be provisions in EU law or Kosovan law conferring equivalent protection for whistleblowing detriment to that found in the ERA. The issue was the strength of the connection, rather than the strength of the protection. It followed further that confining the ERA in respect of its whistleblowing protections to a territorial scope did not (or not necessarily) have regressive ramifications for (say) discrimination or sexual harassment claims.

43. Conferring extraterritorial scope on the ERA whistleblowing provisions would cut across the COC scheme and create real difficulties for the administration of EULEX. The HoM could be faced with a disclosure of information prohibited by COC but protected by the ERA; such difficulties would be magnified if the HoM had to deal with a multiplicity of national employment legislation. As expressed in the FCO's skeleton argument:

> "It is not for the UK to impose its policy solutions on other States or international organisations made by collectives of States by applying that legislation extraterritorially to international work places over which it exercises no control. In this sense it is analogous to British health and safety legislation: no one would suggest that it applies in Kosovo as between FCO secondees working in EULEX but not between them and other EULEX staff. "

44. Furthermore, if the decision of the EAT stood, the FCO would be fixed with liability for matters over which it had no control, given the duality of the secondment and the control EULEX had over its own operations. The FCO was not in control of the EULEX workplace; it had no power to implement unilaterally and effectively, a whistleblowing policy for EULEX. Suggestions of other control devices – non-justiciability, immunity and the statutory defence contained in s.47B(1D) of ERA – did not materially assist; in any event, the statutory defence was not available to the co-workers.

45. In all the circumstances, this Court should allow the appeal from the decision of the EAT, restore the decision of the ET and hold that Parliament had not intended ss.47B(1A) and 48(1A) of the ERA to apply to this relationship between co-workers.

46. For the *co-workers*, Mr Keen likewise contended that the appeal from the EAT should be allowed. Mr Keen submitted that the co-workers were participating in these proceedings for the purpose of disputing jurisdiction. He denied that they had submitted to the jurisdiction and also maintained a claim to immunity. Mr Keen drew

our attention to the distinct position of Northern Ireland, in the particular context of Ms Fearon's Northern Irish background. Whereas s.47B(1A) had been introduced into the law of England and Wales from June 2013, the principle of co-worker liability did not become part of Northern Irish law until 1 October 2017 – well after the facts with which this dispute is concerned. In some respects, Mr Keen's position was more "extreme" than that adopted by Mr Collins. Thus, Mr Keen submitted that the test for jurisdiction required, as a *sine qua non*, individual respondents to be based in the jurisdiction, alternatively that the territorial scope of s.47B(1A), ERA should be confined to co-workers based in the jurisdiction. Be that as it may, Mr Keen echoed Mr Collins' submissions as to the impracticability of all the States contributing to EULEX insisting that their national laws applied between co-workers; managers and co-workers would be operating in an environment in which a wide variety of possibly conflicting national laws would need to be applied.

47. For *the Respondent*, Mr Milsom, in his excellent submissions, contended that there was no proper basis for this Court overturning the balance carefully struck by the EAT. The EAT had reached the correct conclusion, albeit by a stricter test than necessary; it sufficed, Mr Milsom submitted, that the Respondent's employment relationship came within the ERA. The Respondent's alternative case was that the ERA applied in these circumstances because, in addition to the Respondent's employment relationship, the co-workers' employment relationships were within the British jurisdiction – and had no connection with any other system of law. By contrast, the ET judgment disclosed errors of law including the conclusion at [57].

48. The liability of the co-workers to the Respondent pursuant to the ERA was not contingent on their rights *inter se* but on their employment contracts with the FCO; they were "siblings not spouses" and it was their common "FCO parentage" that mattered. The secondments were predicated upon a continuing relationship all three enjoyed with the UK. There would be "seismic" consequences for the pursuit of other claims (such as discrimination or sexual harassment), if the FCO was correct in this case. Mr Milsom emphasised (amongst other matters) that each of the Respondent and the co-workers was employed by the FCO and owed undivided loyalty to HMG; their relationships with EULEX were temporary; the EULEX documents made it clear that the labour law of the seconding state applied; claims by and against secondees were to take place in the seconding state's courts; importantly, there was no competing system of law or, if there was, there was a lighter pull towards EU and Kosovan law than towards English law.

