HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Serco Limited (Respondents) *v.* Lawson (Appellant)
Botham (FC) (Appellant) *v.* Ministry of Defence (Respondents)
Crofts (Respondent) and others *v.* Veta Limited (Appellants) and others and one other action

[2006] UKHL 3

LORD HOFFMANN

My Lords,

The issue

1. The question common to these three appeals is the territorial scope of section 94(1) of the Employment Rights Act 1996, which gives employees the right not to be unfairly dismissed. Section 230(1) defines an "employee" as an individual "who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." But the Act contains no geographic limitation. Read literally, it applies to any individual who works under a contract of employment anywhere in the world. It is true that section 244(1) says that the Act "extends" to England and Wales and Scotland ("Great Britain"). But that means only that it forms part of the law of Great Britain and does not form part of the law of any other territory (like Northern Ireland or the Channel Islands) for which Parliament could have legislated. It tells us nothing about the connection, if any, which an employee or his employment must have with Great Britain. Nevertheless, all parties to these appeals are agreed that some territorial limitations must be implied. It is inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with Great Britain. The argument has been over what those limitations should be. Putting the question in the traditional terms of the conflict of laws, what connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair?

The answer to this question will also determine the question of jurisdiction, since the Employment Tribunal will have jurisdiction to decide upon the unfairness of the dismissal if (but only if) section 94(1) is the appropriate choice of law.

The facts

2. The facts of the three cases illustrate the situations in which the question of territorial scope may arise. In *Lawson v Serco Ltd* the employer is a substantial United Kingdom company which operates world-wide providing services to the public and private sector. It engaged Mr Lawson, a former RAF policeman, to work as a security supervisor on Ascension Island, where the company had a contract to service the RAF base. After six months on the island, Mr Lawson resigned, claiming that he had been constructively dismissed. Ascension is a 35 square mile volcanic island in the South Atlantic with no indigenous population. About 1100 people are stationed there, mostly working in defence or communications. It is a dependency of the British Overseas Territory of St Helena.

3. In *Botham v Ministry of Defence* the MOD first employed Mr Botham in 1988 as a "UK-Based Youth Worker" with the British Forces Germany Youth Service. Thereafter he worked under a succession of contracts and eventually as an established UK-Based Youth Worker at various MOD establishments in Germany. In accordance with the NATO Status of Forces Agreement of 1951 he was part of the "civil component" of the British Forces in Germany and treated as resident in the UK rather than Germany for various purposes including taxation. In September 2003 he was summarily dismissed on allegations of gross misconduct but claims that his dismissal was unfair.

4. In *Crofts v Veta Ltd* the employer is a wholly-owned subsidiary of Cathay Pacific Airways Ltd. Both are Hong Kong companies. Veta's only function appears to be to employ aircrew for Cathay aircraft. Cathay operated a "Permanent Basings Policy" by which some aircrew could be assigned a permanent "home base" outside Hong Kong. Mr Crofts was based at Heathrow, which enabled him to live in the United Kingdom. In July 2001 Mr Crofts was dismissed by Veta in circumstances which he claims were unfair.

5. Thus in *Lawson* and *Botham*, employer and employee both had close connections with Great Britain but all the services were performed abroad. In *Crofts* the employer was foreign but the employee was resident in Great Britain and although his services were peripatetic, they were based in Great Britain. In *Lawson* the Court of Appeal [2004] EWCA Civ 12; [2004] ICR 204 said section 94(1) did not apply to a case in which all the services were performed abroad and this ruling was followed by the Employment Appeal Tribunal and the Court of Appeal in *Botham.* In *Crofts*, however, the Court of Appeal (by a majority) [2005] EWCA Civ 599; [2005] ICR 1436 decided that Mr Crofts's basing in Great Britain was sufficient to enable the Employment Tribunal to treat section 94(1) as applicable.

