EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal

On 12th December 2002

Judgment delivered on 11 March 2003

Before

HIS HONOUR JUDGE J ALTMAN

MR A E R MANNERS

MS B SWITZER

STEPHEN LAWSON APPELLANT

SERCO LTD RESPONDENTS

__Appeal No.

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant

MR J. ALGAZY

(of Counsel)

Instructed By:

Messrs Mills Kemp & Brown with Hinchcliffe Baker

Solicitors

1-11 Huddersfield Road

Barnsley

South Yorkshire S70 2LP

For the Respondents

MR E. SUTER

(of Counsel)

Instructed By:

Industrial Relations Workshop

3 Park Drive

Weybridge Park

Surrey KT13 8UU

HIS HONOUR JUDGE J ALTMAN:

1. This is an appeal from the decision of the Employment Tribunal sitting at Watford on the 8th October 2001 when the application of Mr Lawson was dismissed for lack of jurisdiction. The primary issue is the definition of the limits of territorial jurisdiction of the Employment Tribunal following repeal of Section 196 of the Employment Rights Act 1996. Mr Lawson brought a claim before the Employment Tribunal in which he alleged unfair dismissal. In respect of such claims, amongst others, Section 196 had provided that the provisions of Part 10 of the Act, which contain the provisions relating to unfair dismissal

"do not apply in relation to employment during any period when the employee is engaged in work wholly or mainly outside Great Britain."

This provision was repealed by the Employment Relations Act 1999 with effect from the 25 October 1999. Whilst we do not rely on Hansard in interpreting the repeal, it is useful to place this in context. Hansard records that the Minister of State during debate explained the reason for the repeal:

"Section 196…is a complicated section…After careful consideration, we concluded that the complexities are unnecessary. International law and the principles of our domestic law are enough to ensure that our legislation does not apply in appropriate circumstances. There must be some proper connection with the UK first, and in such cases it is right that UK law should apply."

It is necessary, therefore, to examine the general rules as to jurisdiction together with the other relevant provisions in statute and regulations. The Employment Tribunal gave a helpful and carefully reasoned decision whilst expressing concern as to their limited access to source materials. Mr Lawson appeared before them in person. We have had the considerable advantage of detailed submissions from Counsel, Mr Algazy and Mr Spencer for Mr Lawson, and also from Mr Suter who did appear before the Employment Tribunal.

2. The Employment Tribunal found that Mr Lawson worked for the Respondents from the 22nd September 2000 until the 6th April 2001. His work involved being a Security Supervisor on Ascension Island in the South Atlantic, where the Respondents were contracted to the Royal Air Force to provide security. Mr Lawson is of British nationality and domiciled in England; the Respondents are a company registered in the United Kingdom where their head office is also based. Mr Lawson responded to an advertisement in England where he was also interviewed. He was paid in sterling in the United Kingdom into his United Kingdom bank account. He was not eligible to pay United Kingdom tax because of working abroad. The contract of employment referred to

"…the principal statement and the written particulars of other terms of employment as required under legislation"

and the documentation referred to United Kingdom statutes including the Misuse of Drugs Act 1971 and the Official Secrets Act. Mr Lawson worked throughout in Ascension Island, and was subject to management there. His contract provided for him to work 40 hours a week and additional hours where necessary, to be determined by the manager.

The nature of the claim before the Employment Tribunal.

3. In his originating application to the Employment Tribunal, Mr Lawson stated the type of claim as being 'unfair dismissal' and in the details section he stated:

"I was forced to resign because my employer forced me to work longer hours than my contract stipulated and that these additional hours had the effect of increasing my work load and, as a result, my health suffered…these excessive hours breached the rules under the Working time Agreement…My health suffered on two counts…I believe that given the circumstances I was dismissed or had to resign for asserting a statutory right."

In paragraph 5 of their decision the Employment Tribunal stated that Mr Lawson's argument was that he was dismissed for asserting a right under the Working Time Regulations 1998. His case, so it appears, was that by protesting to management about the long hours he was compelled to work he was asserting a statutory right and that was the reason for his dismissal. The Employment Tribunal continued:

"In our view, he was also, within the meaning of Section 100(1)(c) an employee at a place where there was no health and safety representative who was bringing to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed ware harmful or potentially harmful to health or safety."

