

ENGLAND AND WALES / JUDGMENT

Clyde & Co LLP & Anor v Bates Van Winkelhof [2012] EWCA Civ 1207 (26 September 2012) [2012] EWCA Civ 1207

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Case No: A2/2012/1161/EATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM the EMPLOYMENT APPEAL TRIBUNAL

HIS HONOUR JUDGE PETER CLARK

UKEAT/0568/11/RN and UKEAT/0168/12/RN

Royal Courts of Justice

Strand, London, WC2A 2LL

26/09/2012

B e f o r e :

LORD JUSTICE LLOYD

LORD JUSTICE RICHARDS

and

LORD JUSTICE ELIAS

Between:

CLYDE & CO LLP (1)

JOHN MORRIS (2)

Appellants

- and -

KRISTA BATES VAN WINKELHOF

Respondent

Mr Andrew Stafford QC and Mr Chris Quinn (instructed by Clyde & Co) for the Appellants

Mr Thomas Linden QC and Mr David Craig (instructed by Mishcon de Reya) for the Respondent

Hearing date : 18 July 2012

HTML VERSION OF JUDGMENT

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Lord Justice Elias :

Can a member of a limited liability partnership be a worker within the meaning of Section 230 of the Employment Rights Act 1996? That is the question of principle which arises in this case. The second issue arising is whether, on the facts, the Tribunal had jurisdiction to hear the claims advanced by the claimant notwithstanding that she spent the majority of her time working abroad.

The background.

Ms Bates Van Winkelhof, whom I shall call the claimant although she is the respondent to this appeal, is an English qualified solicitor. She worked for a number of firms in London before joining Shadbolt and Co LLP ("Shadbolts"), a UK firm, in 2005. Initially she was employed as an associate pursuant to a contract of employment and was hired specifically for the purpose of moving to Tanzania in order to develop Shadbolts' relationship with a Tanzanian law firm, FK Law. At that time the claimant was married to a Dutch national and she and her husband wished to bring up their son in Tanzania. Her contract with Shadbolts specified that she was to be working on secondment at FK Law's offices. In addition to her contract with Shadbolts she had a separate employment contract with FK Law, which was necessary to comply with Tanzanian law.

In early 2009 Shadbolts terminated its joint venture agreement with FK Law and entered into a new agreement with a different Tanzanian law firm, Ako Law. The claimant became engaged with that firm on essentially the same basis as she had been with FK Law.

The claimant purchased a flat in London in August 2009 which the Tribunal found she had intended to acquire for her own use, although from time to time she rented it out on short term lets.

The first appellant, a firm of solicitors, ("the appellant") is a limited liability partnership ("LLP") registered under the Limited Liability Partnership Act 2000. It was keen to recruit the claimant and to exploit her African links. She was offered a membership of the LLP as an equity member, but conditional upon the firm taking on certain parts of Shadbolts' business. She was told that senior equity partner membership would be proposed once favourable results from the joint venture with Ako Law had been demonstrated. The appellant did acquire part of Shadbolts' practice and the claimant duly became an equity member.

She signed a deed of adherence on 1 February 2010. The other parties to the deed were the LLP itself which in law has a legal status separate from its members, and each of the members individually. The agreement was governed by English law. It provided that the claimant would be bound by the terms of the appellant's members' agreement. This required, amongst other matters, that except with consent in writing, each member should devote his or her full time and attention to the business and would not be engaged or interested in any other business or profession, and should be just and faithful to the LLP in all transactions relating to the business.

The claimant's remuneration was calculated in a complex way. She was paid annually £103,000.00 as a profit share of the partnership; \$85000, which continued a payment she had received from Shadbolts attributed to her employment with Ako Law; and 20% of the profits of the joint venture. She paid National Insurance contributions in England, but tax was paid in Tanzania. This was because although she worked part of the time in London it was not sufficiently frequent to trigger any obligation to pay UK tax.

She worked principally but not exclusively in Tanzania. It was agreed that she would return to London about six times a year and she would spend approximately two weeks in the UK on each occasion. In fact from 1 February 2010 to 1 January 2011 she spent 100 days in London, 78 in the London office and 22 for personal reasons. Although her work was substantially for the Tanzanian operation, she did some work for the London office. She had an office base and access to a secretary when working in London. She was in various ways held out to be a partner of the appellant.

The source of her complaints is that on 23 November 2010 she reported that the managing partner of Ako Law had been involved in money laundering and had paid bribes both to secure work and to affect the outcome of cases. She was dismissed by Ako Law on 25 November and suspended by the appellant the following day. There was an investigation which culminated in her being expelled as a member on 13 January 2011.

She brought two claims against the firm and one against Mr Morris, a senior equity member directly involved in her expulsion.

First, she brought, solely against the firm what is colloquially known as a whistle blowing complaint pursuant to Section 47B of the Employment Rights Act 1996, alleging that she had suffered a number of detriments, in particular being expelled as a member, on the grounds that she had made protected disclosures in respect of the senior partner of Ako Law.

Second, she contended with respect to both appellants that she had been subject to unlawful sex discrimination in that a male partner would not have been treated in the same way as she was, and/or that her expulsion from the firm was pregnancy related because she had recently informed the firm that she was pregnant. These claims were made pursuant to Section 45 of the Equality Act 2010 and related provisions.

The appellant strongly contests the merits of these claims which have still to be determined. It took two preliminary points which were designed to establish that the Employment Tribunal had no jurisdiction to hear either claim.

First, it contended that the claimant was not a worker as defined by Section 230(3) of the Employment Rights Act and accordingly was not entitled to bring a whistle blowing claim. It is accepted that this would not disqualify her from bringing her discrimination claims because Section 45 of the Equality Act 2010 specifically extends the relevant protection of that Act to partners of limited liability partnerships, just as Section 44 does to partners in partnerships governed by the Partnership Act 1890.

Second, the appellant submitted that the claimant could not bring either claim because she worked primarily outside the jurisdiction in Tanzania. It was asserted that her links with Great Britain are too slender to bring her within the category of workers who can benefit from the rights in issue. The basis of this argument is that neither the Employment Rights Act nor the Equality Act says anything about the territorial scope of the legislation, but various authorities establish that there are implied limits to the reach of the rights conferred by those Acts and it is submitted that these limits operate to bar the claimant because she falls outwith them.

The 'worker' point.

Section 230(3) of the ERA provides:

"In this Act "worker"...means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

- (a) a contract of employment, or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly."