49. As to practical difficulties if the ERA applied extraterritorially, Mr Milsom submitted that, whatever the solution, there would always be tensions; what if a British secondee was given an instruction by a EULEX manager which would involve contravention of the Official Secrets Act? Moreover, if the ERA's unfair dismissal provisions but not its whistleblower protection provisions applied, what was the position with regard to a whistleblower dismissal claim? In any event, the perfect should not be the enemy of the good. The intention of development in whistleblowing legislation was to expand liability. Here, the underlying and grave issue went to corruption in criminal trials. Any limiting principle (if relevant limiting principle there was) could not be based on territoriality alone – and the FCO was putting more weight on territoriality than it would properly bear. There were other answers to the sensitivities (or tensions)

highlighted by the FCO – Mr Milsom instanced non-justiciability, immunity and the statutory defence contained in s.47B(1D), ERA.

DISCUSSION

50. *(A) Clearing the decks:* It is at once convenient to clear the decks and put to one side various matters which do not advance the argument or lack substance.

51. First, reference was made from time to time, especially on behalf of the co-workers, to the policy of the *Brussels Regulation (Recast) EU 1215/2012* ("the Brussels Regulation") telling against the co-workers being sued other than in their country of domicile. Even assuming that the co-workers' "domicile", whether at common law or under the Brussels Regulation, was not England (a question upon which I express no concluded view), I am unable to accept that Brussels Regulation policy considerations are relevant here. The Brussels Regulation is concerned with which court should hear a claim; it has nothing to say on the content of the substantive law applicable to a claim or the extraterritorial application of the ERA.

52. Secondly, it does not seem to me that in a claim such as the present the co-workers' "base" is in any way dispositive. I agree with Simler P in that regard. Not least, the "base" of individuals working internationally may change from time to time. The position may be different when an employee working abroad seeks to invoke the jurisdiction of the ET in an unfair dismissal claim against his/her employer; in such cases, the base of the employer in the UK may well be of importance to or even determinative of the ET's jurisdiction,

53. Thirdly, while it is instructive to note that the principle of co-worker liability only became part of Northern Irish (as distinct from British) law in 2017, given Ms Fearon's working history (essentially outside the UK since 2009), I cannot see that a separate consideration of Northern Irish law is required – or that the position in Northern Irish law would have impacted on Ms Fearon's expectations (even so far as those are known or relevant).

54. *(B) The statutory framework:* It is common ground that there is no authority governing the question of the extraterritorial application of ss. 47B(1A) and s.48(1A) ERA. All parties, however, referred to the statutory framework of the ERA and the line of authority addressing its extraterritorial application in the context of s.94(1), ERA, dealing with unfair dismissal.

55. Intriguingly, as originally enacted, s.196 of the ERA contained provisions governing the application of the Act to employment outside Great Britain; that provision, however, had a "somewhat chequered history" and was subsequently repealed, leaving the territorial ambit of the ERA entirely to the Courts: *Lawson v Serco* [2006] UKHL 3; [2006] ICR 250, at [7] – [8]; *Jeffery v British Council* [2018] EWCA Civ 2253; [2019] IRLR 123, at [2(1)].

56. S.94(1) ERA simply provides that "An employee has the right not to be unfairly dismissed by his employer". As Lord Hoffmann observed in *Lawson v Serco*, at [1], the ERA contains no geographic limitation; read literally, it applied to any individual working under a contract of employment anywhere in the world. Some territorial limitations were therefore to be implied *(ibid)*:

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

57. Turning to the question of territoriality, Lord Hoffmann said this (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. This is why all the parties are agreed that the scope of section 94(1) must have implied territorial limits. More difficult is to say exactly what they are…..section 94(1) provides an employee with a special statutory remedy. Employment is a complex and sui generis relationship, contractual in origin but, once created, having elements of status and capable of having consecutive or simultaneous points of contact with different jurisdictions. So the question of territorial scope is not straightforward. In principle, however, the question is always one of the construction of the construction of section 94(1). As Lord Wilberforce said in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152, 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'."

58. For present purposes, it is of some relevance to note that *Lawson v Serco* gave two examples where s.94(1) might apply to an expatriate employee (at [39] – [40]): first, the employee posted abroad to work for a business conducted in Britain; secondly, the employee working "in a political or social British enclave abroad", especially in the latter example where, although there was a local system of law, "the connection between the employment relationship and the United Kingdom was overwhelmingly stronger".