Territoriality

6. The general principle of construction is, of course, that legislation is prima facie territorial. The United Kingdom rarely purports to legislate for the whole world. Some international crimes, like torture, are an exception. But usually such an exorbitant exercise of legislative power would be both ineffectual and contrary to the comity of nations. This is why all the parties are agreed that the scope of section 94(1) must have implied territorial limits. More difficult is to say exactly what they are. Where legislation regulates the conduct of an individual, it may be easy to construe it as limited to conduct within the area of applicability of the law, or sometimes by United Kingdom citizens anywhere: see *Ex p Blain; In re Sawers* (1879) 12 Ch D 522. But section 94(1) provides an employee with a special statutory remedy. Employment is a complex and sui generis relationship, contractual in origin but, once created, having elements of status and capable of having consecutive or simultaneous points of contact with different jurisdictions. So the question of territorial scope is not straightforward. In principle, however, the question is always one of the construction of section 94(1). As Lord Wilberforce said in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152, it

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

The repeal of section 196

7. The Act has not always been silent on the question of territorial scope. When the right not to be unfairly dismissed first made its appearance as section 22 of the Industrial Relations Act 1971, it was accompanied by a provision (section 27(2)) which said that section 22 did not apply "to any employment where under his contract of employment the employee ordinarily works outside Great Britain". (There was also a special exception for people who worked outside Great Britain on ships registered in the United Kingdom). The same form of words that had been used in the 1971 Act was used to limit the scope of a number of additional rights conferred upon employees by the Employment Protection Act 1975, such as the right to maternity leave and time off for trade union and public duties: see section 119(5) of the 1975 Act. Earlier employment legislation on matters such as redundancy payments and the right to be given a written statement of particulars of the employment agreement had contained somewhat different geographic limitations: see for example section 17(1) and (2) of the Redundancy Payments Act 1965 and section 12(1) of the Contracts of Employment Act 1972. When all this legislation was consolidated, first in the Employment Protection (Consolidation) Act 1978 and then in the 1996 Act, these various geographical provisions were put into a single section under the heading "Employment outside Great Britain". In the 1996 Act it was section 196 and the rule for unfair dismissal appeared in subsection (3).

8. The interpretation by the courts of what became section 196(3) had a somewhat chequered history and in *Wilson v Maynard Shipbuilding Consultants* AB [1978] ICR 376, 386 Megaw LJ said that the legislation (in "deceptively simple-looking words": see p. 384) had thrown up some problems which he did not think Parliament had foreseen. He invited Parliament, if it thought that the courts were interpreting the section in a way which frustrated its intention, to reconsider the matter and amend it. Parliament's imaginative response, twenty years later, was to leave the matter entirely to the judges. By section 32(3) of the Employment Relations Act 1999 it repealed the whole of section 196 and put nothing in its place. The only part to survive was the special provision for mariners, which was re-enacted in slightly different form as section 199(7) and (8). Otherwise, the courts were left to imply whatever geographical limitations seemed appropriate to the substantive right.

9. Your Lordships have heard various submissions about the inferences, if any, which can be drawn from the fact that Parliament repealed section 196 of the 1996 Act. In particular, it was submitted that Parliament must have intended to widen the territorial scope of the various provisions to which section 196 had applied. Counsel said that support for this argument could be found in the brief statement of the Minister of State, Department of Trade and Industry (Mr Ian McCartney) when recommending the repeal of section 196 to the House of Commons: see Hansard (HC Debates) 26 July 1999, cols 31-32. It is no criticism of Mr McCartney's moment at the despatch box to say that I have not found his remarks particularly helpful in dealing with problems which he is unlikely to have had in mind. Subject to one point to which I shall return later and on which it seems right to infer that the application of at least some parts of the 1996 Act was intended to be widened, I do not think that any inferences can be drawn from the repeal of section 196 except that Parliament was dissatisfied with the way in which the express provisions were working and preferred to leave the matter to implication. Whether this would result in a widening or narrowing of the scope of the various provisions to which section 196 had applied is a question upon which, in my opinion, the decision to repeal it throws no light. Parliament was content to accept the application of established principles of construction to the substantive rights conferred by the Act, whatever the consequences might be.

10. That does not mean, however, that the 1996 Act must be read as if the right not to be unfairly dismissed had been newly created without any guidance about its territorial application. There are in my opinion three ways in which the earlier history may be relevant.

11. First, the original exclusion of cases in which the employee ordinarily "works outside Great Britain" shows that when Parliament created the new remedy in 1971, it thought that the sole criterion delimiting its territorial scope should be the place where the employee worked. If he ordinarily worked in Great Britain, he should be entitled to protection. If not, then he should not. It attached no significance to such matters as the places where he was engaged, from which he was managed or his employer resided. The repeal of section 196 means that the courts are no longer rigidly confined to this single litmus test. Nevertheless, the importance which parliament attached to the place of work is a relevant historical fact which retains persuasive force.

