Case No: 2207090/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr. Michel Lee**

Respondent: **UBS AG**

Heard at: London Central **On:** 13-15 January 2020
Before: Employment Judge Goodman

Representation
Claimant: Mr. J. Cohen Q.C.
Respondent: Mr. A. Nawbatt Q.C.

PRELIMINARY HEARING

RESERVED JUDGMENT

1. The unfair dismissal and sex discrimination claims are dismissed for want of territorial jurisdiction, whether in English or European law.

2. The tribunal declines to refer the case to the European Court on the basis that the territorial scope of the Equal treatment Directive is not *acte clair*.

3. The preliminary hearing for case management on 14 February 2020 is cancelled.

REASONS

1. The claimant has brought claims against his employer for unfair dismissal and sex discrimination. For 23 of his 25 years of employment he worked outside Britain, and outside the EU, first in Japan and then in Hong Kong. The respondent, a global bank with a branch in London, disputes that an English employment tribunal has jurisdiction to hear his claims. The jurisdiction point was listed for decision as a preliminary issue.

2. To decide the issue, I heard oral evidence from the claimant, Michel Lee, from James Green, a Director of the Investment Bank's Chief Operating Office team, based in London, and from Zeze Chan, Head of Employee Relations for the respondent's Asia Pacific (APAC) region, based in Hong Kong. I was provided with 1500 pages of documents. There was an agreed statement of facts.

3. I read written submissions for each side: the claimant filed an opening note and a supplemental note on closing, the respondent a closing submission. I also heard oral submissions from each. Judgment was reserved for want of time.

Findings of Fact

4. The claimant was born in Reading and is a British citizen. His early schooling was in Hong Kong, and besides his British passport he has a Hong Kong residence card, first issued when he was aged 11. His secondary schooling was in Britain. He has a bachelor's degree from UCL in Physics, Computer Science and Electronics, and a master's degree from Imperial College London in Advanced Information Technology. On leaving university in 1993, he was offered work for the London office of Swiss Bank Corporation, the respondent's predecessor, as a graduate trainee in information systems.

5. In addition to English he speaks Cantonese, Mandarin, Japanese and some French. He lives with his wife, who is Japanese, and their two children, in Hong Kong. He supports his parents, who live in Hong Kong. He also owns property in Japan and Britain.

6. The respondent is global financial services firm headquartered in Switzerland. Its operations span three regions: EMEA (Europe and the Middle East), the Americas, and APAC. Its financial services include an Investment Bank, which from 2013 comprises Corporate Client Solutions (CCS) and Investor Client services (ICS). CCS offers capital raising, M&A and other services to corporate clients. ICS (whose clients are for example, pension funds, money managers and insurers) is divided between Equities, FRC and global research.

7. Within APAC, there are 40 offices and over 8,900 employees. Of these 40, the Hong Kong office has 2,600 employees and its own support services.

8. The claimant started employment on 1 November 1993 in London. He was assigned to the recently established equities derivatives department. He joined the respondent's UK defined benefit pension scheme, and remained a member throughout.

9. On 19 June 1995 the claimant went on international assignment to SBC Japan Ltd (part of Asia Pacific), and continued to be employed by SBC London under a contract governed by English law. The offer of assignment was for three years, but this was extended more than once and in fact he lived and worked substantially in Japan until the end of

December 2006, a period of 11 and a half years.

10. During this period he remained on the London payroll. His salary in Japanese yen was paid into a Hong Kong bank account, and he paid tax in Japan. The respondent assigned KPMG to handle his tax affairs.

11. The location of employment specified in the contract (29 March 1996, SBC Warburg) was London, and he could not be transferred without his agreement. There were further international assignment agreements in 1999 and January 2002 (the respondent was now UBS rather than SBC). In June 2003 he transitioned from international assignee to local employee status in Tokyo, which meant phasing out his assignee benefits, but "in all other respects the contract between UBS and yourself dated 1 February 2002 remains in force". The assignment contract was extended for another two years.

12. In January 2007 he moved on international assignment to UBS AG Hong Kong branch (also in Asia Pacific). A Market Terms Assignment Letter dated 11 December 2006 confirmed this was an international assignment from London to Hong Kong, expected to last until 30 June 2008, "after which you will return to UBS London". There is next a letter of extension dated 3 July 2012, extending the assignment contract for 31 months "until July 2012" (sic). On 7 October 2015 the international assignment contract dated 22 December 2006 was extended for 24 months, until 30 September 2017, "at which time you are currently scheduled to return to London". Finally, by letter 7 August 2017, there was a further extension of 24 months, and the assignment was now to end on or about 30 September 2019, "at which time you are currently scheduled to return to UBS London".

13. That date was not reached, because in March 2018 the claimant was suspended from work, and on 24 July 2018 he was dismissed.

14. The extensions were made in accordance with the respondent's Market Terms Assignment policy. It was guided by their Market Terms Approach, "intended to provide all assignees with monetary compensation which, so far as practically possible, is comparable to that of their host peers in London". It states: "Consistent and fair administration of this policy across all assignees to which it applies is critical to its credibility and effectiveness." Terms could not be cherry picked, and, "This policy is applicable only to those whom UBS decides to transfer to another country on a temporary basis and who are selected at UBS discretion to be eligible for this policy. It is not applicable if employees are being transferred on a permanent basis, where other policies apply". Under the policy there was provision for assistance with immigration, tax advice, language training, travel and relocation expenses. Assignees generally remained on the host country payroll. Holidays were to be notified to the host country and host country public holidays were to be taken, but the annual leave allocation was whichever country had better provision. Working hours were those of the host country. Home country employment contracts, codes of ethics, the employment handbook and employment policies, remained in force.

