Appeal No. UKEAT/0237/20/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 11 May 2021
Judgment handed down 25 May 2021

Before

THE HONOURABLE MRS JUSTICE EADY DBE

(SITTING ALONE)

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(1) PARTNERS GROUP (UK) LIMITED
(2) PARTNERS GROUP (USA) INC APPELLANTS

MS M MULUMBA RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID CRAIG QC (of Counsel) MS NAOMI HART (of Counsel) Instructed by: Macfarlanes LLP, 20 Cursitor Street, London EC4A 1LT
For the Respondent	In Person

SUMMARY

TOPIC NUMBER: 30

JURISDICTION – TERRITORIAL SCOPE OF THE EMPLOYMENT RIGHTS ACT 1996 AND THE EQUALITY ACT 2020

The Claimant was a national of the Democratic Republic of Congo who was accepted on to the Second Respondent's Associate Program in the USA. The Second Respondent is a US company and the Claimant's offer stated that her contract was governed by the law of New York and her employment was "at will". As part of the rotational placements under the Program, and once her US work visa expired, the Claimant moved to work for other companies in the group, first in Switzerland and then for the First Respondent in London. She remained, however, an employee of the Second Respondent. When her time on the Associate Program finished, the Claimant was not offered a permanent position but her employment was continued as the Respondents wanted to assist her in maintaining her immigration status in the UK whilst she looked for other work (otherwise she would have had to return to the DRC). During this time, the Claimant made various complaints against the Second Respondent and started proceedings in New York. Subsequently, the Claimant's employment was terminated and she brought proceedings in the ET, under the **Employment Rights Act 1996** and the **Equality Act 2010**, raising various complaints relating to her employment in the US, Switzerland and in Great Britain. Determining whether the Claimant fell within the scope of British statutory employment protection, the ET held that it had jurisdiction to hear the claim. The Respondents appealed.

Held: *allowing the appeal in part*

In its reasoning, the ET had acknowledged that the Claimant's claims pre-dating her move to London were not matters that the ET could determine, albeit they would fall to be considered as part of the background. It was, therefore, wrong for the ET's Judgment to state that "*it does have jurisdiction to hear the claim*" and the Respondents' appeal would be allowed in this respect.

Similarly, having stated that it would not have found that the Claimant fell within the scope of British employment law if simply employed in this jurisdiction on a temporary placement under the Associate Program, it was incumbent upon the ET to state *when* it found that her employment had fallen within the reach of the relevant statutory protections. The appeal was also allowed on this basis.

Although the ET had generally carried out a careful evaluation of the different factors relevant to the question of territorial reach in this case, it had apparently failed to have any regard to the fact that it had been provided that the contract of employment was subject to New York law. That was a potentially relevant factor (*Duncombe v Secretary of State for Children, Schools and Families (No.2)* [2011] ICR 1312 and *Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389 applied), in particular in determining whether the Claimant had sufficient connection to British employment law (see, *obiter*, *Powell v OMV Exploration & Production Ltd* [2014] ICR 63). The failure to take account of this factor had rendered the ET's conclusion unsafe and the Respondents' appeal on this ground would also be allowed.

Whilst the ET had accepted the Respondents' case as to the reason why the Claimant's employment had been continued after she had ceased to be on the Associate Program, it was not bound to find that the lack of permanence to her position in London was fatal to her ability to claim that she fell within the scope of British employment protections. The ET had been entitled to give weight to the length of time the Claimant had been kept on, her integration within the London office and to her inability to move elsewhere (due to her immigration status). The appeal on this wider basis was dismissed.

THE HONOURABLE MRS JUSTICE EADY:

Introduction

1. This appeal concerns the territorial scope of statutory employment protections under the **Employment Rights Act 1996** and the **Equality Act 2010**, sometimes referred to as "territorial jurisdiction". It raises a particular issue as to the need for clarity in defining when an employee's employment first fell within the scope of the relevant protection in a case involving a non-British national, employed by an American company, whose position when working in Great Britain was found to have evolved over time.

2. I refer to the parties as the Claimant and the Respondents (or, as necessary, the First or Second Respondent), as they were before the Employment Tribunal ("the ET"). This is the full hearing of the Respondents' appeal against the Judgment of the London Central ET (Employment Judge Nicolle, sitting alone, at a Preliminary Hearing on 3 and 4 December 2019), sent out to the parties on 14 January 2020. By that Judgment, the ET determined (relevantly) that it had "*jurisdiction to hear the claim*". Specifically, the ET concluded that the Claimant's employment fell within the territorial scope of British statutory employment protections, such that it could proceed to determine her claim. The Respondents have been given permission to appeal against the ET's Judgment on this question.

3. In the proceedings before the ET, the Claimant was represented by solicitors and she appeared by counsel at the preliminary hearing; she has, however, represented herself on this appeal. The Respondents were also represented by counsel before the ET, albeit not by those who currently appear. The ET heard evidence from the Claimant and, for the Respondents, from Christian Truempler, Vice-President of the Entrepreneur Governance team at Partners Group AG

(referred to by the ET as "PG Switzerland"). There was also an agreed bundle of documents and skeleton arguments were produced by both sides.

4. For the purposes of the hearing before me, I also had the benefit of skeleton arguments from the parties, which I was able to read in advance, together with a bundle of authorities, a core bundle and small supplementary bundles provided by each side. At the outset of the hearing, the Claimant sought to renew an application to admit fresh evidence on the appeal; her initial application in this regard having been refused by the EAT Registrar. I refused that application for reasons given orally at the hearing (in summary, applying the test in *Ladd v Marshall* [1954] 1 WLR 1489: (i) with reasonable diligence, the evidence could have been obtained for use at the original hearing, and, in any event, (ii) the Claimant could not show that the evidence would probably have an important influence (even if not decisive) on the result of the case).

The Background

5. The Respondents are part of a global, private markets investment management business. The group is headquartered in Zug, Switzerland and has some twenty offices worldwide. The First Respondent is a company incorporated in the UK; the Second Respondent is incorporated in Delaware USA.

6. The Claimant is a citizen of the Democratic Republic of Congo ("the DRC"). Prior to her employment with the Respondents, she had been educated at higher education establishments and employed in both the UK and the USA.

