EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms SAIMA BHATTI	**CABLE NEWS INTERNATIONAL, INC.**

Heard at: London Central (in public; by video)

On: 10, 11, 12 & 13 July 2023 and 14 July 2023 (in chambers)

Before: Employment Judge **P Klimov** (sitting alone)

Representation:

For the Claimant: **Mr P Gorasia**, of Counsel

For the Respondent: **Mr P Nicholls KC**, of Counsel

Reserved Judgment

1. The Tribunal has jurisdiction to consider the Claimant's complaints of:

(i) unfair dismissal (ss.94, 98 of the Employment Rights Act 1996("**ERA**"));
(ii) victimisation (s.27 of the Equality Act 2010("**EqA**"));
(iii) discrimination arising from disability (s.15 EqA);
(iv) failure to make reasonable adjustments (ss. 20, 21 EqA), to the extent arising from acts/failures to act on or after 1 March 2017;
(v) direct race discrimination (s.13 EqA) in relation to complaints of (i) lower pay; and (ii) denial of broadcasting opportunities, both to the extent arising from acts/failures to act on or after 1 March 2017;
(vi) direct sex discrimination (s.13 EqA) in relation to the complaint of lower pay, to the extent arising from acts/failures to act on or after 1 March 2017;
(vii) equal pay (Chapter 3 EqA), to the extent arising from acts/failures to act on or after 1 March 2017; and

(viii) holiday pay (s.13 ERA, and regulation 14 of the Working Time Regulations 1998 ("**WTR**")) with respect to the accrued but not taken annual leave in the period from 1 March 2017 to 31 December 2017.

2. The Tribunal does not have jurisdiction to consider any other parts of the Claimant's claim.

Reasons

Background and issues

1. On 22 May 2018, the Claimant presented a claim in the Employment Tribunal against the Respondent. It contained complaints of unfair dismissal, holiday pay/unlawful deduction from wages, direct race and sex discrimination, discrimination arising from disability, failure to make reasonable adjustments, victimisation and equal pay.

2. On 20 September 2018, the Respondent entered a defence contesting the Tribunal's jurisdiction to consider the Claimant's complaints ("**the Jurisdiction Issue**"). The Respondent did not present a substantive response to the Claimant's complaints pending determination of the Jurisdiction Issue.

3. In parallel to this claim in the Employment Tribunal, the Claimant also brought a claim against the Respondent in the High Court. On 31 October 2018, the Claimant's claim in the Employment Tribunal was stayed, pending determination of the High Court proceedings between the parties. These were settled in March 2020.

4. On 22 November 2022, a preliminary hearing for case management purposes was held, at which this hearing was listed to determine the Jurisdiction Issue.

5. The Claimant was represented at the hearing by Mr Gorasia and the Respondent by Mr Nicholls KC. I am grateful to both Counsel for their cogent and thorough submissions and other assistance to the Tribunal.

6. There were two witnesses for the Claimant: the Claimant and Mr A David, and two witnesses for the Respondent: Ms L M Yee and Mr B Rozier. The Claimant also presented a witness statement of Mr K Penhaul. However, Mr Penhaul lives in Spain and was unable to travel to this country to give his evidence. Permission to take evidence from abroad was not received in time for the hearing. I accepted Mr Penhaul's witness statement (the Respondent not having opposed it being submitted in evidence). However, recognising that Mr Penhaul's evidence had not been tested in cross-examination, I gave much less weight to his evidence than to those of other witnesses.

Essentially, I accepted Mr Penhaul's evidence in paragraphs 4 and 5 of his witness statement as corroborating the evidence of the Claimant and Mr David that the Claimant was often in the London Bureau when she happened to be in London. I disregarded his other evidence. The Claimant presented a supplemental witness statement responding to various points made by the Respondent's witnesses in their witness statements. Mr Nicholls confirmed that the Respondent did not object to the Claimant's supplemental statement being admitted in evidence. I admitted the Claimant's supplemental statement in evidence.

7. I was referred to various documents in the 719-page bundle of documents introduced by the parties in evidence. References in this judgment to the relevant pages in the bundle are given in the format [**p.xxx**]. Each side prepared a cast list and a chronology, and each submitted an opening skeleton argument and closing submissions. There was also an agreed list of issues. Both sides submitted their respective bundles of authorities. There was some overlap between the authorities bundles. I refer to the relevant authorities when dealing with the issues before me.

8. At the start of the hearing, I discussed with the parties the order, in which I should consider the Jurisdiction Issue. It appeared to me that the first question I needed to answer was whether the Claimant had any rights under the Employment Rights Act 1996("**the ERA**"), the Equality Act 2010("**the EqA**") and the Working Time Regulations 1998 ("**the WTR**") – (together "**the Acts**") to bring her complaints. In other words, I had first to determine whether, on the facts of this case, the Claimant's case fell within the "territorial reach" of the Acts. Throughout this judgment, I will refer to this as "**the Territorial Reach Question**".

9. If the answer to this question was no, the matter would end there. If on the facts the Claimant's case did not fall within the territorial reach of the Acts, she would naturally not enjoy their protection, nor have any enforceable rights or remedies under the Acts. Accordingly, the question of the proper forum, in which she should bring a complaint about the alleged violations of such non-existent rights would be rendered otiose.

10. If, on the other hand, I were to determine that the Claimant's case is within the territorial reach of the Acts, the next question would be whether the Tribunal was the correct forum to adjudicate on her claim, notwithstanding the fact that the Respondent is domiciled in the United States. Throughout this judgment, I will refer to this as "**the International Jurisdiction Question**".

11. Whilst it is possible to approach the matter in the reverse order, and that was how both parties presented their opening submissions, I find that it is more logical to first decide on the existence or otherwise of a substantive right(s), and then proceed to deal with the question whether an employment tribunal

has the necessary jurisdiction to adjudicate complaints arising from the alleged violation of that(those) right(s). Both parties agreed with that approach and that was how they presented their closing submissions.

12. Additionally, at the outset of the hearing, I raised with the parties the question of whether, in deciding the Territorial Reach Question and/or the International Jurisdiction Question, I must have regard to the provisions of the Human Rights Act 1998 ("**the HRA**") and the European Convention of Human Rights ("**the ECHR**"). I am grateful to both Counsel for their submissions on this issue.

13. Finally, I agreed with the parties that at this stage I did not need to deal with the question of whether the Claimant was an employee or a worker within the meaning of s.230 ERA, or s.83 EqA, or reg. 2 WTR. Accordingly, this judgment must not be read as determining the Claimant's employment status for the purposes of domestic legislation.

14. However, it was accepted that in order to determine the International Jurisdiction Question, it was necessary to consider whether the Claimant was an "employee" within the meaning of EU Law for the purposes of the EU Regulations No 1215/2012 ("**the Brussels Regulations**"). Although, in light of my primary conclusions on the effect of the Brussels Regulations, this question becomes somewhat academic, I shall nonetheless, make my findings and determination on this issue, in case my primary conclusions should be wrong in law.

Findings of Fact

15. I shall confine my factual findings to the matters, which are pertinent to the disposal of the issues before me.

16. The Claimant is a broadcast journalist. She was born in London, where at all material times she maintained a home. Her family lives in London. The Claimant is a British citizen. She describes her race as Pakistani.

17. The Respondent is a well-known international media company, operating across the world under the name "CNN". The Respondent's legal organisational form is a US corporation, incorporated in the state of Delaware, USA, with the headquarters in Atlanta, Georgia, USA ("**the Atlanta HQ**"). The Respondent has various subsidiaries and branch offices across the world. The Respondent's UK subsidiary is a limited liability company, incorporated in England under the name Cable News International Limited ("**CNIL**"). It has an office in London ("**the London Bureau**").

18. Operationally, outside of the US and Americas region, the Respondent has two regional headquarters: (i) the Hong Kong Bureau ("**the HK Bureau**"),

responsible for the Asia-Pacific region, including Thailand, and (ii) the London Bureau, responsible for Europe, the Middle East and Africa ("**the EMEA Region**"). Both are subordinate to the Atlanta HQ.

19. At the material times, the head of the HK Bureau was Mr Simon Harrison until February 2015 and Mr Roger Clark from September 2015. The London Bureau was managed by Mr Thomas Evans from around the end of 2014.

20. Before joining the Respondent, the Claimant worked as a broadcast journalist for various other media companies and broadcasters, including the BBC, ITV, Channel 4. Between June 2007 and June 2011, she worked in Pakistan, first for an English language news channel, Dawn News, (until March 2010), and then as a freelance journalist for various UK and US-based broadcasters. From June 2011 until the end of 2012, she worked in London as a freelance journalist for various British broadcasters, and on some occasions for the Respondent, also as a freelancer.

21. In October 2012, the Respondent offered the Claimant a 12-month contract, starting on 1 January 2013 as a "newsgatherer and reporter" based in Pakistan. The Claimant accepted the offer. The parties signed a contract governing their relationship.

22. The contract contained the following relevant terms:

> ***1. Services.*** *CNN hereby engages Contributor to render services as a newsgatherer and reporter (the "Services") for one hundred fifty (150) days during the Term. The Services shall include newsgathering and reporting in Pakistan. Contributor hereby accepts such engagement pursuant to the terms and conditions of this Agreement.*
>
> ***2. Term.*** *The Term of this Agreement shall be for the period from January 1. 2013 through December 31. 2013, subject, however, to prior termination as hereinafter provided.*
>
> ***3. Production.*** *Production of programming in which Contributor's services are utilized shall be produced in Pakistan or at such other locations as CNN may direct, at such times as may be determined by CNN, consistent with CNN production schedules. The programming shall be such length and in such form as is suitable, in CNN's sole discretion, for dissemination to the public via television, radio and all other means or methods for the transmission of audio-visual or audio or visual signals or material whether now known or hereafter created.*
>
> ***4. Compensation.*** *During the Term of this Agreement. Contributor shall receive compensation from CNN in full payment for the Services and all rights granted to CNN herein at the rate of Live Hundred Dollars (US$500.00) per day for the Term. Contributor agrees to provide at least 150 days of service during the Term, however in the event that CNN requests fewer than 150 days of service, CNN will nonetheless pay for at least 150 days at the agreed rate. Contributor shall invoice CNN for any days over 150 at the $500.00 rate. Such compensation shall be payable monthly, less any withholdings and deductions required by law.*
>
> *When Contributor is traveling on CNN business in connection with Contributor's services hereunder. CNN will pay Contributor a per diem amount as set forth in the CNN Contributor Travel Guidelines ("Guidelines") for expenses incurred for meals, and will also reimburse for*

Contributor's hotel, ground transportation, and airfare in accordance with the Guidelines. Reimbursements for expenses incurred while entertaining clients, or for other business purposes, must be pre-approved and will be made upon submission of receipts. In accordance with CNN policy and IRS guidelines, the per diem amount and any reimbursed expenses will be included as income in Contributor's Form 1099 that is sent to Contributor and the IRS after the end of each calendar year. Contributor will be solely responsible for any and all tax liability associated with such expenses, if applicable, and it is Contributor's responsibility to obtain independent tax advice concerning the foregoing.

[…]

***12. Independent Contractor**. The parties to this Agreement agree that Contributor is a professional person, and that the relation created by this Agreement is that of purchaser-independent contractor. Contributor is not an employee of CNN and is not entitled to the benefits provided by CNN to its employees, including, but not limited to, group medical or life insurance and participation in the company retirement savings. It is further understood that CNN may, during the Term of this Agreement, engage other independent contractors to perform the same or similar work that Contributor performs hereunder and that programming concerning the same or similar topics and affairs provided by other independent contractors may be licensed, cablecast, broadcast, telecast, or otherwise used by CNN at any time during or after the Term of this Agreement.*

[…]

***17. Pay or Play.** Nothing herein shall be deemed to obligate CNN to use the Services in any programming or otherwise, and CNN shall have fully discharged its obligations to Contributor by providing her with the compensation set forth above.*

23. Additionally, by the terms of the contract, the Claimant agreed that for the duration of its Term she would provide her services in the field of cable or broadcast television exclusively to the Respondent. The contractual terms also required the Claimant to disclose to the Respondent all interests that were a source of income and any financial interests that may create a conflict of interest. The Claimant agreed to assign to the Respondent all rights to works made pursuant to the contact, with the Respondent having the perpetual and exclusive right to use any such works. The Claimant granted the Respondent the right to use her professional name, voice, likeness, and biography for publicity purposes. The Claimant did not have the right to assign the contract to a third party. The Respondent had the right of first refusal to negotiate an extension of the contract with the Claimant. The Respondent reserved the right to terminate the contract if the Claimant's "*voice or appearance changes in such a manner so as to, in the sole discretion of [the Respondent], render Contributor incapable of properly performing the Services*". The governing law of the contract was agreed to be the laws of the State of Georgia.