59. *Duncombe v Secretary of State for Schools* [2011] UKSC 36; [2011] ICR 1312 concerned a British teacher employed by HMG to work at an EU school in Germany. The Supreme Court held that the claimant's employment had such an overwhelmingly close connection with Britain and British law that it was right to conclude that he

should enjoy protection from unfair dismissal pursuant to s.94(1), ERA. Baroness Hale of Richmond JSC (as she then was) observed (at [8]) that it was only "exceptionally" that s.94(1) would 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."

60. Baroness Hale went on (at [16]) to enumerate the combination of factors contributing to the decision of the Supreme Court in that case, including the following:

> "….First, as a sine qua non, their employer was based in Britain; and not just here but the Government of the United Kingdom. This is the closest connection with Great Britain that any employer can have, for it cannot be based anywhere else. Second, they were employed under contracts governed by English law;….. Although this factor is not mentioned in *Lawson v Serco Ltd*, it must be relevant to the expectation of each party as to the protection which the employees would enjoy. The law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by Parliament in order to fill a well known gap in the protection offered by the common law to those whose contracts of employment were ended. Third, they were employed in international enclaves, having no particular connection with the countries in which they happened to be situated, and governed by international agreements between the participating states…."

61. In *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1; [2012] ICR 389, it was held that s.94(1) applied to an employee who lived in Great Britain but travelled to and from his employment in Libya where he worked for 28 days at a time for a company based near Aberdeen. Lord Hope of Craighead DPSC took as the starting point (at [27]) that the employment relationship must have "a stronger connection with Great Britain than with the foreign country where the employee works". The general rule was that the place of employment was decisive but that was "not an absolute rule" and (*ibid*) particular regard was to be had to the "nature and circumstances of employment". Lord Hope went on to say (at [28] – [29]):

> "…It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.

> …… The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain."

62. With respect, though further citation is unnecessary, a particularly valuable summary of this line of authority was furnished by Underhill LJ in *Jeffery v British Council (supra),* at [2].

63. Importantly, when considering the connections between an employment and any competing systems of law, "…the relative merits" of those systems play no part in the inquiry: Rimer LJ, in *Dhunna v CreditSights Ltd* [2014] EWCA Civ 1238; [2015] ICR 105, at [40]. The object of the exercise was simply to decide whether an employee is able to except himself from the general rule hinging on the place of employment by demonstrating the strength of his connections with Great Britain and British employment law (*ibid*).

64. Turning from unfair dismissal to the introduction of co-worker liability for whistleblowing detriment, achieved by way of the *Enterprise and Regulatory Reform Act 2013* ("ERRA") amending s.47B, the rationale was explained by Underhill LJ in *Timis v Osipov* [2018] EWCA Civ 2321, at [28] – [31]. In a nutshell, the protection for "protected disclosures" was only hitherto available in respect of acts or omissions by the employer. There had been no provision making it unlawful for fellow workers to victimise whistleblowers. In its current version s.47B(1A) (as amended) makes individual co-workers personally liable for acts of whistleblower detriment done by them. As Underhill LJ observed (at [30](1)):

> "….Although the principal purpose of the legislation may have been to provide a route to vicarious liability on the part of the employer, in order to fill the lacuna identified in *Fecitt* [i.e., *Fecitt v NHS Manchester* [2011] EWCA Civ 1190; [2012] ICR 372], the effect nevertheless is that the individual is rendered liable in his or her own right, irrespective of the liability of the employer…."

A form of vicarious liability was thus created for the employer but (at [30(2)] it was not absolute, as shown by the statutory defence for the employer contained in s.47B(1D) ERA (set out above).

65. For present purposes, the statutory framework suggests the following conclusions:

i) At least so far as concerns s.94(1), ERA is ordinarily territorial in its application. The UK, as Lord Hoffmann trenchantly observed, rarely purports to legislate for the whole world. Ordinarily, therefore, where the place of employment is outside the UK, s.94(1) will not apply. Accordingly, the place of employment is generally decisive as to whether the employee enjoys the protection of s.94(1).

ii) That said, the general rule of territoriality (hinging on the place of employment) is capable of being displaced where the strength of the connection with Great Britain and British employment law is sufficient to do so. One such example would be a British enclave abroad, where the "British connection" outweighed any links to the local law. Accordingly, as a limiting factor on the application of ERA, territoriality is not necessarily decisive.

iii) An assessment of the strength of connection with Great Britain and British employment law is one of fact and degree calling for an intense consideration of the factual reality of the employment in question. There is no hard and fast rule; the application of the principle/s hinges on the individual circumstances.

iv) Whatever its impact on the vicarious liability of the employer, s.47B(1A) gives rise to personal liability on the part of the co-worker for whistleblowing detriment. Whereas s.94(1) is solely concerned with the relationship between employer and employee, an application of the "British connection" test in the context of s.47B(1A) must, at the least, be adapted to include consideration of the relationship between the co-workers in question. This final reflection leads directly to the fundamental divide between the parties in the appeal before us.