7. In July 2015, the Claimant successfully applied for employment on the Second Respondent's Associate Program. In her application, the Claimant gave her home address as

being in Fairfax, Virginia and listed her most recent employers as being the World Bank, based in Washington DC, and prior to that eBay and Goldman Sachs in London. As the ET recorded (paragraph 12 of its written reasons), the offer letter from the Second Respondent, dated 10 July 2015, included the following provisions:

> **"Your home region will be the Americas, and you will be a member of the firm's Associate Program;**
>
> **Base annual salary of $120,000;**
>
> **Provision for a discretionary cash bonus at the sole and exclusive discretion of PG USA;**
>
> **Eligibility to participate in Partners Group's Employee Participation Plan with the amount of any reward being at the sole and exclusive discretion of PG USA;**
>
> **Eligible to participate in PG USA 401(k) Retirement Plan;**
>
> **Requirement that must comply with the Company Code of Conduct, Company Handbook and other instructions established for PG USA employees;**
>
> **Provision that employment to be at will; and**
>
> **Provision for arbitration of disputes to include claims under Title VII of the Civil Rights Act of 1964;**
>
> **Provision that the offer letter should be governed, construed and enforced in accordance with the laws of the State of New York."**

8. The Claimant accepted the offer of employment with the Second Respondent on those terms. She also signed receipt of the Second Respondent's Handbook, which included a sexual harassment policy that detailed the bodies to which any complaints should be made as (for New York based employees) the New York State Division of Human Rights and the New York Commission on Human Rights.

9. The Associate Program was intended to last 12-24 months, determined by business requirements, with a series of rotations, each of 3-6 months. The Claimant's first and second placements were in the US, first in San Francisco, from 21 September 2015 to April 2016, and then in New York, from April 2016 to 16 July 2016. On 17 July 2016, the Claimant was moved to Switzerland, where she stayed for two placements before being transferred, at her request, to work in London. Although still employed by the Second Respondent, the Claimant worked in

London, as part of the First Respondent's Infrastructure Investment and Private Market team, from 4 March 2017, until her employment was terminated on 31 August 2018.

10. The Claimant had initially been employed by the Second Respondent under a student visa but this expired on 16 July 2016, at which point she ceased to be eligible to work in the US. The Claimant then worked in Switzerland under a relevant Swiss permit, albeit when she became ill in the autumn of 2016, the Second Respondent assisted her in obtaining a visa to return to the US for treatment, where she remained from 27 October to 26 November 2016. The Claimant then returned to Switzerland where she remained until her transfer to London, where she worked under a tier 2 intra-company transfer graduate trainee visa, which was renewed every three months. The Claimant did not otherwise go back to the US save for a short visit to spend time with her family over the holiday season, between 21 December 2017 and 3 January 2018.

11. Throughout her employment, the Claimant was paid her salary in US dollars to her US bank account. At all times, she was subject to US tax but, as a result of spending more than 183 days in the UK, as of 5 September 2017, she became eligible for UK income tax and was given a notional UK salary of £81,000 for tax purposes. There was some dispute between the parties relating to the Claimant's tax position. It was the Claimant's position that the Respondents had failed to provide her with appropriate support in this regard and she considered that they might have had an ulterior motive in maintaining the existing position, whereby she was treated as an employee of the Second Respondent, seconded to the First Respondent, rather than being localized in Great Britain, as she had requested. Although not expressing a definitive conclusion on this point, the ET allowed that some of the decisions made by the Respondents, relating to the Claimant's position, might have been for the purpose of ensuring that she did not acquire statutory employment protection in Great Britain (ET written reasons, paragraph 80).

12. The Claimant's expenses were also reimbursed in US dollars and paid into her US bank account, and she was provided with a US dollar-dominated corporate AMEX card. As for pension, the Claimant was entitled to make contributions to the Second Respondent's pension plan, although it was her evidence that she only made two such contributions.

13. The Claimant received other benefits, including US life and health insurance. In relation to the latter, initially the Claimant was included in the Second Respondent's health insurance program in the US but was treated as having a change of status for these purposes from the end of July 2016, after which she seems to have been covered by the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), an American health insurance program that allows an eligible employee the continued benefits of health insurance coverage in certain contexts. It was common ground that the Claimant's treatment in the US in October and November 2016 was covered under COBRA, facilitated by the Respondents.

14. When the Claimant moved to London she also received an initial housing allowance from the Second Respondent, paid in US dollars, amounting to approximately £1,000 per month. After the first three months, it appears that the Claimant was then entitled to a stipend equal to the amount that would be incurred in providing her with a corporate flat in Zug, Switzerland; this was consistent with the Claimant being treated as an expatriate on secondment.

15. There was a dispute between the parties as to the Claimant's status in London for up to the last 12 months of her employment. It was the Claimant's position that, up until a meeting on 5 July 2018, she regarded herself as a continuing participant in the Associate Program, with the opportunity of a permanent position. The Respondents contended, however, that it had been

made clear to the Claimant, at a meeting on 31 August 2017, that her employment was only being continued on a good will basis, to provide her with an opportunity to secure alternative employment and obtain longer term immigration status in the UK; the Respondents described this as an "Accommodation Period", the aim of which was to assist the Claimant who wished to avoid any possible risk of having to return to the DRC.

16. The ET considered this issue was potentially relevant to the question of territorial scope, as:

> **"37. … the existence of, what the Respondents term the Accommodation Period, significantly elongated the Claimant's employment in the UK … [and] … whether the Claimant had a genuine expectation of a permanent position of employment with the Respondents during the Accommodation Period is relevant. This relates to whether she should properly be regarded as an employee seconded to the UK for a relatively short duration or in the expectation of a more permanent arrangement."**

17. Essentially accepting the Respondents' case in this regard, the ET concluded that the Claimant would have been aware that her on-going employment in London was outside the normal Associate Program. The Claimant contends the ET did not make a clear finding as to when such a change in her employment status was made and points to the absence of any documentary record of the alleged 31 August 2017 meeting. From the ET's reasoning, however, it is clear it accepted the Respondents' position that the Claimant's employment had continued outside the Associate Program in recognition of the difficulties arising from her immigration status, and that this was known to the Claimant (ET written reasons, paragraphs 37-42).

18. The ET made further findings in relation to the Claimant's employment in London as follows:

(1) At no point was the Claimant "localized" in the UK (that is, transferred to the employment of the First Respondent, which was the relevant local entity within the group), albeit that had been considered by the Respondents in 2016 and 2017 (ET written reasons, paragraphs 43-45).

(2) When working in London, from a regulatory perspective, the Claimant's work was subject to the FCA; she did not undertake any work – and, given her immigration status, would not have been eligible to do so – for US clients. She considered herself fully integrated into the London office and worked more or less exclusively with UK colleagues. (ET written reasons, paragraph 46).