4. The Respondents, by their cross-appeal, contend that the Employment Tribunal erred in inferring a health and safety claim when this had not been included in the originating application or in argument. Mr Suter contends that the Employment Tribunal were in effect putting forward their own grounds for the claim. In support of this he cites a decision of the EAT in Scotland, **Taylor v Dumfries and Galloway Citizens Advice Services** EAT/550/00 [unreported] 20th February 2001. However, in that case the EAT upheld a refusal of the Employment Tribunal to permit the applicant to advance health and safety issues as a basis for claiming unfair dismissal because, although other grounds for alleging unfair dismissal had been included in an originating application running to some 29 pages, the first mention of any health and safety matter was on the morning of the hearing. By then such a claim, which was completely new, was out of time. Indeed in that case, in refusing leave, the Employment Tribunal chairman had stated:

"The Tribunal is unable to accept that the matter is merely a question of applying the correct label. The applicant's originating application makes no mention of unfair dismissal on health and safety grounds"

5. The present case is quite different. Mr Lawson put 'unfair dismissal' in the 'type of claim' box, but bearing in mind that the very explanatory note for that box states "(for example, unfair dismissal, equal pay)", he cannot be criticised for not stating the type of unfair dismissal being claimed, whether relating to working time or health and safety or otherwise. In the body of the application he does clearly refer to both matters, although not specifying that he was dismissed for raising matters of health and safety. It seems to us that the Employment Tribunal were simply construing the originating application, and following the well-established practice of looking at the substance of the application and not whether a particular 'label' had been affixed to it. We disagree with the proposition in the cross-appeal that the decision of the Employment Tribunal suggested that the health and safety issue had not been raised in the 'originating application or in argument', for their decision made clear that they were referring only to 'in argument'. It appears that they were simply drawing attention to the other matter that appeared on the face of the originating application. In those

circumstances it seems to us that a claim for unfair dismissal relating to the raising of health and safety matters was included in the originating application and the cross-appeal is dismissed.

6. The claim before the Employment Tribunal was for unfair dismissal. Mr Lawson said he was constructively dismissed. In this context dismissal, for the purpose of a claim for unfair dismissal, is defined in the Employment Rights Act 1996:

"95. -(1) For the purposes of this Part an employee is dismissed by his employer if…-

(a) …

(b) …

(c) the employee terminates the contract under which he is employed… in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

The Employment Tribunal concluded that the claim for constructive dismissal 'is, necessarily by implication, a claim of breach of contract'. However, it seems to us that the claim is in reality for a breach of statutory duty, by reason of the unfair dismissal. Section 94 of the Employment Rights Act creates a right:

"an employee has the right not to be unfairly dismissed by his employer"

and the employer consequently has the corresponding statutory duty to not dismiss unfairly.

The fact that in order to establish whether there has been a breach of duty it is necessary to examine contractual issues refers to the evidential tests that have to be met to qualify a particular situation for the statutory claim, and not the nature of the claim being made. The distinction between a claim in contract and one in breach of statutory duty can be seen from the fact that in the history of the Employment Tribunals there were many years when they had jurisdiction to try claims of unfair dismissal but no jurisdiction to try claims of breach of contract. Accordingly, in considering the territorial jurisdiction of the Employment Tribunal we start on the basis that we are considering a claim based on a statutory right or duty.

Jurisdiction: The Applicable Principles

The Proper Law of the Contract.

7. The Employment Tribunal identified the law that was to govern jurisdiction. They referred to Section 204(1) of the Employment Rights Act 1996, the Act that embodies the claim for unfair dismissal, which provides:

"204 Law governing employment

(1) For the purposes of this 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 of a part of the United Kingdom, or not"

They found:

"17. We are not ignoring Section 204. We believe the better view is that the abolition of Section 196 has brought within our jurisdiction the termination of any contract reached between any person as employee and any employer, (natural or Corporate) carrying on business in the UK, where so ever the work is performed but provided that the contract is either governed by UK law or the parties agree to submit to the jurisdiction of the UK Tribunals."