The concept of worker therefore embraces both employees, being persons employed under contracts of employment within limb (a), and a sub-set of those who personally undertake to provide work for another party but do not qualify as employees under limb (a). I will call the latter "limb (b) workers". All employees are necessarily workers as defined, but not all workers are employees.

The significance of the distinction is that many employment rights are conferred only upon employees and therefore limb (b) workers cannot take advantage of them. Other rights are conferred more generally on workers thereby extending the protection beyond employees to include limb (b) workers. These rights include, apart from the right to be protected from suffering a detriment for whistle blowing, the right to basic labour standards in relation to minimum wages, working hours, and protection from unlawful deductions from pay. Many of the rights derived from the EU, such as the right to equal pay and the right not to be discriminated against on certain grounds, also apply to workers widely defined. In that context the domestic legislation has to be read where possible so as to ensure that the right extends to those who fall within the scope of the European concept of worker, which has an autonomous Community meaning: see

Allonby v Accrington and Rossendale College

[2004] ICR 1328

, para 66. I discuss that meaning below.

Given that so many rights are conferred on employees, the law has had to develop principles to distinguish employees from other workers. We are not concerned with the definition of employee in this case. Suffice it to say that amongst the varied tests which have been adopted from time to time, the one which has best stood the test of time is the "control" test, as it is usually described, adopted by McKenna J in the case of

Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance

[1968] 2 QB 497

. This envisages a hierarchical relationship with the employer exercising a degree of control over the activities of the worker.

With the development of rights for workers who are not employees, it has also become necessary to distinguish those who provide work for a business and are sufficiently integrated into it to be treated as workers of that business from those who are essentially working for themselves but who, in the course of carrying on their own business or profession, personally perform work or services for other parties. The statutory definition seeks to catch that distinction by focusing on the need for the other party to the contract to be someone other than the client or customer of a profession or business. This led Langstaff J in

Cotswold Developments Construction Ltd. v Williams

[2006] IRLR 18, para 53 to suggest that the distinction between a limb (b) worker and an independent contractor working on his own account could often be determined by focusing on whether the:

"putative worker actively markets his services as an independent person to the world in general... or whether he is recruited by the principal as an integral part of the principal's operations".

As I observed, giving the judgment of the EAT in

James v Redcats

(Brands) Limited

[2007] ICR 1006

, that will often provide the answer but not in certain difficult cases where the putative worker might not fall within the definition notwithstanding that he does not market his services.

In such cases both domestic and EU authorities have sought to map the boundary between those who fall within the definition of limb (b) and those who do not by focusing on the degree of dependence existing between the putative worker and the employer. In

Byrne Bros (Formwork) Ltd v Baird

[2002] ICR 667

, a case concerning the Working Time Regulations, Mr Recorder Underhill QC, as he then was, said this (para 17(2)):

"The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business ... It is sometimes said that the effect of the exception is that the 1998 Regulations do not extend to the 'genuinely self-employed'; but that is not a particularly helpful formulation since it is unclear how 'genuine' self-employment is to be defined."

He went on to suggest that the degree of independence is critical (para 17(4)):

"Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."

In the

Redcats

case Elias P agreed that "the degree of independence is in large part what one is seeking to identify" (para 48).

The EU has adopted a similar approach when defining the autonomous concept of worker in EU law, but in addition to the notion of dependence it uses the language of subordination. In

Allonby

, which concerned an equal pay claim by a college lecturer who was ostensibly a self-employed independent contractor, the Court of Justice defined the essence of the concept of worker in the following way (paras 67-68):

"67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration see, in relation to free movement of workers, in particular

Lawrie-Blum

... para 17, and

Martinez Sala,

para 32.

... It is clear that the authors of the treaty did not intend that the term 'worker', within the meaning of Article 141(1)EC should include independent providers of services who are not in a relationship of subordination with the person who receives the services"

Allonby

and other decisions of the European Court to like effect which it followed (

Lawrie-Blum v Land Baden-Wurttemberg

(Case C-66/85) [1987] ICR 483 and

Kurz v Land Baden-Wurttemberg

(Case C-188/00)

[2002] ECR I-10691

) were considered by the Supreme Court in

Jivraj v Hashwani

[2011] UK SC 40

[2011] ICR 1004

. In that case the question was whether an agreement which provided that one of a panel of three arbitrators should be a holder of high office within the Ismaili community constituted discrimination on religious grounds, contrary to Regulation 6(1) of the Employment Equality (Religion or Belief) Regulations 2003 which implemented a relevant European Directive. This was so only if the arbitrator could properly be described as an employee within the meaning of the Regulations. The Supreme Court held that he could not. Lord Clarke, with whose judgment Lord Phillips of Worth Matravers, Lord Walker of Gestingthorpe, and Lord Dyson agreed, summarised the effect of the European law principles in the following way (para 27):

"I would accept Mr Davis's submission that the Court of Justice draws a clear distinction between those who are, in substance, employed and those who are "independent providers of services who are not in a relationship of subordination with the person who receives the services."

Lord Clarke held that whether the relationship could properly be described as one of subordination or not required a careful appraisal of the particular facts. Here the arbitrator was not in a subordinate relationship with those to whom he provided his services; in no sense was he subject to their directions as contemplated in paragraph 67 of

Allonby

.

The hearings below.

The employment judge held that the claimant was not a worker and therefore could not pursue the whistle blowing claim. She expressed her conclusion as follows (para 83):

"As an equity member of an LLP the claimant was providing services for the partnership in which she was an active partner as well as being supplied as a consultant with Ako Law. The Tribunal considers therefore the claimant satisfies the first part of the definition of worker contained in section 230(3) of the Employment Rights Act 1996 (ERA), namely that if she worked under any other contract to do or perform personally any work or services for another party to the contract. However, the Tribunal does not find that the claimant satisfies the second part of section 230(3) in that the claimant was an equity member of the first respondent and shared in the profits generated from her work. The Tribunal therefore finds that the claimant was in business in her own right receiving a share of the profits in relation to the work carried out."

The employment judge's observation that the second part of the statutory definition was not met suggests that she must impliedly have concluded that the LLP, as the other party to the contract, was a client or customer of the business or profession carried on by the claimant.

That was plainly how HH Judge Clark understood her decision when he heard the case on appeal and he focused in his judgment on the question whether the LLP was a client or customer. In fact this particular ground for rejecting the claim had not been taken or argued before the employment judge, and so HH Judge Clark held that her decision could not stand for that reason alone. However, both parties accepted that, rather than remit the matter to the Employment Tribunal, the EAT should determine whether the claimant was a worker or not.