66. *(C) The fundamental divide:* As became clear in the course of argument, the fundamental divide between the FCO stance and that of the Respondent concerned the correct point of focus: was it (1) the EULEX co-worker relationships between the Respondent and the co-workers; or (2) the relationships between the Respondent, on the one hand and the co-workers on the other, with the FCO, their common employer? The FCO contended for the former; the Respondent for the latter. The significance of the view taken of this divide cannot be over-stated; in my judgment, it is determinative of much of what follows.

67. Attractively though Mr Milsom advanced his submissions as to the importance of the "common parentage of the FCO" to the "sibling" relationship between the Respondent and the co-workers, its true significance strikes me as more modest. While it is *necessary* for the Respondent and the co-workers to have a common employer to found a claim under s.47B(1A) ERA, the fact that there is a common employer is plainly not *sufficient* to determine that s.47B(1A) applies extraterritorially to the relationship between them so as to confer jurisdiction on the ET to entertain the claim under s.48(1A).

68. Instead, given the duality (noted earlier) in any secondment, the key to the correct point of focus lies in the factual reality of the relationships with which we are concerned.

69. In my judgment, it is here that Mr Collins, for the FCO, had much the better of the argument. On the facts, although, as Mr Milsom contended, the respective secondments were indeed predicated upon a continuing relationship between the individuals concerned and the FCO, their common employment by the FCO was little more than happenstance. Thus:

i) The Respondent and co-workers had never worked together in the UK; they worked together solely in Kosovo.

ii) The Respondent and the co-workers were seconded to EULEX separately not together; that they were in post together at all was a matter of coincidence.

iii) The Respondent and the co-workers were only brought into contact at all through their performance of their respective EULEX roles at theatre level - not by reason of the FCO being their common employer. They were in Kosovo, to act (as set out above) in the "sole interest of the mission" and, so far as concerned the Respondent, to report to and take lawful instructions from her EULEX manager. Thus, Mr Ratel became the Respondent's line manager in succession to a line manager who was not a FCO secondee, and himself reported to a Czech line manager, also not a FCO secondee. Ms Fearon was Special Adviser to the EULEX HoM; her predecessor was French; as EJ Wade held, when advising the HoM, Ms Fearon saw herself "as loyal to EULEX first and FCO second".

iv) No doubt but for their employment and secondment by the FCO none of the Respondent and the co-workers would have been in Kosovo at all; but the key relationship upon which the Respondent's whistleblower detriment claim against the co-workers turns arose not by reason of the FCO being their common employer but instead from the conduct of their EULEX roles.

v) In the circumstances, although the contracts of employment of the Respondent and the co-workers were governed by English law and although they all owed duties to HMG, the centre of gravity of the relevant relationship between them is to be found in the theatre level performance of their EULEX roles, rather than their underlying FCO contracts of employment.

70. *(D) Did s.47B(1A) apply extraterritorially to the relationship between the Respondent and co-workers as seconded EULEX staff members?* For the reasons given, the correct point of focus must be the relationship between the Respondent and the co-workers as seconded EULEX staff members. In Lord Wilberforce's formulation, cited by Lord Hoffmann in *Lawson v Serco*, at [6], the question is whether this EULEX relationship was within the "…legislative grasp, or intendment…" of s.47B(1A)?

71. In my judgment, the answer to this question must be "no". Put starkly, EULEX was an international mission, not a UK mission. In EJ Wade's words (ET judgment, at [54]), the base of the Respondent and the co-workers was "…the international world that was EULEX not the territorial bubble of the UK". Insofar as EULEX was an enclave at all, it was an international enclave not a UK enclave – and, unlike the position in *Duncombe (supra)*, there was no or no sufficient reason for the default option here to be found in British employment law (as discussed further below).

