EMPLOYMENT LITIGATION INVOLVING EMPLOYEES WHO WORK ABROAD
AND/OR FOREIGN EMPLOYERS

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INTRODUCTION

1. This paper covers, in note form, the three main issues which may arise in any employment case where the employee works wholly or partly abroad and/or has a foreign employer, and the questions are as to the employee’s rights and where the litigation should be adjudicated. It also deals with some of the procedural issues which may arise, particularly in the High Court.

2. The three main issues in relation to this type of dispute are:

   a. **International jurisdiction or forum**: whose courts and tribunals should decide the case?

   b. **Applicable law**: which substantive law is applicable to the contract of employment under consideration?

   c. **The territorial scope of applicable mandatory law**: how the employment tribunals decide what statutory rights the employee has in the case of:

      i. Purely domestic law rights;

      ii. Rights derived from Community law.

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1 This paper is adapted from a paper presented by Thomas Linden QC to the Scottish ELA on 29 September 2016.
3. This threefold classification of the potential issues in this type of case was recognised by the Employment Appeal Tribunal ("EAT") in Simpson v Intralinks Ltd\(^2\), and see also Powell (Simpson) v OMV Exploration & Production Ltd\(^3\). In many cases it will not be necessary to deal with all three questions in detail because the answer to one or more of them will be obvious. But it is important to bear in mind that the questions do not stand or fall together. For example, obviously, the English courts are accustomed to applying foreign law to disputes over which they have jurisdiction. Perhaps less obviously, British mandatory law (eg our system of statutory employment protection) might, in principle, be applicable to the contract of employment under consideration but the employee might nevertheless be outwith the territorial scope of that law.

WHICH IS THE RIGHT FORUM?

The Brussels II Regulation

4. There may be two questions where forum is in issue: can the court or tribunal adjudicate the dispute and, if so, should it do so or should it stay the proceedings and allow another court or tribunal which has the power to adjudicate it to do so first.

5. The cornerstone provision for deciding these questions in both the courts and the tribunals is the recast Brussels I Regulation 1215/2012 which applies to proceedings issued on or after 10 January 2015 ("the Brussels II Regulation") and, in particular, Section 5 (Articles 20-23). The Brussels Convention 1968 (to which Denmark is party) and the Lugano Convention (Switzerland, Norway and Iceland) make similar provision for the determination of jurisdiction and Article 6 of the Posted Workers Directive\(^4\) makes special provision to ensure that the posted worker can bring proceedings to enforce her rights in the territory to which she is posted. Where European legislative regime applies, it determines which court(s) have jurisdiction and, by and large, must accept jurisdiction.

6. For the sake of simplicity this paper concentrates on the Brussels II Regulation. Note, however, that the original Brussels I Regulation was materially different in its terms relating

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\(^2\) [2012] ICR 1343 EAT at paragraph 5

\(^3\) [2014] ICR 63 EAT

\(^4\) 96/71/EC
to employment litigation before it was recast, most notably in that the employment provisions did not themselves permit an employer to be sued in a Member State unless it was domiciled or deemed to be domiciled in the EU. Whether this was permissible was a matter for national law. The new Article 21.2 of the Brussels II Regulation does permit this in certain circumstances. So advisers should bear in mind that the bulk of the case law and commentary so far has proceeded on the basis that only employers who are domiciled in a Member State can be sued in a Member State and that, where an employer is not domiciled in a Member State, national law applies to determine jurisdiction. That may no longer be where the line is to be drawn between cases where the Brussels II Regulation ceases to govern jurisdiction and cases where national law takes over.

7. Broadly speaking, the relevant national law is the domestic law which the courts or tribunals of a given country apply to determine whether they have jurisdiction. In the courts, this refers to the CPR rules about service, the doctrine of forum non conveniens, the rules about enforcement of jurisdiction or arbitration clauses etc. In the employment tribunals, it refers to the rules which deal with the jurisdiction of the tribunals including Rule 8 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the ET Rules”).

8. As has been recognised in the case law, Section 5 of the Brussels II Regulation makes special provision for employment cases so as to ensure that the employee has the minimum of difficulty in enforcing or defending her rights. The first question in a given case may therefore be whether Section 5 applies to the case under consideration. This will be the position where the matter is one “relating to individual contracts of employment” (Article 20.1), a phrase which is required to be, and has been given, a broad and pro employee meaning in the case law.

9. Article 20.1 poses two questions: (a) is there a contract of employment in play and (b) if so, does the claim “relate to” that contract?

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5 See eg [Wright v Deccan Chargers Sporting Ventures Ltd](https://www.bAILI.org.uk/search?query=Wright+%26+Deccan+Chargers+Sporting+Ventures+Ltd) [2011] EWHC 1307 QBD for an example – here, a contract claim in England against an employer based in India.

6 See eg [Glaxosmithkline v Rouard](https://www.bAILI.org.uk/search?query=Glaxosmithkline+v+Rouard) [2008] ICR 1375 CJEU, para 17 (the objective of the provisions is to protect the weaker party to the contract by means of rules of jurisdiction that are more favourable to his interests) and now Recital 18 to the Brussels II Regulation.
a. As to question (a), the phrase “individual contract of employment” has an autonomous EU law meaning which is not co-extensive with the English domestic law concept of contracts of employment. It has, instead, been interpreted with reference to the CJEU case-law which defines the term “worker” as it appears in article 45 TFEU and elsewhere in EU law. Courts should ask whether, for a certain period of time, the putative “employee”:

“performed services for and under the direction of that company in return for which he received remuneration”

b. Arguably, the Court should also consider whether the individual “was bound by a lasting bond which brought him to some extent within the organisational framework of the business of that company.”

c. As to question (b) – whether the claim relates to the contract of employment – a broad approach based on whether there is a “material nexus” between the claim and the contract has been applied. Applying this approach claims in tort can fall within the scope of section 5. More generally, arguments which are seen as based on form, rather than substance (eg that an incentive scheme agreement was a separate agreement to the actual contract of employment and a contract with a distinct legal entity to the employer), do not currently carry much weight. Thus, in Samengo-Turner v J & H Marsh & McLennan (Services) Ltd & Others the Court of Appeal held that:

i. a dispute, under an incentive award scheme, between the US parent company of the UK employer and certain UK employees of that subsidiary “related to” individual contracts of employment although the incentive award agreements were between the parent and the employees;

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8 Holterman, para 45.

9 See e.g. Bosworth and another v Arcadia Petroleum Ltd and others [2016] EWCA Civ 818, para 67.


11 [2008] ICR 18 CA
ii. a parent company which provides benefits to employees of associated companies within the same group may be regarded as an employer for the purposes of the Regulation if it provides those benefits in order to reward and encourage those employees for the benefit of their immediate employer and the group as a whole.\(^\text{12}\)

10. Where Section 5 does apply, there are essentially two overlapping routes to establishing that the court or tribunal has jurisdiction to hear the complaint against the employer: domicile, and place of work or recruitment. Article 21 provides as follows:

“Article 21

1. 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.\(^\text{13}\)”

11. Under the Brussels II Regulation, the general principle for all litigation is that a party may only be sued in a jurisdiction in which they are domiciled: Article 4.1. Article 21 reflects this approach but with various important modifications to assist the employee, and the new Article 21.2 goes as far as to provide that the employer need not be domiciled in a Member State if the employee habitually works there or, if he has no place of habitual work, the business which engaged him is/was there.

\(^\text{12}\) See, further, Petter v EMC Europe Ltd [2015] IRLR 847 CA which followed and applied Samengo – Turner. Again, see Bosworth and another v Arcadia Petroleum Ltd and others [2016] EWCA Civ 818 for the limits to this approach.

\(^\text{13}\) As noted above, this is an important change and, read with Article 6.1 it means that, where proceedings were issued on or after 10 January 2015, arguably the courts of a Member State cannot apply national law to determining jurisdiction, even where the proposed defendant is domiciled in a non Member State, if the Brussels II Regulation is engaged.
12. The domicile of the typical (corporate) employer is defined by Article 63.1 as follows:

“1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat;
(b) central administration; or
(c) principal place of business.”

13. “Statutory seat” is not a term of art in English law, but is defined in the Regulation to mean a company’s registered office, or if none its place of incorporation, or if none the place under the law of which the formation of the company took place. Applying article 63.1 a defendant may have more than one place of domicile.

14. However, under Article 20.2, an employer will be deemed to be domiciled in a Member State in the following circumstances:

“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.”

15. As to the interpretation of this provision, see Olsen v Gearbulk Services Ltd and the cases referred to by the EAT in that case. In (very) broad terms, the branch, agency or establishment must be an emanation or alter ego of the employer which has a sufficient degree of permanency, and the link with the branch etc must be sufficient to say that the dispute concerns its operations in the place in question.

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14 Article 63.2 Brussels II.

15 For general guidance on interpreting article 63.1 see Young v Anglo American South Africa [2014] EWCA Civ 1130 at paras 39 – 45.

16 [2015] IRLR 818 EAT. Mahamdia v People’s Democratic Republic of Algeria [2013] ICR 1 CJEU also contains a useful summary of the main cases on these issues.

17 Most of the cases involve the interpretation of what is now article 7(5) of the Brussels II Regulation which is worded identically.
16. If the employer is domiciled or deemed to be domiciled in a Member State, the employee has a choice to sue in the place of domicile or the Member State where or from which s/he habitually carries out his or her work, or last habitually worked or, if none, the Member State in which the business which engaged the employee is situated (“the Limb B test”). Note that the choice to sue in the place of the business which engaged the employee only arises if there is no habitual place of work; otherwise, the choice is between where the employer is domiciled or deemed to be domiciled and the place where or from which the employee habitually worked.

17. If the employer is not domiciled or deemed to be domiciled in a Member State, the employee will only be able to sue in a Member State if s/he passes the Limb B test and then only in the State to which the test points.

18. As to how the habitual work part of the Limb B test operates, the test is clearly a broad one and the answer will be obvious in many cases, particularly given that it is sufficient to work habitually “from” a given place. In a case where the employee works in a number of places, if it is to be England & Wales, this must be the “effective centre of his working activities” or the place “from which the employee mainly carries out his obligations towards his employer”\(^\text{18}\). When identifying that place, it is necessary to take into account where the employee spent most of his working time, where he had an office, where he organised his work for his employer and to where he returned after each business trip abroad\(^\text{19}\). In the absence of an office it is necessary to focus on the place in which the employee carries out the majority of his work. The employee’s place of residence is also relevant\(^\text{20}\). In effect, it must be his working base and the approach to identifying his base is similar to the approach applied in Lawson v Serco\(^\text{21}\) (see, further, the discussion of the base test below).