8. Mr Algazy on behalf of Mr Lawson submits that the Employment Tribunal erred in relying on the fact that 'the contract is either governed by UK law or the parties agree to submit to the jurisdiction' as limiting jurisdiction, for he points out that the Employment Tribunal appear to rely on the 'proper law' of the contract itself to determine jurisdiction contrary to the provision of Section 204. He draws attention to the distinction between determining the jurisdiction of a Tribunal to try a particular claim on the one hand, and the law that is to be applied to that claim once jurisdiction is established on the other. He cites in support the text book **The Conflict of Laws** by **Dicey and Morris,** paragraph 33–077:

"Section 204(1) provides that… Accordingly, the (Employment Rights Act 1996) applies, prima facie, to all contracts of employment, whatever their governing law, and will be treated as a mandatory provision for the purposes of Article 6 and Article 7(2) of the Rome Convention…"

9. We return to the Rome Convention in due course. We accept that the Employment Tribunal erred in using the law applicable to the contract of employment as the means of determining the jurisdiction of the Tribunal. It seems to us that Section 204 does not permit of that approach. Accordingly the 'proper law' is not the measure of jurisdiction in this case.

The Statutory Provisions

10. . We have then looked at the provisions of the statute itself and regulations made under it to see if any indication of the limits to jurisdiction are set out or indicated. Section 244 of the Employment Rights Act 1996 provides:

"(1) …this Act extends to England and Wales and Scotland but not to Northern Ireland"

Mr Suter submits that these words exclude 'anything which happens' outside these areas. However, it seems

to us that the wording applies the Act directly to a geographical territory, not to a characteristic either of the parties or of the subject matter of a dispute; it does not state for example 'extends to contracts performed in…' or 'extends to parties domiciled in…', or indeed, as would follow from Mr Suter's submission, 'extends to anything that happens in…'. The proposition of Mr Suter would, it seems to us, constitute a very wide exclusion of anything that does not 'happen' within the territory, and indeed, before its repeal, Section 196 would arguably have been otiose in those circumstances. Furthermore, as the reason for the repeal of Section 196 was to leave the Employment Rights Act subject to the general law as to jurisdiction, it seems to us that Section 244 would not have been left intact if it was intended to deal with jurisdiction in that way. Section 244 seems to us to mean no more than that those who are otherwise within the jurisdiction of the Employment Tribunals in England, Wales and Scotland are within the provisions of the Act. This seems to be supported by the extract from **Dicey and Morris**, quoted above, and also by the reference that has been made to **Statutory Interpretation** by Francis Bennion, 4th Edition at page 282:

"Section 106. Presumption of United Kingdom extent.

Unless the contrary indication appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the Untied Kingdom"

Again this does not, it seems to us, dictate the need for parties or the proper law of the contract to be in the United Kingdom for jurisdiction to be established. Indeed, if that were so it would open other issues, such as the question as to what was to determine such an issue, the domicile of a party, the registered office, the place of performance?

11. We conclude that section 244 defines the territory within which the Act is to apply and does not define those who are to be treated as subject to that territorial limit. We find that the Act does in fact do that which appears to have been intended by the repeal of Section 196, namely to remove any qualification of jurisdiction from the body of the Act itself so as to leave any such limits to other legal provision. We have then looked at the regulations made under the Act.

The Procedural Regulations.

12. Section 7 of the Employment Tribunals Act 1996 provides:

"7(1) The Secretary of State may by regulations…make such provision as appears to him to be necessary or expedient with respect to proceedings before industrial tribunals

(2)…

(3) Industrial tribunal procedure regulations may, in particular, include provision –

(a) for determining by which tribunal any proceedings at to be determined…"

The general power in subsection (1) appears very wide. In particular we note that the power is not restricted to regulating procedure, but covers all 'proceedings' and that the phrase 'with respect to proceedings' leaves a very wide arena to the Secretary of State.

13. Accordingly, the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 came into effect, updating earlier provisions, on the 16th July 2001. Regulation 11 states:

"11 Proceedings of Tribunals…

(5) The rules contained in Schedule 1, (which deals with Employment Tribunal Procedures)…shall apply in proceedings to which they relate where –

(a) the respondent or one of the respondents resides or carries on business in England and Wales;

(b) had the remedy been by way of action in the county court, the cause of action would have arisen wholly or partly in England and Wales…"

This wording differs from the following regulation 6:

"(6) The rules in Schedules 4, 5, and 6 shall apply in relation to proceedings before a tribunal which relate to matters arising in England and Wales…"

It appears that in order to apply regulation 6, it is first necessary to determine that the matter does arise in England and Wales; it is then that the regulation applies. It is the subject matter of dispute that has to be examined to identify jurisdiction. On the other hand regulation 5 appears to require examination not of the subject matter of the dispute, such as the performance of a contract, but rather simply the place of business of the Respondent. It seems to us that the two elements of 'matters arising' and 'place of business of the respondent' are only really relevant to the issue of jurisdiction and that the regulations there purport to set some limits to jurisdiction. That conclusion is based on the words of the Regulations themselves, and we derive support for it from the two following matters.

