Case No: A2/2010/2085

Neutral Citation Number: [2011] EWCA Civ 231
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
THE HON MR JUSTICE UNDERHILL
UKEAT/0546/08/ZT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2011

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE ETHERTON
and
LORD JUSTICE ELIAS

- -

Between :

THE MINISTRY OF DEFENCE	**Appellant**
- and -	
(1) MRS C WALLIS	**Respondent**
(2) MRS G GROCOTT	

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

MR PHILIP COPPEL QC (instructed by the Treasury Solicitor) for the Appellant
MR PHILIP MEAD (instructed by Dean Wilson LLP) for the Respondents

Hearing date: 8th February 2011

- -

Judgment
As Approved by the Court

Lord Justice Mummery:

Introduction

1. The jurisdiction of Employment Tribunals (ET) is statutory, as is the bulk of the law applied by them. The Sex Discrimination Act 1975 (the 1975 Act) expressly delimits the territorial scope of the right not to be discriminated against on the ground of sex. Although the territorial reach of the right not to be unfairly dismissed conferred by Part X of the Employment Rights Act 1996 (the 1996 Act) is not distinctly restricted, the principles articulated by the House of Lords in *Serco Limited v Lawson* [2006] ICR 250 (*Serco*) set implied bounds to its scope of application.

2. The jurisdictional issues in these appeals differ from those raised when the ordinary courts of this country are asked to exercise jurisdiction in cases with a foreign element in the subject matter of a civil claim or affecting the defendant to it. In these appeals the issues turn on the terms of the legislation by which the employment rights were created, rather than on the operation of common law conflict of laws rules and the Conventions and Council Regulations applicable, for example, to jurisdiction over contract or tort claims.

3. In employment protection law the territorial limits normally connect to the factor of the claimant's employment or deemed employment at an "establishment in Great Britain." That often depends on where the claimant did his work at the relevant time. The country in which the contract of employment was made or the alleged wrong of unfair dismissal or unlawful discrimination took place are not connecting factors affecting the ET's jurisdiction. In some instances, such as those set out in s.10 of the 1975 Act, it is provided that, in the specified circumstances, employment is "to be regarded as being at an establishment in Great Britain."

The proceedings

4. These claims for unfair dismissal and sex discrimination were contested by the employer, the Ministry of Defence (MoD), at a preliminary stage. The grounds of objection were that the claimants entered their contracts of employment outside Great Britain, that the claimants did the entirety of their work outside Great Britain and that their work was done solely to service the international facility in Belgium and the Netherlands at which they worked. Accordingly, it was said that their employment did not fall within the territorial scope of the 1975 Act or under the *Serco* shade of the 1996 Act, and that the ET had no jurisdiction to entertain the claims, which should be dismissed at this stage.

5. The claimants are married women who, until they were dismissed, commenced their work and thereafter worked for the MoD wholly outside Great Britain. When they began working in that employment, their respective husbands were armed service personnel employed by the MoD already working at NATO HQs in Belgium and the Netherlands. The claimants' dependent spouse status advantaged them in obtaining employment with the MoD to work in schools which were part of NATO HQs. The MoD dismissed the claimants when their respective husbands ceased to be employed by the MoD as armed service personnel and instead began working at the NATO HQs in a civilian capacity.

6. This appeal, brought with permission granted by Elias LJ on 7 October 2010, is from the order of the Employment Appeal Tribunal (EAT) (President - Underhill J) dated 29 July 2010. The EAT dismissed an appeal by the MoD from the decision of the ET sent to the parties on 7 October 2008 holding that the claimants Mrs Claire Wallis and Mrs Dawn Grocott had acquired the right not to be unfairly dismissed and that Mrs Wallis had also acquired the right to pursue discrimination claims under the 1975 Act.