(3) The Claimant was both working and living in the UK; to the extent that she used an address in the USA (including for tax purposes), that was her parents' home, used by the Claimant for convenience; it was not her regular or intended place of abode (ET written reasons, paragraph 47).

19. In early 2018, the Claimant had instructed a New York law firm to act for her in relation to complaints she wished to pursue regarding her employment (in part, these matters are also relied on by the Claimant in the proceedings she has since lodged with the ET). On 3 January 2018, her lawyers wrote to the Second Respondent regarding her complaints, referring to the Claimant as "*currently serving as a Partners Group USA, Inc. Investment Associate*", and, on 23 March 2018, they issued a Charge of Discrimination in the New York Division of Human Rights and New York City Commission on Human Rights. In the New York proceedings, the Second Respondent was named as the Claimant's employer and, at paragraph 7 of the Charge, it was stated that the Claimant had always remained an employee of the Second Respondent, as set forth in her offer letter, with decisions concerning her employment being made in the US. At paragraph 25, the Claimant further asserted protection under Title VII of the US Civil Rights Act 1964. It was the Claimant's case before the ET, however, that she had only initiated the complaint in New York on the advice of her US lawyers.

20. On 27 August 2018, the Second Respondent's lawyers submitted a detailed letter in response to this complaint, in which it was stated that, as a non-citizen working in Europe, the Claimant was not entitled to relief pursuant to Title VII as it did not apply to the employment of "*aliens outside of any State*". The letter went on to assert that the majority – if not all – of the specific allegations of harassment and discrimination made in the Claimant's complaint described conduct that occurred while she was working abroad, not in the US.

21. On 31 August 2018, the New York District Office of the US Equal Employment Opportunity Commission advised the Claimant that her complaint would be dismissed. This was on the basis that, given its limited resources, the Commission would only take on those cases which were most likely to result in findings of violations of the laws it enforced.

22. In the meantime, by letter of 5 July 2018, the Respondents advised the Claimant that her employment would be terminated on 31 August 2018. That letter was signed by representatives of both Respondents, stating that it constituted notice on behalf of each of them.

The ET's Decision and Reasoning

23. The ET considered this was a complex case, concerning an employment relationship that had evolved over the course of the Claimant's employment. It defined the question it had to determine as being:

> **"70. … whether during the Claimant's employment in London … she established a sufficient connection with the UK for the Tribunal to have jurisdiction. …"**

It concluded that she had.

24. In reaching that conclusion, the ET accepted that the Respondents' plea of absence of jurisdiction in the US proceedings did not automatically mean that jurisdiction must exist in an

alternative country: the determination of the existence, or otherwise, of territorial jurisdiction in Britain was not predicated on the existence or absence of jurisdiction in the US (or elsewhere) but was a question to be decided based on tests set out in the relevant case-law (ET written reasons, paragraph 71). In particular, the ET considered the facts of the present case against those in *Fuller v United Healthcare Services Inc* UKEAT/0464/13. That case - on which the Respondents had placed reliance as being largely analogous - had involved an employee based in the US, who had worked in the UK on a two-year placement, and whose employment had been found to be outside the territorial scope of the ET. In the present case, however, the ET considered there were a number of important distinctions from the facts of *Fuller*; specifically:

(1) The Claimant had not maintained her home in the US. Indeed, from 4 March 2017, her home was in London; the US was no longer her "home base", and she had no reason to return there, and, given her immigration status, it was not possible for her to do so (ET written reasons, paragraph 73).

(2) Unlike Mr Fuller, the Claimant did not undertake any significant work outside London after 4 March 2017 and, again, her immigration status would have made any travel outside the UK problematic (ET written reasons, paragraph 74).

(3) It was also relevant that, for the entirety of her employment in London (and at the time of its termination), it was not legally possible for the Claimant to work in the US. There was, therefore, no prospect of her returning to the US in the foreseeable future either at the end of the Associate Program or during the Accommodation Period. That was very different to Mr Fuller's position who, as a US citizen, could return to the US at any time (ET written reasons, paragraph 75).

(4) Whereas Mr Fuller's assignment to the UK had finished before his employment was eventually terminated in the US, the Claimant had been dismissed in the UK whilst still working in London (ET written reasons, paragraph 75).

25. The Respondents had placed significant reliance on the terms of the offer letter sent to the Claimant at the outset of her employment, in particular to the fact that her employment was subject to the provision of US benefits and discretion exercised by the Second Respondent. The ET found, however, that the position as it evolved was a matter of fact to be considered in addition to the originally stated contractual position (ET written reasons, paragraph 76). In this regard, the ET observed that, while in London, the Claimant reported to London based managers and worked with UK Presidents and Vice Presidents in the Infrastructure and Private Markets teams. At various points, the possibility of the Claimant's employment being localized to the UK was considered by the Respondents and it was significant that the letter of dismissal had been signed by representatives of both. As for the determination of discretionary awards under the various incentive-based programs, the ET accepted the Claimant's contention that it was probable that a process of "*global calibration*" existed in this regard, such that the reality – as opposed to the contractually documented position – was that the entitlement to, and amount of, such benefits would have been largely determined, in relation to the Claimant during her time in London, by London or Swiss based employees rather than by employees of the Second Respondent in the US (ET written reasons, paragraph 77).

26. More generally, given that the last 18 months of the Claimant's employment was based exclusively in the UK, the ET was satisfied that it could not be said to have been peripatetic. The ET accepted that the Claimant's location was largely determined by her immigration status and that her employment in London had been significantly extended as a result of the Respondents' wish to assist her, given her immigration status and her wish to avoid returning to the DRC. The determining factor was, however, the fact and duration of the Claimant's employment in London rather than the label placed on it (ET written reasons, paragraph 78).

27. Although the ET accepted there were potential inconsistencies in the Claimant's case before it, as compared with what she had said in her New York complaint, these were not seen as conclusive as to the underlying employment relationship and how that had evolved. The ET took the view that the parties' respective positions in the New York proceedings were not "*in themselves material factors militating in favour of UK jurisdiction*":

> **"79. … In reaching my decision I have considered the case solely on the basis of the overriding factual matrix and the question of whether the Claimant had a sufficiently strong connection with Great Britain to give rise to the jurisdiction of the tribunal. …"**

28. It was the ET's finding that the Claimant "*was a US employee based in the UK for work and domestic purposes*". The ET accepted that many elements of the Claimant's employment pointed to a continuing level of connection with the US, but it considered it relevant that a number of these factors were determined by the Respondents and that some of those determinations were arguably made with a view to reducing the Claimant's level of connection with the UK, possibly with the express purpose of her not acquiring statutory employment protections within the UK. In the circumstances, the ET had focussed on the underlying reality of the situation (ET written reasons, paragraph 80).