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\(^{18}\) Koelzsch v Luxembourg [2011] IRLR 514, para 39. This case itself involved the application of article 8(2) of the Rome Convention on the law applicable to contracts (and is discussed in that context further below), but both provisions are worded (and have been interpreted) in the same way. See also C-384/10 Voogsgeerd v Navimeer [2012] IL Pr 341. A preliminary ruling on article 21.2 is also forthcoming in C-242/16 Jose Pontes Pedroso v Netjets Management Ltd.

\(^{19}\) Rutten v Cross Medical Limited [1997] ECR 1-57 paragraph 23


\(^{21}\) [2006] ICR 250 HL (the base test is also discussed in Olsen v Gearbulk Services Ltd [2015] IRLR 818 EAT).
19. There is less authority on the interpretation of the “place of business” part of the Limb B test. It is however clear that (i) this part focuses only on the conclusion of the contract and the business which effected it, rather than on how the relationship played out in practice (ii) the place of business need not have distinct legal personality and (iii) the place of business may be that of an entity other than the employer, if (despite the words of the contract) the employee was in fact engaged by the other entity22.

20. Two further key points on the Brussels II Regulation:

a. **Article 22** is important. It restricts the *employer* to suing the employee in the Member State in which the employee is domiciled, but with an exception for counter-claims. It was on this basis that the court granted anti suit injunctions in *Samengo-Turner* and *Petter v EMC Europe Ltd*23 to restrain proceedings against the employee which had been brought in New York and Massachusetts respectively24. In this context, in broad terms “domicile” for the employee generally means the place in which s/he is resident where the nature and circumstances of his residence indicate that he has a substantial connection with that place25.

b. **Article 23** allows the parties to agree a forum for the resolution of their dispute other than that which is indicated by Articles 20-22, but only by way of an agreement made *after* the dispute in question has arisen unless that agreement favours the employee. This is important as it means that exclusive jurisdiction clauses which form part of the documents relating to the contract of employment are of no effect in *limiting* the employee’s options26 although they may *add* to

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22 *Voogsgeerd* [2012] IL Pr 341 at paras 50, 58 and 65.

23 [2015] IRLR 847 CA

24 Note that the conclusion that the Brussels II Regulation may be enforceable by injunction is controversial given that, inter alia, as between the courts of the Member/Contracting States at least, this does not appear to be the position. Rather, the Brussels II Regulation depends for its effectiveness on its faithful application by the courts of the Member States including the application of the rules on lis alibi pendens. (*Turner v Grovitt* [2004] ECR 1-3565 and *Allianz and Generali Assicurazioni* [2009] ECR 1-663). See, further, below.

25 See paragraph 9 of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001, and see further, Dicey & Morris 15th Edition, paragraph 11R-077.

26 Article 25
In Petter, for example, it was a term of the contract that Massachusetts law applied and the Massachusetts courts had exclusive jurisdiction but this did not avail the employer claimant because of the operation of Articles 22 and 23. There is also an interesting issue as to whether this applies to arbitration clauses in employment contracts which require the dispute to be resolved by an arbitration to be held elsewhere.

The relevance of Rule 8, Schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

21. In the employment tribunals the Rule 8 of the ET Rules provides as follows:

“(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.”

22. The effect of these (broad) provisions is unclear, particularly since the scope for the application of national law was further reduced when the Brussels II Regulation came into effect, as noted above. On one view Rule 8 merely seeks to identify when claims should be presented in England & Wales as opposed to Scotland, assuming that the courts and tribunals of the United Kingdom have jurisdiction by operation of the Brussels II

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27 See eg Mahamdia v People’s Democratic Republic of Algeria [2013] ICR 1 CJEU, para 62.

28 Note that such clauses would not be effective in relation to statutory rights in any event as they would amount to contracting out of the legislation: Clyde & Co Ltd v Bates van Winkelhof [2012] ICR 928 QBD. If, however, the Tribunal claims were compromised on the basis that the arbitrator would decide the dispute, this would work provided the agreement was embodied in a COT3 negotiated through ACAS or a valid compromise agreement.
Regulation. On another view, however, where the Brussels II Regulation is not engaged and/or does not require a particular answer, Rule 8 may supplement it. Thus, if the employer is not domiciled in any Member State and the Limb B test is not satisfied in relation to any Member State either (eg because the employee does not habitually work in or from the EU and was not engaged by a business in the EU) the Brussels II Regulation would arguably not be infringed if the employment tribunal were to accept jurisdiction, applying national law in the form of Rule 8.

23. The point seems theoretical, however, because such an employee would be unlikely to have employment rights under our legislation given the lack of connection between the employment and this jurisdiction. This reflects the practical reality that in relation to statutory claims in the employment tribunal the question of the statutory rights of the employee and the jurisdiction of the tribunal will almost invariably stand or fall together. Moreover, although a tribunal might be obliged to stay the proceedings if the Brussels II Regulation required it, in Lawson v Serco Lord Hoffmann was sceptical about the possibility that the doctrine of forum non conveniens would operate in relation to statutory rights given the unlikelihood that a claimant would have the same statutory rights in more than one jurisdiction.

Scope for a stay where the Brussels Regulation confers jurisdiction on our courts or tribunals?

24. In light of Articles 6.1, 21.2 and the decision of the European Court in Owusu v Jackson that, in effect, the doctrine of forum non conveniens has no application where the Brussels II

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29 See, eg IDS Brief “Employment Tribunal Practice and Procedure” paragraphs 2.37 and 2.49.

30 Note that such cases would be less rare where jurisdiction depended on the domicile or deemed domicile of the employer, as was the position under the Brussels 1 Regulation. Then there might be employees who worked here for foreign employers and were held to have substantive EU employment rights and/or to be within the territorial scope of domestic statutory employment protection applying Lawson v Serco principles. The Brussels 1 Regulation would not require them to be able to sue here but Rule 8 might arguably enable them to. As noted, however, the position has now arguably been altered by the Brussels II Regulation.

31 See the approach in Pervez v Macquarie Banks Ltd (London Branch) [2011] ICR 266 EAT

32 (supra) paragraph 24

33 [2005] ECR 1-1383
Regulation confers jurisdiction on the courts of a Member State, even where the competing courts are those of a non-Member State, there is likely to be limited scope for an employer to ask a court or tribunal to decline jurisdiction in favour of a foreign jurisdiction, even where that employer is in a non-Member/non-Contracting State, unless there are already proceedings on foot.

25. Where there are parallel proceedings in different jurisdictions, in broad terms, the Brussels II Regulation requires the following:

a. As between the courts of a Member/Contracting State:

i. where the same cause of action is being litigated between the same parties in two jurisdictions, the court first seised must decide any issues as to jurisdiction and the other courts must stay the proceedings until that issue has been decided. If the court first seised has jurisdiction, the other courts must decline jurisdiction: Article 29. In broad terms, a court or tribunal is seised of a matter when proceedings are issued although there are nuances relating to service: Article 32.

ii. where there are related actions pending in the courts of other States, the court first seised must accept jurisdiction (assuming it has jurisdiction) and the competing courts and tribunals may (ie are permitted to) stay the proceedings before them: Article 30.

iii. where more than one court has exclusive jurisdiction, the courts of other Member/Contracting States must decline jurisdiction in favour of the court first seised: Article 31.

b. If the competing court is not in a Member/Contracting State: and jurisdiction is based on Articles 4 or 7-9 (i.e. in broad terms, the defendant is domiciled in the EU), the position is governed by Articles 33 and 34 of the Brussels II Regulation:

i. Article 33 deals with cases where a claim is pending in a non-Member State and the same claim is then brought in a Member State. In broad terms, a

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34 This is a reference to the Brussels and Lugano Conventions. See, however, Lungowe & Others v Vedanta Resources Plc & Others [2016] EWHC 975 (TCC) where the TCC held that the court could in principle grant a stay in the exercise of its case management powers, notwithstanding Owusu.
stay may be granted if the foreign court will give a judgment which is capable of enforcement in that Member State and “a stay is necessary for the proper administration of justice”;

ii. Article 34 deals with cases where a related claim is pending in a non-Member State when a claim is brought in a Member State. In broad terms, a stay may be granted where (a) it is expedient to hear the related actions together so as to avoid the risk of irreconcilable judgments, (b) the foreign court will give a judgment which is capable of enforcement in that Member State and (c) “a stay is necessary for the proper administration of justice”.

c. The cases in which this sort of issue will arise in an employment dispute are likely to be very rare, however. The key principle of Section 5 is that the employee should not be forced to litigate in a forum which is not convenient to her: this is a rule in the case of proceedings against the employee (Article 22) and the cases where the employee wishes to bring proceedings in more than one jurisdiction but the most convenient forum is not the one in which the employee wishes to proceed first will be unusual.

26. Where the Brussels II Regulation does not require a particular conclusion on jurisdiction and/or does not confer jurisdiction on the court, the matter is one for national court applying its laws. In the courts of England & Wales the court has a discretion to permit service out of the jurisdiction under CPR rr6.36. In the employment tribunal, it is a matter to be determined under Rule 8 ET Rules which in principle also provides for a power to stay the proceedings in favour of a foreign court or tribunal: see, further, below.

**Anti-Suit Injunctions to restrain proceedings elsewhere?**

27. The High Court has jurisdiction to restrain, by way of an anti-suit injunction, a person from continuing or instituting proceedings abroad if it is inequitable for that person to do so. The discretion to do so is, however, exercised with caution given that, although formally against
the person rather than the court, this type of injunction amounts to an interference with the process of a foreign court and so detracts from judicial comity\(^\text{35}\).

28. However, the position under EU law appears to be that this power effectively does not exist where the foreign proceedings are taking place in a Brussels II State or a Lugano State. As long as such proceedings fall within the scope of those instruments (as defined in Article 1) they may not be restrained by an English court, even if the English court was seised first, even if the parties agreed to litigate in England, and even if the proceedings in the English court (which the anti-suit injunction seeks to prevent) fall outside the scope of the Brussels II Regulation\(^\text{36}\).

29. Although anti-suit injunctions may still be granted in respect of proceedings in other places, as noted above in relation to the Samengo-Turner and the Petter cases, even the existence of this power is controversial where the anti-suit injunction seeks to enforce the Brussels II Regulation against the courts of a Brussels II State or a Lugano State.

30. It is a pre-requisite that the English court must have personal jurisdiction over the respondent (i.e. the party sought to be restrained). This must be established in accordance with the normal principles of jurisdiction in personam. It must be lawful for the respondent to the injunction to be served with process of the English court, and if the respondent has a defence to the assertion of jurisdiction over him he will be entitled, on application, to have service of process set aside. For example, in a case where an employer wished to injunct an employee who was domiciled in England, the Court would have jurisdiction by virtue of Article 22(1) of Brussels II.