7. It is accepted by the MoD that the ET has jurisdiction to entertain the claims made by Mrs Grocott and Mrs Wallis for breach of contract for failure to pay notice pay. The position taken by the MoD on the statutory claims for unfair dismissal and discrimination is that the country where the claimant was taken on, did all her work and which secured all the benefit of her work (i.e. Belgium in the case of Mrs Wallis and the Netherlands in the case of Mrs Grocott) is where her employment was located and that the legal system of that country is the natural forum for those claims. The MoD is not able to say, in advance of any such proceedings, whether or not it would plead state immunity in proceedings brought by the claimants in the local foreign tribunal.

8. These cases are of much wider significance to the MoD (and also to the Foreign and Commonwealth Office) than the facts of these cases might indicate. Guidance is sought on issues affecting these and other similar cases. There are bases of various kinds all over Europe and the rest of the world at which the MoD employs very many service and civilian personnel. In some cases locally employed staff are married to members of the serving armed forces of the United Kingdom.

The law

9. At this stage a bare outline of the law will suffice, leaving discussion of some of the detailed aspects to when I consider the MoD's submissions.

10. The right not to be unfairly dismissed conferred on employees by Part X of the 1996 Act is not in terms confined to employees working wholly or partly in Great Britain. In *Serco* Lord Hoffmann, with whom the other members of the Appellate Committee agreed, said that some employees working abroad come within the scope of the 1996 Act, though the circumstances "would have to be unusual." He gave three examples of classes of expatriate employees falling within the scope of the 1996 Act: (i) employees posted abroad to work for the purposes of a business conducted in Great Britain; (ii) employees working in a British political or social enclave abroad; and (iii) possibly other employees having "equally strong connections with Great Britain and British employment law." The MoD says that only class (iii) could possibly apply here, that the connections to Great Britain are not equally strong to those in (i) and (ii) and that the circumstances are not unusual enough to make this an exceptional case for an ET to exercise extra-territorial jurisdiction.

11. Under the 1975 Act the ET has jurisdiction in the case of discrimination by an employer "in relation to employment by him at an establishment in Great Britain" (s.6(1) and under s.10 "employment is to be regarded as being at an establishment in Great Britain") in specified circumstances none of which apply here, i.e. if the employee does his work wholly or partly in Great Britain or, in the case of work wholly outside Great Britain, the employee is ordinarily resident in Great Britain and

works for the purposes of a business carried out by the employer at an establishment in Great Britain.

12. However, Mrs Wallis asserts against the MoD, as an emanation of the State, directly enforceable rights of equal treatment under the Equal Treatment Directive (76/207/EEC), as consolidated and updated in 2006/54/EC (the Directive). She relies on *Bleuse v MBT Transport Ltd* [2008] ICR 488 and *Duncombe v Department of Education and Skills* [2010] ICR 815, in which the judgment of the Supreme Court is pending, for the proposition that the EU principle of effective judicial protection requires that there should be available in Great Britain a jurisdiction to determine her EU claim derived from the Directive.

More background facts

13. The MoD employed Mrs Wallis as a part-time Library Assistant in the British Section of the International School attached to SHAPE in Belgium. SHAPE is an international military headquarters staffed by military personnel from NATO member states, including the United Kingdom. Legal relations there are partly governed by the NATO Status of Forces Agreement, 19 June 1951 (SOFA) made between the parties to NATO regarding the status of their forces. For the purposes of SOFA and within the meaning of Article 1, Mrs Wallis was a "dependent" who was treated as a "locally engaged civilian" who was a member of "the civilian component." The "civilian component" comprise "civilian personnel accompanying a force of a Contracting Party in the employ of an armed service of that contracting Party." The court was taken through the detailed provisions of SOFA as background to the appeal. Under Article IX.4 local civilian workers employed by a force or civilian component are not regarded as being members of that force or civilian component. It was not suggested that the issues on the appeal turn on the application of SOFA.