29. The ET also found that the Claimant's employment in London was not consistent with a normal short, three- (or six-) month rotation under the Associate Program: "*if not immediately … during the course of her 18-month period during which she lived and worked in London [the Claimant's position] had evolved to one where UK statutory employment protection applied"* (ET written reasons, paragraph 81). That was so notwithstanding the fact that the Claimant remained an employee of the Second Respondent throughout her employment (ET written reasons, paragraph 82). The ET was clear: the identity of the Claimant's employer was not determinative of the question of jurisdiction and, by the time her employment was terminated,

her workplace was in Great Britain, as (1) the Claimant had lived and worked exclusively in London for the last 18 months of her employment; (2) she had worked almost exclusively on UK matters (and not only matters relating to US business or clients) during her time in London; and (3) she did not return to the US either in advance of, or subsequent to, the termination of her employment (ET written reasons, paragraph 83). The ET summed up its conclusion on this issue as follows:

> **"85. … the Tribunal has jurisdiction to hear the various complaints particularised by the Claimant under the ERA and the Equality Act on the basis that her time in London did not constitute a casual, short-term secondment but rather that the terms and duration of the Claimant's time in London is consistent with UK statutory employment protection applying."**

30. As for whether the allegations made by the Claimant that pre-dated her employment in London should still be considered as potentially relevant background matters, the ET noted that the course of events as alleged by the Claimant involved a significant commonality between business units and personnel, holding:

> **"87. … whilst I find that those allegations pre-dating the commencement of the Claimant's employment in London on 4 March 2017 are not individual matters upon which the tribunal could make determinations they are nevertheless potentially relevant as background matters, tending to support or weaken, either sides' case as to what occurred later in London."**

31. Against those findings, the Judgment of the ET was stated to be that: "*it does have jurisdiction to hear the claim*".

The Application for Reconsideration

32. By letter of 21 January 2020, those acting for the Respondents applied to the ET for reconsideration of its Judgment, in particular as to which claims had been found to fall within the scope of the statutory protections in issue, and the precise date on which territorial jurisdiction had been established in relation to the Claimant's employment in London. In setting out the grounds for this application, the Respondents explained as follows:

> **"5.1 The Tribunal has held at §1 that it has jurisdiction to hear "the claim". However, the Tribunal will recall that the claim in fact contains a number of separate claims and, on its**

> **findings, it appears to the Respondents that certain of those claims are to be admitted only as background evidence.**
>
> **…**
>
> **6 The Respondents understand, therefore, that the issues stated at paragraphs 6(a)-(e) of the Agreed List of Issues [all issues relating to the Claimant's employment either in the US or in Switzerland and pre-dating her move to London] on any view fall to be dismissed for want of jurisdiction (although may be raised as background facts).**
>
> **7 The Respondents consider that there is a possible lack of clarity in relation to the conclusion that that "if not immediately, that during the course of her 18-month period during which she lived and worked in London evolved to one where UK statutory employment protection applied." …**
>
> **…**
>
> **8 The Respondents invite the Tribunal to confirm that the relevant date that the Claimant established jurisdiction was, accordingly, the date of (or immediately prior to the date of) her dismissal on 31 August 2018.**
>
> **9 Alternatively, the Respondents invite the Tribunal to reconsider its conclusion and to reach the conclusion set out in the preceding paragraph …**
>
> **…**
>
> **10 The Tribunal is therefore invited to specify the date where (on the balance of probabilities) the evolution that the Tribunal has found had reached a position whereby statutory employment protection in fact arose. For example, the Respondents invite the Tribunal to specify that the relevant date was (e.g.) 3 January 2018."**

33. The ET refused the application for reconsideration and declined to provide the further clarification sought, explaining its position as follows (adopting the same paragraph numbering as used in the application):

> **"5.1 I consider that the question as to what constitute "background" matters has been addressed at paragraph 87 and I do not consider that this requires further elaboration or reconsideration.**
>
> **5.2 to 5.4 and 6. These paragraphs represent observations on the Judgement, with which I concur, rather than grounds for reconsideration.**
>
> **7 to 7.2. These paragraphs represent observations on the Judgement, rather than grounds for reconsideration.**
>
> **8. I do not consider it necessary, or in accordance with the determination of the existence of territorial jurisdiction, for the Judgement to specify a date at which UK territorial jurisdiction was first attained. I consider this to be a wholly artificial exercise and is not one which would be a consistent with the principles enunciated in the relevant case law …**
>
> **9 to 9.4 and 10. I consider the that this had been addressed in my response to 8 above. …"**

34. The ET having declined to further clarify its Judgment further, the Respondents have effectively pursued these questions by way of this appeal.

The Relevant Legal Principles

35. Although the ET's Judgment stated its conclusion that it had "jurisdiction" to hear the Claimant's claim, the issue it had to determine might be better expressed as one of legislative territorial scope or reach; as the learned editors of *Harvey on Industrial Relations and Employment Law* have observed (see PIII [1]): "*Territorial jurisdiction concerns the reach of British legislation and the span of the authority given by Parliament to British courts and tribunals*".

36. The statutory provisions that underpin the various claims relevant to this case (contained within the **Employment Rights Act 1996** ("the ERA") and the **Equality Act 2010** ("the EqA")) make no express provision regarding the territorial reach of the rights and obligations in issue. The approach that courts and tribunals should adopt in determining questions of territorial reach in respect of British statutory employment rights in this context has been considered in a number of cases, including by the House of Lords in *Lawson v Serco Ltd* [2006] ICR 250, by the Supreme Court in *Duncombe v Secretary of State for Children, Schools and Families (No.2)* [2011] ICR 1312 and in *Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389, and – with reference to the **EqA** – by the Court of Appeal in *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] ICR 975. The principles laid down in the case-law were helpfully summarised by Underhill LJ in the combined appeals *Jeffery v British Council; Green v SIG Trading Ltd* [2019] ICR 929, as follows:

> **"(1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then the Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94 (1) of the Act); nor is there any such provision in the Equality Act 2010.**
>
> **(2) The House of Lords held in *Lawson* that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the Act in the cases where an employee works overseas.**
>
> **(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker – that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer – will be subject to the employment law of**