24. The parties entered into subsequent contracts to cover the Claimant's services in 2014, 2015, 2016 and 2017, respectively. These contracts were essentially on the same terms as the initial 2013 contract, except that:

(i) the 2015 contract described the services to be provided by the Claimant as one of "*a newsgatherer and reporter in Asia"* and provided that "*Production of programming in which Contributor's services are utilized shall be produced in Asia or at such other locations as [the Respondent] may direct"*. Additionally, the Claimant's daily rate of pay was changed, so as to be denominated in GBP rather than USD, and

(ii) the 2016 and 2017 contracts described the services to be provided by the Claimant as one of "*a newsgatherer and reporter in Bangkok, Thailand*", and stated that "*The Services shall include newsgathering and reporting in Bangkok and Asia*". The daily rate, still dominated in GBP, was increased to £506.

25. For ease of following the relevant events, I find it convenient to separate the chronology into five discrete periods:

(i) From 1 January 2013 to 31 March 2014 ("**Period 1**"), during which the Claimant worked primarily in Pakistan as a local correspondent;

(ii) From 1 April 2014 to 31 December 2014 ("**Period 2**"), during which the Claimant's relationships with the HK Bureau and the London Bureau had been established;

(iii) From 1 January 2015 to 26 May 2016 ("**Period 3**"), during which the Claimant worked "overwhelmingly" in Asia;

(iv) From 27 May 2016 to 28 February 2017 ("**Period 4**"), when the Claimant, having spent 5 months in London on medical leave, then returned to Bangkok and worked exclusively in Asia; and

(v) From 1 March 2017 to 31 December 2017 ("**Period 5**"), when the Claimant was in London, predominately on medical leave, and when she was told that her contract would not be renewed for 2018.

1 January 2013 – 31 March 2014 ("Period 1")

26. During 2013, the Claimant worked exclusively in Pakistan as a local correspondent, except for a 6-day period of "hostile region training" in January 2013 in Hereford, UK and a 2-day meeting in London in February 2013 with Ms Ellana Lee (Managing Editor, Hong Kong). The Claimant accepts that from 1 January 2013 until 1 April 2014, she worked primarily in Pakistan and concedes that the Tribunal does not have jurisdiction to consider her complaints relating to that period. I therefore make no further findings in relation to that period.

1 April 2014 – 31 December 2014 ("Period 2")

27. In April 2014, whilst in London, the Claimant applied for a Chinese journalist visa. The application process required her personal attendance in London on 10, 11, 14 and 15 April 2014. Under the Respondent's policy, time spent

dealing with visa applications counts as work, and accordingly the Claimant claimed and was paid in respect of these 4 days.

28. Around the same time the Claimant negotiated with Mr Tony Maddox, the Respondent's Managing Director, her move from Pakistan to Bangkok to become a newsgatherer/reporter for Asia. The move was agreed by the Respondent. The Claimant also agreed with Mr Maddox that she could be deployed directly by the London Bureau, and that when she was in London, she would give her availability to the London Bureau directly. Mr Maddox told the Claimant that she should not call herself "Bangkok correspondent", because that position did not exist. Instead, when she was reporting in Asia, she should say that she "happened to be in Bangkok".

29. In May 2014, the Claimant was in Bangkok and Kuala Lumpur, working on various stories. On 30 May 2014, she flew to Pakistan to pick up her belongings. She was asked by the London Bureau to cover the story about the release of Bowe Beghdahl, a US soldier who was held captive in Afghanistan and Pakistan, which she did.

30. In June 2014, the Claimant worked in Pakistan and Bangkok.

31. In July 2014, whilst in London, the Claimant was asked by the London Bureau to go to Amsterdam to report on the MH17 story[1]. The Claimant spent 11 days in Amsterdam, from 18 to 27 July 2014, covering the story.

32. Upon her return to London from Amsterdam the Claimant was asked by the London Bureau to travel to Jerusalem to report on Israel-Palestine conflict in Gaza. She spent two days working in Israel. While there she was injured when a cameraman drove a truck over her foot. After undergoing medical treatment in Israel, the Claimant returned to London in the middle of August 2014.

33. On 27 and 28 August 2014, the Claimant worked in London at the request of the London Bureau, covering the story about Aafia Siddiqui, a Pakistani woman imprisoned in the US. After that, she flew to Pakistan, under the directions of the Atlanta HQ, and worked there until 10 September, covering clashes between protesters and the police, after which she returned to London.

34. The Claimant was on vacation in London between 10 and 20 September 2014. She then flew to Atlanta, where, on 23 September 2014 at the Atlanta HQ she had a meeting with Mr Maddox. At that meeting, the Claimant and Mr Maddox reaffirmed the arrangements that they had agreed in April 2014. Mr Maddox told the Claimant that the flexibility the Claimant was offering to the

[1] The Malaysian airline flight from Amsterdam to Jakarta shot down over Ukraine.

Respondent worked very well for both sides. Mr Maddox asked the Claimant how she was getting on with the London Bureau staff. She told him that it was working really well and that she had more regular interactions with the London Bureau staff than with the HK Bureau staff. Mr Maddox confirmed to the Claimant that her 12-month contract would be renewed on the same basis for a further period of 2015.

35. At the same meeting, the Claimant discussed with Mr Maddox an expansion of her role to include presenting news from the Respondent's London Bureau studio. Mr Maddox said that he was happy for that arrangements to take place and directed the Claimant to discuss further details with Mr Mike McCarthy, Head of New Programmes, and Ms Meare Erdozain, Executive Producer of News Programmes. Later Mr McCarthy asked the Claimant to do a screen test, which she did on 6 October 2014 in the London Bureau.

36. The Claimant spent the rest of 2014 in Asia, working in Bangkok, Hong Kong, Philippines and Seoul.

37. On 17 December 2014, the Claimant was asked by the London Bureau to fly to Pakistan to cover the Pakistan school shooting story. The Claimant said that she was not fit to travel because of the injury to her foot and turned down the assignment.

38. The Claimant returned to London from Asia at the end of December for Christmas.

1 January 2015 – 26 May 2016 ("Period 3")

39. The Claimant was on vacation in London until 11 January 2015. Whilst on vacation she applied for a Thai visa on 5 January 2015. She was paid for that day as a working day.

40. On 23 January 2015, the Claimant flew to Bangkok. The Claimant rented a flat in Bangkok, which she kept until the end of March 2017. Prior to renting this flat, when working in Asia, the Claimant would stay in Bangkok at her friends' apartments.

41. From 23 January until the end of June 2015 the Claimant worked in Asia on assignments given to her by the HK Bureau. She reported from various locations in Southeast Asia and Pakistan

42. At the end of June 2015, the Claimant flew to London for holiday.

43. Whilst in London, the London Bureau deployed the Claimant to cover a story about the MH370 investigation[2]. The Claimant was sent by the London Bureau to Toulouse, France, where parts of a plane found in the Indian Ocean were being examined. She worked in Toulouse for 9 days from 31 July to 8 August 2015.

44. On 17 August 2015, the Claimant was deployed to cover the Bangkok shrine bombing story. She worked in London for one day on the story, and on 18 August 2015 flew to Bangkok to continue working on that story.

45. The Claimant worked for the rest of 2015 in Southeast Asia and Pakistan. She was in London between 1 and 5 December 2015 and again between 13 December 2015 and 14 January 2016. She was not deployed by the London Bureau during that time. While in London, she applied for a Pakistani visa and was paid by the Respondent for the two days (4 and 6 January 2016) taken to apply for and obtain the visa.

46. Between January 2016 and June 2016, the Claimant worked in Southeast Asia and Pakistan, with the exception of the period between 22 and 28 March 2016, when she was in Brussels, deployed there by the London Bureau to report on the terrorist attack in the city. After Brussels, the Claimant went to Paris on vacation. However, she was contacted by the London Bureau and asked to fly to Pakistan to cover the Easter Fairground bombing in Lahore. She flew to Lahore and stayed there until 6 April 2016.

47. Between 19 and 22 April 2016, the Claimant was in Hong Kong. She went to the HK Bureau to meet with two of the Respondent's executives from the Atlanta HQ (Meara Erdozain and Andrew Demaria). The Claimant asked them to adjust her work pattern to reduce her travel and to make her a news presenter or a part-time news presenter from the London Bureau. The Respondent did not agree to that request.

27 May 2016 – 28 February 2017 ("Period 4")

48. On 27 May 2016, the Claimant returned to London and began a period of medical leave due to problems with her injured foot. She advised the Respondent that she was not available for international assignments which required her to travel abroad.

49. In October 2016, the Claimant had a telephone conversation with Mr Maddox. Mr Maddox asked the Claimant about her recovery. The Claimant asked Mr Maddox to be allowed to work out of London. Mr Maddox did not agree to that and told the Claimant that he wanted her to continue to work as before,

[2] A Malaysian International airline's flight which disappeared on 8 March 2014 en route from Kuala Lumpur to Beijing.

sharing her time between London and Asia. He told her that her contract would be renewed for 2017 on that basis. The Claimant accepted that.

50. The Claimant stayed on medical leave until 9 November 2016, when she travelled to Thailand, where she stayed until the beginning of December 2016. From there she travelled to Seoul and worked there until mid-February 2017. From 14 to 23 February 2017, she worked in Malaysia covering the assassination of Kim Jong Nam.

1 March 2017 – 31 December 2017 ("Period 5")

51. The Claimant returned to London via Bangkok, and on 1 March 2017 began a second period of medical leave to deal with her foot injury. The Claimant informed the Respondent that she was not available for travel. From April 2017 the Claimant stopped renting her flat in Bangkok.

52. On 23 May 2017, the Claimant offered to the London Bureau and the Atlanta HQ to cover the Manchester bombing story. The offer was declined by the Atlanta HQ. The Atlanta HQ warned the London Bureau that in case the Claimant offered her services to the London Bureau directly the offer should be declined, because the Claimant was on medical leave ("*we don't want to touch this*").

53. On 4 June 2017, the Claimant was deployed by the London Bureau to report on the London Bridge terror attack. She worked one day on this assignment. The London Bureau asked the Claimant if she could continue the following day, 5 June 2017. The Claimant said that she would have loved to but was in pain and therefore would need to do less hours. She was later told that she would not be needed at all.

54. On 5 June 2017, the executives at the HK Bureau and the Atlanta HQ found out that the Claimant had been deployed by the London Bureau on 4 June 2017. That generated an internal email discussion, the upshot of which was a direction that no one was allowed to deploy the Claimant without prior approval of Roger Clark (Head of the HK Bureau) or Mitra Mobasherat (Director of Coverage in Atlanta HQ). It was also agreed that Thomas Evans (Head of the London Bureau) would not be using the Claimant "*going forward*", and that upon his return to Hong Kong Mr Clark would speak with the Claimant.

55. During this second period of medical leave the Claimant kept in email contact with Mr Clark, updating him on her medical situation, including telling him about the offer by Crystal Palace FC to assist the Claimant with her foot rehabilitation. In that correspondence the Claimant sought the Respondent's agreement to allow her to gradually return to work, by working from the London Bureau while undergoing her rehabilitation programme.