15. According to the Policy, the duration of assignment was 12-36 months. It could end by repatriation, assignment to another host country, an extension, localisation (to the host country), or termination of employment. Approval was needed from business leaders for any extension. There was provision for a comprehensive review and an approval matrix for any request for policy exception. The claimant was now well over the time envisaged for assignment under the policy, so renewal was an exception.

16. The claimant's move to Hong Kong coincided with a global review of the position of international assignees, (the review was probably a consequence of UBS's massive losses in the US subprime market in 2008-9). In March 2010 regions were asked to initiate discussions with all but the most senior assignees, who were said to be in separate discussions, though not with assignees who were in the UK pension scheme, as planned changes to the scheme, (closure of the defined benefit scheme to new joiners), as yet confidential, were due for consultation later in the year, and "they will not want to leave such a generous pension plan".

17. The claimant was on the Hong Kong list for localisation after 30 June 2010. His local manager confirmed discussion should go ahead with him once the UK pension position was settled, which took some time. In April 2011, a costs comparison showed difficulty equalising his pension, as contributions to the Hong Kong scheme were subject to a cap which was way below the value of his UK scheme. There was further discussion in 2012, and in June 2012, as his manager emailed HR saying: "spoke to him, He's fine". However it was not fine, and localisation was deferred, apparently as his wife was expecting, and his medical insurance cover would be affected. (It should also be noted that in May 2012 he requested paternity leave under the UK policy). In July 2012 he was given the extension letter noted above. A later internal HR email (July 2017) about localising the claimant and another Hong Kong assignee noted: "Michel (the claimant) has had localisation discussions in 2012 and failed. His concerns back then were around his employment rights and protection differences between the two countries". This email also noted that if localised the claimant would have to pay more tax. Other documents show that if the claimant became localised, he could no longer be a member of the UK pension scheme, his pension would be frozen, and he could not rejoin if he later returned to the UK.

18. By the end of 2014 the claimant was on a list of 8 long term investment bank international assignees whom the respondent proposed to keep on assignment terms. The position would be reviewed in two years' time, but with the intention of extending them further at that point. The rationale was:

> "this is a select group of senior APAC based MDs whose existing assignments have now expired. Importantly there is minimal cost differential relative to local status, and continuation of their market terms assignment allows them to maintain home country pension continuity, international health cover, and for the Hong Kong-based

individuals, also maintains the opportunity to claim overseas work day relief. From an administrative perspective the arrangement will also greatly reduce the management time spent in respect of the IA end date review processes".

19. In 2017, as the claimant came up to the end of his current extension, Sam Kendall, the local manager, approved a further extension, on HR recommendation, noting the 2012 conversation about employment protection, and the tax position. The justification given by APAC to Global for the extension was that he had been holding "various important roles to the SPAC businesses", and the extension costs had been minimal. This extension proposal was approved and signed off for Global by Andrea Orcel, Chief Executive of UBS Ltd and UBS AG London Branch.

20. The tribunal notes therefore that the respondent considered him no longer in reality likely to return to the UK, whether to their advantage or his, otherwise they could have dealt with an anomalous assignee by repatriating him. The claimant would be financially disadvantaged by localisation, both in paying more tax, and losing added years in the UK defined benefit scheme, as well as his concern at losing UK employment protection. The only business reason apparent was that the respondent valued his ability and did not want to risk losing him by imposing localisation. Presumably they could have tried to negotiate a buy out, but it cost less to leave things as they were.

<u>Pay and pension in Hong Kong</u>

21. The 2017 Compensation Statement shows that by his final year of employment the claimant received annual salary of HKD (Hong Kong Dollars) 4,500,000, shown to be the equivalent of £330,000 home salary, the United Kingdom being the home country, and Hong Kong the host country. He was also paid a Role Based Allowance (RBA) of HKD 10,500,00, so the sum of the two was more than three times the home salary. In addition, he received an annual incentive payment of HKD 30,000,000, split between an annual discretionary cash award, a discretionary blocked shares award, an equity ownership plan award, and deferred contingent capital plan award. His total compensation was HKD 45,000,000, then worth about £4,569,300. He could elect to have up to half of this paid in his home country; it was said he made no election and it was all paid in Hong Kong, though a letter from UBS to the Hong Kong Inland Revenue of 27 February 2008 states that part of his remuneration is paid into a UK bank account "for ease of administration". .

22. The claimant paid tax in Hong Kong. As an assignee, he claimed for one third of his time outside Hong Kong, so reducing the tax bill in Hong Kong. He did not pay tax or national insurance in the UK. He was never here long enough to be tax resident. He could have paid voluntary NI contributions had he wished.

23. From 2014 the claimant contributed to a compulsory Hong Kong pension scheme, while continuing a member of the non-contributory UK defined benefit scheme. Defined benefit schemes are now very rare in

the private sector, because the large and long-term fall in interest rates caused by quantitative easing policy requires enormous amounts of capital to fund them. For the same reason they are even more valuable than before, when compared to defined contribution schemes.

24. The claimant's contract of employment was governed by English law, and the Market Terms policy confirmed this. When in 2018 the respondent was looking to investigate allegations of misconduct against him, they considered whether to use the English disciplinary policy, or a Hong Kong procedure, and decided to use the English policy on pragmatic grounds that if they did not, any unfair dismissal claim he brought in England would succeed for want of proper process. The investigation and hearing were carried out by Hong Kong personnel using the English procedure. His appeal against dismissal was heard and decided in London. His dismissal reasons referred to breaches of the UK Code of Ethics. (The tribunal does not know if the Hong Kong Code of Ethics differed in any material respect).