> **the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case-law as "the territorial pull of the place of work". (This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended the Act to apply if they are based in Great Britain.)**
>
> **(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".**
>
> **(5) In *Lawson* Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a "British enclave" abroad. But the decisions of the Supreme Court in *Duncombe* and *Ravat* made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.**
>
> **(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what *Ravat* was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/EU-funded international schools considered in *Duncombe*.**
>
> **(7) The same principles have been held by this Court to apply to the territorial reach of the 2010 Act: see *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438, [2016] ICR 975."**

37. In a footnote to sub-paragraph (4) of this summary, Underhill LJ observed that:

> **"The authorities fairly consistently refer to factors connecting the employment "with Great Britain *and* British employment law"; but these two elements largely overlap, and I will sometimes for brevity refer simply to the former."**

38. The need to keep in mind the connection with British employment law is, however, emphasised by the Respondents in the current appeal. In particular, they place reliance on the fact that the Claimant's contractual terms (as set out in the offer letter of 10 July 2015) were stated to be governed by New York law, a factor that, as Baroness Hale recognised in *Duncombe*, will be relevant to the expectation of the parties as to the protection that would apply (see per Baroness Hale at paragraph 16 *Duncombe*).

39. Whilst such a provision cannot be determinative - parties cannot opt in or out of the territorial reach of British statutory employment protection simply by contractual agreement – this is not an irrelevant consideration; as Lord Hope of Craighead DPSC stated in *Ravat*:

> **"32. … The question whether the tribunal had jurisdiction will always depend on whether it can be held that Parliament can reasonably be taken to have intended that an employee in the claimant's position should have the right to take his claim to an employment tribunal. But, as this is a question of fact and degree, factors such as any assurance that the employer may have given to the employee and the way the employment relationship is then handled in practice must play a part in the assessment."**

Going on to observe, on the facts of that case:

> **"33. The assurances that were given in the claimant's case were made in response to his understandable concern that his position under British employment law might be compromised by his assignment to Libya. The documentation he was given indicated that it was the employer's intention that the relationship should be governed by British employment law. This was borne out in practice, as matters relating to the termination of his employment were handled by the employer's human resources department in Aberdeen. This all fits first into a pattern, which points quite strongly to British employment law as the system with which his employment had the closest connection."**

40. Specifically, it has been suggested that the parties' contractual choice of governing law might be of particular relevance when considering the question whether there is sufficient connection with British employment law: as Langstaff P observed (albeit *obiter*) in *Powell v OMB Exploration & Production Ltd* [2014] ICR 63:

> **"56. If his focus had been on … the question of connection with English/British employment law, the judge would have been bound to take account of the fact that the parties had agreed that the law would not apply to the contract. They had agreed that the course of the United Kingdom would have no jurisdiction. Those are relevant considerations."**

41. Unlike the lead cases of *Lawson, Duncombe* and *Ravat*, the present case does not involve a British worker who is employed abroad. The Claimant is a national of the DRC, employed by a US company, who came to work in London after initially being employed in the US and Switzerland. In such a case, the circumstances need not be truly exceptional before a connection with the system of law in Great Britain can be identified; as Elias LJ noted in *Bates van Winklehof v Clyde & Co LLP* [2012] ICR 883:

> **"98. All that is required is that the tribunal should satisfy itself that the connection is, to use Lord Hope DPSC's words [in *Ravat*], "sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim.""**

42. Location within Great Britain is not, however, determinative, as was found in the case of *Fuller v United Healthcare Services Inc* UKEAT/0464/13. Mr Fuller was a US citizen, employed by a US company, who took up the role of Managing Director for a UK subsidiary company based in London. Applying the principles derived from the case-law (as summarised above), the ET concluded that (I précis) whilst the fact that Mr Fuller ordinarily worked in Great Britain gave rise to a territorial pull, that was not determinative; having regard to all the circumstances:

> **"Overwhelmingly the strongest connection, both in the deliberate intention of the parties to the employment relationship, as contractually expressed, and in the factual outworkings (sic) of that contract was to the United States." (see as cited at paragraph 18 of the EAT's Judgment in *Fuller*).**

43. The EAT upheld the ET's decision in *Fuller*, observing that, following the guidance in *Ravat*, all the circumstances had to be considered, which included (but were not limited to):

> **"42. … the terms of the contract, the applicable law, the place of performance of the work, and the living arrangements of the employee."**

And noting:

> **"Only once these facts have been ascertained can the ET stand back and consider what connection if any there is to Great Britain, and importantly, with British employment law."**

44. In *Fuller*, the ET had found that the parties had entered into a contract that had "*an overwhelmingly close connection with the USA*" (EAT Judgment, paragraph 42). The ET did not, however, make the mistake of just considering the contractual position (and see *Todd v British Midland Airways* [1978] IRLR 370, where Lord Denning MR demonstrated an early appreciation of the fact that the terms of an employment contract might not be conclusive in this regard: "*You have to go by the conduct of the parties and the way they have been operating the contract*."), but found that the terms agreed between the parties also reflected the reality of the situation. Dismissing Mr Fuller's appeal against the ET's decision, the EAT held:

> **"44. … in the light of the findings in fact concerning the nature of the contract and the claimant's initial and continuing connection with the USA, it seems to me that it cannot be said that his employment relationship with his American employer has a strong relationship with the UK and UK employment law."**

45. Although the facts of the case will be for the ET to determine, whether or not there is sufficient connection to a particular country, and to the laws of that jurisdiction, to overcome the territorial pull of the place of work requires an evaluative judgement to be made on the basis of the underlying facts. That evaluation is a matter of law, albeit that it involves an exercise of judgement with which an appellate tribunal will not interfere unless:

> **"136. … [the ET] took into account matters it should not have taken in to account or failed to take into account matters is should have taken into account or made some error or was otherwise wrong." See per Longmore LJ in *Jeffery*.**

46. In cases where the employee moves between different countries, the ET'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, per Rimer LJ at paragraph 43). 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. Thus in *Tradition Securities and Futures SA v X and anor* [2009] ICR the EAT upheld the employer's argument that the right to bring a discrimination claim before an employment tribunal must be addressed by reference to the Claimant's situation at the time of the alleged discrimination. In that case, the employees' complaints relating to events that had occurred during their employment in Paris remained outside the territorial reach of British employment law notwithstanding the fact that they were able to pursue complaints in relation to conduct that was alleged to have taken place later, after they had moved to work in London.

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) **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 ET retrospectively (see per Bean J at paragraph 19, *Tradition Securities*).