56. On 4 August 2017, Mr Clark emailed the Claimant saying:

"*Our position remains the same. You should stay off work until you are fit to return. When you came back a few weeks ago, it didn't do your recovery any good at all and we don't want that to happen again. In any case, your engagement is with the Bangkok bureau, not the London bureau and given you're a correspondent, it's not as straight-forward as working from another office.*"

57. On 29 August 2017, Mr Clark met with the Claimant at the London Bureau. The meeting was also attended by Mr Matthew Taylor (HR Director at the London Bureau). At the meeting, Mr Clark told the Claimant that her contract would not be renewed. The Claimant was asked to return her pass and ID card and was escorted off the premises. The Claimant was invited to sign a settlement agreement, which offer she declined. The Claimant was not offered any further assignments by the Respondent for the remainder of her 2017 contract, which lasted until 31 December 2017. However, she continued to be paid through to the end of 2017 based on the Pay or Play arrangements (see below).

Claimant's interactions with the London Bureau and the HK Bureau

58. From April 2014, whenever in London the Claimant informed the London Bureau that she was available for deployment and gave her availability. The Claimant did not ordinarily inform the HK Bureau that she offered her availability to the London Bureau.

59. Throughout the period of the Claimant's work for the Respondent the Claimant was a regular visitor to the London Bureau when she was in London. Typically, she would meet in the London Bureau with her colleagues to discuss work issues, research news items and prepare her pitches to the management. She would also participate in social events with the colleagues from the London Bureau.

60. Until the email exchange on 5 June 2017 (see paragraph 54 above), the London Bureau was able to deploy the Claimant without seeking the prior authorisation or approval of the HK Bureau and the Atlanta HQ. The Atlanta HQ held the ultimate decision-making authority and was able to override the London Bureau or the HK Bureau on the issue of the deployment of correspondents, including the Claimant.

61. In the whole period of her work for the Respondent, the Claimant visited the HK Bureau only on a few occasions. Ms Licia Yee, the HK Bureau Senior Planning Editor, who was responsible for allocating assignments to the Claimant for the HK Bureau, met the Claimant face-to-face only 2-3 times in the entire period from April 2014 to August 2017.

62. The Claimant was required to keep a log of her deployment in a form of a spreadsheet ("**the days-tracker**") and submit those to the Respondent monthly. The days-tracker served as a tool to record the Claimant's work for the Respondent. It was used by the Respondent for budgeting purposes. In the days-tracker the Claimant recorded in respect of each month the dates when she worked, the item/story on which she worked on those dates, which internal group/region requested the Claimant to work on that item/story and the total number of days in that month she worked on that item/story. The Claimant submitted her completed days-trackers and expenses to the Respondent's business operations team based in the London Bureau.

Pay arrangements

63. The Claimant was initially paid in USD into her Pakistani bank account. However, that arrangement did not work well due to difficulties with transferring money from the USA to Pakistan. From October 2014 the Claimant was paid in GBP into her UK bank account. All sums were paid gross, without any deductions for tax or national insurance. In the relevant periods the Claimant did not pay taxes or national insurance in the UK.

64. The guaranteed amount, i.e., 150 days x the then current daily rate, was paid by the Respondent to the Claimant monthly in twelve equal instalments, irrespective of the number of days worked by the Claimant in that month. For any days in excess of 150 days worked by the Claimant in any given year (as recorded in the days-tracker), the Claimant had to invoice the Respondent and was paid for the extra days at the same daily rate.

65. The Claimant was not paid for her time when she was researching news, discussing her ideas with colleagues, or pitching stories to the London Bureau or the HK Bureau. These activities were not recorded by the Claimant in the days-tracker. She was not paid when she was not working, whether it was because she was on holiday, on medical leave, or because the Respondent did not deploy her to work on an assignment. However, the Respondent was contractually obliged to pay, and did pay, the Claimant for 150 days during the contract term whether or not it utilised the Claimant's services for that number of days in that year, under the so-called Pay or Play arrangement (see paragraph 22 above). Such 150-day paid periods included time when the Claimant was on medical leave in 2016 and in 2017, and after she was told in August 2017 that her contract would not be renewed. The Claimant was reimbursed by the Respondent for her business expenses. This did not include the Claimant's travel expenses for trips between London and Bangkok, unless travelling on a particular assignment.

Days-tracker records

66. The total number of days recorded by the Claimant in the days-trackers as working are:

    (i) in **Period 2** (1 April 2014 – 31 December 2014) - **124** days, comprising:
        a. **6** days in London (obtaining Pakistani visa, Aafia Siddiqui story and screen shot),
        b. **11** days in Amsterdam (MH17 story),
        c. **21** days in Jerusalem (Israeli – Palestine clashes),
        d. the rest (**86** days) in Pakistan and Asia.

    (ii) in **Period 3** (1 January 2015 – 26 May 2016) - **220** days, comprising:
        a. **4** days in London (obtaining Thai visa (1 day) and Pakistani visa (2 days), and 1 day on Bangkok shrine bombing story),
        b. **9** days in Toulouse (MH370 story),
        c. **7** days in Brussels (reporting on the terrorist attack),
        d. the rest (**200** days) in Pakistan and Asia.

    (iii) in **Period 4** (27 May 2016 – 28 February 2017) - **38** days in 2016 (no records are available for January/February 2017) **all** in Asia, and

    (iv) in **Period 5** (1 March 2017 – 29 August 2017) - **1** day in London (4 June 2017 reporting on the London bridge attack).

Territorial Reach Question

The Law[3]

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

    "***First, in all cases where there is a foreign element, the question arises as to whether the English court or tribunal has jurisdiction to hear the case at all or whether it should be heard in a foreign court … this is an issue of private international law and will be referred to as international jurisdiction. If the Defendant is domiciled in a Member State of the European Union, the question of international jurisdiction must be determined by applying the rules of the Brussels I Regulation …*** *Secondly, in domestic cases or in foreign case where England has international jurisdiction, there may be an issue as to which domestic court or tribunal should hear the case: for example, should the case be heard in the High Court or County Court, or in some countries by a court in a particular district? This issue will be referred to as domestic jurisdiction. In employment cases, this issue is of particular significance. That is because of the role of Employment Tribunals in enforcing employment*

[3] I will cite the relevant law I applied on the International Jurisdiction Question when dealing with this issue later in the judgment.

rights. Broadly speaking, 'normal' Common Law claims, for example in tort arising from injuries sustained at work, or in contract, are brought in the Common Law courts … whereas statutory employment rights must be enforced through the Employment Tribunals … ***Thirdly, even if the court or tribunal has jurisdiction to hear the claim in both the senses described above, and English law applies, in the case of statutory employment rights the Claimant must show that he falls within the scope of the relevant legislation … most statutory rights have either express or implied territorial limits which must be satisfied … this last issue … will be referred to as territorial scope*** ." (***my emphasis***)

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

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

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

71. Equally, there should be no difference in the territorial reach test with respect to various rights in the ERA (in this case s.94(1) and s.13 ERA) – see *Lawson v Serco Ltd* 2006 ICR 250, HL at [14], *Bleuse v MBT Transport Ltd and anor* 2008 ICR 488, EAT and *British Council v Jeffery and another case* 2019 ICR 929, CA)[5].

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

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

[5] I will deal with the question of the possible effect of the ***Bleuse*** principle on EU-derived rights later in the judgment.

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

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

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

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

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

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

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

and went on to formulate the relevant question as:

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

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

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

at [11] Lord Hoffman said:

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

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

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

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

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

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

79. At [34] Lord Hoffman said:

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

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

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

81. In *British Council v Jeffery and another case* 2019 ICR 929, CA, the Court of Appeal considered how the above dicta by Lord Hope in ***Ravat*** could be reconciled with what Lord Hoffman said in ***Lawson*** at [34]. While the Court did not come to the same view on this question, all judges agreed that there must be evaluation of whether a particular employment has the sufficient

connection with Great Britain and British Employment Law[7] before the question of the territorial reach of the Act can be answered. As Underhill LJ put it at [41]

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

Peripatetic employees

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

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

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

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

84. At [31], Lord Hoffman continued:

" *…… Unless, like Lord Phillips of Worth Matravers MR, one regards airline pilots as the flying Dutchmen of labour law, condemned to fly without any jurisdiction in which they can seek*

[7] Underhill LJ said in the footnotes to his judgment: *The authorities fairly consistently refer to factors connecting the employment "with Great Britain and British employment law"; but these two elements largely overlap, and I will sometimes for brevity refer simply to the former."*

[8] This was a notable departure from an earlier decision by the Court of Appeal in *Wilson v Maynard Shipbuilding Consultants A.b.* [1978] I.C.R 376, where the Court held that the correct approach was "*to look at the terms of the contract express and implied […] in order to ascertain where, looking at the whole period contemplated by the contract the employee's base is to be*". [at 387 F]. Furthermore, the Court said that one must look at the contract terms at the time of the making of the contract, and subsequent conduct of the parties cannot be used as an aid in construing the contract terms. That was pursuant to the longstanding principle on construing contract terms (see *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583, applied to employment contracts in *Keeley v Fosroc International Ltd* [2006] EWCA Civ 1277), however since doubted as being correct on a number of occasions – see, for example, *BCCI v Ali* [2002] 1 A.C. 251 at [31]).

redress, ***I think there is no sensible alternative to asking where they are based. And the same is true of other peripatetic employees****". (****my emphasis****)*

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

"46 ***In cases where the employee moves between different countries, the employment tribunal's evaluation may need to recognise a change in the relevant circumstances. In some cases - such as that of Mr Fuller – the connection may remain with the original base (in Mr Fuller's case, the US); in others, the position may change. The assessment must, however, be of the position at the time of the matter of which complaint is made*** *(and see Dhunna v CreditSights Ltd [2015] ICR 105, para 43, per Rimer LJ).* ***In particular, if the relevant act, omission or decision fell within a period of employment outside the territorial reach of British employment law, it will not subsequently fall within scope as a result of the employee later establishing the requisite connection with Great Britain and the statutory protections afforded within this jurisdiction.*** *Thus in Tradition Securities and Futures SA v X [2009] ICR 88 the Employment Appeal Tribunal upheld the employer's argument that the right to bring a discrimination claim before an employment tribunal must be addressed by reference to the claimant's situation at the time of the alleged discrimination. In that case, the employees' complaints relating to events that had occurred during their employment in Paris remained outside the territorial reach of British employment law notwithstanding the fact that they were able to pursue complaints in relation to conduct that was alleged to have taken place later, after they had moved to work in London.*

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

Employees based abroad

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

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

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

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

"*….it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership**.** The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country,* ***should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary***." (***my emphasis***)

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

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

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

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

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

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

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

"(5)….In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.

(6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what Ravat was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work….".

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

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

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

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

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

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

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

The "*sufficiently strong connection*" factor must be evaluated through the "prism" of employment relationship.

99. Additionally, in assessing the competing connection factors, the Tribunal must not fall into the error of comparing the competing jurisdictions to decide which would be more favourable to the employee (see *Creditsights Ltd v Dhunna* 2015 ICR 105, CA at [40] and *Foreign and Commonwealth Office v Bamieh* [2020] ICR 465 at [82-85]). The fact that the local law might not offer the same level or the same type of protection as available under British employment law is irrelevant. As Gross LJ said in ***Bamieh*** at [42] "*The issue was the strength of the connection, rather than the strength of the protection*".

Governing Law

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

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

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

Repeal of s.196 ERA

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

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

> *"Frankly, we do not think that those who were responsible for this legislation realised the existence of this problem. But we have to try to give guidance how such cases, of which the present case is one, ought to be approached so as to give effect, as sensibly as is possible, to the words of paragraph 9(2). If the guidance which we give is not in accordance with the intention of the legislation, or if it should involve consequences which are regarded by the policy-makers as undesirable, or if it should involve insoluble problems for the industrial tribunals who will have to consider such questions, we express our urgent support for the plea*

which has already been made by Phillips J. [1977] I.C.R. 112, 117 in his judgment under appeal in this very case, that those who have the responsibility for so doing should, as a matter of urgency, reconsider paragraph 9 (2). If amendment or clarification is required, paragraph 11 (2) and (3) of Schedule 1 to the Act of 1974 provides a relatively simple procedure. Let it not be said that the Employment Appeal Tribunal or this court is frustrating the intention of the legislature when both those courts are urging that, if their interpretation of the words used should not give effect to the intention of the legislature, the legislature should be invited urgently, by a simple procedure, to clarify its intention."