HH Judge Clark did so and held that the employment judge had been in error. He recognised that as far as counsels' researches were concerned, the precise issue as to whether a partner or equity member of a limited liability partnership could be a limb (b) worker had never been determined, but he was satisfied that they could be. He cited the observation of Langstaff J in the

Cotswold

case reproduced at para 20 above and continued (para 21):

"In the present case the Claimant was recruited by the First Respondent to join them from Shadbolts. Under the LLP agreement between the Claimant and the First Respondent at clause 24.1, noted by the Judge at paragraph 23 of her Reasons, the Claimant agreed to devote her full-time attention to the business of the First Respondent; indeed, one of the alleged grounds for her expulsion was a breach of clause 24.1. Mr Quinn accepts that she was an integral part of the First Respondent's operation; she, by agreement, precluded herself from offering her professional services to anyone but the First Respondent, let alone the world at large. In these circumstances, it is plain and obvious to me that the exclusion proviso did not apply to her. She was in the subordinate position referred to in

Baird

and again by the Court of Justice of the European Union in

Allonby v Accrington & Rossendale

College

[2004] ICR 1328

, Judgment paragraph 68. The First Respondent was not her client."

The judge therefore concluded that it was impossible to describe the incorporated partnership as the claimant's client or customer (the "exclusion proviso" did not apply, as he put it) and accordingly she fell firmly within the statutory definition of worker. He appears to have considered the issue of subordination in the context of determining whether the LLP was a client or customer rather than as an independent requirement in its own right.

The grounds of appeal.

The appellant now appeals against the EAT's conclusion on two grounds. The first is that the EAT erred in finding that the claimant was in a subordinate position and therefore was a worker within the meaning of the relevant definition. Complaint is made that the EAT made this determination by focusing solely on the fact that she had agreed to devote her time and attention to the business of the LLP and not to work for anyone else. The appellant submits that the EAT should have relied upon other materials which were available to it and which demonstrated that as an equity member the respondent was able to take an active part in the running of the partnership which was at odds with the idea that she was in a subordinate relationship. For example, she was entitled to see draft accounts and to attend meetings at which they were considered; she could see any books of account of the LLP; she could attend meetings at which the partnership budget would be considered; vote when new members were under consideration and so forth. The submission is that when all these factors are weighed in the balance, the finding that she was in a subordinate position with respect to the LLP is unsustainable.

The second ground raises an issue which was not advanced below. The contention is that the claimant could not be a worker because of the effect of Section 4(4) of the Limited Liability Partnership Act 2000. This relates to the employment status of members. It is as follows:

"A member of a limited liability partnership shall not be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership."

The appellant contends that this shifts the focus of the inquiry; instead of asking whether the member is employed by the LLP, the question is whether she would have been so employed had the firm been a partnership with unlimited liability under the 1890 Act. The appellant submits that the claimant would have been neither an employee nor a worker and therefore cannot bring the whistle blowing claim.

A preliminary objection

.

Before considering the merits of the argument, it is necessary to discuss a preliminary objection raised by Mr Linden QC, counsel for the claimant. He submits that we should not hear this argument at all because it is a new point which was not advanced below in either the Employment Tribunal or the EAT. Mr Stafford QC, counsel for the firm, accepts that this is a new point but he says that since it goes to jurisdiction and involves no further findings of fact, the court should hear it.

Mr Linden disputes that this is the case. He says that the application of the section depends upon a finding that the member of the LLP would have been a partner if the firm had not been registered as an LLP, and that in order to determine that question it is necessary to focus on the precise relationship between the claimant and the firm. That was not the subject of evidence below and had that point been in issue at the Employment Tribunal, the respondent would have wanted to adduce evidence about how the particular relationship with the partnership had developed in practice. For example, he notes that although the partnership terms required the payment of capital that had by agreement been waived in her case. There may also be other aspects of the relationship which would need to be considered more fully.

He also referred us to a number of authorities in which the Court of Appeal has held that it should be exceptional for the EAT to allow new points to be taken whether or not new facts need to be found, although if they do that will in most cases constitute an overwhelming factor militating against allowing the point to be run: e.g

Jones v Governing Body of Burdett Coutts School

[1999] ICR 38

, 44 per Robert Walker LJ, followed in

Glennie v Independent Magazines (UK) Ltd

[1999] IRLR 719

para.17 per Laws LJ, and in

Unison v Sheffield City Council

[2006] EWCA Civ 825

,

[2006] IRLR 810

paras 20-21 per Laws LJ.

A fortiori

should that be the case where the point has not been taken in either the Employment Tribunal or the EAT.

In fact in each of these three cases permission to run the new point was refused, but in each it would have been necessary to remit the case for fresh findings of fact to be made had permission been granted. In

Glennie

, Laws LJ, whilst emphasising that the discretion to allow new points should be exercised only exceptionally, recognised that this may be the case where the point goes to jurisdiction and where it involves "a pure or hard edged point of law requiring no or no further factual inquiry."

I would readily accept that if the new argument could not now be determined fairly without further findings of fact, that would dictate that we should not exercise our discretion to hear this new ground, particularly given that the appellants have at all times been legally represented. However, I am satisfied that Mr Linden is mistaken about that. The question is whether under the Partnership Act 1890 the claimant would be a partner. That simply requires an answer to the question whether, by their actions, the parties intended to create a partnership: see

M Young Legal Associates v Zahid

[2006] 1 WLR 2562

. That would be the case where the putative partner is by agreement carrying on a business for the pursuit of profits in common with others.

Zahid

shows that a partner need not be remunerated by reference to profit (although the claimant was) and that it is no bar to being a partner that he does not make any capital contribution, although that may be a factor pointing against finding that a partnership has been created.

I do not think it conceivable that if the practice of Clyde & Co had been carried on by an unincorporated partnership under the Partnership Act instead of by an LLP, the claimant could have asserted, successfully that, notwithstanding that she signed the deed of adherence and bound herself to the members' agreement, she did not become a partner. She has entered into a detailed agreement whereby in place of the arrangement where, under the 1890 Act, each member would be an agent of each other, the members are now all agents of the LLP. She has significant rights of participation in the running of the business and she has been held out in various ways as a member of the firm. Whatever particular arrangements may have been made about her obligation to commit capital to the partnership, the terms of the deed of adherence and the members' agreement to which she has voluntarily become a party make it clear that she would have been treated as a partner if the firm had been operating under the 1890 Act. It is not alleged that the agreements are a sham. So I do not accept that further evidence could put in doubt the answer to that question.