14. First, the provision of some restriction on jurisdiction in the regulations can be seen as filling a gap intentionally left by the repeal of Section 196 only a year before. Although the wording of the new Regulations is similar to that contained in their 1974 predecessor, the fact that there had been some changes in wording leads to the reasonable inference that the new Regulations took account of the repeal of Section 196 in this way. We disagree with the proposition that these Regulations conflict with the provisions of the primary legislation. We have been referred to **Bennion** on **Statutory Interpretation 4th edition** which provides that delegated legislation cannot override any Act, but the enabling Act gave, it seems to us, power to the Secretary of State to make the provisions made, and the provisions do not appear to override the Act. The Act does not expressly provide that jurisdiction is unlimited, which provision would indeed render any regulatory provision that limits jurisdiction inconsistent with such provisions; rather the Act is silent as to jurisdiction, so leaving the matter open for possible definition elsewhere.

15. Secondly, there are two other provisions that are relevant, the Civil Jurisdiction and Judgments Act 1982 and the European Council Regulations 'On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters' which were promulgated on the 22nd December 2000, some 7 months before the Procedure Regulations. It has been submitted by Mr Algazy that the 1982 Act also gives jurisdiction to the Employment Tribunal. The purpose of the 1982 Act was to give effect to the Brussels Convention of 1968, to which a number of European countries were signatories. Schedule 1 incorporated the Convention, and included the following:

"Article 1. This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend…to…(none applicable in this case)…

Article 2. Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State"

Domicile, for the purposes of the Act is defined in Section 42:

"42 (1). For the purposes of this Act the seat of a corporation or association…shall be treated as its domicile.

(2) …

(3) A corporation or association has its seat in the United Kingdom if and only if –

(a) it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address in the United Kingdom; or

(b) its central management and control is exercised in the United Kingdom.

To the extent that the jurisdiction depends on the corporation being a United Kingdom company or having its central management in this country, as well as only 'carrying on business' in the United Kingdom, this Act is slightly more restrictive than the Employment Tribunal (Constitution and Rules of Procedure) Regulations in the jurisdiction it establishes over Companies. However, on the findings of fact of the Employment Tribunal it appears that in the case before us there is no practical difference because the Respondents are covered by both provisions. Further, Mr Suter relies on the judgements in the Court of Appeal in **In re Harrods (Buenos Aires) Ltd. [1991] 3 WLR 397** in support of the proposition that the 1982 Act only applies where the potential competing jurisdictions are both of signatories to the Brussels Convention embodied in the 1982 Act. Mr Algazy points out that the ratio in that case is related to the finding that the English Court still had power to stay proceedings over which it otherwise has jurisdiction under the 1982 Act where an alternative, competing jurisdiction, is of a state that was not a signatory. However, it seems to us that an examination of the judgements demonstrates that the learned Lord Justices reached their conclusion on the wider basis that the 1982 Act is intended to regulate jurisdiction only as between the signatory states. In rejecting the proposition that the Act applied even where one of the jurisdictions was not of a signatory state Dillon LJ said at page 417:

"…if Article 2 has the full mandatory effect…the English Courts would be bound to hear and decide an action against a person domiciled in England even though both parties to the action had agreed that the courts of some non-contracting state – be it New York or Argentina – should have exclusive jurisdiction.

Such results would, in my judgment, be contrary to the intentions of the Convention.

Bingham LJ, quoted the Jenard report at page 419:

" "…it follows, for the purpose of laying down rules on jurisdiction, that a very clear distinction can be drawn between litigants who are domiciled within the Community and those who are not." ".

He continued at page 420:

"Thus in the present case, Intercomfinanz being domiciled in none of the contracting states, it would not violate the letter or the spirit of the Conventions if the English court were to assume jurisdiction over it on any of the traditional grounds, however exorbitant."