14. Mrs Grocott was employed by the MoD as School Secretary within the British Section of the Armed Forces North International School attached to the Joint Forces Command Headquarters (JFC) at Brunssum in the Netherlands. It is an international military headquarters staffed by military personnel from NATO member states, including the United Kingdom. For the purposes of SOFA she was also a "dependent" and was treated as a "locally-engaged civilian" who was a member of "the civilian component."

15. Their respective husbands were serving members of the armed forces who, at the time that each of the claimants was engaged by the MoD, were already working for the MoD at SHAPE and JFC respectively. The contract issued to Mrs Wallis was headed "Employment Contract for Dependant Employees. Legal Employer UKSU [United Kingdom Support Unit] SHAPE" and the contract issued to Mrs Grocott was headed "Employment Contract-UK Dependant."

16. In the autumn of 2007 their husbands left the UK forces, but continued to work at SHAPE and JFC, but employed instead by NATO as civilians. The MoD dismissed the claimants, Mrs Wallis by letter dated 12 September 2007 and Mrs Grocott by letter dated 2 October 2007. The reason for the dismissal was that, after their spouses had ceased to be employed by the MoD, they were no longer considered to be dependents of MoD employees.

17. The MoD submitted and the ET found that neither of the claimants was "posted" from Great Britain by the MoD to work abroad. The ET found that both had applied for their jobs whilst based in the country in which they thereafter worked exclusively. Neither worked in a "British enclave". It found that the two NATO bases belonged to an international organisation and were more accurately described as "international enclaves." It was also found that neither claimant had any significant contact with Great Britain as part of her job.

The ET

18. The long paragraph relating to the unfair dismissal claims in the commendably clear and careful judgment of the Employment Judge (EJ Vivienne Gay) is the key to the case on unfair dismissal:-

> "23. I have accepted that the claimants became employed by the respondent at the SHAPE School near Mons, Belgium in respect of Mrs Wallis and the JFC Brunssum in the Netherlands for Mrs Grocott, because they were dependants of the civilian component of Great Britain. They were employed to work in what was a sort of international enclave, on English terms and conditions of employment rather than host state terms, by reason of their close connection to Great Britain. I am satisfied that it is proper to regard them and their employment as so closely connected to England as to be within the cover or reach of the Employment Rights Act for the purposes of acquiring rights in respect of unfair dismissal. They were not posted abroad, so that they are not in Lord Hoffmann's first expatriate category. Nor have I been persuaded that either school was a British enclave within Lord Hoffmann's second category. The primary connection with England in each case is that each claimant had a spouse engaged in the British military or civilian component, posted to work for the respondent abroad because of that engagement. It was only because each was dependent on and had accompanied her husband on his posting that she was eligible for the job which she did, either at all or on the terms and conditions which were given. The literature from the respondent which accompanied the terms and conditions and the terms and conditions themselves were in every identifiable respect as if they were working in England. Had each claimant not had a spouse in the British armed forces or in the civilian component, she would not have obtained the jobs at all or not on those terms. There was insufficient evidence for me to ascertain whether the respondent would have employed DELs to do the jobs which the claimants did, but I do not have to decide that because it is clear beyond peradventure that they would not have been engaged on the same terms and conditions. I have accepted that it is not a usual or frequent occurrence that locally engaged foreign nationals do the jobs. That is because, with the intention of maintaining family harmony, the respondent seeks to give priority to employing the dependents of those engaged in the forces or in the civilian component. There is plenty of evidence of the close connection between the claimants, the jobs and England in the facts set out above and accepted by the respondent, but that will often be the case. The tipping point and what essentially links the employment to England in each case is that it was reserved on the terms and conditions which were given to these claimants

> for dependents of the British/military/civilian component posted to serve abroad. Each claimant is in a sense (and to use a phrase deployed elsewhere in the employment literature) piggy-backed by her husband or his role and function into Lord Hoffmann's third residual category of expatriate employees. The employment of each and the relationship of each to the respondent (a British employer) has such clear, firm, sound connections with Britain or England that it is appropriate that each claimant should have the protection of English unfair dismissal law, even though she was not appointed in England, or posted abroad and never worked for the respondent in England. I accept the submissions of the claimants in respect of the distinction between the *Bryant* case and theirs. Mrs Bryant's connection with England was apparently just one of fortuitous nationality in directly employed labour (DEL).These claimants, both DEPs, have far stronger and more direct ties."