31. If that basic condition is satisfied, then the courts will grant anti-suit injunctions where the ends of justice require it. The categories of case in which an injunction may be granted are not fixed but, broadly, they will typically be granted in the following circumstances:

   a. First, the court will generally restrain proceedings abroad which are in breach of contract. Commonly, this will be the case where there is a term of the contract as to exclusive jurisdiction or the proceedings are contrary to an arbitration agreement.

\(^{35}\) *Aerospatiale v Lee Kui Jak* [1987] AC 871 at 892.

\(^{36}\) *Turner v Grovit* [2004] ECR I-3565 and *Allianz SpA v West Tankers* [2009] ECR I-663. See also the discussion above on the scope for staying proceedings under Brussels II.
Thus, where contracting parties agreed to refer disputes to arbitration and a claim falling within the scope of the arbitration agreement is made in proceedings in a foreign court, the English court will ordinarily exercise its discretion to restrain the prosecution of those proceedings in the non-contractual forum, unless the party suing in that forum can show strong reasons for proceeding there.\(^{37}\);

b. Second, where there is a non-exclusive jurisdiction clause or there is no term as to jurisdiction at all, the court may restrain foreign proceedings where satisfied that the bringing or continuation of the proceedings is “vexatious” or “oppressive”. This generally requires the applicant to show that England is the natural forum for the dispute, but also to show something more.\(^{38}\) This might be, for example, that the claim abroad was brought in bad faith\(^{39}\) or is obviously bound to fail.\(^{40}\)

c. Third, an anti-suit injunction is one of the options open to the English court where proceedings have been issued elsewhere and they involve the same cause of action as between the same parties. Such an injunction would, however, only be granted if England were the natural forum for the claim, the other options being for the English proceedings to be stayed or struck out.

32. Unsurprisingly, it is incumbent on the applicant for an anti-suit injunction not to delay the application. The fact that the foreign proceedings are well advanced will tell against the Court’s exercise of its discretion. Notice should normally be given and the court must be provided with the fullest relevant information bearing in mind the issues of comity.\(^{41}\)

\(^{37}\) Ust-Kamenogorsk Hydropower Plant JSC v AESUst-Kamenogorsk Hydropower Plant LLP [2014] 1 All ER 335 at [25].

\(^{38}\) Deutsche Bank v Highland Crusader Offshore Partners at [50].


\(^{41}\) See, generally, CPR 25.1.12.4 and Volume 2 section 15-94.
Service of proceedings

33. This is not the time to explore the topic of service exhaustively. However, in the courts, where jurisdiction depends on effective service:

a. Obviously, permission to serve out of the jurisdiction will not be required if the employer can be served here eg because it has a presence here or because it consents to service eg via legal representatives here;

b. Under CPR r6.33, permission is not required, either, where (in broad terms) the courts have jurisdiction by virtue of the Civil Jurisdiction and Judgments Act 1982 (which incorporates the Brussels Convention), the Brussels II Regulation and the Lugano Convention (ie in very broad terms, on the basis of the principles discussed above in relation to the Brussels II Regulation);

c. Otherwise, apply the rules on service out of the jurisdiction ie CPR rr6.30-6.47 and Practice Direction B ie the applicant for permission has to show:

i. One or more grounds in paragraph 3.1 of Practice Direction B eg, there is a defendant within the jurisdiction in any event and the aim is to join the foreign defendant to the same proceedings. In relation to contract claims, eg the contract was made within jurisdiction, was made by or through an agent trading or residing within the jurisdiction, is governed by English law, or contains a term to the effect that the court shall have jurisdiction or the claim related to a breach of contract committed within the jurisdiction;

ii. That the claim has reasonable prospects of success; and

iii. That “England is clearly the appropriate forum for the trial of the action” ie the forum where the case may most suitably be tried for the interests of all parties and the ends of justice.

d. If the defendant considers that it has been wrongly served or otherwise intends to dispute jurisdiction, it should file and Acknowledgement of Service and make an application for a declaration on the issue within 14 days of doing so: CPR r11. Normally, one should not file a Defence or seek an extension of time to do so as this may be regarded as submission to the jurisdiction: White Book 2015 page 472. CPR
r11(7) essentially allows the clock to be reset in relation to the timetable for serving the Acknowledgement of Service and the Defence in the event that the court rejects the application to decline jurisdiction.

34. Note that in the employment tribunal:

a. The approach in relation to contract claims is to ask whether the courts would have jurisdiction to hear and determine the claim: Rule 3(a) Extension of Jurisdiction (England & Wales) Order 1994. So the approach outlined above ought to apply.

b. Service for other types of claim is dealt with more informally. Rule 86, Schedule 1, of the ET Rules makes general provision for documents to be delivered eg by post or email, arguably without limitation in terms of territory.

Security for Costs?

35. This section deals only with the particular aspects of CPR 25.12 and 25.13 which relate to foreign claimants: see the White Book for a more general consideration of the Court’s powers in relation to security for costs.

36. On the application of the defendant, the High Court may make an order for security for costs against a claimant who is resident out of the jurisdiction but not resident in another Member State, a Lugano State, or in one of the small number of states bound by the 2005 Hague Convention on Choice of Court Agreements. Under the old version of the rule, which referred to the place of “ordinary residence”, the question was where the claimant habitually and normally resided from choice and for a settled purpose. Guidance on this issue can be derived from the interpretation of the concept of “residence” as it appears in paragraph 9 of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001.

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42 CPR 25.13(2)(a). Various other grounds for ordering security for costs are identified in the other sub-sections of CPR 25.13(2) (and elsewhere in the CPR) but none relate directly to the claimant’s country of residence.


44 See eg Cherney v Deripaska [2007] EWHC 965 (Comm).
37. The court must also be satisfied that it is just to make such an order having regard to all the circumstances of the case. In cases relating to claimants resident abroad, impecuniosity cannot be the reason for the making of an order since this is inconsistent with the rule against discrimination under Article 14 ECHR. Instead, the focus must be on the extent of the difficulty which the defendant would face in enforcing a costs order, having regard both to the scope for enforcing a costs order in England and to how much more difficult/expensive it would be to enforce such an order abroad. The effect of this approach is that any award is likely to reflect the additional costs of enforcement of any costs order, over and above the costs of enforcement which would be incurred if the claimant were residing within the jurisdiction. If, however, there is a concern that enforcement will be thwarted by the claimant (eg through concealing/movement of assets) the full amount of the estimated costs may be ordered by way of security. See, also, condition CPR 25.13(2)(g): “the claimant has taken steps in relation to his assets which would make it difficult to enforce an order for costs against him”.

38. An order may be made on the same grounds against appellants or cross-appellants and Defendants can also apply for orders for security for costs against parties other than the claimant (where the claim has been assigned and third party funder cases), but the other party’s place of residence is not one of the bases for the making of such an order. We therefore do not cover these provisions here.

39. It is for the court to determine the amount of the security and how and when it must be given. Application must be made promptly, ideally by the time of the first Cost Management Conference and the application must be supported by evidence.

45 CPR 25.13(1)(a).
46 Nasser v United Bank of Kuwait [2002] 1 WLR 1868 at [61] and [62].
47 De Beer v Kannar & Co (No 1) [2001] EWCA Civ 1318
48 CPR 25.15(1).
50 CPR 25.12(3).
WHAT IS THE APPLICABLE LAW?

40. Having decided whether the court or tribunal has jurisdiction, the next question is as to which system of law applies to the contract of employment under consideration. In relation to this question the courts and tribunals apply what is now Article 8 of the Rome I Regulation\(^{51}\) to contracts of employment entered into on or after 18 December 2009. Otherwise the Rome Convention, which is in broadly the same but not identical terms, applies. For the sake of simplicity, this paper deals with the Rome I Regulation. However, many of the authorities under consideration dealt with the Rome Convention. Equivalence between the Convention and Rome I is a rule of thumb, but should not be assumed.

Rome I – an introduction

41. The Rome Convention on the Law Applicable to Contractual Obligations was incorporated in the law of the United Kingdom via the Contracts (Applicable Law) Act 1990 (“the 1990 Act”), and applied to contracts made after 1 April 1991.\(^{52}\)

42. Accompanying the Rome Convention, which was opened for signature in 1980, was a report by Professors Giuliano and Lagarde, the special status of which as a tool for interpretation of the Rome Convention (and now the Rome I Regulation) was stipulated in the Rome Convention itself.

43. The parties to the Rome Convention were the Member States, although some (including the United Kingdom) availed themselves of various reservations and derogations whose effects fall outside the scope of this paper and which do not impact to any significant extent on matters relating to employment law.

44. Revision of the Rome Convention was identified as a priority by the Council of Ministers in 1998. In December 2005, the European Commission presented a proposal for the conversion of the Rome Convention into a Council Regulation. The UK originally decided not

\(^{51}\) 593/2008/EC. Rome II Regulation (864/2007/EEC) deals with non contractual obligations including tort and industrial action.

\(^{52}\) We have not addressed the position in relation to the (now) relatively rare cases involving contracts of employment entered into prior to this date.
to opt into the Rome I proposal, but subsequently abandoned its misgivings. The Rome I Regulation came into force on 7 July 2008 and, as indicated above, applies to contractual obligations entered into from 17 December 2009.

45. Rome I applies, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It should be distinguished from Rome II, which applies to the law applicable to non-contractual (e.g. tortious) obligations.

46. Key points to note about the Rome I Regulation in general include the following:

   a. It does not apply to evidence and procedure: Article 1(3). So, the lex fori (law of the forum) will apply in relation to these aspects of litigation. However, by Article 18, insofar as the law governing contractual obligations raises presumptions of law or determines the burden of proof, it is this law, and not the lex fori, which will apply. Difficult questions may arise as to whether a given legal principle is properly regarded as a matter of evidence/procedure or substantive law.

   b. By Article 2 (“Universal application”), any law specified by the Rome I Regulation is to be applied whether or not it is the law of a Member State. The spectre of the Regulation (and, previously, the Rome Convention) leading to disputes between parties neither of which did business in Europe explains many of the UK’s misgivings about ratifying these international instruments in the first place. But there is no doubt that they were intended to have, and do in fact have, the effect of enabling European courts to apply the laws of, say, Delaware or Djibouti, regardless of whether the courts in those jurisdictions would act reciprocally.

   c. By Clause 7 of the Recital, the substantive scope of Rome I is designed to be consistent with Brussels I (now Brussels II) and Rome II.

   d. The overriding principle is that, subject to certain exceptions, a contract is governed by the law chosen by the parties: Article 3(1). This choice must be clearly demonstrated, whether by express provision or otherwise, and may apply to all or part of the contract.

   e. In the absence of a choice of applicable law, Article 4 establishes various principles for determining the applicable law in relation to different types of contract. By way of example only, Article 4(1)(a) provides that the law re a contract for the sale of
goods shall be governed by the law of the country where the seller has his habitual residence. Similarly, Article 4(1)(b) provides that a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. There is a hierarchy of sweeping-up provisions at Article 4(2)-(4), which may be of importance in certain cases involving workers’ contracts where the contracts are held to be outwith the scope of Article 8 (see below). These provide as follows (in summary):

i. In cases not specifically covered by Article 4(1), or covered by more than one of Articles 4(1)(a)-(h), the contract shall be governed by “the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence”: Article 4(2).

ii. But, where it is “clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply”: Article 4(3).

iii. And, where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected: Article 4(4).

f. The most important general exception is that provided by Article 9 (“Overriding mandatory provisions”). This is discussed below.