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

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

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

105. Whilst in ***Lawson*** Lord Hoffman thought that the repeal of s.196 "*throws no light*" on the Territorial Reach Question (see paragraph 76 above), I note that in the Commons debate on 26 July 1999, The Minister of State, Department of Trade and Industry, Mr. Ian McCartney (Hansard, vol 336) said:

"Section 196 of the Employment Rights Act 1996 generally limits the operation of the Act to employees who ordinarily work in Great Britain. It is a complicated section resulting from several consolidations, some relating to legislation at least a quarter of a century old.

After careful consideration, we concluded that the complexities are unnecessary. International law and the principles of our domestic law are enough to ensure that our legislation does not apply in inappropriate circumstances. There must be some proper connection with the UK first, and in such cases it is right that UK law should apply. *Other legislation has no need for such restrictions. We believe that now is the time to simplify the provisions, in line with our commitment to good regulation.*

Repealing that section has a number of other significant advantages. ***It ensures that we fulfil our European Union obligations, which, in some circumstances, mean that rights that are derived from Europe should apply to individuals who may not currently be covered.*** *It extends employment rights to employees temporarily working in Great Britain and thus facilitates the implementation of the posting of workers directive, which otherwise would require further regulations later this year. It also means that people who may have worked for some years in the UK, but who are nevertheless excluded from claiming under the Employment Rights Act 1996, will be able to rely on the protection of our legislation, as should be the case.* ***The recent case of Carver v. Saudi Arabian Airlines demonstrates the need for this provision****.*

I do not claim that the amendment will have dramatic effects in practice—few cases arise, and the additional costs to employers will be minimal. ***Nevertheless, it takes forward an important principle, and modernises and simplifies our legislation.*** *The position of mariners is special, and special provisions apply to them at present under sections 196 and 199. The amendment ensures that their position is unchanged.*

> ***The implications of doing otherwise can be fully examined in the longer term.*** *The new powers in the Bill to confer rights—clause 20, which would become section 23 of the Act—will provide us with the opportunity to consult on whether changes to the provisions applying to mariners would be desirable….."(**my emphasis**)*

106. It is, of course, debatable whether the repeal of s.196 ERA has achieved the intended simplification of the legislation. However, it appears that at the time the mischief the repeal was seeking to address was the narrow interpretation of the meaning of the phrase "*ordinarily works outside Great Britain*" in s.196 ERA adopted by the courts by looking solely at the contract terms at the time of the making of the contract ("***the contract test***") without considering the reality of the situation ("***the function test***") (see *Wilson v Maynard Shipbuilding Consultants A.b*. [1978] I.C.R 376). Hence the reference to *Carver v Saudi Arabian Airlines* [1999] I.C.R. 991, in which a flight attendant was unable to pursue a claim for unfair dismissal against her employer despite working the last six years before dismissal out of Heathrow[9]. In that case the Court of Appeal affirmed *the contract test* and dismissed Lord Denning's dicta in ***Todd*** (see paragraph 82 above), which the Court said had laid the foundation of *the function test*, as *obiter* because "*enlargement of the **Wilson** principles was unnecessary for the decision in **Todd***". However, as noted above (see paragraph 83) in ***Lawson*** Lord Hoffman expressly approved Lord Denning's dicta and notably, linked it to the repeal of s.196 ERA. The EAT decision in ***Mulumba*** (see paragraph 85 above) appears to confirm that the function test should now be used.

107. I think this background is relevant to the question of statutory construction, because otherwise to "*giv[e] effect to what Parliament may reasonably be supposed to have intended"* when Parliament said nothing on the subject appears to be a nearly impossible task. In these circumstances, referring to Hansard materials as the relevant background seems to me appropriate on the principles established in *Pepper (Inspector of Taxes) v Hart* 1993 ICR 291, HL.

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

The Human Rights Act 1998

[9] However, the Court allowed appeal with respect to her claim under the Sex Discrimination Act 1975 on the basis of a different test - where at the time of the alleged discrimination the claimant was "wholly or mainly" working.

109. The Human Rights Act 1998 ("**HRA**") incorporates the European Convention of Human Rights ("**ECHR**") into the UK domestic law.

110. Section 2(1) of the Act states:

> **"*2.— Interpretation of Convention rights*.**
> *(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—*
> *(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,*
> *(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,*
> *(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*
> *(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen*."

111. Section 3 of the Act states:

> **"*3.— Interpretation of legislation*.**
> *(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*
> *(2) This section—*
> *(a) applies to primary legislation and subordinate legislation whenever enacted;*
> *(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*
> *(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility*."

112. Section 6 of the Act states:

> *"**6.— Acts of public authorities.***
> *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
> *(2) Subsection (1) does not apply to an act if—*
> *(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
> *(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*
> *(3) In this section "public authority" includes—*
> *(a) a court or tribunal, and*
> *(b) any person certain of whose functions are functions of a public nature,*
> *but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament*.
> […]"

113. Article 1 of the ECHR states:

> **"*Obligation to respect Human Rights***

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

114. Article 6(1) of the ECHR states:

"***Article 6***

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Analysis and Conclusion on the Territorial Reach Question

What was the Claimant's place of work?

Submissions

115. Both sides agree that the Claimant was a peripatetic employee, in the sense that she frequently travelled to various destinations from where she was based to undertake assignments and then returned to her "base". However, and critically, the parties disagree where at the material time the Claimant's base was: - in London (the Claimant's case) or in Bangkok (the Respondent's case).

116. Mr Gorasia argues for that Claimant that she was based in London because it was her home, she maintained strong personal connections to London and the UK (bank account, mobile phone number, accommodation, car, GP registration, she voted in general elections), she did most of her preparatory work in London, she was deployed to various assignments by the London Bureau (albeit the Claimant accepts that the bulk of the assignments were in Asia), she spent her medical leave in London, she regularly attended the London Bureau for work and to socialise with her colleagues, who considered her part of the London team.

117. In contrast, Mr Gorasia argues, Hong Kong could not be her base because she rarely went there, and her connection to Hong Kong was very limited. As far as Bangkok is concerned, Mr Gorasia argues, the Claimant was connected to Bangkok much less than to London and used her flat there as a pied-à-terre. Bangkok, Mr Gorasia says, was for the Claimant a mere "launchpad" or "springboard within Asia".

118. In response, Mr Nicholls, for the Respondent, says that the Claimant did not work in Great Britain, she first worked in Pakistan and then

overwhelmingly in Asia. She accepted that in cross-examination. This is further supported by the details of her assignments in the days-trackers. The Claimant lived in Bangkok, she had a flat there, which she kept until 2017. She went on her Asian assignments from Bangkok and returned there. Therefore, Bangkok was her base. Whilst she was frequent visitor to London, the evidence show that those visits were for the purposes of seeing friends and family and having holidays. They were not for the purposes of work.

119. With respect to the Claimant's argument that the days-trackers do not record all her work and that she had been doing a lot of background and preparatory work in London, which work was not reflected in the days-trackers, Mr Nicholls says that even if that was the case, the work which characterises the Claimant's work for the purposes of determining the Territorial Reach Question is the work for which she was paid, not such other background and preparatory work. And, in any event, Mr Nicholls argues, there is no direct evidence where the Claimant did such background and preparatory work.

120. Mr Nicholls say that although it is accepted that the Claimant sometimes worked outside of Asia, that, in comparison with her assignments in Asia, was very infrequent, and in any event, except for the two short assignments and time spent obtaining foreign visas, all such assignments were outside Great Britain. Mr Nicholls highlights the fact that in four years of her work for the Respondent, the Claimant worked in Great Britain only 19 days (as recorded in the day-trackers), 13 of which were spent on visa applications and training. In contrast, when one looks at the same days-trackers, one sees that the Claimant was routinely in Asia and for lengthy periods.

121. Finally, in response to the Claimant's argument that the London Bureau was deploying her on various assignments in the EMEA region, Mr Nicholls argues that what matters is not where the employer was based, but where the employee was based (*Windstar v Harris* [2016] ICR 847, [46]). Therefore, he says, this does not help the Claimant, and in any event, this assertion is wrong on the facts. The Claimant was managed by the HK Bureau and not by the London Bureau staff.

122. In sum, the Respondent's position is that the Claimant's case is based on what she wanted the circumstances to be, but not what they were in reality, and that is because the Respondent never agreed to the Claimant's working out of London as her base.

Conclusion

123. A peculiar feature of this case is that although the Claimant neatly fits into the category of a peripatetic employee, as described in **Lawson** (see

paragraphs 82- 84 above), I find that she had not one but two work bases - Bangkok and London, from which bases she worked at various times. As the Claimant put in her email to her friends and family of 26 November 2014 [p.205] she was: "*Bouncing between Bangkok and London and wherever else they want me to be*".

124. I do not accept Mr Nicholls' submission that the Claimant was based in Bangkok and her visits to London were merely holidays and not for work purposes. I accept the Claimant's evidence that back in April 2014 she struck a deal with Mr Maddox that she would be splitting her time between Asia and London, and when in London she would make herself available for work, and the London Bureau would be able to deploy her directly. This deal was further reaffirmed at the meeting in Atlanta in September 2014. This is consistent with how things evolved in practice, as can be seen from the Claimant's various assignments between April 2014 and June 2017 and the role of the London Bureau in deploying the Claimant. It is also notable that Mr Maddox told the Claimant that she should not be calling herself a Bangkok correspondent but instead say that she "happens to be Bangkok". He also agreed to the Claimant's request to consider expanding her role into news presenting from the London Bureau, for which purpose the Claimant did a screen shot test in London in October 2014. All that appears unnecessary and inconsistent, if the intention was that the Claimant should be based solely in Bangkok and operate out of Bangkok as an Asia correspondent.

125. I also accept the Claimant's evidence, as further corroborated by Mr David's evidence and Mr Penhaul's statement, that she was a frequent visitor to the London Bureau. While I accept that Mr David was himself in the London Bureau only 7 weeks a year, this does not necessarily mean that he could not give reliable evidence on the frequency of the Claimant's presence in the London Bureau. On the contrary, given the limited time Mr David was in the London Bureau and the fact that the Claimant too was spending long periods outside of London, Mr David forming the impression that the Claimant was "*very much a fixture there*" suggests that the Claimant was indeed coming to the London Bureau quite frequently whenever she was London. The Respondent chose not to call any witnesses from the London Bureau to provide evidence to the contrary.

126. It is also of some significance that the Respondent did not place any restrictions on the Claimant's visits to the London Bureau. The Respondent gave the Claimant an ID card and a pass to the London Bureau, and it appears the Claimant was free to attend the London Bureau whenever she wanted, whether to meet local staff, or to work from the London Bureau on her research and pitches, or to attend local social gatherings. One would not expect that kind of arrangements to be extended to someone who comes to London to merely take their holidays.

127. The Claimant was issued with a Blackberry device by the London Bureau and given the UK number SIMM card. She was included on the distribution list of "London Bureau Matters" emails. She submitted her expenses via the Respondent's staff based in the London Bureau. All these things point to the Claimant being treated by the London Bureau as one of their "international troops".

128. I also accept the Claimant's evidence that although she was taking time off when in London, at the same time she was offering her availability to the London Bureau to be deployed by them. As she called it, putting herself "on call" or "on stand-by". That is consistent with the documentary evidence [pp.162, 201, 292, 312, 701] and the fact that the London Bureau did deploy the Claimant directly on several occasions in 2014, 2015, 2016 and 2017. Ms Yee in cross-examination accepted that it would be unusual for a correspondent going abroad on holiday to contact the local CNN office in that country and offer themselves to be deployed by that office. In contrast, the Claimant was doing that consistently since she had struck her deal with Mr Maddox in April 2014.

129. Additionally, this is consistent with the "Pay or Play" arrangements between the parties under the Claimant's contract. The Claimant was offering her availability (a minimum of 150 days) to both the HK Bureau and the London Bureau, and they were taking them, if and when needed. In short, she was working across both Asia and EMEA region splitting her time between the two.