25. Regulation. In 2017 the claimant was subject to regulation by the UK Prudential Regulation Authority (PRA) as a Material Risk Taker (MRT) under the EU Capital Requirements Directive 2013. So were some other Hong Kong equities staff who were locally employed. The criterion was that they "speak to clients who book into UBS Ltd…senior front office representatives". He was also identified as a Key Risk Taker for FINMA, the Swiss regulator, UBS being a Swiss company. While in Japan he was licensed with the Japan Securities Dealers Association, and in Hong Kong he was licensed as a Representative Officer with the Securities and Futures Commission there.

The Nature of the Claimant's Work for the Business

26. The claimant's special knowledge has always been in the technically complex and highly valuable area of equity derivative products. These are not traded on any exchange, but sold direct to bank clients. Briefly, and probably overlooking the sophistication and risks of the operation, the bank takes stock from the client company as collateral for a loan to a company, and then in complex ways hedges the risk of the loan going bad and the collateral proving inadequate. If this works, the bank can make a substantial profit, while providing a company with capital it may not otherwise be able to raise. SBC's London branch is one of the few UBS offices to handle equity derivatives. The risks are complex, and London has the expertise to run sophisticated risk management technology, counterparty risk management, effective operational procedures, and sufficient financial/regulatory capital to act as dealing counterparty.

27. The claimant was recruited to develop the business initially because of his strong qualitative academic background. At the time London was keen to expand its client base for equity derivatives beyond the UK and Europe, and because of his language skills he was assigned to develop the Asian client base, starting with the London offices of Japanese banks and brokers, and other London banks and brokers with access to clients

in Asia. His move to Tokyo in 1995 was to an office that at the time focused on listed equity brokerage only. His task was to prospect for Asia-based clients for equity derivatives products from London. He was very successful, and by the end of his 11 year stint in Tokyo he recalls that Japan-based clients made up 15 to 25% of total equity derivative revenue in London. He was also able to build up substantial corporate (as against institutional) clients for derivatives (London's client base was predominantly institutional investors, such as money managers, banks, pension funds and insurers). When in 2007 he moved to Hong Kong, his goal was to expand still further, and develop the Asia ex-Japan non-financial corporate client base for the equities derivatives business, while continuing to oversee the business with Japan-based clients.

28. Initially, in Hong Kong, he was Co-Head of Structured Products and Alternative Markets Asia. In 2009 he became Co-Head of Equity Derivatives Solutions and Sales for APAC. In 2010 he was asked to oversee both institutional and corporate equity derivatives client activity across Asia-Pacific. He chaired the APAC suitability and reputational risk committee to review products provided to clients. He had to see that UK regulation on best execution, know your client and anti-money laundering was observed in client dealings. The business continued to build: by 2013 the corporate equity derivatives business in UBS London made up 33% of total business revenue for equity derivatives. APAC clients contributed around 60% of this corporate equity revenue. In 2013 he became Head of Equity Derivatives Sales and Head of Strategic Equity Solutions for APAC. In 2017 he became head of UBS's equity capital markets and solutions business for APAC, and at the same time interim head of China investment banking. From January 2017 he was on the board of directors for UBS securities China.

29. In all these roles his local reporting line was to APAC managers. Like many large businesses, UBS has a matrix reporting system, by which he also reported into a product group, in this case equity derivatives. His annual performance review was, save at the beginning, conducted by an APAC manager, with some input from one or more matrix managers. The reviews for 2005-2017 show that he was highly regarded, "a rock star", bringing his ability to bear on devising solutions for corporate clients wanting to raise capital, "not just a product salesman" (2008), and "finding innovative solutions for clients, ensuring executions through diligent navigation of the firm" (2015). Perhaps responding to criticism in 2011 from the head of APAC equities that he "could be even more global by reaching out more to our European and American offices", to look for reciprocity in ideas, he made cross-border pitches within APAC, and between APAC and the US (2017).

30. It is clear from these appraisals that the scope of his operations was within the APAC region. For example, his financial targets in later years were GED (global equity derivatives) for APAC, SESG for APAC, and cash – ECM for Asia ex-Japan. There is an spproving comment from Roger Naylor, of the Global business, in 2013, that he had "taken full ownership of the GED APAC business", and was "setting an example for the rest of global equities". In 2008 Jason Barron, in the UK for Global,

said: “if anyone is going to get more business done in APAC, Michel is going to do it”, with praise in 2010 for his being “innovative, and his understanding of the technical aspects of complex transactions is fantastic”, though in 2011 he said: “I haven’t had as much to do with Michel”. In 2016 a matrix manager commented “he is an expert in the APAC business and knows the sales market the inside out”.

31. The issue is what extent he was part of the London equity derivatives business, making money for the bank by prospecting for APAC-based clients, or whether he is properly to be seen as part of the APAC region. As noted above, the technicalities of the derivatives business were done in London (and perhaps a few other centres), and subject to the UK regulator. Trades were booked in London (in the APAC book there), London branch was the counterparty to the contract, and London supplied the capital. James Green explained that the Equity Capital Markets (ECM) division worked with clients to get the business and devise solutions for their capital needs, the origination stage. The next stage is structuring, execution and risk management, which involves collaboration between the ECM derivatives business, and the global equities derivatives team (GED), in another division. ECM leads the transaction structuring, negotiates the transaction terms with the client, prepares legal documentation and sees that regulatory and accounting issues have been addressed. The GED team then take responsibility for day-to-day management of the market and credit risk arising from the transaction, and its trading desk executes any trades required. His evidence was that most of the transactions originating from APAC involved APAC-listed securities, such that risk management was normally done by the APAC GED team rather than London; if there was a cross- regional deal the claimant would draw on support from the Americas, if the equity was listed in New York - and the other way round if New York was doing a deal with an Americas client with APAC listed equity.