Rome I – Provisions particular to Employment Contracts

47. In the introductory section, we have identified some of the general provisions governing the effect of Rome I. Whilst it is important to bear these in mind, the key provision for an employment lawyer is Article 8 (“Individual employment contracts”).

48. The philosophy that underpins the operation of Article 8 (and its predecessor, Article 6 of the Rome Convention) is the need to secure greater protection for the party seen as the weaker in the contractual relationship. Unrestrained application of the general choice of law rule in Article 3, even allowing for the qualification in Article 9, could have the effect of
depriving an employee of important social policy protections. So, although the starting point is that the choice of law is respected, it is not applied at the expense of what statutory employment protection which would otherwise be applicable.

49. Article 8(1) provides:

“An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.”

50. Before considering the effect of Article 8(1), and the limitations imposed by paragraphs 2, 3 and 4, it is necessary to consider the scope of the provision. What is an “individual employment contract”?

a. An individual employment contract falls to be distinguished from a collective agreement (although, under domestic law, such contracts are presumed not to be legally binding).

b. The phrase “individual employment contract” should be given the same meaning in the context of Rome I as it is in relation to Brussels II (see above). So, the Court will not be receptive to employers’ arguments to the effect that collateral contracts dealing with e.g. bonus or LTIPs, or contracts with service companies, fall outside the rubric. This is so even though Rome I, unlike Brussels II, does not contain the widening words “relating to...”. So, in Duarte v. Black & Decker Corporation53, the fact that the restrictive covenants under consideration were not contained in the service agreement but in a separate LTIP agreement was held to be no bar to the agreement being an “individual employment contract”.54

53 [2007] EWHC 2740

54 “The LTIP agreement was obviously intended to operate as part of an overall package of Mr Duarte’s employment terms. I also think that it cannot have been the intention of the framers of the Convention to allow Article 6 to be circumvented by hiving off certain aspects of an employment relationship into a side agreement which, standing alone, would not amount to an individual employment contract because neither party promises to work for the other.” Per Field J, at [52].
51. The key employment-specific provisions under the Rome I Regulation are as follows:

a. Express choice of law is respected for the purposes of deciding the applicable law of contract (Article 8.1);

b. However, the parties cannot choose to deprive the worker of the protection of law which would otherwise be applicable and which, under that law, cannot be derogated from by agreement (Article 8.1) e.g. statutory employment rights;

c. To decide which mandatory law would otherwise be applicable, and also the applicable law of contract where there is no express agreement, Articles 8.2-8.4 apply:

   “2........the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.” (Emphasis added.)

d. Articles 8(2) and (3) apply tests which are essentially the same as the tests for jurisdiction under Article 21.1(b), Brussels II Regulation, discussed above, and the same approach to these tests applies. However, unlike under Article 21, there is an overriding “closer connection” test under Article 8(4) of the Rome I Regulation. The leading authority on the habitual work test is Koelzsch v Luxembourg55 where the European Court of Justice emphasised the importance of the protection of the employee and therefore the preferability of reaching a conclusion which enables the employee to enforce her rights in the country in which she carries out her working activities, rather than relying on the alternative place of engagement test (given that, by definition, the employee will not work there). The habitual work test should

55 [2012] 1 QB 210
therefore be given a broad meaning as referring to “the state with which the work had a significant connection”.

e. In **Koelsch**, an Article 8(2) case, the CJEU also held that where the employee habitually works in a number of countries (he was a lorry driver), the country in which he “habitually carries out his work” is that in which the centre of activities is based; in the absence of any such centre, the relevant country is that in which he carries out the greater part of his activities. Of course, whilst this approach is conducive to easier enforcement, it will not necessarily be the case that the mandatory law of the place where the employee habitually works is more beneficial to the employee than that which applies in the place of business of the employer. Nor will it necessarily be the case that the mandatory law provides more protection than the country whose law is chosen in the contract.

f. As to the application of the overriding “closer connection” test: see **Schlecker v Boedeker**. Here the Court emphasised that the approach should be to consider the facts of the particular case as to the strength of connection and that the decision should not be influenced by which system of law is more beneficial to the employee. The employee habitually worked in the Netherlands and wanted to rely on more generous Dutch employment law, but it was held that her contract was more closely connected to Germany given that: she lived in Germany and commuted to the Netherlands at the employer’s expense, the employer was a German company, she was paid in German marks (pre-Euro), she paid German national insurance and her pension was arranged through a German provider etc. Although it was for the national court to determine the weight to be given to the various factors, particular regard was to be had to the country in which income tax was paid and/or whose social security system applied to the employee. This was Germany.

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56 [2013] ICR 1274 CJEU

57 See the echoes of this approach in **Olsen v Gearbulk Services Ltd** [2015] IRLR 818 EAT where the fact that the employee had gone to some trouble to ensure that he did not pay tax here was held to be relevant to the territorial reach of our system of employment protection, albeit this was the applicable system of mandatory law.
g. An important question that arises concerns the meaning of “non-derogable provisions” in Article 8(1). What provisions of national law fall within this expression?

i. Clearly, any laws from which parties are, by statute, prohibited from excluding, ought to fall within the expression. So, all rights within the Employment Rights Act 1996 are caught, because the prohibition on contracting out in s.203(1) applies across the statute. Further, s.204(1) of the 1996 Act provides that for the purposes of the Act “it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or a part of the United Kingdom, or not”. Assuming that “non-derogable” is given its literal meaning, that means that all rights under the 1996 Act, from the trivial to the substantial, are covered.

ii. In Duarte, a more restrictive approach was taken in relation to the doctrine of restraint of trade. The employee worked in England; the restrictive covenants in issue were contained in a contract with a Maryland choice of law clause. The employee contended that the English restraint of trade doctrine was a long-standing rule of public policy and thus a “mandatory rule” from which derogation was not possible. Field J held, relying on the Giuliano-Lagarde Report, as follows:

“In my opinion, the mandatory rules referred to [in] Article 6.1 are specific provisions such as those in the Employment Rights Act 1996 and the Factories Acts whose overriding purpose is to protect employees. The law governing the enforceability and validity of restrictive covenants in employment contracts is of an altogether different character. It is part of the general law of restraint of trade which in turn is part of the general law of contract. It is true that covenants in employment contracts are harder to justify than covenants contained in commercial agreements, but the same test of what is reasonably necessary to protect the covenantee’s legitimate interest applies to both types of agreement. The English law of restrictive covenants in employment contracts does not therefore consist of mandatory rules affording protection to employees within

58 Art.6(1) of the Rome Convention referred to “mandatory rules from which the parties may not derogate”; under Rome I, there is no longer any reference to “mandatory rules”, though there is no indication that this omission was intended to effect any significant alteration to the law.
iii. It is respectfully submitted that Field J’s reasoning is debateable. If parties to a contract cannot derogate from a particular rule, then the rule is, by definition, mandatory. The Rome I Regulation does not, at least within Article 8, draw a distinction between mandatory rules that are designed for protective purposes and mandatory rules that serve some other purpose. In any case, part of the rationale for the restraint of trade doctrine is to protect employees in subordinate economic positions from being prevented from pursuing their chosen occupations after their employment has terminated.

36. The overriding effect of mandatory law is then reinforced by Article 9, which applies generally to all contracts rather than specifically to contracts of employment, and provides as follows:

“1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.” [Emphasis added.]

37. It will be noted that there may be significant overlap between “provisions that cannot be derogated from by agreement” in Article 8(1), and “overriding mandatory provisions” in Article 9. The important point to note is that Article 9 applies only to the law of the forum. Article 8(1) is not so limited. In practice, however, arguments as to the applicability of the “non-derogable provisions” principle in Article 8(1) will often be presented with Article 9 arguments in the alternative.
38. **Simpson v Intralinks Ltd**\(^59\) is an example of a case in which what is now Article 8(1) was held to have no application (the applicable law was German), but what was then Article 7 of the Rome Convention. The EAT held that the Sex Discrimination Act 1975 and the Equal Pay Act 1970 were the equivalent of “overriding mandatory provisions” under what was then Article 7. If this is right, and if Article 9 of the Rome I Regulations applies to the same type of provisions as Article 7, the decision as to forum is likely to determine the issue as to statutory rights even if the answer to the applicable law question is different under Article 8 and the employee therefore has statutory rights elsewhere. Thus, on this argument, if the UK employment tribunal has jurisdiction (eg applying the Brussels II Regulation) and is to determine the dispute, UK mandatory law should be applied *in addition* to any foreign law which is generally applicable to the contract by virtue of Article 8. This then raises the question of the territorial scope of that law as to which see, further, below – UK mandatory law may be applicable but it may not protect the employee in question because the employment does not have a sufficient connection with the UK.

39. Before turning to this question, however, note Article 21, Rome 1 Regulation which provides as follows:

> “The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum”

40. In **Duarte v. Black & Decker Corporation**\(^60\) a senior manager at Black & Decker had been poached by a competitor having had access to highly confidential information about product development. He was party to a long-term incentive plan (“LTIP”) with Black & Decker which contained a two-year prohibition on working for ten specified competitors and their associated companies. The LTIP was expressly stated to be governed by the laws of the State of Maryland, USA. He sought a declaration that the covenant was unenforceable. Field J held that the covenants were unenforceable under Maryland law, which was sufficient to resolve the claim. As we have seen, he went on to reject Mr Duarte’s alternative contention that (if the covenants were enforceable under Maryland law) the

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\(^{59}\) [2012] ICR 1343 EAT

\(^{60}\) [2007] EWHC 2740
covenants infringed the “non-derogable provisions” clause under Art.8(1). But, the judge did go on to hold (obiter) that since the doctrine of restraint of trade is an aspect of English public policy it fell within the Article 21 exception:-

“When Mr Duarte entered into the covenants, he was working in England under a contract of employment which...was governed by English law. The job he wishes to take up....is a job in England whose terms are also governed by English law. The public policy of this country...is therefore directly engaged if the covenants are enforced by an English court applying Maryland law when they would be unenforceable under English law.... the result of the application of a specified law would be “manifestly” incompatible with the public policy of the forum”

41. This tends to illustrate the breadth of the options available to the domestic courts in applying Rome I in such a way that they do not have to depart from norms of English law even where they are obliged to apply the law of a foreign country.