130. I accept that the Claimant was spending significant periods in Bangkok and that was her base when she was undertaking assignments in Asia under the directions of the HK Bureau. However, she equally had "down time" in Bangkok and not all her time there was work. Essentially, the Claimant split her life between Bangkok and London, both socially and workwise.

131. Furthermore, the Claimant was spending significant periods in London in Period 4 and Period 5, and although in those periods she was deployed by the London Bureau only on a very few occasions, she continued to offer her services to the Respondent and continued to be paid by the Respondent on a monthly basis.

132. I accept the Claimant's evidence that in those periods she would frequently come to the London Bureau to do preparatory work and pitch her ideas. The fact that she did not record that time in the days-trackers as working time and was not paid for that time in addition to the guaranteed 150 days does not mean that this time must be disregarded for the purposes of determining where the Claimant was based and the strength of connection with that jurisdiction.

133. Whether or not the HK Bureau regarded the Claimant as a "HK Bureau or Asia asset" is not relevant. The reality of the situation was that the London Bureau was deploying the Claimant directly and the Claimant was accepting such assignments without seeking prior permission from the HK Bureau. The Respondent did not produce any convincing evidence to show that to deploy the Claimant the London Bureau had to and did seek prior approval from the HK Bureau. Ms Yee's evidence was that she was not aware of many deployments of the Claimant by the London Bureau, and that the London Bureau had a separate desk log of available "international troops". Ms Yee said that she did not know how often the Claimant was in the London Bureau or how frequently she contacted the London bureau.

134. It is not until shortly before the Respondent had decided to part companies with the Claimant, that it tried to introduce some distance between the Claimant and the London Bureau [pp. 299, 314 -315, 324], and that was in the context the Claimant stopping coming to Bangkok and asking to be based solely in London to enable her to undergo medical treatment on her foot.

135. The question, however, whether the Claimant was based in Great Britain at the material time (see paragraph 82 above).

Governing Law

136. Before turning to this key question, I pause to say that although I do have regard to the fact that the governing law of the Claimant's contract was the laws of the State of Georgia, USA, I do not consider this to be a significant factor in determining the Territorial Reach Question. It was neither party's case that the Claimant's employment was more closely connected with that jurisdiction. Although she visited the Atlanta HQ on some occasions, she was never based in the Atlanta HQ and never worked in the USA as a correspondent. This choice of law does not create any stronger connection to Thailand and Thai employment law than to Great Britain and British employment law. Therefore, if at all relevant, I consider this factor as neutral.

Where was the Claimant based at the material time?

(i) Unfair Dismissal

137. As far the Claimant's dismissal[10] is concerned, I find that she was based in Great Britain at the material time, that is when she was dismissed. By 29 August 2017 she was no longer undertaking any assignments in Asia. She

[10] I use the terms "dismissal" and "dismissed" for brevity. This, however, should not be taken as a finding that the conversation on 29 August 2017 amounted to dismissal under the ERA. I also make no findings as to the effective date of termination. I do, however, observe that the Respondent's pleaded case is that the Claimant was in Great Britain "at the time of her dismissal" (para 36(ii) of ET3).

left Bangkok on 1 March 2017. She stopped renting her flat there. Her last deployment was by the London Bureau in June 2017. The deployment was in London. She continued to offer her services to the London Bureau only [p. 312]. She continued to come to the London Bureau on a regular basis. At the time of her dismissal, she was not in London merely "on a casual visit" (see ***Lawson*** at [78]). On the contrary, by then she had been in London for almost 5 months. She continued to be paid by the Respondent monthly whilst she was on medical leave/stand-by under the Pay or Play arrangements [p. 376]. She remained in London for the rest of the contract Term, until 31 December 2017, for which period she continued to be paid by the Respondent [p. 376].

138. The dismissal took place in London. The Claimant was invited to a meeting at the London Bureau, at which meeting she was dismissed. The London Bureau HR director was presented and escorted the Claimant off the premises and took her ID and access card.

139. Therefore, in so far, as the Claimant's complaint of unfair dismissal is concerned, I find that at the material time the Claimant was based in Great Britain and the sufficiently strong connection with Great Britain and British employment law is established for the Claimant to come within the territorial reach of the ERA.

140. It follows, that I find that at the material time the Claimant did have the right under s.94 ERA not to be unfairly dismissed and her claim for unfair dismissal may proceed.

(ii) & (iii) Discrimination arising from disability and victimisation

141. For the same reasons, I find that ss.15 and 27 EqA apply on the facts. The Claimant complains that she was dismissed and subjected to various other detriments because she requested reasonable adjustments on 3 August 2017. In the alternative, she was treated unfavourably by being dismissed because of something arising from her disability, namely sickness absence, inability to perform her work at full capacity and/or travel, and the need to requests for adjustments to her workplace and work arrangement. Therefore, for the reasons set out above (see paragraphs 137 and 138) I find that both at the time of the alleged protected act and the alleged detriments/unfavourable treatment the Claimant was based in Great Britain.

(iv) Failure to make reasonable adjustments

142. This matter is more complicated because the alleged failure spans the period from the Claimant's injury in August 2014 to her dismissal in August 2017. During that time, as I found, the Claimant was based both in Bangkok and London. There are significant periods of time when the Claimant was in Asia and equally lengthy periods in 2016 and 2017 when she was in London.

143. The Claimant first requested adjustments to her work arrangements in April 2016. However, the duty to make reasonable adjustment arises not with a request by a disabled person, but when the relevant requirements under s.20 EqA become present.

144. On the Claimant's case, she had a disability from 12 August 2014 by reason of the sustained foot injury and was put at a substantial disadvantage from that date by the Respondent's various provisions, criteria or practices (paragraph 47 of the ET1). She claims this was an on-going failure by the Respondent to make reasonable adjustments.

145. Therefore, because the duty to take such steps as is reasonable to have to take to avoid the disadvantage was engaged on every day the Claimant remained in the Respondent's employment, it necessarily follows that the duty was engaged in the period when the Claimant was solely based in London (i.e., from 1 March 2017). Accordingly, I find that her claim for failure to make reasonable adjustments in relation to acts/failures to act from 1 March 2017 falls within the territorial reach of the EqA.

146. With respect to the period between 12 August 2014 and 28 February 2017, although, as I found the Claimant had two work bases: Bangkok and London, to decide whether the EqA has the territorial reach with respect to that period, I need to determine whether the connection with Great Britain and British employment law was on the facts stronger than to Thailand and Thai employment law.

147. In that period (i.e. between 12 August 2014 and 28 February 2017) the Claimant spent considerably more time on assignments in Asia, operating out of Bangkok, then in Europe, operating out of London. In early February 2015 she rented a flat in Bangkok to have her own place to live, that was for work purposes. In contrast, while maintaining her place in London, the majority of time she spent in London in that period was on holiday or medical leave.

148. I accept that the Claimant was a frequent visitor to the London Bureau when in London, including in that period. However, such visits were more informal, i.e., the Claimant "popping in" to the London Bureau to see her colleagues, discuss her ideas and pitch her stories to the local management. They did not result in many actual assignments being given to the Claimant by the London Bureau in that period.

149. The picture that emerges from that analysis is that despite the Claimant's efforts to spend more time working in London or being deployed out of London, work took her, time and again, back to Asia, operating out of her base in Bangkok. As the Claimant accepted in cross-examination, in 2014 and in 2015 she worked "overwhelmingly" in Asia, and in 2016 and in 2017 before returning to London in March 2017 she worked "mainly" in Asia. It

appears that this was, in fact, what caused the Claimant to leave Bangkok in March 2017 and seek a more permanent posting in London, working part-time while undergoing a rehabilitation programme on her foot, which in turn might have precipitated her departure.

150. I see no other significant factors, which are strong enough to overcome "the territorial pull" of Bangkok as the Claimant's principal place of work in that period. I accept that when in London the Claimant would have been doing some background and preparatory work before her assignments in EMEA. However, she would have been doing similar background and preparatory work in Bangkok between her assignments in Asia. Considering a far greater number of paid assignments in Asia than in the EMEA region (even less so in Great Britain) in that period, logically the Claimant would have been spending more time in Bangkok/Asia than in London doing any such background and preparatory work.

151. I do take regard to the fact that in Period 4 the Claimant spent 5 months in London on medical leave and was paid by the Respondent for this entire period under the Pay or Play arrangements. I also accept the Claimant's evidence that during that time she was often popping in to the London Bureau to see her colleagues. However, I do not regard these factors as sufficiently strong to overcome the "territorial pull" of Bangkok, from where in that Period 4 the Claimant had been deployed on <u>all</u> her assignments.

152. It is also of significance that in October 2016 the Claimant had asked Mr Maddox to be allowed to work out of London, but that was not agreed by Mr Maddox, and consequently in November 2016 the Claimant had to return to Asia because, as she says in her witness statement, she wanted to keep her job. She then worked exclusively in Asia in that Period 4.

153. I do not consider the fact that the Claimant was paid in GBP in her UK bank account as being of a particular significance. As was accepted by the Claimant this was because there had been some difficulties in transferring USD into her Pakistani account. In any event, what's more important is not where she was paid, but for what, and in that period in the vast majority of cases that was for her work in Asia out of Bangkok.

154. Also, the fact that the Claimant offered herself as being available for deployment by the London Bureau when in London (on call/on stand-by), is a factor, but it must be looked in the context of how many times the Claimant's availability was actually utilised by the London Bureau in that period, and that was far less than the days she had offered to the HK Bureau when in Asia, which days were then taken by the HK Bureau.

155. It is also notable that the Claimant herself considered that she needed to be "released" by the HK Bureau. That was her evidence in cross-examination

when taken to her correspondence in May - June 2017 with Mr Clark. At that is despite the Claimant no longer offering any availability to be deployed in Asia.

156. For all these reasons, I find that the territorial reach of the EqA does not extend to the Claimant's complaint of failure to make reasonable adjustments in relation to any acts/failures to act before 1 March 2017.

(v) Direct race discrimination

157. The Claimant's complaint of direct race discrimination relates to three matters: (i) her pay, which she says was lower than other correspondents, who did not share the Claimant's race, (ii) being denied live news broadcasting opportunities, and (iii) and the comment "*you did not have the look we are looking for*" allegedly made by Ms Erdozain in April 2016 in Hong Kong.

158. With respect to the pay and broadcasting opportunities, for the reasons explained above (see paragraphs 146 - 155) I find that the territorial reach of the EqA extends only to the acts/failures to act from 1 March 2017 and not before. The Claimant's ET1 does not particularise the broadcasting opportunities she claims she was denied. Therefore, it is not clear if there were any falling within the period from 1 March 2017. To the extent there were, this part of the complaint falls within the territorial reach of the EqA.

159. With respect to the alleged comment, I find that this complaint falls outside the territorial reach of the EqA, because it was before the date when the Claimant's connection with Great Britain and British employment law became stronger than with Thailand and Thai law (i.e. before Period 5). The alleged comment was made in Hong Kong by a US employee. There are no other significant factors to connect that alleged episode to Great Britain or British employment law.

(vi) & (vii) Direct sex discrimination/Equal pay

160. This complaint is about pay and is essentially put in the alternative to the direct race discrimination complaint. Accordingly, for the same reasons I find that the territorial reach of the EqA extends only to the acts/failures to act from 1 March 2017 and not before.

(viii) Holiday Pay/Unlawful deduction from wages

161. Finally, dealing with the holiday pay claim. The right to holiday pay is conferred by the WTR. Regulation 13 confers the right to annual leave, and regulation 14 provides for compensation to be paid if, on termination of the

contract, the worker has outstanding holiday due. The WTR was implemented to give effect to the EU Directive 2003/88 on working time.