32. To what extent did London, rather than APAC, benefit from the claimant’s work? Deals were booked in London (“remote booking”). There was then a process for transferring revenues back to the divisions involved. The respondent called this Hard Transfer of Revenue, (according to Mr Green, revenue meant not sales income before costs, but profit, or loss - the word loss is not mentioned in the documents, but his evidence was that a loss is negative profit). The policy document supplied in the bundle, IB132, covered the Advisory and Equities Capital Markets businesses. The claimant did not do advisory services, but was engaged in equities capital markets (ECM), which was defined to include “equity capital raising services, as well as related derivative products and risk management solutions”. He also had an ECM cash target, and ECM revenues were booked locally, and did not go to London at all. The policy was stated to apply only to 50% of ECM revenues, as the other 50% was covered by either IB015 (ECM Cash) or IB031. By IB 132, that 50% of the profit was split between the area that originated the business and the area that executed it. According to Mr. Green, as most APAC originated deals involved APAC listed stock, in practice APAC ended up with all the revenue. London (EMEA) would only retain part of the revenue if an APAC originated deal involved stock listed in London.

33. As for the detination of the other 50%, IB031 was not in the bundle. Just before submissions the respondent introduced a document entitled "IB030 and IB031 Asia Equities trading", updated 2018, whose stated purpose was to document and describe the transfer methodology for Asia Global Equities in the light of ECD methodology on arms-length justification of transfer pricing. It concludes in section 6.3 that "a common model used by UBS and other financial institutions is to attribute the revenues based on contribution ratio", which in Asia is principally by traders, so it should be transferred to the trader location. By this method that revenue, after transfer to UPCAL, is transferred to Hong Kong, and profit and loss from other books is transferred to Hong Kong too. UPCAL is UBS Principal Capital Asia Ltd, which participates in equity swap and synthetic ETD trades to facilitate hedging for UPS London, and a portion of the profit and loss booked in UBS London is transferred to UPCAL under IB 271, and a profit split method is applied at the book level to transfer the revenue.

34. It is clear from this that much revenue was transferred to Hong Kong, but what is obscure is how much was retained in London, which contributed in some degree to earning the revenue. Mr. Green described London Derivatives as a shared services function (so servicing other parts of the business, as, say, HR or accounts might service a manufacturing business with several factories), so some system for attributing revenue to that function might be expected. The underlying document (IB031) is not available, and there must also be some caution whether the document at section 6.2 is in fact complete. It is not also clear to what extent this 2018 document alters previous practice or merely elucidates it. There was not time to recall Mr Green to deal with it, and in any case the tribunal did not have IB031 which accounted for the destination of the 50% of revenue not covered by IB132. A further possibility is in the use of "revenue" to mean profit, and whether some notional costs of the London activity had been deducted from revenue before it was split for transfers to constituent businesses within the respondent.

35. The economic reality of transfer pricing (and so what these hard revenue transfer policies told us about the territorial relevance of the claimant's activity) was in any case challenged by the claimant on the basis that such policies are devised to minimise tax payable in a higher tax jurisdiction. Of course this is a factor. It is economically rational for a business to seek to minimise costs, including tax, but tax authorities want to understand the business rationale for transfers, and see some demonstration of why revenue is attributed to one jurisdiction rather than another. Hence, presumably, the explanation of the methodology, and the note on IB 132 to the effect that Group Tax monitor the splits informally, and that KPMG (as tax advisers) monitor hard transfer annually to confirm they are carried out at arm's length.

36. Another reason for transfer pricing is for management accounting, to allocate income to reflect the contribution of various business units, and measure whether a unit as a whole or individuals within it are earning their keep, important where people are rewarded on achievement of

financial targets. Mr Green did not mention management accounting, but he did say the policy was designed to see that revenue allocation between regions and offices was “fair. The fact that the Hard Revenue Transfer policy lists the legal entities between which transfers are made (including in the list UBS London Ltd and UBS AG Hong Kong Branch) suggests that it was primarily about tax.

37. As a member of what was later named the global equity derivatives executive committee, the claimant had a reporting line to the global head of equity derivatives, as well as his local reporting line within APAC. From 2005 to 2016 the global head of equity directives from time to time was based in London; from 2016 the current head is based in New York. The committee met by telephone weekly or bi-weekly, and twice a year face-to-face, these meetings alternating between London and New York. The committee sets budgets, revenue and cost targets, strategy and key performance indicators for the equity derivatives business. It oversees risk management and compliance processes, and determines year-end compensation and promotion for all equities derivatives staff. In March 2017 he stepped down from this committee when asked to focus in corporate clients. From then his equity derivatives manager was Sam Kendall, then David Chin, in Hong Kong.

38. From 2010 the claimant also sat on the APAC Equities Management committee, meeting weekly to consider recruitment, promotion and compensation across the region.

39. Within Hong Kong he had many direct and indirect reports, and carried out their performance reviews and ratings, bonus, promotion and succession planning.

40. The claimant undertook business travel within Asia Pacific and occasionally to north America to do deals with Asia-based corporate clients. His visits to London seem, from the business travel invoices, to have been few, perhaps twice a year, for a few days on each occasion. There is a list for the Hong Kong tax authorities of when he went overseas for work and leisure, but the destinations are unspecified, and other evidence shows that he made many visits to other offices within Asia Pacific, an area reaching from India to New Zealand.