42. Identifying the applicable law is one matter. Determining how and by whom it should be applied is another matter altogether. In the Intralinks case (supra), Langstaff J considered, obiter, that if the effect of what was then the Rome Convention had been to require the application of German law in the context of an equality claim, then that would be a task undertaken by the Employment Tribunals, which are statutorily invested with the responsibility to determine workplace equality claims. But it is not difficult to imagine circumstances in which this might pose very substantial difficulties. To take but one example: let us suppose that an employee is recruited in France by a British employer whose centre of operations is in London but which has an office in Paris. The employment contract contains a French choice of law clause. The employee works exclusively in London. After 1.5 years’ employment he is dismissed. He wishes to bring a claim for unfair dismissal. Under UK law, he is not permitted to do so. But French law has no qualifying period of service. Must the Tribunal permit him to bring his claim? And if it does, is the Tribunal bound to disapply the statutory cap, since there is no such cap in French law?

THE TERRITORIAL REACH OF BRITISH STATUTORY EMPLOYMENT LAW

43. Even if the conclusion is that English law is the applicable law of the contract of employment, and the court or tribunal has jurisdiction, where the claim is based on
applicable UK mandatory law there may be a remaining question as to the territorial scope
of the legislation on which the employee relies. In other words, the legislation may be
applicable in principle but nevertheless afford the employee no protection because s/he
works abroad and/or has a foreign employer. The **Lawson v Serco** and the **Bleuse** principles,
discussed below, then come into play to determine this issue.

**The background to Lawson v Serco**

44. Section 196 of the Employment Rights Act 1996 originally enacted different tests for
territorial effect according to the particular right asserted by the employee. These tests
might require consideration of where the employee was actually working at the material
time, or the terms of his contract as to his base, or a combination of these and other
considerations.

However, as noted above section 204 of the 1996 Act provided (and provides) that “it is immaterial” whether the contract of employment is governed by the law of the United Kingdom. Section 196 was then repealed in 1999 and it fell to the House of Lords in **Lawson v Serco** to decide how the question of the territorial effect of the 1996 Act should be approached in the context of a series of cases where unfair dismissal was alleged.

45. The **Lawson v Serco** principles have since been applied to other rights under the 1996 Act
including an unlawful detriment claim pursuant to s.47B of the 1996 Act. They have also
been accepted as applying to domestic legislation generally when that legislation is silent as
to its territorial scope, albeit subject to any requirements of Community law: see eg **Bates
van Winkelhof v Clyde & Co LLP** and **Cox v Ergo Versicherung AG**. Moreover, aspects of

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61 Note that in the context of auto enrolment, the Pensions Act 2008 defines a “jobholder” as a worker “who is working or ordinarily works in Great Britain under the worker’s contract”. This is effectively the terminology of the old test in relation to unfair dismissal claims but it was given a more modern interpretation, following **Lawson v Serco**, in **R (on the application of Fleet Maritime Services (Bermuda) Ltd) v. Pensions Regulator** [2016] IRLR 199 (Admin).

62 [2006] ICR 250 HL

63 See **Smania v Standard Chartered Bank** [2015] ICR 436 at [43]. Langstaff P held that no less stringent a test should apply when asking whether a claim to have suffered detriment short of dismissal is within the scope of the 1996 Act as applies when asking whether a claim to have been unfairly dismissed because of the disclosure is covered.

64 [2013] ICR 883 CA. The case was appealed to the Supreme Court, but the issue of territorial jurisdiction was not considered by the Supreme Court: [2014] UKSC 32, [2014] 1 WLR 2047.
the approach in Lawson v Serco have even been applied to domestic legislation that is not silent as to its territorial scope.\(^{66}\)

46. In relation to the Equality Act 2010, of course, the pattern was similar: there were provisions in the legacy enactments which dealt with territorial reach and which required the case to relate to “employment at an establishment in Great Britain” (as defined) but these did not appear in the 2010 Act, which was silent on mainstream questions of territorial scope and left the gap to be filled by the courts.\(^{67}\) In R (on the application of Hottak) v Secretary of State for Foreign and Commonwealth Affairs\(^{68}\) the Court of Appeal rejected an argument that Part 5 of the Equality Act 2010 should have a wider territorial reach than s.94 of the 1996 Act, and that the court should look upon the territoriality problems with greater sympathy in discrimination claims than in unfair dismissal claims\(^{69}\). The difference in relation to discrimination claims, however, is that rights under the 2010 Act are underpinned by Community law which may in a given case require modification of Lawson v Serco principles in order to enable the employee to enforce EU rights. In Hottack the Court of Appeal did not consider the position under EU Law and whether this made any difference to the territorial effect of the legislation, presumably because the employees were Afghan nationals, recruited in Afghanistan to work as interpreters for the British military in Afghanistan, and were therefore considered not to have EU law rights.

47. It is important to note, however, that not all domestic employment legislation is silent as to its territorial scope. By way of example, the National Minimum Wage Act 1998 provides at s.1 that a person qualifies for the national minimum wage if an individual is a work who is working, or ordinarily works, in the United Kingdom under his contract. Similarly, the Trade

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\(^{65}\) [2014] AC 1379


\(^{67}\) However, there are specific provisions applying the Equality Act 2010 to employment on ships, hovercraft and other offshore work: see ss. 81 -83 of the Equality Act 2010 and the Equality Act 2010 (Offshore Work) Order 2010.

\(^{68}\) [2016] IRLR 534 CA

\(^{69}\) The Lawson v Serco principles have also been applied to discrimination claims brought under Part 3 (Goods and Services) of the Equality Act 2010, see Campbell v Thomas Cook Tour Operations Ltd (No.2)\(^{[2014]}\) EqLR 655.
Union and Labour Relations (Consolidation) Act 1992 expressly sets out the territorial scope of many of the rights it contains.

**Lawson v Serco: the overall approach**

48. The House of Lords held that the question of territorial effect is one of statutory construction - did Parliament intend the 1996 Act to protect the employee in question? The general principle of construction is that it is presumed that Parliament did not intend to legislate for the whole world and the question is therefore as to the implied limitations on the category of employee Parliament intended to enjoy the rights in question. This question is fact sensitive, but the House of Lords (Lord Hoffmann) gave guidance as to what sort of employee would be “within the legislative grasp” of the 1996 Act.

**Lawson v Serco: the standard case**

49. Lord Hoffmann confirmed that the 1996 Act is intended to apply to employment in Great Britain. The right not to be unfairly dismissed applies to employees who are working in Great Britain *at the time of dismissal*. In contrast to the case law under the old section 196(2) of the 1996 Act, which gave primacy to the terms of the contract as to place of work and the intention of the parties at the outset of the employment, the question depends on where *in fact* the employee is working at the time of dismissal or the matter complained of. However, a person who is in Britain “merely on a casual visit” is not protected.

**Lawson v Serco: peripatetic employees**

50. These are, for example, airline pilots and cabin crew, international management consultants, salesmen etc. The House of Lords held that this category of employee will normally be protected if her “base” is Great Britain.

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70 See [Carver v Saudi Arabian Airlines](https://doi.org/10.1093/icr/991.ca) [1999] ICR 991 CA
51. Again, the employee’s working base is to be identified by reference to what actually happens in practice, rather than the terms of the employee’s contract, although these are relevant. As to a definition of “base”: per Lord Denning in *Todd v British Midland Airlines* \(^{71}\):

“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.”

An employee’s base would be “where he started off from…..where he received his orders from…..where his National Insurance cards and his contract, etc. were kept”

52. This approach to identifying the employee’s base was approved by the House of Lords in *Lawson v Serco* \(^{72}\). As noted above, it resembles the approach to the habitual work test under the Brussels II Regulation. Arguably, recent cases have adopted an even simpler approach, reiterating that the question is as to the employee’s base, rather than the employer’s and emphasising the significance of the questions where the employee begins or ends his tours of duty \(^{73}\).

52. On this basis, the pilots employed by Veta Ltd, a Hong Kong company, were protected because they were based at Heathrow.

**Lawson v Serco: expatriate employees**

53. This category of employee lives and works entirely or almost entirely abroad. According to Lord Hoffmann an expatriate employee will only be protected in *exceptional* cases \(^{74}\). (Generally), s/he would need to be:

a. working for an employer based in Great Britain;

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\(^{71}\) [1978] ICR 959 CA

\(^{72}\) See paragraphs 28 and 32-33 in particular.


\(^{74}\) “Truly exceptional”: see *R (on the application of Hottack) v Secretary of State for Foreign and Commonwealth Affairs* [2016] IRLR 534 CA
b. under an employment relationship which was “rooted and forged” in Britain i.e. she was recruited here and entered into the contract of employment here;

c. then posted abroad;

d. And either:

i. a representative of the British business abroad, working for the business back home and liable to return and/or be posted elsewhere eg the Rome correspondent of the Financial Times, London; or

ii. a person “who is operating within what amounts for practical purposes to an extra territorial British enclave in a foreign country” eg a military base or an embassy (though not if recruited locally).

54. On this basis, Mr Botham was protected under the British enclave “exception” as he worked for the MoD on a military base in Germany. Mr Lawson was also protected as he worked on an RAF base on Ascension Island. The fact that he was employed by a private sector contractor did not affect this conclusion given that Mr Lawson’s employment did not have an obvious connection with the local system of law on the Ascension Island. However, Lord Hoffmann indicated that a person recruited locally would not be protected even if it was to work in a British enclave abroad, e.g. to the British Embassy in Rome, because her employment would be strongly connected with the local system of law. On this basis, Bryant v Foreign and Commonwealth Office was approved.

The subsequent clarification/development of the Lawson v Serco principles

55. Since Lawson v Serco, the courts have developed what Lord Hoffmann said and the following key points have emerged, mainly in relation to the expatriate cases.

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75 See Williams v University of Nottingham [2007] IRLR 660 EAT for an example of a case where, on the facts, this line of argument failed.