And he cited with approval Mr. Lawrence Collins writing in (1960) L.Q.R. 535:

"…the states which were parties to the Convention had no interest in requiring a contracting state to exercise a jurisdiction where the competing jurisdiction was in a non-contracting state. The contracting states were setting up an intra-Convention mandatory system of jurisdiction. They were not regulating relations with non-contracting states"

It appears that the judgements in this case were indeed based on the wider finding that the 1982 applies only to as between signatory states. We follow that and find that the 1982 Act has no strict application in this case, because the competing jurisdiction is that of Ascension Island, not a signatory to the Convention. In those cases where the Act does apply, it would seem to narrow slightly the jurisdiction of the Employment Tribunals, otherwise defined in the Employment Tribunal (Constitution and Rules of Procedure) Regulations, in the way already demonstrated above.

16. Nonetheless the broad similarity between those Regulations and the 1982 Act demonstrates the consistency between the limits of jurisdiction in the Regulations and other relevant legislation, which lends support to our conclusion that the Regulations contain clear jurisdictional qualifications.

17. The same can be said of the European Council Regulations 'On Jurisdiction and the Recognition and

Enforcement of Judgments in Civil and Commercial Matters':

"Whereas…

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor…

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for…

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State…"

Again we conclude that such provisions apply only to the choice of jurisdictions between members of the European Union. However, and in that these provisions are broadly similar to the Employment Tribunal (Constitution and Rules of Procedure) Regulations, they lend support to the construction we have found. This seems the more so bearing in mind that the purpose of repealing Section 196 was said to be to make the Employment Rights Act consistent with the general law. In all cases it is the proximity of the Respondent to the United Kingdom that provides the yardstick for determining jurisdiction.

Conclusion as to jurisdiction

18. The Employment Rights Act gives a right to an employee to bring a claim before an Employment Tribunal, and that is in effect defined in the Rules of Procedure under the Industrial Tribunals Act 1996 as being a claim against an employer who carries on business in England and Wales – there being similar provisions for Scotland. Furthermore there appears to us to be no other fetter on jurisdiction, save only to the extent of the European Regulations and Conventions referred to. Accordingly we find that, on the facts as found by them, the Employment Tribunal erred in concluding that they did not have jurisdiction. Those facts established that the Respondents carried on business in England and applying the law to the facts we find that the Employment Tribunal could properly come to no other conclusion but that they did have jurisdiction to entertain the claim for unfair dismissal.

Competing Jurisdictions.

19. Mr Suter then submits that even if the Employment Tribunal does have jurisdiction, the proceedings should be stayed in favour of the more appropriate and convenient forum of Ascension Island. The Courts will stay proceedings where first there are competing jurisdictions and secondly it is shown, applying **Spiliada Maritime Corporation v Cansulex Ltd** [1896] 3 WLR 972 HL, that the other is the more convenient forum. However, as has been emphasised elsewhere, the Employment Tribunals are the creature of statute and its powers are contained in the Regulations. We have considered the provisions of paragraph 6 of Schedule 1:

"Entitlement to bring or contest proceedings
6. - (1) A tribunal may at any time before the hearing of an originating application, on the application of a party made by notice to the Secretary or of its own motion, hear and determine any issue relating to the entitlement of any party to bring or contest the proceedings to which the originating application relates."

However, we have concluded that a stay in favour of a more convenient forum does not raise issues of 'entitlement', for a stay only arises where a party is in fact entitled to bring proceedings in this jurisdiction; the 'stay' only postpones their continuation, generally indefinitely.

20. Mr Suter has also drawn attention to Regulation 10

10. - (1) The overriding objective of the rules in Schedules 1, 2, 3, 4, 5 and 6 is to enable tribunals to deal with cases justly.

It is said that this is not confined to dealing with matters justly at the hearing, but the examples in that section are not of a kind, it seems to us, to give authority to a Tribunal to stay the proceedings altogether. We find that such a sweeping power is not to be inferred from this regulation.

21. Mr Suter then seeks to rely on regulation 15(d) which provides

15. - (1) Subject to the provisions of these rules, a tribunal may regulate its own procedure.