72. It is therefore apparent that the Respondent's case needed to surmount two hurdles to warrant the application of s.47B(1A), ERA to the relationship between the Respondent and her co-workers as seconded EULEX staff members. The first was extraterritoriality, itself calling for an exceptional application of the statute. Yet, by itself, extraterritoriality is not necessarily insuperable. Thus, had the Mission been a purely UK mission ("UKLEX", as referred to in argument), it might well have come within the legislative grasp. The second and cumulative hurdle, was the need to establish a sufficient connection between the common engagement of the Respondent

and the co-workers at EULEX, and British employment law. To my mind that British connection is not or, at most, insufficiently, established. Essentially the same factors which led to the conclusion that the correct point of focus was the EULEX co-worker relationship between the Respondent and the co-workers, underline the international – not UK – setting of EULEX and tell against the establishment of any such connection and the ERA legislative grasp extending to this relationship. In the event, the combination of extraterritoriality and the international setting of EULEX strike me as fatal to the Respondent's case.

73. This conclusion may well be sufficient to decide the appeal in favour of the FCO and the co-workers. It is reinforced by a consideration of the matter from a variety of other perspectives, to which I next turn.

74. *(E) Rome II:* Having thus far focused on the relevant *relationship,* confirmation of, or at least support for, this conclusion is furnished by a consideration of the *choice of law* of the tort in question (if tort there was) based on the application of *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations* ("Rome II"). As already established, the relationship between the Respondent and the co-workers was non-contractual; accordingly, Rome II is applicable. No agreement was made as to choice of law under Art. 14, Rome II. It follows that the governing provision under Rome II is Art. 4, which furnishes the "General Rule".

75. Art. 4 provides as follows:

> "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the county or countries in which the indirect consequences of that event occur.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

76. Plainly, Art. 4.1 points to Kosovan law rather than English law. Plainly too, on the facts already outlined, Art. 4.2 does not point to British law; neither Mr Ratel nor Ms Fearon had their "habitual residence" in the UK even if that could be said of the Respondent; indeed, if the Respondent was, at the time, habitually resident in Kosovo,

it may be that Art. 4.2 would likewise point to Kosovan law, though it is unnecessary to reach a firm conclusion in this regard. It follows that the only route to English law under Rome II would be by way of Art. 4.3.

77. Art. 4.3 requires a still more searching inquiry than that already undertaken, in that the test is whether the "tort/delict" is "*manifestly*" more closely connected with "a country other than that indicated" in Arts. 4.1 or 4.2. The tort here (of whistleblowing detriment), if tort there was, must be found in the context of the relationship between the Respondent and the co-workers as seconded EULEX staff members. Realistically, it is only by the route of that relationship that English (or British) law could be the governing law of the tort/delict under consideration. However, the analysis already conducted strongly suggests that the EULEX co-worker relationship furnishes an inadequate basis for underpinning such an Art. 4.3 argument. If so, then by this approach as well the foundation for the extraterritorial application of s.47B(1A) ERA disappears; there can be no such foundation unless the governing law of the tort in question was English (or British). As will be recollected, the crucial linkage between choice of law and extraterritorial jurisdiction was illuminated by Lord Hoffmann in *Lawson v Serco*, at [1] (set out above).

78. *(F) Practical consequences:* Any proposed solution to the present issue must, at the least, take into account the practical consequences. These too support the conclusion favoured above.

79. First, given the absence of an international consensus on whistleblowing, all the more so as to the personal liability of co-workers – the UK may properly be described as an outlier in this area – I accept Mr Collins' submission that applying the ERA whistleblowing provisions extraterritorially would cut across the COC scheme and create real difficulties for the administration of EULEX. The Court would be applying a UK policy solution to an international mission, which the UK does not control. As already posited and faced with a disclosure of information prohibited by COC, the HoM could be faced with an assortment of conflicting national employment legislation. Any such problems would be compounded by the consideration that the ERA provisions could apply only between FCO secondees working in EULEX but not between them and other EULEX staff. It is no answer to say that some tensions between the seconding state and the international mission may be unavoidable, for instance an instruction given by a EULEX manager to a British secondee involving contravention of the Official Secrets Act. Even assuming that example to be realistic, there can be no warrant for enlarging the scope for such tensions.