76 (unreported) 10 March 2003 EAT

77 Paragraph 39
56. In *Ravat v Halliburton Manufacturing and Services Ltd*\(^7\) the Supreme Court emphasised that the language of exceptionality was intended to apply to cases where the employee was truly an expatriate because they lived and worked abroad. Cases where the employee works partly here but mainly abroad, and/or lives here, are not true expatriate cases. It will therefore not necessarily require an exceptional case for such an employee to be protected.

57. Lord Hoffmann said that he had not been able to think of any other examples of exceptional expatriate employee cases and that they “would have to have equally strong connections with Great Britain and British employment law” to the examples which he had given\(^7\). Subsequent cases have recognised that the examples given by Lord Hoffmann were just that. If the tribunal encounters a case in which there are “equally strong connections with Great Britain and British employment law”\(^8\) the fact that the case does not fit within one of the *Lawson v Serco* examples is not fatal: see eg *Duncombe v Secretary of State for Children Schools and Families (No 2)*\(^8\). Per Lady Hale:

> “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.”

58. It has also been held that it may be necessary to carry out a comparative exercise in the expatriate cases to see whether (per Lord Hoffmann) “despite the workplace being abroad, there are other relevant factors so powerful that the employment relationship has a closer relationship with Great Britain”\(^8\): see eg *Bates van Winkelhof v Clyde & Co LLP*\(^8\). However, this does not appear to be a rule and it is not necessary in cases where the individual lives

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\(^7\) [2012] ICR 389 UKSC paragraph 29

\(^8\) Paragraph 40

\(^8\) Paragraph 40

\(^8\) [2011] ICR 1312 UKSC paragraph 8

\(^8\) Lord Hoffmann paragraph 36

\(^8\) [2013] ICR 883 CA
and/or works here for at least part of the time, such that he is not to be regarded as an expatriate employee. Per Elias LJ\textsuperscript{84}, in expatriate employee cases:

“There is then a strong connection with that other jurisdiction and Parliament can be assumed to have intended that in the usual case that jurisdiction, rather than Great Britain, should provide the appropriate system of law. In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force. However...that is not necessary where the applicant lives and/or works for at least part of the time in Great Britain, as is the case here.”

59. The overall test has been articulated by the Supreme Court in \textit{Ravat v Halliburton Manufacturing and Services Ltd}\textsuperscript{85} as follows:

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

32... The question whether the tribunal has jurisdiction will always depend on whether it can be held that Parliament can reasonably be taken to have intended that an employee in the claimant’s position should have the right to take his claim to an employment tribunal”.

60. The application of the test will be fact sensitive. Any evidence which goes to the factual question of the strength of the connection between the employment and Britain/our system of employment law is relevant. The issue will often be determined at a substantive Preliminary Hearing at which both sides will call detailed evidence, and the Employment Judge will make detailed findings of fact. Whilst the issue could also be determined on the basis of assumed facts, the EAT has expressed reservations about that approach as “[a]ssumed facts are capable of being artificial and may constrain a tribunal’s inquiry”.\textsuperscript{86}

\textsuperscript{84} paragraph 98

\textsuperscript{85} [2012] ICR 389 UKSC paragraph 29

The appellate courts have provided the following guidance on factors that may or may not be relevant to the Employment Tribunal’s inquiry as to the strength of the connection between the circumstances of the employment and Great Britain and British employment law:

62. **Relevant factors** may be:

a. Where the employee was recruited (eg *Powell*);

b. (Obviously), where the work is done although this will not always be decisive (see eg *Fuller* and *Olsen*, discussed below);

c. Where the employee is based (eg *Duncombe No 2*);

d. The parties’ choice of law (eg *Bleuse*, *Wallis*, *Duncombe*, *Hottack*, *MoD v Holloway*) despite the fact that section 204 of the 1996 Act says that governing law is immaterial;

e. What has been said to the employee as to which system of law will apply (eg *Ravat*);

f. If the employee has been told that his employment is subject to UK legislation eg the Official Secrets Act 1989 (eg *Jeffrey*).

g. Where the employment relationship has been managed from an operational and/or an HR perspective (eg *Ravat*);

h. Where the employee’s home is (eg *Ravat*) and/or whether s/he has accommodation here (eg *Winkelhof*);

i. Where the employee gets paid and in what currency (eg *Fuller*);

j. Where the employee is entitled to a Civil Service Pension (eg *Jeffrey*);

87 See also paragraph 10.71 of the Equality and Human Rights Commission’s Code of Practice on Employment for guidance on relevant matters.

88 UKEAT/0396/14

89 Although the fact that an expatriate employee is employed under a contract which expressly incorporates English law cannot on its own compel the conclusion that territorial jurisdiction is established, it is an important and significant factor: *Jeffrey v The British Council* UKEAT/0036/16/JOJ at [12].
k. Where the employee pays tax and makes social security contributions and/or any steps which the employee has taken to influence his where he does so (eg Olsen);

l. Where the employer is registered/the business is based (eg Powell);

m. Connections with government/the State and/or representing Britain abroad (eg Duncombe and Wallis).

n. The nature of the employer, and whether it plays an important part in British public life (eg Jeffrey).

63. The appellate courts have also held that certain considerations are irrelevant to the application of the test:

a. It is not relevant to compare the merits and de merits of the system of labour law which will apply if English employment law is held not to apply: Dhunna v CreditSights Ltd90;

b. What was contemplated at the time when the relevant employment contract was made: Dhunna v CreditSights Ltd at [43].

c. The type of unfair dismissal claim does not matter. Thus, the fact that the claim is automatic unfair dismissal for having made a protected disclosure under section 103A of the 1996 Act is irrelevant and does not mean that Parliament intended the 1996 Act to have a greater territorial reach than it would have in the case of the “ordinary” right not to be unfairly dismissed: Smania v Standard Chartered Bank91.

The application of the principles: examples of recent cases where expatriate employees have been held to be protected on the facts, although they did not necessarily fall into an established Lawson v Serco category

64. In relation to British citizens employed by the British Government on government business abroad:

90 [2015] ICR 105 CA at [40]. Note how this reflects the approach under Brussels II and Rome 1 discussed above: see Schleker (supra).

91 [2015] ICR 436 EAT
a. **Ministry of Defence v Wallis**\(^{92}\) held: although they were recruited abroad, and were not working in a British enclave, the claimants were within the scope of the 1996 Act given that they were employed by the Ministry of Defence to work in the British section of International Schools established by NATO in Belgium and the Netherlands, on terms which were expressly governed by English law, and in jobs for which they were only eligible for as long as they were spouses of serving members of the armed forces who were posted there.

b. **Duncombe v Secretary of State for Children Schools and Families (No 2)**\(^{93}\) held: a teacher employed by the British government at a school in Germany pursuant to its international obligations and on terms expressly governed by English law was protected by the 1996 Act, although he was working for an establishment in Germany\(^{94}\).

65. In relation to “expatriate” cases involving private sector employers:

a. **Ravat v Halliburton Manufacturing and Services Ltd**\(^{95}\) concerned a British employee of a British company who was originally recruited there, who lived in Preston, Lancashire, who paid tax and National Insurance here, and who commuted to and from Libya to work on a 28 days on/28 days off pattern. These and other features of his employment established a sufficiently strong connection although he was working for a German subsidiary of Halliburton in Libya.

b. In **Bates van Winkelhof v Clyde & Co LLP**\(^{96}\) a member of an English LLP was engaged to work principally in Tanzania. However, it was agreed that she would return to London six times per year and would be there for a fortnight on each occasion. In

\(^{92}\) [2011] ICR 617 CA

\(^{93}\) [2011] ICR 1312 UKSC

\(^{94}\) See also **Jeffery v British Council** UKEAT/0036/16 (British Council employee protected) but contrast **R (on the application of Hottack) v Secretary of State for Foreign and Commonwealth Affairs** [2016] IRLR 534 CA: no Equality Act protection where the employees were Afghan nationals, recruited in Afghanistan to work as interpreters for the British military in Afghanistan at Camp Bastion and the British Embassy in Kabul under contracts which were not governed by English law.

\(^{95}\) [2012] ICR 389 UKSC

\(^{96}\) [2013] ICR 883 CA
the event, she spent 110 days there in the 11 months prior to her expulsion including 78 days working in the London office. She had a flat there and she paid National Insurance. These and other features of the relationship meant that she was not a true expatriate and they were sufficient for her to be protected.

c. In *Lodge v Dignity & Choice in Dying*[^97] an Australian citizen was employed in London. Her contract stated that it was governed by the law of England and Wales and subject to the exclusive jurisdiction of the English courts. In 2008, she decided to return to Australia because her mother was unwell. It was agreed that she would continue working remotely as head of finance and she began working from Melbourne, returning to London several times a year for work purposes. She dealt with her own tax affairs in Australia and was subject to the Australian pension regime. Held: she was protected by analogy with the foreign correspondent example in *Lawson v Serco*.

**The application of the principles: examples of cases where the employee was not protected although they were spending substantial time here:**

66. In *Fuller v United Healthcare Services Inc*[^98] the Claimant was a US citizen with his home in Texas, employed by a US company and paid in dollars. At the relevant time, he was on a 2 year assignment under which he was said to be based in the US but travelling in EMEA and spending c50% of his time in the UK. The company leased a flat in London for him for the period of the assignment. The Claimant had some personal belongings shipped over but his furniture remained in Texas where his partner lived. The company had an office in London and the Claimant’s email sign off referred to the US and the London addresses. When the assignment ended after 10 months he alleged unfair dismissal and sexual orientation discrimination. The EAT held that:

a. The employment relationship was a US one and so he did not pass the *Lawson v Serco* test;

[^97]: [2015] IRLR 184 EAT

[^98]: UKEAT/0464/13
b. Nor was his employment subject to EU law, essentially for the same reason. The fact of his work in the UK was insufficient (though it would have been prior to the enactment of the Equality Act 2010 because he did not work wholly outside Great Britain).

67. In Olsen v Gearbulk Services Ltd the Claimant, a Danish national domiciled in Switzerland, was recruited as a result of a process conducted in England at the Weybridge offices of an English subsidiary of the Gearbulk group. He was offered an English law contract with that subsidiary under which he would have relocated to Weybridge but, for tax reasons, he elected to enter into a Bermudian law contract with GSL, a Bermudian company, and not to relocate here. In practice he was based at his home in Switzerland from which he travelled internationally and where he did a small amount of work. However, he had an office in Weybridge and spent full weeks working there, such that nearly 50% of his working time was spent here. He also had rented accommodation in Esher where he stayed when working here. The EAT held:

a. As it was agreed that he was a peripatetic employee, and the ET found that he was not based here, he was not protected;

b. The ET was entitled to take into account (against him) the fact that he had deliberately arranged his affairs so as to minimise his connection with this jurisdiction for tax reasons.