Moreover, in my view this is an important issue of hard edged law which goes to the question whether the tribunal has jurisdiction to hear the claim at all. Furthermore, the merits of the case have not yet been determined so the claimant is not being deprived of the fruits of a substantive remedy in her favour. I would therefore give permission for this point to be argued. It is also one of wider significance than the instant case and I think that the court should consider it. Any prejudice to the claimant can be dealt with by an appropriate costs order

I turn, therefore, to consider what impact Section 4(4) has on the rights of the parties.

The effect of section 4(4).

Section 4(4) is a puzzling section to interpret, not least because read literally it requires the court to ask whether, if the members were partners under the Partnership Act 1890, they would be employees. But it is well established, and indeed common ground at least for the purposes of this appeal, that such partners cannot be employees, as the discussion later in this judgment will demonstrate. So the test becomes meaningless at least as far as employees are concerned. The problem was identified by Rimer LJ, with whose judgment Jackson LJ and Sir Nicholas Wall P agreed, in

Tiffin v Lester Aldridge LLP

[2012] ICR 647

, and he went on to explain how the section should be construed (paras 31-32):

"The drafting of section 4(4) raises problems. Whilst I suspect that the average conscientious self-employed professional or business person commonly regards himself as his hardest master, such perception is inaccurate as a matter of legal principle. That is because in law an individual cannot be an employee of himself. Nor can a partner in a partnership be an employee of the partnership, because it is equally not possible for an individual to be an employee of himself and his co-partners (see

Cowell v. Quilter Goodison Co Ltd and Q. G. Management Services Ltd

[1989] IRLR 392). Unfortunately, the authors of section 4(4) were apparently unaware of this. The subsection is directed to ascertaining whether a particular member (call him A) of an LLP is or is not for any purpose an employee of it. The statutory hypothesis which the subsection requires in order to answer that question is that A and the other members of the LLP 'were partners in a partnership'. That hypothesis, if it is to be read and applied literally, must in every case produce the same answer, namely that A cannot be an employee of the LLP for any purpose. If that had been Parliament's intention when enacting section 4(4), it might just as well have ended the subsection immediately before the word 'unless'. That, however, was plainly not its intention. The subsequent words must be contemplating a practical inquiry that, in particular factual circumstances, will yield a yes or no answer to the question whether a particular member of an LLP is an employee of it. The subsection must, therefore, be interpreted in a way that avoids the absurdity inherent in a literal application of its chosen language so that it can be applied in a practical manner that will achieve the result that I consider it obviously intended. The presumption is that Parliament does not intend to enact legislation whose application results in absurdities, and section 4(4) must therefore be interpreted with that in mind.

In my judgment the way section 4(4) is intended to work is as follows. Subject to the qualification which I mention below, it requires an assumption that the business of the LLP has been carried on in partnership by two or more of its members as partners; and, upon that assumption, an inquiry as to whether or not the person whose status is in question would have been one of such partners. If the answer to that inquiry is that he

would

have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of the LLP. If the answer is that he would

not

have been a partner, there must then be a further inquiry as to whether his relationship with the notional partnership would have been that of an employee. If it would have been, then he will be, or would have been, an employee of the LLP. I consider that it is implicit that the primary source material for the purpose of answering these questions will be the members' agreement although this will not necessarily represent the totality of what may be looked at. The inquiry thus requires a consideration of the circumstances in which a person may become a partner in a partnership under the Partnership Act 1890...."

In that case the member was seeking to bring proceedings for unfair dismissal. This required her to be an employee, and the court held that had this been an unlimited partnership she would have been a partner, which was inconsistent with employee status. So she could not pursue her claim.

The first issue, therefore, is whether, if in the present case there were a partnership under the 1890 Act, the claimant would be a partner. As I have said, in my view there can be no doubt about that. She is plainly pursuing a business for profit in common with others. But a further question then arises. If she would have been a partner, what is the effect of the section? This turns on the construction of the words "employed by the limited liability partnership". Does this mean employed as a worker widely defined i.e covering both limb (a) employees and limb (b) workers? Or do the words simply mean employed as an employee?

If the former is correct, as Mr Stafford contends, then a member of the partnership can only be a limb (b) worker under the 2000 Act if he or she would have been a limb (b) worker under the 1890 Act. By contrast, if the latter is the correct construction, as Mr Linden submits, then although a member could not be an employee unless he had that status under the 1890 Act (and Mr Linden accepts that on the authorities a partner in an 1890 Act partnership could not be an employee) he could be a limb (b) worker irrespective of the position under the 1890 Act. Once he is held to be a limb (b) worker under the 2000 Act, as the EAT concluded in this case, that status is not affected even if he would not have been treated as a limb (b) worker under the 1890 Act. The subsection simply has nothing to say about the status as a limb (b) worker of a member of an LLP and so is wholly irrelevant to that question.

In construing the section, Mr Stafford relies on the fact that Section 230(5) of the Employment Rights Act 1996 provides in terms that for the purposes of that Act the phrase "employed" covers both employees and limb (b) workers and he submits that this is the more natural meaning of the phrase.

Mr Linden contended that this provision does not support Mr Stafford at all; indeed, the fact that Parliament needed to spell out in Sub-section (5) that this was the particular definition being given to the concept of "employed" in that Act suggested that it was not the natural meaning. He says that the usual meaning of the word "employed", absent any further elucidation, is employed as an employee under a contract of service and that Parliament would have framed the section differently had it intended to embrace limb (b) worker status also.

I would accept that focusing simply on the language, the argument is not clear cut, although I would incline towards Mr Stafford's construction on the basis that the wording is ambiguous but Parliament is likely to have had the wider meaning in Section 230(5) in mind when enacting the section. But the language does not provide the only evidence of the meaning. In my judgment, it must be gleaned from the context in which this provision was passed. The intention seems to me to be that whatever the employment status of the partners under the 1890 Act, it should not alter as a result of incorporation. Rights should neither be gained nor lost when partners under the 1890 Act are transformed into members of the LLP under the 2000 Act. On any view Section 4(4) makes it plain that Parliament did not intend to change their status as regards the question whether they are employees under limb (a), as Mr Linden accepts. I can see no logical reason why Parliament would have adopted a different position with respect to the question whether they may be limb (b) workers.