Relevant Law

41. From 1999, section 94(1) of the Employment Rights Act 1996 providing the right not to be unfairly dismissed, has been silent as to whether it applies to work outside Great Britain. So too is the Equality Act 2010 on discrimination.

42. There is now a body of authority on what Parliament intended to be the territorial scope of the unfair dismissal right. In **Lawson v Serco (2006) ICR 250**, 2 groups were identified who might be included, peripatetic employees, and expatriate employees, it was said “the circumstances

would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. I think that there are some who do". He identified two cases that might apply to an expatriate employee, one posted abroad to work for business conducted in Britain, and one working in a political or social British enclave abroad, but he did not say that might not be others, just that he could not think of any at the time. Particular factors, he dismissed the relevance of any comparison of which legal system was more beneficial for the employee, the employee's nationality or place of recruitment was not of itself sufficient. Something more might be provided by the fact that he was working abroad "for the purposes of the business carried on in Great Britain", rather than the business conducted in a foreign country which belongs to British owners or as a branch of British business, but as representative of the business conducted at home. He gave the example of sales executive working for the Financial Times in London, but based in San Francisco. A foreign correspondent for the newspaper would be working for the London business, but a sales executive selling advertising space for local edition would not. Another such example appears in **Lodge v Dignity in Dying (2015) IRLR 184,** where although the claimant had relocated to Australia for family reasons and worked from home, all her work was "for the benefit of her employer's London operations".

43. In **Ravat v Halliburton Manufacturing and Services Ltd (2012) ICR 389**, a case where all the work was done outside the UK, the starting point was identified as "the employment relationship must have a stronger connection with Great Britain and with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not absolute. The open-ended language of section 94 (1) leaves room for some exceptions whether connection with Great Britain is sufficiently strong so this can be justified", and where someone works and is based abroad "it will always be a question of fact and agree as to whether the connection is sufficiently strong to overcome the general rule of the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection Great Britain and British employment law before an exception can be made for them". On the point whether the law governing the contract was the determining feature, that was relevant, but not determinative, as it was not open to the parties to contract in to employment tribunal jurisdiction. "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 British and working for British employer – will be subject to employment law of the country where he or she works rather than the laws of Great Britain". It 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 contract has been handled in practice must play a part in the assessment."

44. In **British Council v Jeffrey** and **Jonathan Green v SIG Trading Ltd (2018) EWCA Civ 2253**, seven propositions were set out, pulling together the existing cases. The "territorial pull of the place of work" could, exceptionally, be displaced where there were "factors connecting the

employment in Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction". In the case of a worker who is truly expatriate, living and working abroad, rather than a "commuting expatriate", the factors connecting the employment of Great Britain and British employment law "will have to be especially strong" to overcome the territorial pull of the place of work. Such an exception was shown for the British employees at government and EU funded international schools, considered in **Duncombe v the Secretary of State for Children Schools and Families.**

45. There was no such exception in **Ravisy v Simmons and Simmons LLP UKEAT/0085/18**, where a Paris based French lawyer's claims against an international employer based in London failed to displace the French territorial jurisdiction on the basis, among other things, that the Paris business, though not independent had some autonomy, and she was only able to practice in France. She was subject to regulation in both countries.

46. A "commuting expatriate" would be someone like the claimant in **Bates van Winkelhof v Clyde and Co LLP (2013) ICR 883**, who by contract spent half the year in London.

47. Both in **Serco** and in **Dhunna v Creditsights Ltd (2015) ICR 105,** it was made clear that what matters is the position when dismissal occurs, not what was contemplated when the contract was made.

48. It was settled in **Hottak v Secretary of State for Foreign and Commonwealth Affairs (2016) ICR 975** that the same tests apply for jurisdiction in discrimination claims under the Equality Act as for unfair dismissal.

Submissions

49. The claimant argues that he worked for the benefit of the London Branch's equity derivatives business, which was conveniently performed in Japan and then Hing Kong, where the clients were based. The transfer of revenues should be disregarded as a tax strategy. Strong weight should be given to the ongoing contractual arrangement, only recently renewed before dismissal, whereby he was an assignee expected to return to London at the end of the assignment of no other plans were made, and to the fact that this was not an automatic renewal but a considered and reasoned decision.

50. The respondent argues that he connection with Britain was but historic. His connection with Hong Kong and the Asia Pacific region was extremely strong, and the contractual position, and the fact that the derivatives business was centred in London was not strong enough factors to displace that.

Discussion and Conclusion

51. There is a very strong territorial pull for Hong Kong in this case. At the

time of dismissal the claimant had lived and worked outside Great Britain for 23 years. He was paid his salary in Hong Kong, and paid tax to the government there. He went to London, on the available evidence, for a few days a year for the GED committee, which alternately met in New York. Whatever his nationality, and the origin of his employment with the London branch, he was in the category of true expatriates, and was not a commuter, or a peripatetic worker.

52. What are the factors that pull in the other direction? First is the long series of assignment contracts envisaging, at any rate on paper, his return to London. The evidence of the discussions on renewal is that the two sides were focused on the cost of leaving him on assignment as against localising him to Hong Kong (whether in equalising his UK pension, which he would lose if he localised), or the tax advantage of being an international assignee, rather than local, and administrative cost of renewals. Neither side seems to have contemplated that at any point he would be wanted back in London. The respondent wanted him in Asia Pacific where he had client links and useful language skills. The claimant's concern was not to lose the employment and contractual protection he had. There is no evidence that at the time he declared an attachment to Britain or indicated that he wished to return. By 2012 and later, when these discussions occurred, he was a posted worker only on paper. It is argued for the claimant that in the decision by the respondent not to localize them they were responding to what HR had seen employment protection, meaning UK employment rights, and so by implication assured him he had such rights. It is not altogether clear that this is what both sides meant – it could have referred to protection of his pension and the Hong Kong tax position as much as statutory rights. There was no explicit assurance, the respondent simply failed to take the localisation beyond preliminary discussion, only reissuing assignment letters as extensions were required. Leaving that aside, of course he did not want to lose employment protection, which was a benefit to him, but as the parties cannot agree where jurisdiction lies for statutory rights, that is but one of the factors to be weighed in the pull of territories. The recommendation was signed off by Andrea Orcel because his contract was made in London.