19. As for the sex discrimination claim made by Mrs Wallis, the ET was satisfied that Mrs Wallis may continue with her claims under the 1975 Act. The ET held that, although the 1975 Act did not, on its own terms, entitle her to pursue a claim for sex or marital status discrimination, she could rely in the ET on her directly enforceable rights against the MoD based on the Directive. It was held that the 1975 Act should be construed compatibly with her Directive rights in accordance with the principles laid down in *Litster v Forth Dry Dock and Engineering Co Ltd* [1989] IRLR 161.

The EAT

20. The EAT dismissed the MoD's appeal on the unfair dismissal point stating that the ET reasoning in paragraph 23 (quoted in full above) was "clear and cogent, and …unimpeachable." The President of the EAT rejected the contention that the "special connection" must take the form of "some inherent feature of the work." He said:-

> "13. …I am confident that Parliament must be taken to have intended that employment relationships of this kind, parasitic as they are on the employee's spouse's status as a member of the armed forces posted abroad, should fall within the scope of British employment law…"

21. As for the claim under the 1975 Act the EAT held that there was jurisdiction, whilst recognising that there was a potential distinction between this case and *Bleuse* and *Duncombe* in that the relevant legislation in those cases did not contain any express territorial limitation of the kind found in the 1975 Act. It might be easier to "read down" restrictions on territorial scope which depended on implication rather than on express provision.

The MoD's submissions

22. On the unfair dismissal claims Mr Philip Coppel QC, appearing for the MoD, submits that the ET and the EAT did not identify any strong connection between the *work* carried out by the claimants on the NATO bases and the MoD's business in Great Britain. Instead, the tribunals erroneously relied on aspects of the claimants' personal life, namely the attributes of the respective persons to whom they were married, the employment of those spouses by the MoD and the connection of those spouses' employment to Great Britain, all of which were said to be irrelevant to the issue.

23. He submits that the employment of the respective husbands by the MoD at NATO HQs was a pre-condition of the availability of the claimants' posts, but that it did not colour the work carried out by the claimants or otherwise connect them to the MoD in Great Britain. The ET erred in law in holding that it did by focusing on the pre-conditions for the positions at the schools rather than on the purpose served by the work that they carried out under their employment. The nature and purpose of their work was not to serve the MoD's business in this country. The nexus between their work and the MoD's business here fell far short of the "strong connections" required by Lord Hoffmann in *Serco* to bring an employee working overseas within the protection of British employment law.

24. Mr Coppel submits that, subject to immunities possibly available as a result of SOFA, the claimants' positions were no different from that of any other civilian employed by the MoD in any place outside Great Britain exclusively to carry out work at that place. Their cases were no different from that of Mrs Bryant in *Bryant v Foreign & Commonwealth Office* (2003) EAT/174/02/RN, (Mr Justice Burton EAT President). The dismissal of Mrs Bryant's claim by the EAT was said by Lord Hoffmann in *Serco* to have been rightly decided. Mrs Bryant worked at the British Embassy in Rome in a position of responsibility in respect of police and judicial liaison. She was employed on local terms and conditions to carry out duties entirely in Italy.

25. On the sex discrimination claim by Mrs Wallis, Mr Coppel submits that the Directive does not have an autonomous, pan-European operation. It did not expressly prescribe the territorial reach of the measures that the member states were to take to implement the Directive. He submits that the Directive did not confer on a person in the position of Mrs Wallis, who had worked entirely out of a particular member state, a directly enforceable right that had a greater territorial reach than that provided for in s.10 of the 1975 Act. Mrs Wallis was not a person posted out of that member state (i.e. the United Kingdom), nor was her work directly for the benefit of a body within that member state.