It follows that in my view Mr Stafford's analysis is correct. If the claimant would have been a limb (b) worker had she been a partner under the 1890 Act, she has that status as a member of the LLP; if not, she cannot acquire that status by virtue of being such a member, notwithstanding the incorporation of the LLP itself.

The central question, therefore, becomes whether partners of partnerships formed under the 1890 Act could be limb (b) workers.

The employment status of partners in partnerships under the 1890 Act.

There is no case which has in terms considered the question whether a partner can be a limb (b) worker under the 1996 Act. There are, however, authorities which show that the nature of a partnership is inconsistent with the status of an employee, and Mr Stafford submits that the reasoning of those cases precludes any kind of employment relationship arising.

Mr Linden disputes this and submits that there are material differences between the two forms of status, and that there is nothing inherently incompatible between being both a partner and a limb (b) worker.

The first case in which the employment status of a partner was considered appears to be the Court of Appeal's decision in

Ellis v Joseph Ellis & Co

[1905] 1 KB 324

. In that case a member of a partnership formed for the purpose of working a mine worked in the mine as a working foreman by arrangement with his co-partners. He received weekly wages out of the profits of the business. He suffered a fatal accident working in the mine and his widow thereupon claimed compensation under the Workmen's Compensation Act 1897 from the surviving partners. In order to qualify he had to have been a workman, which was defined broadly in the Act and extended beyond employees strictly defined:

" 'Workman' includes every person who is engaged in an employment to which this Act applies, whether by way of manual labor or otherwise, and whether his agreement is one of service or apprenticeship or otherwise and is expressed or implied, is oral or in writing..."

The relevant question for the Court of Appeal was whether, having regard to his position as one of the partners, the claimant fell within the statutory definition. Could he be regarded as a workman in the employ of the partnership with the other partners being his employer? Lord Collins MR thought that he could not (p328-329):

"The supposition that the deceased man was 'employed', within the meaning of that term as used in the Act, would appear to involve that he, as one of the partners, must be looked upon as occupying the position of being one of his own employers. It seems to me that, when one comes to analyse an arrangement of this kind, namely, one by which a partner himself works, and receives sums which are called wages, it really does not create the relation of employers and

employed, but is, in truth, a mode of adjusting the amount that must be taken to have been contributed to the partnership assets by a partner who has made what is really a contribution in kind, and does not affect his relation to the other partners, which is that of co-adventurer and not employee. Such a partner cannot put himself in the position of not being a partner when he is one, or of being a workman employed, when that position would involve that he would be both employer and employee. The definition of a 'workman' given in the Act might cover a person in such a position, apart from the difficulty that arises from the consideration that he would be his own employer; but that is not conclusive, because the applicability of the Act appears to depend not merely on the question whether the injured man was a workman within the definition given by the Act, but also on the existence of the relation of employer and workman. Sect.1 sub-s.1 provides that, "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." That section appears to me clearly to contemplate a relation between two opposite parties, of whom one is employer and the other employee. It seems to me obvious, when the true position of the deceased is analysed, that he was not such a workman as is contemplated by the Act, and that a person cannot for the purposes of the Act occupy the position of being both employer and employee".

Mathew and Cozens-Hardy LJ were of the same opinion. Mathew LJ stated that it was legally impossible for the same person to occupy the position of being both master and servant, employer and employed. Cozens-Hardy LJ likewise held that "the Act only applies where there is on one side an employer, and on the other side a workman, who are different persons."

It is of note that Lord Collins accepted that focusing simply on the statutory language, the definition of workman might be satisfied. However, the context in which the compensation issue arose was one of employment, and that requires a relationship of employer and worker which is absent where the parties to the relevant contract are partners. Although he does not spell it out, in my view he is implicitly finding that there must be a degree of subordination in the employment relationship which is lacking in the case of partners. The court was not simply focusing on the position of employees. Workers too are in a subordinate relationship with the employer.

A similar analysis was adopted by the Court of Appeal in

Cowell v Quilter Goodison Co Ltd

[1989] IRLR 392. The Court was there faced with a claim for unfair dismissal by an individual who had to demonstrate that he had two years continuous service as an employee within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations. That required the court to consider whether he was an employee during a period when he was an equity partner. Lord Donaldson MR held that he was not (p 393):

"It has been customary in recent years – since the 1960s at least – to eschew the old term 'master and servant', and quite right too. Now we talk about employers and employees and we talk about employment relationship. But it is the terminology, not the relationship which has altered, and it is quite impossible to say, in my judgment, that Mr Cowell was the servant of anybody when he was an equity partner, or that he was the employee of anyone, or that he had any employment relationship with any of the other partners, or perhaps with all the partners, including himself. The firm was not a corporate entity. It had no separate identity. His relationship with the other partners was governed by the concept to which the Partnership Act applies, namely of people who are carrying on business in common with a view to profit, a very well known and well understood relationship in law, and one which is wholly different from the employment relationship."

Lord Donaldson's conclusion is that a partnership is

sui generis

and outwith the context of employment law altogether. Although

Ellis

was not cited, in my view his approach is essentially the same as the Court of Appeal in that case. A partnership under the 1890 Act is not a separate legal entity; hence the partners are all in a contractual relationship with each other in a joint venture, and this is inconsistent with a hierarchical relationship of employer and employee.

Glidewell LJ agreed with Lord Donaldson and in a short judgment observed that the definition of employee under the TUPE Regulations specifically excluded from the definition of employee

"

anyone who provided services under a contract for services". He commented:

"That, in my view, is precisely the position of a normal equity partner. His partnership agreement normally requires him or her to provide his services for the benefit of the partnership".

Lord Justice Farquharson agreed with both judgments.

The claimant understandably puts significant weight on the observation of Glidewell LJ. She contends that in the LLP, the services are being provided to the partnership as an entity, but since they are not being provided to the partnership as a client, the statutory definition of "worker" in Section 230 is satisfied.

As we have seen,

Cowell

was followed by this court in

Tiffin

, Rimer LJ commenting that once it is established that a claimant is a partner, that leaves no scope for any finding that he is also an employee.

In my judgment,

Ellis

and

Cowell

are clear authority for the proposition that a partner in an 1890 Act partnership cannot be a worker. The reasoning in these cases provides no rational basis for distinguishing between employees and limb (b) workers.

There are, in my view, two inter-related reasons identified in the judgments why partners cannot have that status. The first is legal: since the partnership is not a separate legal entity, the parties are in a relationship with each other and accordingly each partner has to be employed, *inter alia*, by himself. He would be both workman and employer which is a legal impossibility.