162. In ***Bleuse*** the EAT (at [57]) held that is that absent any question of Community rights, there was no reason to think that the territorial reach of the WTR would be any different from the limitation found in the 1996 Act as interpreted in ***Lawson***. However, the EAT went on to say (at [57]):

*"…**However, in my judgment the implied limitation that might otherwise be deemed appropriate must be modified so as to ensure that directly effective rights can be enforced by the English courts. That is so, even if on an application of the Serco principles, the base would not be Great Britain. The scope of the provision must be extended to give effect to the directly effective rights under Community law.** That law operates as part of the system of domestic law and must be given effect accordingly. I accept the argument of Ms Kreisberger that if this were not done it would mean that the principle of effectiveness would not be satisfied: there would be no effective remedy for a breach of the Community right*."(***my emphasis***)

163. This principle was approved and arguably further expanded by the Court of Appeal in ***Duncombe*** where at [145] Lord Justice Mummery said:

*"Despite the many objections made by the Department I am persuaded that the Bleuse principle applies to the case of unfair dismissal as to the case of wrongful dismissal. The principle of effectiveness in EC law is fundamental and forceful. **I would go so far as to say that it requires that the implied territorial limitation in domestic law, as identified in Serco, on the right not to be unfairly dismissed should be modified to permit such a claim to be made where that is necessary for the effective vindication of a right derived from EC law**." (**my emphasis**)*

164. When the case came before the Supreme Court, Baroness Hale, giving the leading judgment, said by way of *obiter* remarks at [33]-[34]:

"*33. I would therefore be inclined to agree with the Tribunals and the Court of Appeal that Mr Duncombe and other teachers employed by the Secretary of State in European schools abroad are covered by the Fixed-term Regulations. **But the intended scope of the protection given by the Directive, and others like it, is a question of European Union law to which a uniform answer should be given throughout the Union. 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 the question, therefore, it would probably be necessary to refer it to the European Court of Justice**.*

*34. Were the answer to that simple question to be 'yes' it would then be necessary to give further consideration to the mechanisms appropriate to achieve that end. **There was much discussion before us of whether the Fixed-term Directive had direct effect and whether the principle put forward by the Employment Appeal Tribunal in Bleuse v MBT Transport Ltd [2008] ICR 488 applied. There is no need to enter into that debate at present, but it would seem unlikely that, if the protection of European employment law is to be extended to workers wherever they are working in the area covered by European law, that protection should depend upon whether or not it gives rise to directly effective rights against organs of the state. A way would have to be found of extending it to private as well as public employment**."(**my emphasis**)*

165. It appears, therefore, that there is as yet no definitive answer to the question whether courts and tribunals, when interpreting domestic legislation, which implements employment rights derived from EU Law in order to determine its territorial reach, must depart from domestic law interpretation principles if the application of those principles results in the EU derived rights not being given their intended effect.

166. As Mr Gorasia rightly put it in his submissions – "… *the question becomes what the territorial scope of EU-derived rights are?*". He correctly accepted that EU-derived rights do not apply to workers working outside of the EU (*Hasan v Shell International Shipping Services (PTE) Ltd and ors* EAT 0242/13; *Wittenberg v Sunset Personnel Services Ltd and ors* [2017] ICR 1012, *Nica v Xian Jiaotong Liverpool University and ors* [2018] ICR 535). However, he argues that "*it is conceivable that a case could arise in which a British court held that a worker worked within the EU, but considered that, applying domestic principles, the connection with England and Wales was insufficient for the claim to come within the territorial scope of domestic employment legislation. In such a case, where the Claimant sought to rely on EU-derived rights, the domestic rules on territorial jurisdiction ought to be read in such a way as to give effect to that EU-derived right*".

167. I do not disagree with this proposition, especially considering that the Supreme Court did not expressly overrule the Court of Appeal decision on the scope of the ***Bleuse*** principle. However, for EU-derived rights to apply ordinarily the worker must be working within the EU, i.e., in one or more of its Member States.

168. I can see the danger of falling into a kind of "chicken and egg" situation, where to decide whether a worker's place of work was in a Member State one must consider domestic law principles addressing this question (e.g. the ***Lawson*** principles). However, if the application of such principles results in the worker being denied what otherwise s/he would have enjoyed as an EU-derived employment right, the courts and tribunals must apply a broader interpretation to give effect to such EU-derived right.

169. However, on the present facts, I am satisfied that before 1 March 2017 the Claimant was not working within the EU to the extent sufficient to trigger the application of the WTR. As I found, before 1 March 2017 the connection with Great Britain and British employment law was insufficient for the Claimant to come within the ambit of the ERA and the EqA. The Claimant's connection with other EU states and their employment laws (Belgium, France and the Netherlands) was even weaker. Essentially, she was there on short-term business trips. There were no other factors connecting her employment with the Respondent to those other jurisdictions. Therefore, even taking into account her work in those other Member States, I do not regard that as sufficient to give a broader interpretation to the territorial reach of the WTR.

170. For these reasons, I find that the Claimant's rights under regulation 13 WTR arose on 1 March 2017 when her London base became her main and indeed the only work location. It follows that her rights under regulation 14 WTR and under s.13 ERA apply with respect to the period from 1 March 2017 until 31 December 2017.

171. I must say that I have come to that conclusion not without some hesitation. I find that it is very difficult to determine the extent of the territorial reach of the WTR with no direct authority on the question of the territorial reach of the underlying rights under the EU Directive. To interpret the territorial reach of the WTR in a way to give effect to underlying EU-derived rights in accordance with the ***Bleuse*** principle, one needs to know what the territorial reach of such EU-derived rights is, as a matter of EU law.

172. In ***Duncombe*** Baroness Hale said that to answer that question a reference to the ECJ would probably have been required. The parties did not refer me to any ECJ authorities on this point subsequent to ***Duncombe***, nor did they apply for the question to be referred to the ECJ. In any event, in light of s.6A of **Retained EU Law (Revocation and Reform) Act 2023**, it appears that any such reference from this Tribunal will lie to the EAT and not the ECJ.

173. I do, however, see potentially significant implications for both sides, if indeed under the ***Bleuse*** principle the Claimant's regulation 13 rights should be interpreted as having a wider territorial reach than the territorial reach of the ERA[11]. For example, should the Claimant's entitlement to basic annual leave be calculated proportionally to the time she spent working within the EU in any leave year, whether or not in that period she would have enjoyed any other domestic employment law rights under the local territorial reach test? Considering the recent decision by the Court of Appeal in ***Smith v Pimlico Plumbers Ltd*** [2022] EWCA Civ 70 this could make a substantial difference to her claim under regulation 14 WTR.

174. However, in the absence of any direct authority on this point (at least known to me), and considering what appears to be the settled position that the same "territorial reach test" must apply to all rights under the ERA and the EqA (see paragraphs 68-71 above), my preferred view is that all the Claimant's complaints in the claim must stand or fall together by the application of the same territorial reach test under ***Lawson***.

175. Finally, whilst it was not argued in those terms in relation to other EU-derived rights, my conclusions at paragraphs 165 - 174 above equally apply to

[11] And indeed, potentially wider than the territorial reach of regulation 13A WTR (additional 1.6 weeks of annual leave). See also paragraph 105 above.

the Claimant's rights derived from the Equal Treatment Directive (2006/54/EC).

Territorial Reach - Summary

176. To sum up, I find that the following Claimant's complaints fall within the territorial reach of the ERA, the EqA and the WTR (as applicable):
    (i) unfair dismissal (ss.94, 98 ERA);
    (ii) victimisation (s.27 EqA);
    (iii) discrimination arising from disability (s.15 EqA);
    (iv) failure to make reasonable adjustments (ss. 20, 21 EqA), to the extent arising from acts/failures to act on or after 1 March 2017;
    (v) direct race discrimination (s.13 EqA) in relation to complaints of (i) lower pay, and (ii) denial of broadcasting opportunities, both to the extent arising from acts/failures to act on or after 1 March 2017;
    (vi) direct sex discrimination (s.13 EqA) in relation to the complaint of lower pay, to the extent arising from acts/failures to act on or after 1 March 2017;
    (vii) equal pay (Chapter 3 EqA), to the extent arising from acts/failures to act on or after 1 March 2017; and
    (viii) holiday pay (s.13 ERA, and reg 14 WTR) with respect to the accrued but not taken annual leave in the period from 1 March 2017 to 31 December 2017.

Analysis and Conclusion on the International Jurisdiction Question

177. Having decided on the territorial reach of the Acts, I now need to consider the International Jurisdiction Question, namely, whether despite the presence of a foreign element (the Respondent not being domiciled in this country) the Tribunal has jurisdiction to consider the Claimant's complaints falling with the territorial reach of British employment law.

178. Both parties placed great emphasis on the Brussels Regulations as the instrument, which on the Claimant's case confers such jurisdiction on the Tribunal, and on the Respondent's case - establishes that the Tribunal does not have the necessary jurisdiction to consider the complaints, even if those fall within the territorial reach of the Acts.

179. I consider the correct approach is to start with the relevant provisions of the legislation, which confer jurisdiction on employment tribunals to hear complaints about violation of the substantive rights protected by that legislation. In the present case the relevant sections are ss.23 and 111 of the ERA, s.120 of the EqA, and regulation 30 of the WTR.

180. Although expressed in different terms, all these provisions expressly provide that an employee/worker, who considers that their substantive rights protected by that law have been breached, may present a complaint to the Tribunal, and the Tribunal shall consider it, except if, for example, the complaint was presented out of time.

181. There is nothing in the ERA, EqA or WTR to suggest that the Tribunal jurisdiction to consider such complaints is subject to the Tribunal having "international jurisdiction" under the Brussels Regulations or private international law.

182. I interpret that as telling me that it is the territorial reach of the Acts themselves that confers such "international jurisdiction" on the Tribunal, where necessary. In other words, if Parliament intended that the substantive rights under those Acts must in certain circumstances apply extraterritorially, it would appear inconceivable that at the same time Parliament would have intended that despite such extraterritorial reach of substantive rights under the Acts, the provision of the same Acts establishing the Tribunal as the correct forum to resolve disputes concerning violations of those rights should have a more limited territorial reach, which is to be determined under the Brussels Regulations or private international law (as the case may be).

183. In my judgment, such interpretation is not only against common sense, but would also offend "the right to a court" principle under the common law and Article 6 of the ECHR. I also consider that as a public body, this Tribunal is bound by section 3 and section 6 of the HRA to interpret ss 23 and 111 of the ERA, s.120 of the EqA, and regulation 30 of the WTR as conferring the necessary international jurisdiction on the Tribunal to consider complaints under the Acts falling within the territorial reach of those Acts.

184. I do not accept the analogy Mr Nicholls tried to draw with the time limitation provisions, to the effect that as one may have a substantive right but not able to enforce it because s/he was late in submitting a claim, one may also have a substantive right but not able to enforce it because s/he does not come within the international jurisdiction of the forum which is designated by the relevant statute to deal with the enforcement of that right. In the former case, a person is not deprived of her/his right to a court, but essentially forgoes it by not seeking a redress within the prescribed period[12]. In the latter case, the state, on the one hand, tells an individual that s/he comes within its protection with respect to a particular right, but on the other, if that right is

[12] One, of course, can envisage a scenario when the prescribed period is so short or the process of applying for a redress is so cumbersome that it can be said that the person's right to a court is violated.

violated, the state's devised mechanism for protection of that right, may not be available to that individual at all. That cannot be right[13].

185. Of course, one might hypothesise that a foreign court, which under the Brussels Regulations or the principles of private international law is the correct forum, might apply British employment law in resolving a dispute between the parties, and therefore the individual's right to a court will be preserved. Indeed, it is not that unusual in commercial context for courts in one country, when resolving commercial disputes between the parties, to apply domestic law of another country, whether because that law was chosen by the parties, or as a result of the application of the relevant international treaty or the conflict of law provisions of the seat of the court seized.

186. However, considering that labour relations (and accordingly laws that govern them) are usually considered a matter of public policy, a foreign court entertaining applying British employment law instead of its domestic law to an employment dispute judiciable in that court appears highly unlikely.

187. Furthermore, the right to a court requires that a person has "*a clear, practical opportunity to challenge an act that is an interference with his right*" (see *Bellet v France* (Application no. 23805/94), 4 December 1995) at [36]). If the Claimant is denied access to the Tribunal to challenge an interference with her rights which British employment law gives her, and instead must seek to mount her challenge in a Thai court thousands of miles away from her home, which court may or may not accept jurisdiction and may or may not recognise the substantive right in question, this, on any sensible view, cannot be said to be giving the Claimant "*a clear, practical opportunity*" to challenge the interference with her rights.