26. Further, the Directive itself does not have to be construed to have extra-territorial operation. The expectation was that the implementation by each member state would supply the necessary jurisdictional coverage, so that Mrs Wallis, subject to possible SOFA immunities, would have been able to invoke the rights conferred by the implementation of the Directive in Belgium.

27. In conclusion Mr Coppel says that the 1975 Act implements the Directive by including detailed and generous express provisions covering the territoriality of its operation. The United Kingdom cannot be said to have failed to implement the Directive. There is no scope for the notion of direct effect on which Mrs Wallis relies.

Discussion and conclusions

28. The appeal can only succeed if there was an error of law in the ET's judgment. It correctly stated the jurisdiction over unfair dismissal claims laid down by the House of Lords in *Serco*. The appeal turns on whether the ET erred in law in its application of Lord Hoffmann's class (iii) of expatriate employees to the facts of the case. On that aspect of its decision the ET used its specialist expertise in making an informed and reasoned assessment of the strength of the connection of the claimants' employment to Great Britain and its unfair dismissal law.

A. Unfair dismissal

29. I agree that the claimants' performance of their entire work outside Great Britain is potentially a major obstacle to bringing unfair dismissal claims in the ET. Against that, however, there should be set the employment factors which the ET assessed as "clear, firm, sound, connections with Britain."

30. The factors cumulatively connecting their employment to Great Britain are that the claimants were recruited and employed by the MoD, not by the schools, in their posts at the schools; they were eligible for those posts as dependents of serving members of the armed forces posted by the MoD to work at the NATO HQs; the terms on which the claimants were employed by the MoD were governed by English law; they were employed under conditions providing that they were part of "the civilian component" of NATO, as distinct from locally employed civilians recruited as directly employed labour; they were recruited under an MoD policy of bolstering the recruitment of UK armed forces personnel to the NATO institutions and the civilian component accompanying armed service personnel; and the related reason for dismissal was their loss of status as members of the civilian component consequent on their husbands' ceasing to serve in the British armed forces.

31. I would reject the MoD's submission that the connection between the claimants and Great Britain simply related to aspects of their personal life as spouses. In my judgment, the ET was entitled to conclude that the connection of their employment with Great Britain was equally as strong as if they had been posted by the MoD to work in their posts at the schools as members of the civilian component, or as if their posts were in a British enclave at the NATO establishments to which their husbands had been posted.

32. The ET's conclusion is supported by a carefully detailed assessment of the connecting employment factors. They included the basis on which the claimants were recruited, the identity of their employer, and the terms and conditions on which they were employed, coupled with the MoD's recruitment policy and its reason for the termination of their employment. The MoD operated within a framework of finding employment overseas for accompanying dependants of serving members of the UK armed forces posted overseas. In my judgment, it would be a lawful and reasonable assessment of the claimants' employment situation to say that they were found employment by and with the MoD for "a British reason" of similar strength and quality to that existing in an employment package of being posted to work overseas or to working in a British enclave overseas.

33. I agree with the MoD that the local engagement of a dependant as a member of the civilian component is a different form of employment than that of serving members of the armed forces and civil servants who are posted overseas from the UK overseas, or from employment in a British enclave overseas. But that does not prevent the claimants' employment from having similarly strong connections with Great Britain and its unfair dismissal law, so that their claims should be determined in a British employment tribunal.

34. I would add that, though not strictly relevant to the construction of the 1996 Act, I am not aware of any practical difficulties for either side in the ET's exercise of jurisdiction. In practice difficulties are more likely to be encountered by both sides in

having to grapple with multiple proceedings with the wrongful dismissal claims proceeding in the ET and the unfair dismissal claims proceeding in the Belgian and Dutch courts or tribunals.