The second reason is more sociological. The very concept of employment presupposes as a matter of sociological fact a hierarchical relationship whereby the worker is to some extent at least subordinate to the employer. This is the characteristic which underpins the general understanding of what constitutes the essence of an employment relationship. Where the relationship is one of partners in a joint venture, that characteristic is absent. Each partner is agent for the other and is bound by the acts of the other and each partner is both severally and jointly liable for the liabilities of the partners. There is lacking the relationship of service and control which is inherent in both concepts of employee and limb (b) worker. The partnership concept is the antithesis of subordination.

It is true that the contractual arrangements between the parties may, and typically do, confer different powers on different groups of partners. But the essential nature of the relationship with each partner acting as an agent for, and being responsible for the acts of other partners places them outside the sphere of employment relations entirely.

The comments of Glidewell LJ in

Cowell

admittedly on their face lend some support for the proposition that a member should be seen as self employed. But I do not think that they can be read in that way. First, Glidewell LJ specifically agreed with the judgment of Lord Donaldson MR who treated the partnership relationship as lying outside the employment sphere. Second, in my view Glidewell LJ was speaking in commercial rather than legal terms in his description of the role of the partner.

In my judgment, therefore, a member of an LLP who, if it had not been registered as an LLP would have been a partner in an 1890 Act partnership, can be neither an employee nor a limb (b) worker within the meaning of Section 230 of the Employment Rights Act 1996. It follows that the claimant cannot pursue her whistle blowing claim.

Is the partner in a subordinate relationship?

Strictly, the second ground of appeal in relation to the 'worker' issue does not arise. In substance the contention is that even in an LLP the relationship between the member and the LLP itself is still to be located outside the employment sphere. The appellants submit that the Tribunal came to a proper conclusion and that the EAT should not have interfered with it.

In my judgment, there is a powerful case for saying that, focusing solely on the language of Section 230, the terms of the statutory definition of worker were satisfied in this case. Glidewell LJ was surely right to say that a partner is providing services for the partnership and that would be so in commercial terms whether the partnership has limited or unlimited liability. The significance of the incorporation of the registered LLP is that it overcomes the technical problem which faced an 1890 Act partner, namely that he could not be both worker and employer acting on both sides of the contract. There is now a direct contractual relationship between the member and the LLP. Once it is accepted that the member provides services the firm, as Glidewell LJ remarked, the only issue is whether the relationship is properly characterised as an employment one. HH Judge Clark was in my view correct to find that the limited partnership in this case could in no sensible way be said to be either the client or a customer of the claimant. It involves a high degree of artificiality to describe the relationship in those terms. The claimant was fully integrated into the business of the partnership, she was expressly prevented from acting for anyone else, and so the firm was not simply one of her clients. One can readily see why HH Judge Clark reached the conclusion that she was a worker.

But in my opinion the analysis has to be more subtle. The situation is in my view analogous to that which faced the Court of Appeal in the

Ellis

case. As I have noted, Lord Collins MR observed that the terms of the statutory definition might strictly be met, but there was a further requirement underpinning the definition, namely that one must be able to describe the relationship as an employment one, and the equal position of partners negated that conclusion. I think that is really what the employment judge was driving at in this case. She sought to take the member outside the statutory definition by saying that the relationship did not satisfy the second part of the statutory definition, but her real objection was to membership of the limited liability partnership being treated as lying in the field of employment at all.

It seems to me that if this ground of appeal has force, it is in that context. The complaint has to be that underlying the statutory definition of worker is the notion that one party has to be in a subordinate relationship to the other. In so far as the member is in business on her own account,

it is in a joint venture whose essential nature does not change from that of partners in an 1890 Act partnership, even though the duties of the partner are owed to the LLP as a separate legal entity. The LLP cannot properly be described as a client or customer, but neither can it properly be described as an employer of its members.

On this analysis Section 4(4) was strictly unnecessary. Even without that provision, and notwithstanding the fact that limited liability partnerships are separate legal entities which contract in their own right, the essence of the relationship within the LLP is treated as being unchanged from the relationship between the partners of an unlimited liability partnership, and it is not one of employment.

Given the fact that Section 4(4) bites, I do not finally have to resolve this question whether a member of a LLP could be a limb (b) worker but for Section 4(4), and the issue was not argued in quite the way I have analysed it. However, I am inclined to the view that the employment judge was correct. If she were not, it seems to me that the likely outcome would be that each member is a limb (b) worker but also a limb (a) employee, given the degree of integration into the organisation. Yet that would draw no distinction between members and those genuinely employed by the LLP in the normal way. So I would be minded to hold that the member of an LLP would not by virtue of that status alone constitute either an employee or a worker. Whether the member could enter into some separate employment relationship with the partnership, rather in the manner that a company director can do, would be a different question. There would be no employment status arising out of the simple status of member of the firm.

It may be that it was because of the uncertain effect which the creation of LLPs would have on the employment status of members that Parliament thought it appropriate to pass Section 4(4) so as to make the position clear. In my view it has achieved that objective - albeit in a curiously drafted provision - with the result that a member of an LLP cannot be regarded as employed by the LLP either as a worker or an employee by reason of his or her membership alone.

Territorial effect.

I turn to the second ground of appeal, which relates to the question whether the Tribunal was right to conclude that it had jurisdiction to deal with the sex and pregnancy discrimination and whistle blowing claims.

At the time of the hearing before the Employment judge the leading authority was the House of Lords' decision in

Lawson v Serco

[2006] ICR 250

,

2006 UK HL 3

. There were three cases before the court in which employees working abroad made claims for unfair dismissal. The relevant statutory provision in Section 94(1) of the Employment Rights Act 1996 provided that "an employee has the right not to be unfairly dismissed by his employer", and there was no express territorial restriction on those who could seek to take the benefit of that right.

The leading judgment was given by Lord Hoffmann, with whose judgment Lord Woolf, Lord Roger of Earlsferry, Lord Walker of Gestingthorpe, and Baroness Hale of Richmond agreed. Lord Hoffmann confirmed (para 6) that the question of territorial scope, although not straightforward, is always a question of statutory construction. He cited the following observation of Lord Wilberforce in

Clarke 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?"

Lord Hoffmann emphasised that he was not laying down rules but rather principles which would guide tribunals when determining whether in a particular case the tribunal had jurisdiction. He observed that the paradigm case is somebody working in Great Britain at the time of his dismissal, unless on a casual visit, such as a peripatetic worker based elsewhere.