80. Secondly, I am not persuaded that a decision against the extraterritorial application of the ERA whistleblowing protection provisions would result in the regressive and "seismic" consequences for the pursuit of other claims, such as discrimination or sexual harassment claims, as suggested by Mr Milsom. Suffice to say that (as indeed appears from the COC) in these other areas there is a far greater international consensus than there is in respect of whistleblowing, so that the risk of conflict between different national systems of law is significantly reduced. Nor am I dissuaded from this conclusion by the decision of this Court in *R (Hottak) v Foreign Secretary* [2016] EWCA Civ 438; [2016] 1 WLR 3791, upon which Mr Milsom placed considerable reliance. Contrary, with respect, to Mr Milsom's submissions, *Hottak* cannot be read as authority equating the territorial sphere of application of Part 5 of the *Equality Act 2010* ("the Equality Act") with the ERA whistleblowing protection

provisions – so that curtailing the extraterritorial scope of the latter entails a like curtailment of the former. *Hottak* said nothing whatever about the ERA whistleblowing protections provisions. Properly understood, Sir Colin Rimer in *Hottak* (at [47]) went no further than rejecting the submission that the Equality Act anti-discrimination provisions must have a wider scope than the ERA unfair dismissal provisions, by reason of the intrinsic nature of the anti-discrimination provisions (said to go "to the very essence of man's humanity to man").

81. Thirdly, there is practical force in the FCO concern that the EAT judgment would expose it to liability for matters over which it had no control – in that it had no power to implement, unilaterally and effectively, a whistleblowing policy for EULEX based on British law. There would be obvious ramifications for UK secondees to other international missions from the FCO and other government departments and agencies. In response, Mr Milsom sought to rely on other answers to these sensitivities: namely, by way of control mechanisms, comprised of non-justiciability, immunity and the statutory defence contained in s.47B(1D), ERA. With respect, I did not find these persuasive. The development of the law has been such that non-justiciability arguments have only the most limited scope. So too, claims to immunity are at best a recipe for litigation. The statutory defence for the employer (S.47B(1D)) is, no doubt, of use but necessarily entails the time and cost of defending litigation rather than disposing of it at the outset. Moreover, it should not be overlooked that the statutory defence does not extend to the individual co-workers, facing personal liability for such claims.

82. *(G) Competing systems of law:* An argument for the extraterritorial application of s.47B(1A) is the contention that the relationship between the Respondent and the co-workers has no connection with any system of law other than English law; indeed, such an argument found favour with Simler P (EAT judgment, at [121]). With respect, I cannot agree. For my part, the relationship in question has a closer connection with EU law, alternatively (as a fallback) Kosovan law, than it does with English law. Crucially, as Mr Collins submitted, it is the strength of the *connection* which matters – not the strength of the *protection*: see, *Dhunna (supra).*

83. For the reasons already analysed, the focal point is the relationship between the Respondent and the co-workers in their work for the EULEX mission, rather than their relationships with the FCO, their happenstance common (if somewhat distant) employer. In my view, the EULEX co-worker relationship has a much closer connection with EU law, rather than English (or British) law. As set out above, the conduct of (the seconded) EULEX staff members in the theatre level performance of their secondments was governed by the COC, including a chain of command for reporting malpractice or misconduct, together with detailed provision as to disciplinary proceedings. Nor did the COC exist in a legal vacuum. As held in *H v Council of the European Union and Others* (Case C-455/14P) [2017] 1 CMLR 673, at [55], the (EU) General Court has jurisdiction to review:

> "….acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions… "

84. Such jurisdiction, which could be invoked by the Respondent and extends to non-contractual claims, is provided by Arts. 256(1), 263 and 268 of the *Treaty on Functioning of the European Union* ("TFEU"). While it may well be that the General Court does not have jurisdiction to entertain claims by the Respondent against the co-workers, that, as it seems to me, is neither here nor there. English (or British) law, as already discussed, is currently an outlier insofar as it provides for personal non-contractual liability of co-workers in respect of whistleblowing detriment. It follows that the Respondent may well be restricted in the General Court to a claim against an EU institution; whether in that regard EULEX has, in the international plane, legal personality (it does not have domestic legal personality, as held by Simler P, EAT judgment at [65]) or whether some other EU institution must be answerable, is not a question which we need or should seek to resolve.

85. Pulling the threads together, it cannot be said that the EULEX relationship between the Respondent and the co-workers has no connection with any system of law other than English (or British) law. Approached as a relationship within an international enclave, it has, in my judgment, a closer connection to EU law; moreover, a complaints and disciplinary procedure is available, backed by the jurisdiction of the General Court. That the remedies available under EU law may not equate to those available under English law is neither here nor there.