35. I cannot agree with the MoD's submission that to give the claimants access to an employment tribunal in Great Britain would be (i) a case of "exporting" British unfair dismissal law to a foreign country, such as Belgium or the Netherlands or (ii) contrary to the principles of sovereignty and equality of states in international law. Considerations of international comity could not possibly affect the claimants' husbands' access to an employment tribunal for unfair dismissal from the armed forces and I do not see how they could affect claims by the claimants if there is a sufficiently strong connection of their employment to Great Britain and its unfair dismissal law.

B. Sex discrimination

36. Although the work done by Mrs Wallis was at an "establishment", she cannot bring her employment at the school within the express terms of the 1975 Act: her employment was not at an establishment "in Great Britain"(s. 6(1)); she did not do her work "wholly or partly in Great Britain"(s 10(1)(a)); and her work was not "for the purposes of the business carried on" by the MoD at a place of business at an establishment in Great Britain" and she was not "ordinarily resident in Great Britain" either at the time when she applied for or was offered the employment, or at any time during the course of the employment (s10(1A)).

37. Mr Wallis bases her claim on the Directive, which is sufficiently clear and precise in its terms for her to invoke its direct effect against the MoD as an emanation of the State. The jurisdiction of the ET to determine the Directive- based claim turns on what territorial consequences the doctrine of direct effect carries with it in this case.

38. Mr Coppel asks: what is the directly enforceable EU right and what is its territorial scope? He submits that, in order to answer those questions, it is necessary to examine the Directive, which does not have territorial effect, and the obligation of member states to implement the Directive in their own domestic legal system. Each member state is under an obligation to implement the Directive in its own territory. It is not under an obligation to implement the Directive in the territory of another member state. As I understand this submission, the legal position is that Mrs Wallis's employment is in Belgium and that she should invoke her directly effective EU rights in Belgium, not in the ET in Great Britain.

39. I have real difficulty in understanding the MoD's submission that the Directive neither has extra-territorial effect nor imposes an obligation on member states to implement the Directive in its own domestic law so as to make the EU right available in its court and tribunals even in the case of employees working outside the territory of the member state. The Directive does not specify geographical areas of application: it is a measure addressed to member states requiring them to implement the Directive into their respective systems of domestic law. Those systems must then make provision for the enforcement of the rights through domestic courts and tribunals, the jurisdiction of which will be delimited in the provisions of domestic law. That is the case with ss. 6 and 10 of the 1975 Act which lay down territorial limits to the right not to be discriminated against on the ground of sex. The issue is whether, outside those

statutory limits, directly enforceable rights derived from the Directive can be determined in the ET as a domestic tribunal.

40. It is the function of the national courts to interpret the statutory provisions of domestic law, so far as it is possible to do so, to be compatible with the Directive. In its judgment the ET followed this approach citing *Litster* as an instance of the lengths to which the courts may go in the process of compatible construction, including the reading of words into the domestic legislation that has failed fully and effectively to implement the Directive. If a compatible construction is not possible then effect must be given to the directly effective superior norms of the Directive. Domestic courts are required to disapply incompatible provisions of domestic law to the extent necessary to give effect to the directly enforceable rights derived from the Directive or other EU measure.

41. Thus the prior and preferred route of national courts is that of compatible construction. It may not be possible to achieve that, but at the end of the day it is immaterial whether the construction route or the disapplication route is followed. The technique adopted by the ET was to invoke the principle of effective judicial protection and to read into s.10, for the purposes of compatibility, words to cover the case of a person who is employed to work wholly at an establishment outside Great Britain, but whose employment has a sufficient connection with Great Britain to entitle her to the protection of employment law in the courts and tribunals in Great Britain. There was therefore no need to invoke the principle of effective judicial protection in order to disapply the limitations in s.10 to the extent necessary to allow Mrs Wallis to bring a claim for sex discrimination in the ET based on the directly enforceable EU rights.