He then considered a test proposed by counsel for one of the employers which was to the following effect (para 36):

"Mr Crow submitted that in principle the test was whether, despite the workplace being abroad, there were other relevant factors so powerful that the employment relationship has a closer connection with Great Britain than with the foreign country where the employee works".

Lord Hoffmann thought this formulation to be too imprecise:

"This may well be a correct description of the cases in which Section 94(1) can exceptionally apply to an employee who works outside Great Britain, but like many accurate statements, it is framed in terms too general to be of practical help. I would also not wish to burden tribunals with inquiry into the systems of labour law of other countries. In my view one should go further and try, without drafting a definition, to identify the characteristics which such exceptional cases would ordinarily have."

Lord Hoffmann then observed that someone working abroad would be very unlikely to fall within the scope of the section unless the employer was based in Great Britain. Even then, the fact that the relationship was "rooted and forged" in the UK would not be sufficient to take it out of the general rule that the place of employment is decisive.

Lord Hoffmann identified certain specific circumstances where the tribunal would have jurisdiction notwithstanding that the employee worked abroad. First there are peripatetic employees who travel around the world but have their base in Great Britain. Then he provided two examples of exceptional cases where a tribunal will have jurisdiction notwithstanding that the whole of the employee's work is performed abroad.

The first consists of employees recruited here and posted abroad but who work for a business in Great Britain such as the foreign correspondent of a British newspaper. The second are expatriate employees of a British employer operating in what, for practical purposes, constitutes an extra-territorial British enclave in a foreign country, such as civilians working in military bases abroad. However, Lord Hoffmann emphasised that there may be a third class of other cases where expatriate employees could fall within the scope of the section provided that they had a similarly strong connection with Great Britain and British employment law as the two examples he provided.

In addition to

Serco

, by the time the case came before the employment judge the Court of Appeal had decided

Ministry of Defence v Wallis

[2011] ICR 617

in which the tribunal was held to have jurisdiction to hear unfair dismissal claims made by employees working full time abroad notwithstanding that they did not neatly fit into either of Lord Hoffmann's exceptions. The claimants were employed wholly outside Great Britain by the Ministry of Defence in the British Section of International Schools. They secured their employment purely because they were spouses of members of the Armed Forces who were posted abroad. Their contracts were governed by English law and their terms and conditions were essentially English. They paid national insurance contributions. Their contracts were found by the employment judge to have sufficient connection with Great Britain to permit the Tribunal to exercise jurisdiction. The judge commented that their employment had "such clear, firm, sound connections with Britain or England that it is appropriate that each claimant should have the protection of English unfair dismissal law". The Court of Appeal (Mummery, Etherton and Elias LJ) agreed with the EAT that the finding of the employment judge was impeccable.

The decision of the Employment judge

.

The employment judge in this case concluded that neither of the first two examples given by Lord Hoffmann was applicable. The first exception did not apply because the claimant was already working in Tanzania when she was recruited by the appellants. The employment judge thought that the relevant question was whether she fell into the third category where the connection was equally as strong. She held that the burden was on the claimant "to show that there were strong

connections with Great Britain such that the Tribunal has jurisdiction to hear the claimant's complaint of sex and pregnancy discrimination".

The employment judge concluded that the connections were of that nature. She described them as "clear, firm, sound connections with Great Britain" which precisely echoes the language of the employment judge in

Wallis

. She identified, amongst other matters, the following ten factors establishing that link:

- (1) she worked at least partly in Great Britain;
- (2) the LLP Agreement was governed by English law;
- (3) she was a member of an LLP which resulted in her agreeing budgets with her partners in London;
- (4) she visited London, for work, on a regular basis;
- (5) she was mainly paid from London;
- (6) all her time recording was done on Clyde & Co's time recording system;
- (7) all invoices generated, whilst put through the Tanzanian law firm, Ako Law, were generated from Great Britain;
- (8) she was provided with administrative support from London (even though she had a secretary in Tanzania);
- (9) she appeared on the Law Society website list of solicitors as a member of Clyde & Co;
- (10) Clyde & Co's press releases detailed her as being a member of Clyde & Co.

Accordingly, she held that the Tribunal had jurisdiction to hear the discrimination claims. (The logic of her analysis meant that the Tribunal would also have had jurisdiction to hear the whistle blowing claim if she had found that the claimant was a limb (b) worker.)

By the time the case came to the Employment Appeal Tribunal there had been two further cases where the

Serco

judgment had been considered by the Supreme Court,

Duncombe v Secretary of State for Children, Schools and Families (No 2)

[2011] UK SC 36

;

[2011] ICR 1312

and

Ravat v Halliburton

Manufacturing Services Limited

[2012] UK SC 1

;

[2012] ICR 389

. In

Duncombe

the claimants were teachers who were employed by the British Government under a contract governed by English law to work in European schools. Baroness Hale of Richmond, giving the judgment of the court, after referring to the speech of Lord Hoffmann in

Serco,

said this (para 8):

"It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections, both with Great Britain and with British employment law than with any other system. 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."

On the facts the claimant was found to be within the jurisdiction. The court also approved of the decision of the Court of Appeal in

Wallis

, pointing out that the facts were similar.

Duncombe

emphasises the broader principle underlying the concept of jurisdiction and emphasises that Lord Hoffmann's examples are just that: practical examples.

Ravat

marks a similar distancing from too rigorous an emphasis on the specific examples given by Lord Hoffmann in favour of the adoption of a broader test. The facts, which graphically reveal the complexities which might arise in global employment relationships, are succinctly summarised in the head note as follows:

"The claimant 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. His employer was an associated company of a United States corporation and he worked in Libya for the benefit of another associated company based in Germany. His employer paid his commuting costs, he was paid in pounds sterling and he paid UK income tax and national insurance. The claimant was assured by his employer that he had the full protection of UK employment law while he was working in Libya. In 2006, a manager in Cairo, who was employed by another associated company, decided to make him redundant. The claimant invoked his employer's grievance procedure, and the grievance hearing, the redundancy consultations and an unsuccessful appeal against dismissal all took place in Aberdeen. The claimant brought a complaint of unfair dismissal, pursuant to section 94(1) of the Employment Rights Act 1996 in an employment tribunal in Scotland. The tribunal held that it had jurisdiction to hear the complaint. The Employment Appeal Tribunal allowed an appeal by the employer. On appeal by the claimant, the Court of Session held that the tribunal did have jurisdiction and it remitted the case to the employment tribunal. "