188. I derive further support for that conclusion from the EAT decision in *Pervez v Macquarie Bank Ltd (London Branch) and another* [2011] I.C.R. 266, where Underhill P (as he then was) dealing with the question whether Regulation 19(1) of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 had the effect of depriving the Tribunal of jurisdiction to entertain a claim falling within its territorial reach said at [19 - 20]:

> *19. Those submissions are powerful. I accept that MCSL could not in any ordinary sense of the phrase be said to have been carrying on business in London.* ***But if it followed that the Tribunal had no jurisdiction that would be a very surprising result. Parliament would have conferred rights on a group of employees but would in respect of one sub-set of that group have failed to provide a forum in which those rights could be enforced.*** *Even if my doubts about Mr. Berkley's concession are correct and the Claimant could on the facts*

[13] I do, of course, accept that Article 6 ECHR itself cannot give a substantive right where one does not exist for example, because the law containing such right does not apply to the claimant, including by reason of its territorial reach. However, that is a different issue.

of this case have relied on limb (b), there could be cases where that route is unavailable because the acts complained of unequivocally took place outside the jurisdiction. ***Take for example the case of an employee of a French company on a "non-casual" secondment to a different company in London who is subjected to racial harassment by a colleague in the course of a trip to New York (or indeed Edinburgh), or who is dismissed at a meeting with his employers in Paris. The case would be within the legislative grasp of the 1976 or 1996 Acts, but if MCSL's case were correct an English tribunal could not entertain the claim. Such a situation seems wrong in principle.***

20 Ms. Wilkinson sensibly faced up to this point. She emphasised that the sub-set in question is very limited. The huge majority of employees working in England or Wales will be employed by employers who reside or carry on business here, so that regulation 19 (1) (a) will apply: even foreign–based employers will in all ordinary circumstances have a place of business in the jurisdiction which is where, or is the base from which, the employee works. The only exception would appear to be a case, like the present, of an employee seconded on an ad hoc basis (i.e. not by an employer part of whose business is to supply employees) to work in England or Wales on a sufficiently long-term basis to be regarded as working in Great Britain. But even in such a case the tribunal would, by virtue of limb (b), have jurisdiction over complaints relating to acts or omissions occurring within England and Wales. ***Thus the only situation apparently covered by the substantive legislation but in respect of which the employment tribunal would have no jurisdiction would be one where, although the employee was (ex hypothesi) working or based in Great Britain, he was complaining about acts done outside England and Wales by an employer which neither "resided" in either country nor carried on business there. Such a result can hardly, she submitted, be described as repugnant. Although it may seem anomalous that Parliament should grant a right without a remedy, the anomaly is formal rather than substantial. If one reads the substantive legislation and the regulations together, the situation is simply one where a perfectly sensible limit is placed on the rights conferred, albeit by a somewhat clumsy method. In the rare case where jurisdiction is excluded by regulation 19 (1), the employee will of course still be entitled to bring whatever claims are available to him under his contract and/or under the general law of the country where his employer is resident and/or where the acts complained of were done****.*

21 ***I was tempted by those submissions, but in the end I do not think I can accept them. It is in my judgment wrong in principle that a group of employees, however limited, should notionally enjoy protections which they cannot in fact enforce; and I do not believe that an intention to produce that result should be imputed to the Secretary of State, as the maker of the Regulations, unless it is inescapable.*** *The authorities referred to at para. 15 (1) above are relevant here: in both Bryant and Jackson v Ghost, though the point under consideration was not the same, Judge Burke QC and Judge Clark emphasised* ***that the Regulations could not properly be used to gloss or limit the terms of the primary legislation.*** *In order to avoid such a result it is necessary to hold that in the particular context of regulation 19 a company can "carry on business" in England and Wales by seconding an employee to work at an establishment here, even if the supply of workers to third parties is not part of its ordinary business.* ***That is, I accept, a strained construction; but it is not an impossible one, and I believe it is necessary in order to give effect to the rule-maker's intentions****" (****my emphasis****).*

189. Furthermore, ***Pervez*** was decided under the predecessor Tribunal Regulations. The current Rules enacted by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("**the ET Rules**") contain an additional sub-paragraph 8(2)(d), which in my view, removes the need of any "*strained construction*".

2) A claim may be presented in England and Wales if—
(a)the Respondent, or one of the Respondents, resides or carries on business in England and Wales;
(b)one or more of the acts or omissions complained of took place in England and Wales;
(c)the claim relates to a contract under which the work is or has been performed partly in England and Wales; or
(d) the Tribunal has jurisdiction to determine the claim ***by virtue of a connection with Great Britain*** *and the connection in question is at least partly a connection with England and Wales****. (my emphasis)***

190. I read this as conferring jurisdiction on the Tribunal by virtue of the territorial reach of the relevant legislation and the remaining question is whether the claim should be presented in England and Wales (Rule 8(2)(d)) or in Scotland (Rule 8(3)(d)). That question is determined by considering whether the territorial reach of British employment law arises from circumstances connecting the claim (at least partly) to England and Wales or to Scotland. *Jackson v Ghost* [2003] IRLR 824, upon which Mr Nicholls placed reliance, in my view, is of no assistance to the Respondent. This case was decided under the old 2001 Rules, which did not contain a provision equivalent to Rule 8(2)(d) – see the old Rule 11(5).

191. My conclusion that the territorial reach of the Acts necessarily draws in the Tribunal's international jurisdiction is also consisted with Lord Hoffman's dicta in ***Lawson*** at [1] (see paragraph 75).

192. For these reasons, I find that the Tribunal has jurisdiction to consider the Claimant's complaints falling within the territorial reach of British employment law, summarised at paragraph 176 above.

Brussels Regulations

193. Turning to the Brussels Regulations. It was common ground that because the claim was presented before the so-called IP Completion Date (31 December 2020) under the EU (Withdrawal) Act 2018, it is the Brussels Regulations and not section 15C of the Civil Jurisdiction and Judgments Act 1982 that is the relevant legislative source to consider.

194. Dealing with the applicability of the Brussels Regulations first. Both parties referred me to the article by Louise Merrett at the Industrial Law Journal, December 2010, vol. 39, issue 4 (p. 355-381) where she writes:

"***If the defendant is domiciled in a member state of the European Union****, the question of international jurisdiction* ***must be determined*** *by applying the rules of the Brussels I Regulation"* ***If the defendant is not domiciled in an EU Member State, traditional or national rules of jurisdiction can be applied*** *which means, in the case of employment tribunals, regulation 19(1) of the 2004 Employment Tribunals (Constitution and Rules of Procedure) Regulations. This provides that an employment tribunal in England and Wales shall only have jurisdiction to deal with proceedings where the Respondent or one of the Respondents carries on business in England and Wales." (****my emphasis****)*

195. I have already explained above (see paragraphs 188 - 190) why I consider that there is a clear alignment between the territorial reach and the international jurisdiction under the current 2013 ET Rules. Therefore, my primary conclusion, is that the enquiry can stop there. However, if I am wrong on this, I find that taking further steps by analysing the applicability and the effect of the Brussels Regulations brings me to the same result.

196. The purpose of the Brussels Regulations is to regulate jurisdiction and the recognition and enforcement of judgments between EU member states to ensure uniformity and avoid jurisdictional disputes within the EU. This is explained in Recitals 4, 6 and 21 of the Regulations:

> *"Certain differences between national rules governing jurisdiction and recognition of judgments hamper **the sound operation of the internal market**. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.*
>
> *[...]*
>
> *In order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.*
>
> *[..]*
>
> *In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given **in different Member States**. There should be a clear and effective mechanism for resolving cases of lis pendens and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously." (**my emphasis**)*

197. Therefore, in my view, the Brussels Regulations are to be used to determine the question of international jurisdiction when there is more than one Member State's court that may have jurisdiction over a claim. If there is no such conflict or potential conflict of "inter-EU" jurisdictions, either because there is no international element to the dispute at all, or because the Respondent is not domiciled in any Member State, the national rules of jurisdiction of the court seized must generally apply (see Recital 14).

198. There is, however, an exception to this rule, which is said to be "*in order to ensure the protection of consumers and employees*", which provides that in certain circumstance the Regulations apply "*regardless of the defendant's domicile*" (Recital 14).

199. Article 21 of the Brussels Regulations says:

*21. An employer domiciled in a Member State **may** be sued:*
(a) in the courts of the Member State in which he is domiciled; or
*(b) **in another** Member State:*
*(i) in the courts for the place where or from where the employee habitually carries out his work **or in the courts for the last place where he did so**; or*
(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.
*2. **An employer not domiciled in a Member State** may be sued in a court of a Member State in accordance **with point (b) of paragraph 1**. (**my emphasis**)*

200. The effect of these provisions appears to be that an employer domiciled in a Member State or not domiciled in any Member State may always be sued at a place where the employee habitually carries out his/her work or in the courts of the last place where he/she did so, or where the business which engaged the employee is or was situated.

201. This, however, does not suggest to me that if the requirements in the Article 21(1)(b) are not met, the employer cannot be sued in the courts of a Member State even if the national rules of jurisdiction applicable in the territory of that Member State confer such jurisdiction on the courts of that Member State.

202. Article 21(1)(b) creates an exception to the rule that "*A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised*" (Recital 14). This is reflected in Article 6(1):

> "*If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.*"

203. Therefore, if the exception does not apply on the facts, the principle that the national rules of jurisdiction applicable in the territory of the Member State of the court seized should apply comes back into play.

204. I accept that if the Brussels Regulations do apply (e.g., because the defendant is domiciled or is deemed as domiciled in a Member State), their provisions "*must in principle be applied and prevail over national rules of jurisdiction*" (see *Corman-Collins SA v La Maison du Whisky SA* C-9/12 [2014] QB 431 at [22]). However, if the effect of the application of the Brussels Regulations in the case of a non-EU-domiciled defendant is that they do not confer jurisdiction over that defendant on any court of any Member State, I do not see why that should also have the effect of ousting jurisdiction of a Member State's court, which it has by virtue of the operation of the national rules of jurisdiction applicable in that Member State.

205. Furthermore, considering the purpose of the exception "*to ensure the protection of … employees*", it would be a strange result indeed if that

exception had the opposite effect, that is to deprive an employee from accessing the court in a Member State even if the national rules of that Member State conferred the necessary jurisdiction on the local court. Such interpretation would go against the general principles of EU law, in particular the principles of protection of the weaker party, effectiveness and equivalence. In short, I find that the Brussels Regulations, to the extent apply on the facts, do not have the effect of ousting the Tribunal jurisdiction, given to it by the UK domestic legislation.

206. For these reasons, I find that the Brussels Regulations do not assist the Respondent, whether or not they apply on the facts. However, if the Brussels regulations do apply, I find that the Claimant is entitled to sue the Respondent in this Tribunal by virtue of the operation of Article 21(2) and/or the deeming provisions in Article 20(2).

Employment Status[14]

207. Whilst I make no determination of the Claimant's employment status under s.230 ERA or s.83 EqA, or reg 2 WTR, on the facts before me, I find that the Claimant was "an employee" under EU law and for the purposes of the Brussels Regulations, as a person, who "*for a certain period of time*" performed "*services for and under the direction of another person, in return for which [s]he receive[d] remuneration*", *Lawrie-Blum v Land Baden-Württemberg (Case 66/85)* [1987] 3 CMLR 389.

208. I also find that her relationship with the Respondent can properly be said to be the hierarchical relationship of "subordination" (*Bosworth and anor v Arcadia Petroleum Ltd and ors (C-603/17)* [2019] IRLR 668, at [25-28]). The Claimant's position in her relationship with the Respondent was very different to the position of Mr Bosworth (CEO) and Mr Hurley (CFO) in ***Bosworth***, who were the directors of the claimant-company, "*drafted their employment contract themselves or at their direction*" at [29], "*exercised control over by whom, where and on what terms they were employed*" at [30], and "*had an ability to influence [the claimant-company] that was not negligible and that, therefore, it must be concluded that there was no relationship of subordination*" at [31]. None of these features were present in the Claimant's relationship with the Respondent.