42. Whichever route is followed, the ET has jurisdiction to determine all the claims made by Mrs Wallis: breach of contract, unfair dismissal and sex discrimination. The MoD's submission that the correct forum for a sex discrimination claim based on directly enforceable rights under the Directive is in the courts of Belgium, does not strike one as *effective* judicial protection of an EU claim arising out of her employment: it would require her to bring proceedings in respect of her employment rights in two different jurisdictions in the EU in a case in which her claim is based on a Directive that is addressed to all the member states including the United Kingdom. Otherwise a very unsatisfactory situation would arise in which the ET would have jurisdiction to decide whether her dismissal was unfair, but not whether it was an act of sex discrimination, even though her dismissal was the act of discrimination. Apart from (a) the matter of the statutory cap on compensation which applies to unfair dismissal awards but not to an award for sex discrimination and (b) a possible claim to sovereign immunity in the proceedings before courts of other member states, it is not immediately obvious what advantage the MoD would gain by having to defend employment claims against it in more than one jurisdiction.

The result

43. I would dismiss the appeal. There was no error of law in the judgment of the ET on its jurisdiction to entertain the claims. The claimants were employed by the MoD overseas in unusual circumstances that connected their employment with Great Britain to a degree that was sufficiently strong to bring them within the scope of protection of the British unfair dismissal legislation.

44. Mrs Wallis also has directly enforceable rights under the Directive. She is entitled to effective judicial protection of those rights. That can be afforded either by a compatible construction of s.10 of the 1975 Act or by disapplying the territorial limitations in the 1975 Act that are incompatible with the enforcement in this country of her rights under the Directive. My preference is for the latter, but the outcome is the same if the construction route favoured by the ET is followed.

Lord Justice Elias:

45. I gratefully adopt the recital of the facts given by Mummery LJ and I agree with his conclusions. I add a few observations of my own on each of the two issues before the court.

Unfair dismissal.

46. The question whether the application of the *Serco* principles to the facts establishes a right to claim for unfair dismissal is a question of law, as Lord Hoffmann noted in *Serco*. However, as he also observed, it is "a question of degree on which the decision of the primary fact finder is entitled to considerable respect."(para.34). Mummery LJ has set out in his judgment (para.18) the analysis of the employment judge. In my view it is both cogent and convincing. Although I accept that the claimants were not working in a British enclave, and did not therefore specifically fall into that category of expatriate employees whom Lord Hoffmann held would be entitled to claim for unfair dismissal, nevertheless they were in my judgment working in closely analogous circumstances. They were the spouses of persons who formed part of a British contingent working in an international enclave, and they obtained their employment only because of that relationship. In my judgment they have equally strong connections with Great Britain and British employment law as those employed in British enclaves abroad. It follows that they are entitled to claim for unfair dismissal notwithstanding that they are not employed within the United Kingdom itself.

Sex discrimination.

47. For the reasons given by Mummery LJ at para. 36 above, as a matter of pure domestic law, Mrs Wallis could not bring herself within the scope of the Sex Discrimination Act 1976. She is not linked to Great Britain in any of the ways which the Act requires. She relies on her right to enforce the directly effective right conferred by Article 3 of the Equal Treatment Directive.

48. It is necessary to set out the logical steps in her argument. First, the British courts have jurisdiction in the narrow sense that they have power to determine what her rights are. Second, the law applicable to the relationship under the Rome Conventions is English law. It is common ground that this is the proper law of the contract and furthermore in my view – and I did not understand this to be disputed by Mr Coppel, counsel for the Ministry of Defence - it is the system of law with which the relationship has the closest connection. Third, the domestic courts must give effect to EU law, and this includes any directly enforceable EU right. Fourth, Article

3 of the Equal Treatment Directive confers such a right against the Ministry of Defence, as an emanation of the state. 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 consistently with EU law, or if that is not possible, by disapplying inconsistent provisions of domestic law: see . 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.