The Parties' Submissions

The Respondents' Case

48. For the Respondents it was first contended that the ET erred in law by failing to dismiss the claim in so far as it related to acts arising *before* the Claimant's placement in London. A number of the Claimant's allegations related to events or acts said to have taken place when she was working in the US or in Switzerland, before she had done any work in Great Britain; parliament could not have intended the relevant statutory provisions to apply to a person in the Claimant's position, prior to her carrying out any work in Great Britain and absent any connection with Great Britain or British employment law (*Tradition Securities*). To the extent that the ET's Judgment - stating that it had "*jurisdiction to hear the Claimant's claim*" - was asserting jurisdiction in respect of matters alleged to have taken place prior to her move to London, that was plainly wrong. It was also inconsistent with the ET's own observation (at paragraph 87 of its reasons) that these were "*not individual matters upon which the tribunal could make determinations [albeit] they are nevertheless potentially relevant as background matters, …*"

49. By the second ground of appeal, the Respondents contended that, even in relation to the period post-dating the Claimant's move to London, the ET further erred by failing to take into account that the governing law of the Claimant's contract of employment, as set out in the offer letter, was New York law. At the very least that was a relevant factor, but the ET had failed to

refer to this, or to the fact that the Claimant's employment was "*at will*". The only context in which reference was made to the contract was in the passing mention to pay and benefits; even when referring to the proceedings brought by the Claimant in New York, the ET had failed to consider the contractual position and what this said about the parties' intentions and expectations.

50. Third, the Respondents argued that, in any event, the Judgment was wrong as a matter of law as the ET ought properly to have held that it lacked jurisdiction to consider any of the Claimant's claims even after the commencement of her placement in London. In particular, the ET had failed to give adequate regard to: (1) the choice of New York law as the governing law of the contract; (2) the regime put in place for the resolution of disputes (in the US, and by arbitration); (3) the Claimant's initial attempt to pursue claims in the US; (4) the fact that the Second Respondent continued to employ the Claimant in London beyond her 3-month rotation only to assist her and there was no prospect of her being offered a permanent role.

51. Moreover, although the ET considered the case of *Fuller*, it did so: (1) without regard to the similarity in the written terms of the offer letter in both cases; (2) absent any regard to the governing law; (3) without proper regard to the Claimant's decision to bring proceedings in New York in 2018, which (adopting the words of Baroness Hale in *Duncombe*) reflected the parties' expectation that the protection she would enjoy would be that conferred under New York law; (4) with undue emphasis on the Claimant's immigration status, which had no bearing on whether her employment was sufficiently connected with Great Britain and with British employment law, especially as the Claimant's prolonged employment in London was for the purpose of allowing her to avoid returning to the DRC and not because she had any other connection with Great Britain; (5) without regard to what it had itself identified as relevant, i.e. whether the Claimant

had a genuine expectation of a permanent position with the Respondent during the Accommodation Period (see paragraph 37 of the ET's written reasons).

52. By the fourth and final ground of appeal, the Respondents contended that, even if the ET was entitled to find it had jurisdiction to hear some part of the Claimant's claim arising from the period of her employment in London, it erred by failing to identify clearly when that jurisdiction was established. In particular, the ET had failed to identify any periods of the Claimant's employment in London falling outside its jurisdiction despite the potential existence of such periods being clear on the face of the reasons (see, in particular, the ET's observation that British statutory employment protection had not applied "*immediately*" to the Claimant on her move to London, and that it would not have found that "*UK jurisdiction applied*" to an assignment on rotation under the Associate Program (paragraph 81, written reasons)).

The Claimant's Position

53. The Claimant resists the appeal. She contends that her move to London was always understood to be an indefinite move, not a temporary visit. That was clear given her immigration status: as the Respondents were aware from the start, her US student work authorisation was for 10 months and this had been part of the discussion from the outset, with (as the Claimant contended) London being discussed even at that stage. Moreover, the Claimant had roots in London, having studied at the LSE and worked at the London offices of Goldman Sachs and eBay (although she had also worked at the World Bank in Washington DC, that had been a student internship). Her move to London was more than merely a temporary placement, as the Respondents had emphasised in their response to the proceedings in New York. The Claimant contended that the ET's Judgment had thus to be seen in that context.

54. Turning to the grounds of appeal, in respect of the first ground and the Respondents' attempt to separate out matters that had occurred before her move to London, the Claimant contended there was a connection between those events and with the later incidents in London: the people involved had a connection to London and certain of the events of which she complained related to her work in the UK, although they had occurred before she moved to London. These were all matters to which the ET had had regard and it had been entitled to reach the conclusion it did on this basis. More specifically, the ET had been right to refuse to reconsider this issue. This was ultimately a matter of case management and it would not have been consistent with the overriding objective for the ET to (effectively) strike out elements of the claim when it understood that all matters were interrelated and would need to be considered at the full merits hearing.

55. As for the objection (raised by the second ground of appeal) that the ET had failed to take into account the governing law of the contract, as specified in the offer letter, the Claimant pointed out that this had not been a matter of negotiation: the terms were offered by the Respondents to those entering the Associate Program but did not mean that there was only one place where employees could bring claims notwithstanding their place of work. In any event, as the ET had recognised, it was important to look at how the employment relationship had developed rather than hold the Claimant to the offer letter, which could not foresee the immigration issues that subsequently arose; ultimately the Claimant's work authorisations had dictated where she was employed and that was relevant to the application of employment protections and she had thereby acquired rights under British law.

56. In addressing the more general objections raised by the third ground of appeal, the Claimant did not accept that the ET had made a clear finding of fact as to the start of what the

Respondents called the Accommodation Period. The only documentation that existed to corroborate this was created after the Claimant had first made a complaint. Acknowledging that the EAT was bound by the ET's findings of fact on this point (in particular, as recorded at paragraph 42 of the written reasons), the Claimant did not accept this amounted to a complete acceptance of the Respondents' case and she contended that there was other documentation suggesting that, even after the Respondents were saying the Accommodation Period had commenced, she was still considered to be on the Associate Program by its US head. Moreover, The Claimant argued it was relevant that the ET had accepted that certain of the Respondents' actions could be seen as done with a view to reducing her level of connection with the UK (see paragraph 80, written reasons). Further, there were a number of facts that the ET had permissibly concluded pointed to a connection with Great Britain and British employment law; these had included the Respondents' response in the New York proceedings (which could be seen as an acknowledgement that the relationship had developed over time and that the offer letter was no longer relevant), and the fact that the dismissal letter had been signed off by representatives from both Respondents.