53. A real issue is whether his work in Hong Kong was for the benefit of the London business, of equity derivatives, the product in which he was closely involved. On one model, he was in Asia Pacific to sell the London product (derivatives) to regional clients, and so was closely integrated to the London business and only incidentally to the region. This was not like selling local advertising, as the product relied on skilled personnel and technology based in London, and could not be localised to Hong Kong. On another model, the respondent bank is a global operation, owned and headquartered in Switzerland, not in Britain, or even the EU, operating in three regions, in which the regions sell services and products to local clients, whether they originate locally or require input from elsewhere.

54. The claimant's appraisals show he was not a pure salesman, and that his real and valued skill lay in assessing risk and devising solutions across a range of products and services (including equity derivatives)

which did not rely on reference back to London but was carried out by him, in Hong Kong – in one appraisal he was called a "strong product innovator". Further, although his assignments began with developing equity derivatives in Japan, and moved on to other areas of Asia Pacific, by the time of dismissal he had much wider responsibilities, (for example he had a cash target) for regional corporate clients. On this model, the purpose of his employer's business was to make money in and for Asia Pacific region, as a contribution to the profit of UBS worldwide, not to make money for the Equity derivatives business of UBS London Branch.

55. In favour of the second model is that his financial targets were all related to Asia Pacific, and that the respondent allocated equity derivative income booked in London, but originating in Asia Pacific, back to Asia Pacific, and probably well over half, possibly more, though precisely what proportion remained in London remains obscure. The tribunal does not accept that income was transferred solely to take advantage of a better tax regime; if the tax position had been equal, the respondent still had an "Asia Pacific book" in London, and management accounting and performance targets for offices and individuals would require some allocation to be made so that targets could be set and measured.

56. He was appraised in Hong Kong, by reference to his achievements in Asia Pacific. There was input from the product line matrix, but this was subsidiary, and sometimes the comments of the matrix managers, including Jason Barron in London, show their knowledge of him was general rather than based on specific detail of his work. He was involved in the wider operation in the GED committee down to 2017, involving monthly calls, but this could equally be a contribution on behalf of his region, and does not show he was part of the London branch business. In any case this involvement had ceased by the time of the misconduct alleged against him and by the time of dismissal.

57. He was fully integrated into the APAC region's decision making and staff with responsibility for staff and strategy there.

58. Overall, looking at where the business lay for whose purposes he was employed, it was in Asia Pacific, making that region's contribution to the bank's overall profit. It was not in London, which carried the technical burden of equity derivatives, provided as a product to all the bank's regions, and to whom it made (presumably) some charge for the local cost of its services. The claimant argues that London branch was the "controlling mind" in the equity derivatives business, but it is not clear that London was the only controlling mind, given the alternating meetings in New York, and the location of the current head there. Much of the real thinking on risk and solutions was done by the claimant and his colleagues in Hong Kong and in other offices outside London and New York.

59. It is also said it was London's capital on the line, showing the true location of the derivatives business was there. While the PRA may have imposed a capital holding requirement for regulation, it is not shown that the capital lay in London, rather than elsewhere in the global business, or

that any loss of capital there would not have been met by the global business.

60. Of necessity this activity was regulated in Britain, and in turn the claimant was himself regulated by the UK regulator. But he was also regulated by the Swiss regulator, and it is not suggested his business lay in Switzerland. If he was in fact a London Branch employee, he was also regulated in Hong Kong and Japan, while his Hong Kong employed colleague was also regulated by the UK. The fact of regulation does not of itself determine where the business lay.

61. When it came to discipline and dismissal, the contractual provision for English procedures to be applied to him was followed. This is a relevant factor, but not decisive, and while in **Ravat** it was relevant to the finding that the UK had jurisdiction, that case concerned a commuting employee who paid UK tax, rather than an expatriate. With regard to the Code of Ethics, what was regarded as misconduct in financial services in London is likely to have been misconduct in Hong Kong too, given the global nature of the business. (The misconduct alleged was that he directed or authorised, a cover up of an unauthorised disclosure of one client's dealings to another client.) The pension fund was a tie to the UK, originating from his first two years there. It could have been replaced by some equivalent arrangement but for the cost to the respondent of doing so.

62. In conclusion, the factors attaching him to Great Britain – the contractual position, the salary, pension, holiday and disciplinary procedure being linked to London terms, and his original recruitment in London for the equity derivatives business developed there - do not have weight of sufficient strength to displace the territorial pull of Hong Kong, where he lived and worked for the business of the Asia Pacific region, fully integrated into it, for so long, and with little contact and less direction from London.

The EU Equal Treatment Directive.