209. I do not accept Mr Nicholls' submission that there was a lack of control. Even if it may be said that the Claimant's relationship with the Respondent allowed for a greater flexibility than a typical employer-employee contract, the

[14] It was common ground that the concept "employee" for the purposes of the Brussels Regulations must be interpreted as the autonomous question of EU law and "*the sui generis nature of employment relationship under national law cannot have any consequences in regard to whether or not the person is a worker for the purposes of Community law*" (see *Kiiski v Tampereen Kaupunki* (C-116/06) [2008] 1 CMLR 5, at [26])

Claimant was obliged to make herself available for at least 150 days a year and provide her services if called upon by the Respondent. I do not accept that she was free to turn down any assignment for whatever reason and, as Mr Nicholls put it in his closing submissions, "*could not therefore be required to do anything*". That was not the Claimant's evidence. The Claimant's evidence was that her position was no different to other correspondents. All correspondents could decline to take on a particular assignment for a good reason (health and safety, security concerns, etc). In the Claimant's case, she has done it only once, and that was because she could not travel due to the pains in her foot. She was bound by the contract with the Respondent "*to render services as a newsgatherer and reporter (the "Services") for one hundred fifty (150) days during the Term*", and "*to provide at least 150 days of service during the Term*". There is nothing in her contracts with the Respondent to the effect that she was at liberty to refuse any assignment for any reason or for no reason.

210. The Respondent was in full control of what assignments it gave to the Claimant, when (subject to the Claimant's availability) and where she was deployed. It had full control of how the assignment should be carried out and exercised editorial control of the output of the Claimant's services. The Claimant had to provide her services personally. She could not send a substitute or choose who should be in her team – a cameraman, and editor, etc. Her voice and appearance were "*qualifications for the Services*", and the contract was "*based, in part, upon her on-air ability and appearance*" with the Respondent having the right to terminate it on 30 days' notice if it decided, in its sole discretion, that changes in the Claimant's voice or appearance "*rendered [her] incapable of properly performing the Services*". She had to provide her service to the Respondent on an exclusive basis and could not offer herself as a correspondent to other news agencies. That is in contrast with the Respondent's arrangements with Mr David, who as a freelancer worked for the Respondent and many other agencies, broadcasters and other clients at the same time. The Claimant had to disclose to the Respondent her financial interests, speaking engagements and appearances.

211. All that, in my view, are very powerful indicators that the Respondent had sufficient and indeed close control over the Claimant. The control went beyond the periods when the Claimant was deployed on particular assignments. It covered the entire period of her engagement with the Respondent, including giving the Respondent the right to negotiate an extension of the contract before the Claimant could offer her services to anyone else.

212. The fact that the Claimant was not offered the same benefits and perks (life assurance, medical insurance, etc.) as the Respondent's "regular" employees may be a factor in deciding whether the Claimant was an "employee" or a "worker" within the meaning of s.230 ERA. However, that is

not a material factor to the question of the Claimant's employment status under EU law.

213. Equally, I do not see the fact that the Claimant was required to invoice for her services as a decisive factor, and at any rate, one that could outweigh all others, which, in my view, firmly point towards the employment relationship (within the meaning of EU law) between the parties.

214. For these reasons, I find that the Claimant was "an employee" for the purposes of the Brussels Regulations.

Article 21(1)(b)

215. Considering my factual findings (see paragraphs 51-57) and conclusions at paragraphs 137 and 138, in so far as the Claimant's complaints that fall within the territorial reach of the Acts are concerned, I find that London was the last place from which the Claimant habitually carried out her work. I accept that between 1 May 2017 and her dismissal on 29 August 2017, the Claimant had only one 1-day deployment in London, but she had no other deployment anywhere else. In that period, she continued to offer her services to the London Bureau, she specifically offered to be deployed in London or Manchester, she continued to attend the London Bureau, she continued to be on call/stand-by, the Respondent continued to pay her on a monthly basis under the Pay or Play arrangements until 31 December 2017. She left Bangkok with no immediate plans to return there, at least until after she has finished her rehabilitation programme. She told the Respondent that she was not prepared to travel to Asia and for medical reasons would remain in London.

216. In *Nogueira and ors v Crewlink Ireland Ltd* [2018] ICR 344, the ECJ held that the place where a worker habitually works is the place where, or from which, the worker performs the essential part of his or her duties (at [59]). At [57] the Court said that the "*the criterion of the member state where the employee habitually carries out his work must be interpreted broadly*" and at [59]

> *"[predecessor to Reg 21] must —in view of the need to establish the place with which the dispute has the most significant link, so that it is possible* ***to identify the courts best placed to decide the case in order to afford proper protection to the employee as the weaker party to the contract*** *and to avoid multiplication of the courts having jurisdiction—be interpreted as referring to the place where, or from which, the employee actually performs the essential part of his duties vis-à-vis his employer.* ***That is the place where it is least expensive for the employee to commence proceedings against his employer*** *or to defend such proceedings and* ***where the courts best suited to resolving disputes relating to the contract of employment are situated****".* (***my emphasis***)

217. With respect to the complaints falling within the territorial reach of the Acts it is undoubtedly an employment tribunal in England.

218. Therefore, to the extent the Brussels Regulations apply, I find that the Claimant comes under the Article 21(1)(b) exception and accordingly the Respondent may be sued by her in this Tribunal.

Article 20(2)

219. Further and in the alternative, I also find that the deeming provision of Article 20 (2) apply.

> "*2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.*"

220. I do not accept Mr Nicholls' submissions that because the London Bureau was organised as a UK limited company (CNIL), it could not be "a branch, agency or establishment". Firstly, the Respondent did not present any convincing evidence to show that CNIL was "*free to organise its own work and hours of work without instruction from the parent body*" (*Blankaert and Williams v Trost* [1982] 2 CMLR 1, 14, at [12]). Just because CNIL was organised as a limited liability company and not as a foreign branch or in some other legal organisational form, does not mean that it had "free reign" to do whatever it wished without instruction from the Respondent.

221. On the contrary, the evidence before me, including the evidence produced by the Respondent (Ms Yee's witness statement) is that the Atlanta HQ was where the CNN's central management function was based at all material times, and to which the regional HQs, including the HK Bureau and the London Bureau, reported. Mr Rozier evidence too was that his function was global and two of his direct reports were based in the London Bureau, employed by CNIL, but reporting into Mr Rozier, who was the Atlanta HQ staff.

222. I prefer Mr Gorasia submission on this issue and the authorities he cited in support of it, in particular the CJEU judgment in *Sar Schotte GmbH v Parfums Rothschild Sàrl* [1989] ECC 431, where at [15] the Court, dealing with the question of the concept of branch, agency or other establishment in Article 5(5) of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, held that separate legal personality was not inconsistent with a body being a branch, agency or other establishment. What matters is that:

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

223. The London Bureau and hence CNIL were operating in the name of CNN as a global news agency. It is little doubt in my mind that the appearance created by the London Bureau is that it is a regional establishment of CCN Global - the Respondent.

224. Finally, to come within the deeming provision under Article 20(2), the dispute must arise out of the operations of the London Bureau. That is, the Claimant must show "*such a nexus between the branch and the dispute to render it natural to describe the dispute as one which has arisen out of the activities of the branch*": *Anton Durbeck GmbH v Den Norske Bank ASA* [2003] EWCA Civ 147, [2003] Q.B. 1160, at [40].

225. In my judgment, the Claimant's complaints falling within the territorial reach of the Acts, have the necessary nexus with the London Bureau. The London Bureau was not a mere "innocent bystander" in this dispute. It deployed the Claimant on various assignments for which the Claimant was paid, what she claims was a discriminatory rate. The Claimant was dismissed in the London Bureau. The London Bureau HR person was present and escorted the Claimant off the premises. The evidence shows [p. 313] that the London Bureau chief, Mr Thomas Evan, decided in June 2017 that the London Bureau would not be using the Claimant "going forward". The Claimant sought reasonable adjustments to be allowed to work from the London Bureau on a part-time basis as the means of gradual return to work, which the London Bureau did not accommodate, instead choosing not to use the Claimant. This, in my view, creates sufficient nexus to describe the Claimant's dispute (again, to the extent falling within the territorial reach of the Acts) as arising out of the activities of the London Bureau.

Service of the claim form

226. Finally, I do not accept the Respondent's argument that because the Respondent was served via CNIL, the Tribunal does not have jurisdiction to consider the claim.

227. The rules governing the delivery of documents by the Tribunal are set out in Rule 86(1) of the ET Rules, which reads:

86.— Delivery to parties
(1) Documents may be delivered to a party (whether by the Tribunal or by another party)—
(a) by post;
(b) by direct delivery to that party's address (including delivery by a courier or messenger service);
(c) by electronic communication; or

(d) by being handed personally to that party, if an individual and if no representative has been named in the claim form or response; or to any individual representative named in the claim form or response; or, on the occasion of a hearing, to any person identified by the party as representing that party at that hearing.

228. There is nothing in the ET Rules to suggest that to deliver a claim form to a foreign-domiciled respondent leave to serve out of the jurisdiction is required, or that service on a respondent domiciled abroad is not effective unless effected on the respondent when it happens to be in the jurisdiction, or where the respondent has given an address for service within the jurisdiction. I was not referred to any direct authority on this point. However, it is to be noted that the view of the editor of the IDS Employment Law Handbook is that "*[d]ocuments may also be delivered to parties who are based abroad via any of the above methods*".

229. Furthermore, Rule 91 of the ET Rules provides:

91. Irregular service
A Tribunal may treat any document as delivered to a person, notwithstanding any non-compliance with rules 86 to 88, if satisfied that the document in question, or its substance, has in fact come to the attention of that person.

230. The claim form was delivered to the Respondent via CNIL. The Respondent is clearly aware of the claim. It presented a response to the claim, albeit only to dispute the Tribunal's jurisdiction. Considering the overriding objective under Rule 2, the powers given to the Tribunal by Rule 91, and the fact that none of the authorities, on which the Respondent relies (*HRH Maharanee of Baroda v Wildenstein*, *ABC v Google* [2018] EWHC 137, Hand Held Products v Zebra Technologies Europe [2022] FSR 26 and *BW Legal Services v Glassdoor Inc* [2022] BCC 927) deal with the question of the validity of service of a claim form by an employment tribunal on a foreign domiciled respondent under Rule 86 of the ET Rules, and as such are of little assistance, I am satisfied that the claim form was delivered to the Respondent, and that the Tribunal jurisdiction to hear the complaints falling within the territorial reach of the Acts is not ousted or otherwise restricted by the reason of the claim form being sent to the Respondent via CNIL.

231. For all these reasons, I find that the Tribunal does have jurisdiction to consider the Claimant's complaints, as listed in paragraph 176 above.

232. It follows, that these complaints shall proceed to be determined on their merits.

CASE MANAGEMENT ORDERS MADE PURSUANT TO RULE 29 OF THE ET RULES

233. The Respondent is given leave to amend its response to respond to the Claimant's complaints, which I found the Tribunal has jurisdiction to consider. Any amended response must be received by the Tribunal within 28 days of the date this judgment was sent to the parties. The Respondent must send a copy of its amended response to the Claimant at the same time.

234. There shall be a preliminary hearing for case management purposes on the first available date to be fixed by the Tribunal. The parties will receive a notice of the hearing in due course. If the parties have dates to avoid, they must write to the Tribunal as soon as possible giving their dates to avoid for the rest of 2023.

235. At the next hearing an employment judge will discuss the claim and the response, consider any applications the parties may make, give appropriate case management orders, and list the claim for the next hearing. The parties must liaise to prepare an agreed joint Agenda for the hearing, a draft List of Issues, and proposed directions.

236. If either party wishes to make any application to be considered at the preliminary hearing, the party must send the application to the Tribunal and the other side no later than 21 days before the date of the hearing. The parties' attention is drawn to Rules 30, 53 - 56 of the ET Rules.

Employment Judge Klimov

11 August 2023

Sent to the parties on:

11/08/2023

For the Tribunals Office

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