57. As for the fourth ground of appeal, the Claimant objected that the Respondents were seeking to segment her time during her employment in London and seemed to be saying that the ET should have separated out each claim, addressing the question of jurisdiction individually in each case. That, however, would have been inconsistent with the overriding objective and the ET had been entitled to adopt a different course – allowing that all these matters would have to be considered at the full merits hearing in any event – as a matter of its case management discretion. As for the observations the ET had made regarding how the Claimant's employment had evolved, just because it had said that jurisdiction applied "*if not immediately*" (paragraph 81 of the written reasons) did not mean the ET was finding that she did not have protection from the

beginning of her move to London. That move had been thought through in advance (and it was relevant that she had continued to work in the same part of the business, which did not have a US team) and the caveated language used by the ET simply reflected the dispute between the parties regarding how she came to be moved to London; it was not expressing any wider finding of fact.

58. The ET had been correct on its reconsideration decision to decline to state a date on which territorial jurisdiction commenced: this had been a preliminary hearing and it did not have the full facts and was right not to limit the Claimant's interrelated complaints in a way that would have amounted to a pre-emptive strike-out of parts of her claim.

Discussion and Conclusions

59. In the ET claim that commenced these proceedings, lodged on 28 January 2019, the Claimant made a number of complaints of various forms of unlawful discrimination, harassment and victimisation, and of having suffered detriments by reason of having made protected disclosures in the public interest; she also claimed automatic unfair dismissal as a result of having made such protected disclosures, and pursued a claim of "ordinary" unfair dismissal. By the time of the Preliminary Hearing before the ET in December 2019, the parties had agreed a list of issues, which made clear that the Claimant's claims related to events that occurred: (i) in the course of her employment before she arrived in Great Britain; (ii) whilst she was in Great Britain but before (on the Respondents' case) the Accommodation Period began in August 2017; and (iii) during the Accommodation Period, up to and including the termination of her employment.

60. The first objection raised by the appeal is that, by stating (in its formal Judgment) that it had "*jurisdiction to hear the claim*", the ET failed to distinguish between those parts of "*the claim*" that related to the Claimant's employment in Great Britain and those that arose when she

was employed in the US or Switzerland, when she had no connection with this jurisdiction at all. In resisting the appeal, the Claimant has sought to suggest that, in fact, she always had a connection with Great Britain, and this had been recognized from the outset of her employment with the Second Respondent, and her move to London always anticipated. That, however, is not a characterisation of the Claimant's pre-London employment that is reflected in the ET's findings of fact. Moreover, the distinction between the Claimant's employment before and after her move to London was clearly recognized by her counsel at the preliminary hearing, who is recorded as having argued, in relation to events prior to the Claimant's move to London, that:

> **"… whilst there may not be jurisdiction for the tribunal to determine such allegations they should nevertheless be considered as "background" material relevant to those complaints which occurred whilst the Claimant was based in the UK. …" (see paragraph 67 of the ET's written reasons).**

61. It is also a distinction the ET itself acknowledged, at paragraph 87 of its written reasons; specifically finding that "*those allegations pre-dating the commencement of the Claimant's employment in London on 4 March 2018 are not individual matters upon which the tribunal could make determinations …*".

62. Given that finding, the ET's Judgment ought to have made clear that its jurisdiction could not extend to those claims that pre-dated the Claimant's move to London; those matters fell outside the reach of British statutory employment protections, even if they might be relevant background to later claims relating to events occurring in this country. The Claimant says, however, that this is not a point of substance, and the ET was entitled to decline to clarify the position on the application for reconsideration. The difficulty is, however, that the Judgment represents the ET's formal decision; to the extent that it relates to the entirety of the claim, it leaves it open to argument that those matters pre-dating the Claimant's moved to London fall within the ET's jurisdiction but, as the ET's reasoning makes clear, that does not represent the finding it made. Although the ET's answer to the application for reconsideration referred the

A Respondents to paragraph 87 of the written reasons, stating this was not a matter that required further "*elaboration*", that did not address the difficulty: the ET's own Judgment failed to reflect the finding it had plainly intended to make.

B

63. It is trite law that an appeal lies against a Judgment, not the reasons given for that Judgment (see per HHJ Serota QC in *Wolfe v North Middlesex University Hospital NHS Trust* [2015] ICR 960 at paragraphs 89-92). Here the ET's written reasons correctly stated the position

C but its Judgment did not. That was an error of law and the Respondents' first ground of appeal should therefore be allowed.

D 64. It is next convenient to consider the point raised by the Respondent's fourth ground of appeal: if the ET was entitled to find that the Claimant fell within the reach of British employment law when she was working in London, did it nevertheless err in erred in failing to identify *when*

E that occurred? The question arises because the ET's reasons do not suggest it found that the Claimant fell within the territorial reach of British employment protections immediately upon her move to London but the point is never expressly addressed and there is no finding that states when the Claimant fell within the scope of the statutes she sought to rely on.

F

65. What is clear is that the ET saw the employment relationship in this case as one that "*evolved*" over time (paragraph 70 of the written reasons), and it stated it would not have found

G a sufficient connection had the Claimant moved to London merely on a three-, or six-, month rotation as part of the Associate Program (paragraph 81). The difficulty is that neither party had suggested that the Claimant had moved to London on any other basis: on the Respondents' case,

H she had moved off the Associate Program on 31 August 2018; on the Claimant's case, she had never left it. The ET apparently accepted the Respondents' case in this regard (see paragraph 42

of the written reasons) and seemed to acknowledge that this would mean that her initial employment in London did not have the relevant connection: see its suggestion that British statutory employment protections might not have applied "*immediately*" (written reasons, paragraph 81). If, however, the Claimant's employment in London did not "*immediately*" fall within the scope of British employment law, the obvious question is: when did it do so?

66. The ET again declined to clarify the position in this regard on the application for reconsideration, stating that this would be "*a wholly artificial exercise*". I respectfully disagree. The ET's conclusion on the issue of territorial jurisdiction makes clear that it was satisfied that there came a time when the Claimant had sufficient connection with Great Britain and British employment law, so as to fall within the scope of the relevant statutory protections, notwithstanding the fact that she was a foreign national, employed by a US company, who had initially moved to work in London on a rotational assignment as part of a US Program of such temporary placements. The identification of that time – the apparent change in the Claimant's position – was potentially relevant to determining which of the various claims made in these proceedings fell to be determined by the ET. By failing to specify when the Claimant fell within the scope of British employment law, the ET failed to complete the task required of it; it was an error of law not to determine this question and the fourth ground of appeal is therefore also upheld.