Lord Hope, in a judgment with which Baroness Hale of Richmond, Lord Browne of Eaton-under-Haywood, Lord Mance and Lord Kerr of Tonaghmore agreed, dismissed the appeal and agreed that on those facts the Tribunal did have jurisdiction. Lord Hope considered that there was more merit in the general principle enunciated by counsel in the

Serco

case (reproduced in para. 79 above) than Lord Hoffmann had done. He said this (para 16):

"Lord Hoffmann's rejection of Mr Crow's test as too general to be of practical help in that context, where it was possible to identify the guiding characteristics more precisely, is understandable. But it is important not to lose sight of the fact that he acknowledged that the principle that Mr Crow had identified might well be a correct description of the cases in which section 94(1) could exceptionally apply to an employee who works outside Great Britain. He also described it as an accurate statement. His reasons for declining to adopt it in the case of the expatriate employees were (1) that it was framed in terms that were too general to be of practical help in their case and (2) that tribunals should not be burdened with inquiry into the systems of labour law of other countries. But I do not see these as reasons for rejecting it in a case such as this which cannot readily be fitted into one or other of Lord Hoffmann's three categories."

Lord Hope then emphasised, as had Lord Hoffmann, that the task of the court is to give effect to what Parliament may reasonably be taken to have intended to be the scope of Section 94. Lord Hope agreed that the fact that the relationship was "rooted and forged" in Great Britain, whilst never unimportant, was not sufficient in itself to take the case out of the general rule that the place of work is determinative of jurisdiction. He added this (para 27):

"... I agree that the starting point needs to be more precisely defined. It is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of Section 94(1) leaves room for some exceptions

where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic employee who is based in Great Britain is one example. The expatriate employee, all of whose service is performed abroad, but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another."

Then he observed:

"28. ... 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 ex-patriate because they not only work but also live outside of Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.

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

Lord Hope also emphasised that since the question is ultimately one of degree, considerable respect must be given to the decision of the Employment Tribunal as the primary fact finder (para 35). In that case he concluded that the Employment Tribunal had been justified in concluding that there was a sufficient connection with Great Britain for the Tribunal to exercise jurisdiction. Although the Employment Tribunal judge had not formulated the appropriate question in quite the right way, nonetheless Lord Hope considered that it was plain from the judge's reasoning that he would have reached the same result if he had applied the right test, and accordingly Lord Hope did not consider it necessary to remit the matter.

His Honour Judge Clark considered these two judgments when hearing the appeal in the present case. He held that the employment judge was plainly entitled to reach the conclusions she did which were wholly consistent with the approach in

Wallis

. He also found that if there had to be a comparative exercise carried out between the two systems of law, so that it needed to be shown that the link with Great Britain was stronger than that with Tanzania, the employment judge would necessarily have reached the same result. Following the lead of Lord Hope in

Ravat

, he held that no remission was necessary and that the employment judge's decision on this point should stand.

The grounds of appeal.

The appellants contend that both the Employment Tribunal and the Employment Appeal Tribunal erred in its approach to the question of jurisdiction. It is submitted that in the light of Lord Hope's judgment it was incumbent on the Tribunal to carry out a comparative exercise in which the factors which pointed towards a connection with Great Britain were compared with the factors pointing in favour of another jurisdiction, in this case Tanzania. It was only if the former plainly outweighed the latter that the Tribunal should exercise jurisdiction.

In this case, submits Mr Stafford, the comparison was simply not made and the case should be remitted to the Employment Tribunal. This is not a case where the answer is so obvious that we would be entitled to reach our own conclusion on the matter one way or the other. There are further findings that the tribunal would have to make before the jurisdiction issue could be properly determined.

I do not accept this submission. The comparative exercise will be appropriate where the appellant is employed wholly abroad. There is then a strong connection with that other jurisdiction and Parliament can be assumed to have intended that in the usual case that jurisdiction, rather than Great Britain, should provide the appropriate system of law. In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force. However, as paragraph 29 of Lord Hope's judgment makes plain, that is not necessary where the applicant lives and/or works for at least part of the time in Great Britain, as is the case here. The territorial attraction is then far from being all one way and the circumstances need not be truly exceptional before the connection with the system of law in Great Britain can be identified. All that is required is that the tribunal should satisfy itself that the connection is, to use Lord Hope's words:

"sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim."

I agree with the claimant that, showing remarkable prescience, this is in essence the question posed by the employment judge here. She asked whether there were "strong connections with Great Britain such that the Tribunal has jurisdiction to hear the [complaints]." Even if, contrary to my view, the question was not quite appropriately framed, His Honour Judge Clark was plainly entitled to conclude, as did Lord Hope in the different circumstances in

Ravat

, that had she asked the right question she would necessarily have come to the same conclusion.

I would therefore dismiss this aspect of the appeal.

Alternative submissions

In the circumstances it is not necessary for me to engage with two alternative submissions of Mr Linden. The first was that as Lord Hoffmann himself pointed out in

Serco

, it does not necessarily follow that all the rights under the 1996 Act should have the same territorial scope, although uniformity of application is desirable in the interests of simplicity. Mr Linden submitted that it is very much in the public interest that disclosure of wrong doing should be encouraged and whistle blowers should be protected. Similarly, with respect to alleged unlawful sex discrimination. This, he submits, should if anything mean that the territorial ambit should be wider for these claims than for unfair dismissal. Although I can see some attraction in that argument, it is difficult to identify in practical terms what looser test could be adopted, unless perhaps the principle adopted was that it would suffice for the employer to be in Great Britain irrespective of where the employee works, and that might be a step too far. In any event it is an argument for another day.

The other submission related solely to the discrimination claims. It was submitted that the Tribunal had jurisdiction to hear these EU derived employment claims by analogy with the approach of the EAT in

Bleuse v MBT Transport Limited

[2008] ICR 488

which was followed by the Court of Appeal in the

Wallis

case. The submission arguably involves an extension of the

Bleuse

principle and we heard virtually no argument on this difficult point. In view of my conclusion on the principal argument, it is not necessary to deal with it and in the circumstances I do not think that it would be sensible to do so.

Disposal.

The appeal succeeds on the worker point but fails on the territoriality point. The consequence is that the claimant can pursue her discrimination claims against both appellants but not the whistle blowing claim.

Lord Justice Richards:

I agree.

Lord Justice Lloyd:

I also agree.

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