68. These cases show that because the sufficient connection test is about the connection between the employment relationship/contract and Britain/our system of law, the question where the work is done is a relevant but not a decisive factor. The relationship may be more strongly connected with some other system of law, or not sufficiently closely connected with our system despite the fact that a good deal of work is done here.

**CLAIMS BASED ON EU RIGHTS: The Bleuse Principle**

69. The effect of the Bleuse principle is that Lawson v Serco principles may require to be modified in order to comply with EU law.

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99 [2015] IRLR 818 EAT
70. In **Bleuse v. MBT Transport Limited** the claimant was a German lorry driver who lived in Germany. He was employed by a company registered in the UK but worked solely in mainland Europe and never in Britain. His contract provided that it was governed by English law and that the English courts had exclusive jurisdiction over any disputes. He brought claims under the 1996 Act for unfair dismissal and unlawful deduction of wages, under the Working Time Regulations 1998 for unpaid holiday pay, and for breach of contract.

71. Mr Bleuse argued that:

   a. English law was the applicable law of contract;

   b. The effect of the (then) Brussels 1 Regulation was to give the English courts exclusive jurisdiction in any disputes arising in respect of the contract of employment because his employer was domiciled in the UK and/or this was where the business which engaged him was situated;

   c. Consequently, if the employment tribunal declined jurisdiction it would prevent him from exercising his employment rights altogether and thereby infringe the principle of effectiveness under EU law.

72. The result in **Bleuse** was that:

   a. The EAT dismissed the claims under the 1996 Act because, applying **Lawson v Serco**, Mr Bleuse was a peripatetic employee who was not based in Great Britain.

   b. However, it upheld his right to bring the holiday pay claim based on Article 7 of the Working Time Directive. The EAT held that:

      i. Where *either* English law is the applicable law of the contract, or it provides the body of mandatory rules applicable to the employment relationship by virtue of (then) Article 6(2) of the Rome Convention, an English court properly exercising jurisdiction must seek to give effect to directly effective rights derived from an EU Directive by construing the relevant English statute, if possible, in a way which is compatible with the rights conferred;

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100 [2008] ICR 488 EAT
ii. The statement in the Working Time Regulations 1998 that they “extend to Great Britain only”\textsuperscript{101} should therefore be read purposively so as to ensure the enforcement by the English Courts of directly effective rights to paid annual leave.

73. Note that:

a. The EAT expressly did not base its decision on the argument that the employment tribunal had exclusive jurisdiction under the Brussels I Regulation. The reason why the claims could be brought in the UK, as opposed to anywhere else where the courts had jurisdiction, was that this was the system of law with which Mr Bleuse’s contract had closest connection.

b. It was also self evident that Mr Bleuse had EU rights, so the question whether this was the case did not need to be explored.

74. In Ministry of Defence v Wallis and Another\textsuperscript{102} the Court of Appeal applied Bleuse and held that the Claimants were entitled to the protection of the (then) Sex Discrimination Act 1975. This was despite the fact that the 1975 Act required that they be “employed at an establishment in Great Britain” whereas they were not so employed. They were employed at NATO establishments in Belgium and the Netherlands. Elias LJ summarized the principles as follows:

“\textit{First,} the British courts have jurisdiction in the narrow sense that they have power to determine what her rights are.

\textit{Second,} the law applicable to the relationship under the Rome Conventions is English law….. it is the system of law with which the relationship has the closest connection.

\textit{Third,} the domestic courts must give effect to EU law, and this includes any directly enforceable EU right.

\textit{Fourth,} art 3 of the Equal Treatment Directive confers such a right against the Ministry of Defence, as an emanation of the state.

\textit{Fifth,} there is an obligation on the British courts to give effect to such rights either by invoking the well known Marleasing principle which requires statutes to be construed

\textsuperscript{101} (Reg 1(2))

\textsuperscript{102} [2011] ICR 617 CA
consistently with EU law, or if that is not possible, by disapplying inconsistent provisions of domestic law...

Either way, if the territorial limitations imposed by the domestic statute fail to give effect to the EU right, they must be modified or disapplied.” (emphasis added)

75. Note that:

a. The MoD argued that the Claimants could and should bring their EU/discrimination claims in Belgium/Netherlands where they worked. However, as noted above, the Court of Appeal held that they were entitled (and obliged) to bring their unfair dismissal claims in the UK under the 1996 Act. Thus, the principle of effectiveness would be infringed if they were obliged to litigate in two jurisdictions (unfair dismissal in England and sex discrimination in Belgium/Netherlands), and this entitled them to bring all claims in the UK.

b. Elias LJ also made the following comments on the questions of direct versus indirect effect and who has EU employment rights:

“53...the situation becomes more complex if the domestic law of non-EU countries may be involved, or if reliance is placed on EU rights which do not have direct effect. In the former situation, it may be necessary to determine the geographical reach of the Directive itself to determine whether it extends to workers employed outside the EU: see by analogy Ingmar GB Ltd v Eaton Leonard Technologies Inc (Case C-381/98) [2000] ECR 1-9305. In the latter situation, there may be an issue whether the relevant applicable law determined by the choice of law rules can be read consistently with EU rights in accordance with the Marleasing principles. If it cannot, then no substantive enforceable rights would be afforded to the claimant by the applicable law.”

Which EU rights are protected, and against whom?

76. In general, a rule of EU law is “directly effective” if it is sufficiently clear, precise and unconditional so as to be capable of reliance by an individual in the national courts: see Van Gent en Loos103. This may be so even though the rule leaves an element of discretion to

103 [1963] ECR 13
member states or if it anticipates further, more precise, regulation: see **Defrenne v SABENA**\(^{104}\), **Impact v Minister for Agriculture and Food**\(^{105}\); **Belgische Staat v Cobelfret**\(^{106}\).

77. However, the consequences of this differ depending on the source of the rule in question. In particular:

   a. Directly effective rights deriving from the EU Treaties, or from ‘general principles of EU law’, or from Regulations may be relied on directly against both the state and private individuals and companies: see, for example, **Defrenne** (then Art 117, equal pay for equal work) and **Mangold v Helm**\(^{107}\) (the general principle against discrimination on grounds of age). This is sometimes referred to as “horizontal direct effect”. Accordingly, in any relevant proceedings, national courts are required to (i) interpret domestic law compatibly with those rights, so far as it is possible to do so and (ii) to disapply incompatible national law: see, for example, **Marleasing**\(^{108}\) and **R v Secretary of State for Transport, ex parte Factortame (No 2)**\(^{109}\).

   b. Rights contained in the Charter of Fundamental Rights also have horizontal direct effect, insofar as they are sufficiently clear, precise and unconditional. Notably, for present purposes, Article 47 of the Charter, which sets out the right to an effective remedy and to a fair trial, does have horizontal direct effect: see **Benkharbouche v Embassy of the Republic of Sudan**\(^{110}\).

   c. However, directly effective rights deriving from **Directives** may, as a rule, be relied on directly only against emanations of the state (although that notion has been fairly

\(^{104}\) [1976] ICR 547

\(^{105}\) [2008] IRLR 552, paras 66-67

\(^{106}\) [2009] STC 1127. See also the view of Mummery LJ in **Duncombe** in the Court of Appeal ([2010] ICR 815, para 130) that, even if the Fixed-Term Workers Directive did not contain directly effective rights because it gave member states a choice as to how to implement it, once the UK had made its choice those rights crystallised into directly effective rights for these purposes.

\(^{107}\) [2006] IRLR 143

\(^{108}\) [1992] 1 CMLR 305

\(^{109}\) [1991] 1 AC 603

\(^{110}\) [2015] ICR 793, para 81. Article 27, conferring a right to information and consultation, does not: **Association de Mediations Sociale v Union Local des Syndicats CGT** [2014] IRLR 310
widely interpreted): see *Marshall v Southampton and South West Hampshire AHA* [1986] QB 401 and *Foster v British Gas* [1987] 1 QB 405. This is sometimes referred to as “vertical direct effect”. However, this limitation can in practice often be overcome, because:

i. Sufficiently clear rights arising from a Directive will still have “indirect effect” against private individuals and companies, such that they can be relied on in proceedings between private individuals so as to engage the Marleasing interpretative obligation: see Marleasing itself. This applies not just to the law which purports to implement the Directive, but to any relevant national law: see *Pfeiffer v Deutsches Roes Kreuz*111. The interpretative obligation is a very strong one.112

ii. Often, a Directive will be designed to implement a Treaty obligation or a “general principle of EU law”. In such a case, it may be possible simply to rely on that underlying principle as having full horizontal direct effect against individuals: see *Kucudeveci v Swedex*113 (the principle of equal treatment and non-discrimination on grounds of age); *Mangold v Helm*.

iii. In some cases, the CJEU has held that EU law which is not directly enforceable as against private persons may nevertheless be relied on in an “exclusionary” sense, i.e. the national court may still be required to disapply any inconsistent national law, even though the individual may not be able to rely on the EU rule as giving rise to a positive, enforceable right: see *Unilever Italia v Central Food*114.

78. It follows that it is unlikely to matter whether the employer is an emanation of the state. Indeed Bleuse itself was a claim against a private company, not an emanation of the state, and in Duncombe in the Supreme Court Lady Hale suggested that:

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111 [2005] IRLR 137.

112 As to which see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 HL and the interesting discussion in *Bear Scotland Lt v Fulton & Others* [2015] ICR 221 EAT and *British Gas Trading v Lock (No 2)* [2017] ICR 1 CA.

113 [2010] IRLR 346, paras 50-51

114 [2001] 1 CMLR 556.
“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.” (emphasis added)

Who has EU rights to which the Bleuse principle applies?

79. In Duncombe, Lady Hale suggested that all workers employed by a UK employer in the EU must be entitled to at least the minimum standards required by EU law, although she recognized that the exact degree of protection may vary depending on how EU Directives were implemented by Member States. However, she left open the position where the worker is employed or works outside the EU, even under a contract governed by English law.

“[S]o in what circumstances does a contract of employment between a United Kingdom employer and a worker who is employed to work outside the United Kingdom incorporate the protection given by European law? It may be that it is not enough simply to provide that the contract is governed by English law... Would a person employed to work in China, for example, be able to claim the benefit of all the domestic law which emanates from the European Union?”

80. The general view of the EAT is that the principle does not apply to workers who work outside the EU: see e.g. Hasan v Shell International.115 However, it seems clear that this is too rigid an approach. There is a series of judgments of the CJEU which makes clear that EU law may have effects outside the territory of the EU.