(2)A tribunal may… -

(d) … at any stage of the proceedings, order to be struck out any originating application or notice of appearance on the grounds that the manner in which the proceedings have been conducted by or on behalf of the applicant or, as the case may be, respondent has been scandalous, unreasonable or vexatious; and

Power to regulate procedure seems to us to refer to the operation of the procedure, not the power to stop it altogether in favour of another country. and the reference to a power to strike out is confined to 'the manner in which the proceedings are conducted'. It is clear to us that there is no power to stay proceedings before a Tribunal, and that once jurisdiction is established, the Tribunal cannot close its doors to parties who wish to appear before it. Accordingly the power to stay proceedings in favour of a more convenient forum does not exist in the context of the Employment Tribunal, and we reject the submission that jurisdiction could be declined on that ground.

-

The applicable law

22. Once jurisdiction is established it is necessary to consider the law to be applied by the Employment Tribunal in considering the application. The submissions before us have considered first the relevance of the parties' choice of law, if identifiable; secondly the extent to which, irrespective of such choice, the law is prescribed by the Employment Rights Act 1996 itself, and thirdly, the application of the Contracts (Applicable Law) Act 1990 which enacted into English Law the provisions of another Brussels Convention.

The law of choice

23. There was no express choice of law in the contract. However, the Employment Tribunal found that the terms of the contract incorporated

"other terms of employment as required under legislation"

and whilst the Employment Tribunal observed that there was no mention of what legislation applied, it seems an irresistible inference that reference was there being made to United Kingdom law. The Employment Tribunal also pointed out that it was never brought to the employees attention that some other than United Kingdom law applied and there was the incorporation by reference of various United Kingdom laws. In these circumstances it seems to us inescapable that if an officious bystander asked the parties 'have you chosen the applicable law', the parties would have replied 'of course, it's United Kingdom law'. It is well established that choice of law may be capable of being inferred from the terms of the contract, and if it were necessary to determine whether the parties chose English Law as the applicable law, then on the facts as found by the Employment Tribunal, we consider that they would have been bound to conclude that the parties had chosen English Law.

The mandatory law under the Employment Rights Act.

24. However, the issue of choice does not arise in the event that the Employment Rights Act prescribes the applicable law. We find that this is conclusive. Section 204(1) provides:

"For the purposes of this 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 of a part of the United Kingdom, or not."

Whatever law governs the contract of employment generally, therefore, it appears that it does not circumscribe the operation of the Act itself. The addition of the words 'or not' at the end clearly embrace foreign law. Such other law is 'immaterial' to the application of the provisions of the Act. It seems to us to follow that where the Act contains a mandatory right or duty, then provided there is jurisdiction in a particular case, those provisions will apply whatever law may apply to the remainder of the contract. We find that this is supported by the fact that section 204 is part of a group of sections under the subheading:

"Contracting out etc and remedies"

These sections would appear to deal with the issue as to whether external matters – such as agreement between the parties or provisions of other law, can dis-apply the provisions of the Employment Rights Act, and Section 204 in this context appears unambiguous. Section 94 of the Act provides:

"94. - (1) An employee has the right not to be unfairly dismissed by his employer."

And Section 111 provides:

"(1) A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer."

25. We find that if must follow that once the jurisdiction of the Employment Tribunal is established, the mandatory provisions of the Employment Rights Act relating to a claim for unfair dismissal relate to any application notwithstanding the choice of applicable law by the parties, or the law of the country with which the contract is most closely connected, or any other provision. It follows that any employee can issue proceedings for unfair dismissal against an employer who carries on business in England and Wales and Scotland, (again subject to the possibly narrower provisions for signatory states). This conclusion is supported by the passage from Dicey quoted in paragraph 8 of this judgment.

The Contracts (Applicable Law) Act 1990.