63. The claimant submitted that if the tribunal found no jurisdiction under common law rules for the territorial scope of statutory rights, it should go on to consider whether this case meets the tests for jurisdiction to apply the Equal Treatment Directive, under which the discrimination alleged also fall. The discrimination claim is that two senior women in Hong Kong were not dismissed for similar conduct in this affair when he was. If in EU law there is jurisdiction, then the claimant is denied an effective remedy if there is discrimination, but he cannot bring a claim in England. If on consideration of the cases the point (whether the Equal Treatment Directive applies to employment in Hong Kong) is not *acte clair*, the tribunal is invited to make a reference to the European Court of Justice to determine the position.

64. The claimant's argument starts with **Bleuse v MBT Transport Ltd (2008) ICR 488**, a case in which the German national and German resident claimant worked in Europe – and never in the UK – for an

English employer under a contract subject to English law. His holiday pay claim was a right under the EU Working Time Directive. He could bring his claim in England as that was the law of the contract, the Directive was sufficiently precise to have direct effect, and English law must be construed so as to give effect to his European right. In **MOD v Wallis (2011) ICR 617**, where the claimant could claim unfair dismissal for employment in Germany, it was held the discrimination claims should also be brought in England (not Germany), where the competing laws were those of two member states. The Court of Appeal considered hypothetically that in another case it might became necessary to consider whether the Directive's reach extended to workers employed outside the EU. In **Wittenberg v Sunset Personnel Services Ltd (2017) ICR 1012**, a German national who was German resident was employed by a Scottish company (albeit part of a US group) under a contract governed by Scottish law, to work on ships in Nigeria. He never travelled to or through the UK. The EAT held that EU rights did *not* have worldwide territorial reach and only applied outside the EU where there was a sufficiently close connection between the employment relationship and EU law. **Bleuse** was not authority for EU protections to be enjoyed by an EU worker "wherever he might work". EU law must be limited in its application. There must be a close connection with EU law. Such rights did not extend *automatically* throughout the EU. The claimant argues that the conclusion in **Wittenberg** is wrong, and that rights do not depend on the employee's domicile or where he works, as there are: "a host of EU decisions applying horizontally directly effective rights to employees posted outside of the EU". Further, in **Wittenberg** the EAT was not asked to make a reference to the EU.

65. Of these EU cases considering the scope of EU Directives outside the community, in **Prodest v Caisse Primaire d'Assurance Maladie Paris C-273/83,** the ECJ ruled that French rules about social security sickness benefit could not give better rights to French national than to a Belgian national when they were temporarily posted by a French enterprise to work in Nigeria, outside the EU, as by discriminating between EU nationals it discouraged the free movement of workers. In **Alderwereld v Staatssecretaris van Financien C-60/93,** where a Dutch national was sent by a German company to work in Thailand, there was a dispute whether he should pay social security in both the Netherlands and in Germany. The ECJ held that it was the employment relationship that mattered, not the worker's residence or nationality, and: "the fact that the activities of the worker carried out outside the community is not sufficient to exclude the application of the community rules on the free movement of workers, as long as the employment relationship retains a sufficiently close link with the community". In **Petersen v Finanzamt Ludwigshafen (2013) 2 CMLR 47**, the court ruled on the different tax treatment of the earnings of German resident Danish employees of the Danish International Development Agency working for 3 years in Benin, outside the community. Had they worked for a similar German agency, they would have been tax-exempt. It was held that such an arrangement impinged the principle of free movement of workers, by preferring German employee is over other European employees. "In so far as to relationships by reason either of the place that they were entered into or the place

where they took effect, could be located within the EU, EU law might have been applied to professional activities pursued outside the territory of the EU as long as the employment relationship retained sufficiently close link between employment relationship on one hand and the law of the member state, and thus the relevant rules of EU law, on the other". In this case the links existed because of residence in one member state and employment by another "on whose behalf he carried on his activities", plus Danish social insurance, being subject to Danish law, and having Danish bank accounts.

66. In **Boukhalfa v Germany (1996) ECR 1-2253** the Court ruled on a dispute involving a Belgian national, resident in Algeria, employed at the German embassy in Algiers to issue passports. Under the German statute prescribing terms and conditions for the diplomatic service for local employees, the contracts of German nationals were subject to German law, while the contracts of other nationals were subject to local (here, Algerian) law. She paid into a German pension and some German income tax, disputes were to be resolved in the German capital. It was held that community law could apply to "professional activities pursued outside community territory as long as a was the employment relationship retains a sufficiently close link with the community" (referring explicitly to protest and out of Herald) and "that principle must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of the member state and thus the relevant rules of community law, on the other". Her prior residence in Algeria, and the performance of her duties in Algeria, did not displace the closeness of the connection. On the particular facts, it was very relevant that it was a German law that introduced the discrimination in terms and conditions between German nationals and other community nationals. The Advocate general's opinion argued that employment issuing passports was an important exercise of the function of a sovereign state. The judgement does not mention this explicitly, but does conclude that prohibition of discrimination based on nationality "applies to a national of a member state whose permanently resident in a nonmember country, who is employed by another member state in its embassy in a non-member country and whose contract of employment was entered into and is permanently performed there, as regards all aspects of the employment relationship which are governed by the legislation of the employing member state", suggesting that state employment was not unimportant.

67. The claimant relies on the comment of Baroness Hale in the first decision of the UK Supreme Court in **Duncombe v Secretary of State for Children, Schools and Families (2011) UK SC 14**. This was a case involving British employees in schools in Germany, without any element outside the community. In discussing remedies, the point was made that the Directives provide workers with a protection wherever they are working in the area covered by European Union law. These rights are enforced through contractual arrangements between employer and employee, and the question arises as to the *extent* that the rights are incorporated into the contract: "would a person employed to work in China, for example, be able to claim the benefit of all the domestic law which emanates from European Union?", though immediately continuing:

"it is not necessary to answer that question…", though she returned to the question of the intended scope of protection by Directives in questions of European law, to which a uniform answer should be given throughout the union, and said: "we have not been shown any authority which indicates that the answer is *acte clair*, however obvious we might think the answer to be. Had it been necessary to answer that question, therefore, it will probably be necessary to refer to European Court of Justice". The claimant relies on this to argue that if the tribunal is against him on the territorial scope of the UK statutes, a reference should be made to the European Court on whether the scope of the EU Directive extends to employment in Hong Kong under a contract made under English law in the particular facts of this case.