67. By the remaining grounds of appeal (grounds two and three), the Respondents seek to challenge the ET's substantive finding that any part of the Claimant's employment fell within the territorial reach of the **ERA** or **EqA**. In particular, they say that the ET erred by failing to ask itself whether the Claimant had sufficient connection not only with Great Britain but also with British employment law. Moreover, in considering that second part of the test laid down in

Duncombe and *Ravat*, the Respondents contend the ET would have been bound to have regard to the fact that the governing law of the Claimant's contract of employment was stated to be New York law and her employment was expressly said to be "*at will*": its failure to apply that part of the test, and to have regard to those matters, was an error of law and undermined the ET's evaluative judgement of the various factors relevant in this case.

68. More than that, however, the Respondents say that the ET failed to give proper regard to the various factors that pointed away from a connection with Great Britain and British employment law. In this respect, the Respondents point to the ET's express acknowledgement that "*whether the Claimant had a genuine expectation of a permanent position of employment with the Respondents during the Accommodation Period is relevant*" (ET's written reasons, paragraph 37). Given the ET's acceptance of the Respondents' case on the Accommodation Period, the Respondents say that it could only have concluded that the Claimant never did have any expectation of a permanent position throughout her period of employment in London. That being so, the Respondents contend that the ET ought properly to have found that the Claimant never developed sufficient connection to fall within the scope of British employment protection.

69. Although the ET's written reasons certainly suggest it accepted the Respondents' case on the Accommodation Period, its conclusions are somewhat more nuanced than this argument allows. Whilst it found that the Claimant would have been aware that her on-going employment in London was outside the Associate Program (written reasons, paragraph 42), it did not make a clear finding as to whether she might still have held out hope to be kept on in some permanent capacity. In this regard, it is relevant to note that the length of time this additional period of employment was allowed to continue plainly weighed with the ET, as did the fact that, during that time, on the ETs findings, the Claimant was fully integrated into the London office, with no

continuing connection with the US. To a large extent, as the ET found, that was due to the Claimant's immigration status, but that does not undermine the force of the point. The fact was that the Claimant could not return to the US and, having moved off the Associate Program, there was no expectation that she could move to work for the Second Respondent in some other jurisdiction.

70. More broadly, the ET's reasoning generally evinces a careful evaluation of the factors for and against a connection with Great Britain and British employment law in this case. Thus, it took into account the fact that the Claimant had initially sought to pursue proceedings in New York, which had included complaints that also featured in her claim in this jurisdiction. Having observed that the Respondents' position in those proceedings might also be seen to be inconsistent with their arguments in this case, the ET permissibly concluded that these matters could not be determinative and that its focus should be on the reality of the position as it found it to be.

71. The one caveat to this description of the ET's evaluation relates, however to the absence of any reference to the law under which the Claimant's contract of employment was governed. Although this was recorded in the ET's findings of fact (see paragraph 12 of the written reasons), it does not then feature in the subsequent assessment of the different factors which feed into the ET's judgement and I consider there is force in the Respondents' criticism in this regard. The Respondents also point to the ET's apparent failure to expressly refer to the need for a connection with British employment law (not just with Great Britain), but I do not infer that the ET necessarily lost sight of this aspect of the test. Although it adopted the shorthand of referring to "*sufficient connection with the UK*", the ET had expressly reminded itself of both the need for a connection with Great Britain *and* with British employment law when it had set out the question it had to address as identified in *Ravat* (see paragraph 61 of the written reasons). In answering

that second part of the question, however, it was relevant to consider the parties' expectations, as might be demonstrated by the choice of governing law under the contract. That is not to say that the ET was bound to find that a reference in 2015 to New York law being the relevant governing law, and to this being employment "*at will*", continued to represent the reality of the position during the Claimant's employment in London in 2017/2018. It was not, however, a point that could simply be ignored, and the Respondents were entitled to point to the New York proceedings in 2018 as supporting their contention that the Claimant still considered this provision represented the reality of the employment relationship: that it was one that fell within the scope of New York employment law rather than that of this jurisdiction.

72. This is not a case (as was, for example, the position in *Green v SIG Trading Ltd* (reported alongside *Jeffery v British Council* [2018] EWCA Civ 2253, [2018] ICR 929) where the ET had referred to the contractual, governing law, provision when setting out the factors it needed to balance in this case (see *Green v SIG* at paragraph 95)). Rather (and in this respect demonstrating greater similarity with the position in *Jeffery v British Council*, see paragraph 71), the most that can be said is that the ET merely recorded the governing law provision as part of the factual background; there is no indication that it then returned to this point to consider its potential relevance when carrying out the evaluative judgement required in this case.

73. For those reasons, whilst I do not accept the wider criticisms made by ground 3, I am persuaded that the ET erred in its approach as contended by ground 2. The fact that contract was stated to be subject to the law of New York was a potentially relevant (albeit not determinative) factor, in particular when considering whether there was a sufficiently strong connection with British employment law. By failing to take any account of that factor, the ET erred in its approach and its evaluative judgement was rendered unsafe.

Disposal

74. Having allowed the appeal on ground 1, I am satisfied that the ET's finding, at paragraph 87 of the written reasons, permits of only one answer: in relation to those claims relating to matters pre-dating her move to London, the Claimant did not fall within the territorial scope of the **ERA** or the **EqA** and the ET would, therefore, not have jurisdiction to determine those claims.

75. I also allow the appeal on grounds 2 and 4, but dismiss ground 3.

76. Given my conclusions on grounds 2 and 4, I consider the appropriate course is for this matter to be remitted to the ET for further consideration. Specifically, the ET is to reconsider its decision taking into account the fact that the governing law of the Claimant's contract had been stated to be that of New York. If, having regard to that fact, the ET were to conclude that no part of the Claimant's employment fell within the territorial scope of the **ERA** or **EqA**, that would necessarily be an end of the matter; the entirety of the claims would fall to be dismissed. If, however, the ET were to maintain its conclusion that the Claimant's employment, when in London, evolved so as to establish the necessary connection with Great Britain and with British employment law, it should state *when* it found that to have occurred.

77. Neither party has raised any objection to this matter being remitted to the same ET for reconsideration and, if that is still practicable, I consider that is the appropriate course. Although some time has passed since the preliminary hearing, the ET's findings of fact have substantially been left intact and this is not a case where it was suggested that the decision was totally flawed or that there is any question as to the ET's professionalism. The disposal of the appeal requires

that the decision be reconsidered, and the original ET is best placed to undertake that task if at all possible.