26. This Act deals with the law that is to be applied in member states of the European Union. The preamble refers to earlier provisions which have dealt with jurisdiction, and it seems to us that the same principle applies, that is that it has no application to the law of a non-member state, and that accordingly it does not apply directly to the case before us. Further the actual provisions are noteworthy. Articles 3 and 6 provide that the law to be applied is that chosen by the parties, unless the particular law under consideration is a 'mandatory' law of a

member state; such a law cannot be overridden by the choice of the parties. Further, if the parties have not chosen the law and there is no relevant mandatory law, the law to apply is that of the place where the employee 'habitually carries out his work'. If there is no one place of habitual work, then the law to apply is that of the situation of the 'place of business through which he was engaged'. Finally, the 'habitual place of work' and the 'place of business' are subject to the qualification that they will give precedence to the law of another country if it appears 'from the circumstances as a whole that the contract is more closely connected with another country', and there are detailed definitions of the words 'more closely connected'. Accordingly it seems to us that even if this Act applied to the case before us the result would have been the same, in that the mandatory provisions of the Employment Rights Act would have constituted the applicable law. It would appear to follow, therefore, that in cases examining the application of the laws of two or more members of

the European Union, where the jurisdiction of the English Employment Tribunal has been established under the Employment Tribunal (Constitution and Rules of Procedure) Regulations, the law relating to unfair dismissal will apply as mandatory law.

Working Time Regulations and Health and Safety.

27. Mr Lawson claimed 'automatically' unfair dismissal because he asserted a statutory right under Section 104 of the Employment Rights Act 1996 (the Working Time Regulations) or Section 100 (raising matters of health and safety). As to the first Mr Suter points to Regulation 1(2) of the Working Time Regulations 1998:

"These Regulations extend to Great Britain only"

Thereby, argues Mr Suter, as the work was in Ascension Island, the regulations did not apply to the work and therefore a claim of dismissal of the employee because he relied on the right there expressed must fail. He argues that a claim for unfair dismissal could not be based on this Directive because it has no application outside Great Britain.

28. Section 104 of the Employment Rights Act (as amended) provides:

"104. - (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason …for the dismissal is that the employee-

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)-

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section-

…

(d) the rights conferred by the Working Time Regulations 1998

Mr Suter argues that as the 'right' is confined to Great Britain, it was not 'a right of his', when he was working in Ascension Island. We find construction of this difficult. On the one hand it can be said first that the words 'extends to Great Britain only', are without reference to the place of the 'contract' or the 'work', so that they simply give the same territorial jurisdiction as that of Section 244 of the Employment Rights Act, or else that the words are intended to refer to the domicile or the place of business of the parties. On the other hand the work was performed exclusively in Ascension Island. We note the fear of the opening of floodgates in relation to hours of work in relation to work abroad that was expressed in the decision of the Employment Tribunal. Nonetheless we have concluded, on balance and with hesitation, that there is no reason to assume that the words 'extends to Great Britain only' are intended to be limited to the place where the work is performed, and that the territorial application is to be preferred. We find, accordingly, that on the facts as found by the Employment Tribunal, they would have been bound to conclude that as a matter of law the Working Time Regulations did apply to the employment that was subject to the claim of unfair dismissal.

In any event and even if we are wrong in concluding that the Regulations apply to work outside Great Britain, nonetheless Mr Lawson appears to claim that he believed 'in good faith' that the Regulations did apply, so as to enable him still to claim for the consequent automatically unfair dismissal under Section 104(2). In this case the issue is whether he raised what he believed in good faith to be a statutory right and this is an issue of fact for the substantive hearing.

29. As to the health and safety aspects of the claim, this again is relied on as evidence of unfair dismissal and Section 100 of the Employment Rights is the applicable law before the Employment Tribunal.

CONCLUSION

30. We find that as Serco Ltd did "carry on business" in England and Wales, the Employment Tribunal had, as a matter of law, jurisdiction to entertain his application for breach of his right not to be unfairly dismissed by reason of the Employment Tribunal (Constitution and Rules of Procedure) Regulations. We find that the Employment Tribunal has no jurisdiction to stay the application in favour of a more convenient forum. We find that the applicable law is the mandatory provisions of the Employment Rights Act 1996. We find that the Working Time Regulations applied to Mr Lawson's work in Ascension Island but that if we are wrong about that, the Employment Tribunal must still consider whether the claim comes within Section 104(2) of the Employment Rights Act. We find that the claim under Section 100(1)(c) is within the jurisdiction of the Employment Tribunal.

31. Accordingly this appeal is allowed. We remit the claim to be considered by the same or a freshly constituted Tribunal. It is a matter entirely within the discretion of the tribunal but we suggest that it may be thought appropriate to have a directions hearing to accommodate Ascension Island witnesses, whether by listing for hearing when they are in the United Kingdom, or by ordering written statements with

cross-examination in the form of a written questionnaire, or by some other means.