86. In all this, I have not overlooked Art. 10.2 of the Joint Action. With respect, I agree with Simler P (EAT judgment, at [118(c)]) and differ from EJ Wade (ET judgment, at [57]) that Art. 10.2 does not give the ET jurisdiction at all. As Simler P put it (*ibid*), Art. 10.2 "attributes responsibility for seconded staff members to the seconding state" (and see further, EAT judgment at [55]). However, given the duality of the secondment arrangements, the question remains as to "responsibility" for what? In my judgment, this question leads back to the fundamental divide already expressed: the distinction between the relationships between secondees and their respective seconding states and the relationships between seconded EULEX staff *inter se* relating to the conduct of the Mission. The former comes within Art. 10.2 and gives rise to claims properly described, in this context, as "linked to the secondment". The latter falls on the other side of the line, outside Art. 10.2 and, in the CJEU's wording in *H*, is correctly categorised as giving rise to "theatre level" questions. It is here that I respectfully part company with Simler P; these latter questions are more closely connected with EU law than English law. Art. 10.2 does no more than emphasise the divide occasioned by the duality of the secondment and underline the sphere of responsibility of the seconding state; it does not point to the relationship between the Respondent and the co-workers being governed by English law, nor does it require any such conclusion.

87. Alternatively, there is necessarily a real connection between EULEX staff member relationships *inter se* and Kosovan law. EULEX operated and solely operated in Kosovo. Seconded EULEX staff members enjoyed only limited privileges and immunities from Kosovan law. The reality of the Kosovan connection is highlighted by COC, paras. 2.1 and 2.2, together with Art. 4.1 (and perhaps Art. 4.2) of Rome II. While EULEX strikes me far more as an international enclave with its own EU governing law (for theatre level matters), if the choice lies between local Kosovan law or extending British law into relationships between the Respondent and the co-workers – at risk to the orderly operation of EULEX, in the event of conflicting

national laws – I would prefer Kosovan law as a fall back. At the least, it would result in a single system of law applying between *all* EULEX staff members with regard to theatre level questions. For reasons already sufficiently canvassed, it is unnecessary to explore the remedies open to the Respondent under Kosovan law.

88. For completeness, I am not deterred from these conclusions as to EU and Kosovan law by Mr Milsom's complaint that such contentions had not been advanced before. Even assuming that Mr Milsom's complaint is well-founded, the evolution of the argument is at least in part attributable to the progress of the litigation in *H (supra)*. Furthermore, no new factual matters have required exploration and, on any view, Art. 10.2 (in whatever context) was very fully explored below. I am therefore wholly satisfied that no prejudice has been occasioned by the consideration on this appeal of the rival "pull" of EU and/or Kosovan law.

89. *(H) The judgments below:* It will be apparent that, although there is much with which I agree in her careful EAT judgment, I am unable, with respect, to uphold Simler P's conclusion as to the application of s.47B(1A), ERA to the EULEX relationship between the Respondent and the co-workers. In particular, I part company with Simler P's analysis at [116], [118] and [119] of the EAT judgment and the priority there given to the common – but entirely separate – employment of the Respondent and the co-workers by the FCO. In my judgment it would not only be anomalous if the scope of the ERA extended to some co-workers but not others – it also has the very real potential to undermine the practical operation of an international mission such as EULEX. To reiterate, a wide variety of possibly conflicting national laws in the whistleblowing detriment area, where there is no international consensus, is inimical to the orderly functioning of EULEX. Further and as already discussed, there are other systems of law with which the relationship between the Respondent and co-workers had a closer connection, than with English law, so that there is neither need nor justification for "defaulting" to English law.

90. It will further be apparent that although I agree with EJ Wade's focus on the "international world that was EULEX" and the conclusion to which she came in the ET judgment, I respectfully differ from her reasoning - insofar as it was founded on the domicile or base of the individuals concerned or on her interpretation of Art. 10.2 of the Joint Action.

OVERALL CONCLUSION

91. In the event, I would allow the appeal of the FCO and the co-workers; reverse the decision of the EAT; restore the decision of the ET; and hold that there is not extraterritorial jurisdiction under the ERA in respect of the whistleblowing detriment claims pursued by the Respondent against the co-workers.

LORD JUSTICE LEWISON :

92. I agree.

LORD JUSTICE SINGH :

93. I also agree.