49. As I understand it, Mr Coppel takes issue only with the fourth proposition. He submits that the obligation on each state is to give effect to the Directive only with respect to those with a sufficiently close link to the state. The UK has done this - indeed generously so, he submits - and the Directive itself does not require the rights conferred by it to have any greater extra-territorial effect. The UK has properly implemented the Directive with regard to its territorial scope, and since there is no shortfall, there is no room for the operation of the principle of direct effect. It is only where the Directive has not been properly implemented that the question of direct effect can arise: see *Marshall v South West Hampshire Area Health Authority (Teaching) (Case 152/84) [1986] I.C.R. 335*

50. Mr Coppel's argument does not seek to deny that Mrs Wallis may have EU rights capable of enforcement. But he submits that they should be enforced in Belgium, which is where she was working. That state would have the obligation to give effect to the Directive for workers in its territory. He does not submit that this is because Belgium is a more convenient forum. (Whilst Mr Coppel did float that suggestion, it is an impossible position to sustain, given that the employment tribunal has jurisdiction over the breach of contract and unfair dismissal claims.) Rather, his case is that EU law only permits the claim to be pursued in the territory of the state whose domestic law, in compliance with the Directive, confers that right on the claimant. The submission did not sit happily with Mr Coppel's frank admission that he was not in a position to undertake that the Ministry of Defence would waive any state immunity privilege open to it. If that were successfully to be advanced, it would leave the claimant without a remedy at all.

51. I do not accept Mr Coppel's argument. As Mummery LJ has pointed out, EU law confers rights on workers enforceable against their employers wherever situated within the EU. It does not compartmentalise these rights into geographical units. In my judgment the submissions of Mr Coppel, if correct, would undermine two interrelated principles of EU law. The first is the principle of direct effect which ensures the efficacy of EU law, as enunciated in *Van Duyn v Home Office* [1974] ECR 1337. In my judgment it cannot be a proper implementation of the Directive to allow the appropriate domestic statute to be framed so as to defeat a claim to a directly effective right. I do not see why in this respect territorial limitations on the scope of the domestic statute should be treated any differently from other provisions whose effect is to defeat a claim to a directly effective right. The second is the principle that there should be an effective remedy for breach of an EU right. Plainly that is denied if there is no remedy at all. Furthermore, in so far as the argument is that the right is not defeated but can be enforced elsewhere, in this case in Belgium, that would in my view also in all probability involve a breach of this principle. It is not an effective remedy to have to pursue this EU claim in Belgium when related employment claims are properly being pursued in the British courts, and particularly

when English law is the applicable law. In my view it would subject the claimant to procedural disadvantages which would render it excessively difficult in practice to enforce the EU right: see by analogy the decision of the ECJ in *Impact v Minister of Agriculture and Food* (C-268/06.) [2008] IRLR 532. Furthermore, it would seem to be discriminating between EU and domestic rights in breach of the principle of equivalence. It seems to me bizarre to suggest that the proper court in which to enforce an employment claim against the British government is the court in Belgium.

52. Indeed, in my judgment once a claimant is seeking to enforce a directly effective EU right, 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. This is because whichever system of law within the EU is the appropriate state law to apply, either it gives effect to the EU right when appropriately construed, or it must be disapplied to the extent that it does not. So 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 that 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, particularly if other claims are properly before the court.

53. I recognise that the situation becomes more complex if either 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* principle. If it cannot, then no substantive enforceable rights would be afforded to the claimant by the applicable law. This was the point made by the Employment Appeal Tribunal in the case of *Bleuse v MBT Transport* [2008] ICR 488 para.54. But that is not this case.

54. For these reasons and those given by Mummery LJ, I would dismiss this appeal.

Lord Justice Etherton:

55. I agree with both judgments.