81. Boukhalfa v Germany116 was a free movement of workers case where the complaint was nationality discrimination. Ms Boukhalfa was a Belgian national employed on the local staff of the German Embassy in Algiers. Her contract of employment was concluded in Algiers. Prior to entering into that contract, she was already established in Algeria, where she also had her permanent residence. Under German law her contract was subject to Algerian law

115 UKEAT/0242/13. See also, Dhunna v CreditSights Ltd [2013] ICR 909, EAT paragraph 41; Pervez v MacQuarie Banks Ltd [2011] IRLR 284 EAT paragraph 23.

116 (C-214/94) [1996] ECR I-2253
but it would have been subject to German law had she been a German national. She said that this discriminated against her on grounds of her Belgian nationality.

82. The CJEC held that she was entitled to the protection of the EC Treaty:

“15 The Court has consistently held that provisions of Community law may apply to professional activities pursued outside Community territory as long as the employment relationship retains a sufficiently close link with the Community ... That principle must be deemed to extend also to cases in which there is a sufficiently close link between the employment relationship, on the one hand, and the law of a Member State and thus the relevant rules of Community law, on the other.”

83. It appears that this will be a question of fact.\textsuperscript{117} The link with German law was established by the facts that:

a. her contract of employment was entered into in accordance with the law of Germany and it was only pursuant to that law that it was stipulated that her conditions of employment were to be determined in accordance with Algerian law;

b. her contract contained a clause giving jurisdiction over any dispute between the parties concerning the contract to the courts in Germany;

c. she was affiliated for pension purposes to the German State social security system and was subject, though to a limited extent, to German income tax.

84. Boukhalfa therefore suggests that there may be employees who do not work in the EU but who nevertheless have EU employment rights because, on the facts, there is a sufficiently strong connection between their employment and the EU or the EU system of law.

85. A number of other cases support this principle, e.g.

a. Prodest v Caisse Primaire d’Assurance Maladie Paris\textsuperscript{118} (the EU principle of non-discrimination applied to a complaint by a Belgian national who had been engaged by French agency to work in Nigeria, who was refused social security insurance because his service was provided outside of France);

\textsuperscript{117} See Lopes de Veiga (C-9/88), para 17.

\textsuperscript{118} C-237/83
b. **Aldewereld v Staatssecretaris van Financien**\(^{119}\) (EU rules on free movement of workers applied to a complaint by a Dutch national who had been engaged by a German business and posted to Thailand, who had been required to pay social security contributions in both the Netherlands and Germany);

c. **Petersen v Finanzamt Ludwigshafen**\(^{120}\) paras 39-42 (EU rules on free movement of workers applied to a complaint by a Danish national who was officially resident in Germany and who had been engaged by a Danish undertaking to work in Benin, who was required to pay income tax in Germany but would not have been so required had he been engaged by a German company).

86. Further, it may well be the case that it is not necessary even to establish that the applicable law – at least in the sense of the proper law of the contract – is English law or even the law of an EU member state. **Ingmar GB Ltd v Eaton Leonard Technologies Inc**\(^{121}\) – referred to by Elias LJ in **Wallis** – was a case under the Commercial Agents Directive\(^ {122}\). Ingmar (a company incorporated under English law) and Eaton (a US company) concluded a contract under which Ingmar was appointed as Eaton’s commercial agent in the United Kingdom. The contract stipulated that it was governed by the law of the state of California. The CJEC held that:

> “24... The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a member state, irrespective of the law by which the parties intended the contract to be governed” (emphasis added).
When should the UK courts and tribunals be required to extend the territorial scope of the domestic legislation so as to allow a claimant to enforce such rights in the UK?

87. In the few applicable cases so far, the domestic courts have not been impressed with arguments that a claimant could or should seek to enforce his or her EU rights in a different EU member state. As noted above, in Wallis, the argument that the claimants could enforce their EU equality rights in Belgium (where they worked) was dismissed. This was principally on the ground that this would be contrary to the EU right to an effective remedy (itself a right having direct effect, and now encapsulated in Article 47 of the Charter), given that they were quite properly pursuing unfair dismissal claims in the English tribunal, although Elias LJ also referred to the fact that the English law was the applicable law (see paras 42 and 51).

88. However, there is a legitimate question as to why the UK courts should be required to alter British domestic law to accommodate cases in which (i) the claimants are not pursuing parallel claims in the UK and (ii) the rights in question might be perfectly capable of enforcement elsewhere (particularly where it would not be necessary to have recourse to the Bleuse principle). The domestic cases so far have all relied on the fact that the contracts of employment were governed by English law: in Bleuse, Wallis, and Duncombe, this feature is said to establish a connection with UK employment law (and therefore EU law). However, in Wallis, Elias LJ expressed the view that:

“it matters not which national law is applicable to the right in question, provided at least that it is the law of a member state… once the British court is properly seised of the issue, it would be obliged to give effect to the directly effective right one way or another, irrespective of which body of national rules applies. I suspect in most cases at least it would involve the denial of an effective remedy to require the claimant who is properly before the British courts to go elsewhere to enforce the right…” (para 52).

89. The principal test therefore appears to be simply whether the British court or tribunal has jurisdiction in the narrow sense of being the (or a) proper forum to determine the claimant’s rights, e.g. under the Brussels II Regulation. If it does, then ordinarily it must apply the Bleuse principle, notwithstanding the availability of a remedy elsewhere. However, the

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123 As to this see Ingmar cited above, and Elias LJ’s own observations at para 53 of the judgment.

124 It might be possible to argue that even this more fundamental question of jurisdiction might need to be broadened in an appropriate case so as to permit a claim, if this is necessary to provide an effective remedy for a breach of EU law: see VKI v Henkel [2003] 1 All ER (Comm) 606, para 43 (although the case was in fact decided on a straightforward application of the Brussels Convention).
Court of Appeal has left open the possibility that, in some cases, the availability of a remedy elsewhere may mean that the British courts need not disapply (or expand) the ordinary law on the territorial reach of the domestic statutes.

**The Bleuse principle taken further?**

90. In *Duncombe and Others v. Department for Education and Skills*[^125^], Mr Duncombe had been seconded by the UK government to a European School in Germany where he worked under a series of fixed term contracts but subject to regulations in force at the School which provided that he could not work for more than nine years in total. The contracts expressly provided that they were governed by English law and subject to the exclusive jurisdiction of the English courts. The Court of Appeal held that:

a. The agreement that English law applied meant that the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 governed his contractual entitlements;

b. The use of fixed term contracts was not objectively justified and was therefore contrary to 2002 Regulations (this was subsequently overturned by the Supreme Court);

c. Mr Duncombe’s employment was therefore to be treated as on an indefinite basis and termination after 9 years was in breach of contract;

d. The 2002 Regulations implemented rights under Community law (the Fixed Term Workers Directive 99/70) which, although not directly effective, had been brought into effect in the UK;

e. Although the 2002 Regulations did not confer a right to claim unfair dismissal, and although the right to claim unfair dismissal was not as such derived from Community law[^126^], it would be contrary to the protective purpose of the Directive if the workers

[^125^]: [2010] ICR 815 CA (NB), paras 139-147.

[^126^]: Note that there is now such a right (“protection in the event of unjustified dismissal”), in Article 30 of the Charter of Fundamental Rights. However, there has as yet been no decision as to whether and to what extent this right has direct effect. The UK purported to derogate from this right in the *Protocol on the Application of*
were to lose their jobs immediately solely on the basis of an unlawful time limit on their employment contracts (citing Advocate General Kokott in Impact).

f. Accordingly, the principle of effectiveness required that Mr Duncombe be able to bring such a claim.

**CLAIMS BASED ON EU RIGHTS: the Posted Workers Directive (96/71)**

91. Finally, whatever the position in relation to employees working outside this jurisdiction but with EU law rights, undoubtedly the application of Lawson v Serco principles and any relevant statutory provision would have to be modified to meet the requirements of the Posted Workers Directive ("PWD"), which requires that ‘posted workers’ are guaranteed the protection laid down by provisions covering (in broad terms) working time, minimum pay, agency working, health and safety, pregnancy and childbirth, and non-discrimination.127

92. Under Article 2.1, posted workers are defined as follows:-

"‘Posted worker’ means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works."128

93. As for the undertakings to which the PWD applies, Article 1.1 provides that:-

"This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.”

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127 Art 3.1

128 Article 2.1. It seems that the ‘limited period’ may be short. For example, Art 3(2) provides an exception from the application of annual holidays and minimum pay provisions for those who are posted to assemble or install goods when the period of posting does not exceed eight days – suggesting that in other cases a posting of less than eight days suffices.
Article 1.3 then, in broad terms, identifies three categories of transnational measures where the PWD applies:

**g.** Where the EU undertaking posts workers to the territory of a Member State for its own purposes and under its own direction under a contract between the posting employer and the party for whom the services are intended, provided there is an employment relationship between the posting undertaking and the worker during the period of posting i.e. in short, where undertaking A sends its employee to provide services to undertaking B in another Member State: see Article 1.3(a).

**h.** Secondment arrangements between associated companies in different Member States: see Article 1.3(b).

**i.** Transnational hiring arrangements by employment businesses where the posted worker remains an employee of the employment business during the posting: see Article 1.3(c).

95. The requirement on Member States is that they ensure that the posted worker enjoys equality of terms and conditions of employment insofar as they are laid down:

“by law, regulation or administrative provision and/or by collective agreements or arbitration awards which have been declared universally applicable\(^\text{129}\) ... insofar as they concern building type activities specified in the Annex to the PWD, and relate to the following matters:-

(a) the maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; ....

(d) the conditions of hiring out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

\(^{129}\text{i.e. applicable to all undertakings in a geographical area or in the profession or industry concerned}
(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination.”

96. Thus, in relation to the Working Time Regulations 1998, the National Minimum Wage Act 1998, the Conduct of Employment Agencies and Employment Businesses Regulations 2003, provisions relating to health and safety, pregnancy and maternity provisions and the Equality Act 2010, the courts will have to construe the scope of the statutory rights to encompass those who are posted here from an undertaking in an EU Member State and working here at the relevant time. Does this apply to workers posted into the EU from non Member States given Article 1.4: “Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State”?

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130 Note that these categories fall to be strictly construed. The PWD is primarily a provision which was intended to facilitate freedom to provide services. Since expansive employment laws potentially inhibit this freedom expansive application of the PWD is not appropriate: see Laval [2008] IRLR 160 (paragraph 149 of the Advocate General’s Opinion) and Commission v Luxembourg Case C-319/06 (paragraphs 32-33). This gives rise to issues as to whether, if posted workers are entitled under our law to the benefit of laws other than under these headings, such entitlement is contrary to EU law: see the interesting discussion in March 2009 ILJ 122.