68. The respondent argues that this is not necessary. First, it is said the claimant does not say that EU law *requires* such a reference. Next, **Wittenberg** ruled that **Bleuse** does not provide a warrant for extending or relaxing the English tests of territorial scope where an EU national works for an EU domiciled employer outside the EU. The tribunal should heed the decision in **Green,** where the court considered **Bleuse** in the context of an argument that the ECHR right to freedom of expression was engaged in a whistleblowing claim for employment in Singapore***.*** and concluded that the cases applied only where employment was within the EU, though outside the UK.

69. In **Hasan v Shell International Shipping Services (PTE) Ltd UKEAT/0242/13E** the EAT also considered **Bleuse,** in the context of a claim by a British seafarer employed by a Singapore company, which managed the claimant day to day from an Isle of Man company and had a manning agreement to supply crew to a British shipowner, where there was a request from the claimant for the point about territorial scope outside the EU to be referred to the ECJ. The EAT held that this was a new point on appeal which had not been raised before the employment tribunal, while at the same time noting that there was no authority for the **Bleuse** principle being extended to employment outside the EU, and that the Directive by article 3(1) applies "within the limits of the powers conferred upon the community".

Discussion and Conclusion

70. There is no English authority for the proposition that EU law applies to employment outside the community, save **Wittenberg**, in which the court applied the test of whether there was a sufficiently close connection between the employment relationship and EU law to employment outside the EU so as to extend territorial scope to employment in a non-member state, and decided there was not such a connection. The only other case involving employment outside the community is **Hasan**, where the point was left undecided because it was new. I am asked to conclude that Wittenberg is wrong when judged by the ECJ decisions.

71. What are the limits to the power conferred by the Community? The cases all demonstrate that while EU law may apply to employment outside the EU, there must be a limit to the territorial scope. In the ECJ

cases the test proposed has been whether there was a sufficiently close link with the community, between the employment relationship on one hand and the law of the member state on the other - **Petersen**, and a “sufficiently close link” between the employment relationship and the law of the member state or the community **– Boukhalfa.** This wording suggests that it does not apply to any employment outside the community where employer and employee are EU based or EU nationals. There must be something more, and it is limited to those with “sufficiently” close links. This sounds very close to the English test of whether there is a sufficiently strong connection with the UK. It is however the wording of the EU, not the English, test that the EAT applied in **Wittenberg**.

72. Factually, the cases on the tax and social security treatment of employees’ remuneration (**Prodest, Aldewereld** and **Petersen**) all concern the rules of member states discriminating between their national and other member state nationals on temporary (at least up to three years) assignment outside the community. They are concerned with national laws which discriminate, not employers who discriminate. National laws are by their nature closely linked with the community and its member states. In **Boukhalfa** it was significant that the discrimination between nationals of different member states when locally employed arose from the specific enactment of a member state, so a very close connection, but also that the employment consisted of the exercise of sovereign functions, so a very close link with national and community law. There is nothing in the facts of these cases, nor in the principle (sufficiently close link) that they applied, to suggest that **Wittenberg**, where the same test was applied, was wrong.

73. As European law must be applied by the same standard across the Community, there may be a duty on a court or tribunal of a member state to make a reference to the ECJ: “the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the Court of Justice” - **Srl CILFIT v Ministry of Health 1982 Case 238/81.**

74. How clear is the test? Unless it is suggested that the factual scenarios of each case, which may be many and various, as the English authorities show, should each in turn be referred to the European Court, which might require a reference in very many cases, it is clear enough on the principle to be applied to any set of particular facts. The view expressed by the Supreme Court in **Duncombe** deserves great respect, and the tribunal notes that **Boukhalfa** was cited to the court, but it was *obiter*, and may not have been fully argued. It was discussing the incorporation of EU rights into a contract which could be enforced in a member state,but envisaged that there may be a limit to the territorial scope. It is said to be significant that no reference was sought in **Wittenberg**, but the court could have referred the issue of its own initiative if it considered the point unclear. I cannot see any departure from the principles applied in the ECJ cases to suggest that the decision in **Wittenberg** was wrong and

should not be followed.

75. In the case before this tribunal, the links between the claimant and a member state of the Community are weak. There are links in the law of the contract, the pension (which is a private contractual benefit, not a matter of state rules on social security), and the origin of his employment relationship, which started in England. The derivatives business was booked in London, and the revenue transferred in part, to the region where it originated, but as the business overall was not based in a Community state, but spread across the world, and headquartered in a non-member state, Switzerland, and as the claimant had worked 18 months in England and 23 years in the Far East, it is hard to find that the links with an EU member state or with EU law were sufficiently close to bring it within the limits of the powers conferred on the Community.

76. At the conclusion of the open preliminary hearing, a further preliminary hearing for case management was listed for 14 February. It is no longer necessary given the tribunal's decision that it does not have jurisdiction to hear the claims. If I have inadvertently overlooked a contractual claim the parties should apply.

Employment Judge Goodman

Date 20 January 2020

JUDGMENT SENT TO THE PARTIES ON

23 January 2020

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FOR THE TRIBUNAL OFFICE

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