12. Secondly, a certain amount of guidance, or at any rate ideas and discussion, may be found in the case law on the repealed section 196(3).

Although the judges who decided those cases were applying a particular verbal formula, they were trying to interpret that formula in a way which seemed appropriate to delimit the substantive right. Thus their general views on the proper territorial scope of the right not to be unfairly dismissed remain of interest and I shall in due course refer to some of them.

13. Thirdly, the one point which I mentioned earlier, on which it is possible to identify a definite intention to widen the scope of section 94(1) by the repeal of 196, arises from the fact that part of the legitimate background is the Posting of Workers Directive (96/71/EC) which had been adopted by the European Parliament and Council on 16 December 1996. This required that employees who are posted by their employers to perform temporary work in other Member States should enjoy the protection of a "nucleus of mandatory rules for minimum protection" of employees under the law of the host state: see recitals (13) and (14). Article 3.1 lists the matters forming part of the mandatory nucleus. They include such matters as maximum work periods, minimum paid holidays, minimum rates of pay, health safety and hygiene at work, protective measures for women who are pregnant or have recently given birth. But they do not include the right not to be unfairly dismissed, except perhaps on grounds of pregnancy or childbirth.

14. It seems clear that insofar as section 196(3) prevented rights falling within the Directive from being enjoyed by employees who ordinarily worked outside Great Britain but were temporarily posted here, its repeal was intended to allow the courts to give effect to the Directive by interpreting the relevant substantive provisions as applicable to posted workers. To that extent, the repeal was intended to widen the territorial scope of those provisions. It does not logically follow that the same scope must be given to section 94(1) (except in the very limited circumstances of dismissal for pregnancy or childbirth). There is no reason why all the various rights included in the 1996 Act should have the same territorial scope. Indeed it may be said that by including only the "mandatory nucleus" in the Posted Workers Directive, the European Union has recognised that other rights might legitimately be given a different territorial application. But uniformity of application would certainly be desirable in the interests of simplicity.

The rival formulations

15. Section 196 having disappeared, something must be found to replace it. In the argument before your Lordships, counsel offered a number of different formulations of a new rule, some simple and some more complex. In the courts below there had been even more, but some of these have been abandoned. For example, no one supported the solution which had found favour with the Employment Appeal Tribunal in the *Serco* case, namely that section 94(1) now applies to employment relationships anywhere in the world, subject only to the Employment Tribunal having personal jurisdiction over the defendant under the Employment Tribunals (Constitution and Rules of Procedure) Rules 2001 SI 2001/1171. It is also agreed that, as I said at the outset of this opinion, no assistance can be obtained from section 244(1), which says that the Act "extends" to the territories comprising Great Britain.

16. Perhaps the most simple and elegant solution was that adopted by Pill LJ in the *Serco* case ([2004] ICR 204, 207, para 8:

> "The question is: what are the employments covered by the section? The answer, in our judgment, is straightforward though it may be difficult to apply in some cases: employment in Great Britain."

17. That is indeed putting the matter in a nutshell. But, as Lord Macnaghten memorably said of the rule in *Shelley's* case (1581) 1 Co Rep 93b, it is one thing to put the rule in a nutshell and another to keep it there. (*Van Grutten v Foxwell* [1897] AC 658, 671). Pill LJ had hardly handed down his judgment when another division of the Court of Appeal, in the *Crofts* case, fell to differing over what he meant. Lord Phillips of Worth Matravers MR said that an airline pilot who spent almost all his working time in the air could not be said to be employed in Great Britain (or anywhere else, for that matter) while the majority of the court thought that if one applied the rule with the flexibility recommended by Pill LJ (at p 212, para 28) it could apply to a pilot who was based in this country.

18. Mr Linden, who appeared for Serco Ltd and defended the judgment of the Court of Appeal, was prepared to accept the interpretation of "employment in Great Britain" adopted by the majority of the Court of Appeal in *Crofts*. It could include employees like Mr

Crofts who were based in Great Britain, even though they also worked (perhaps most of the time) outside the country. That did Mr Linden's case no harm. But he was unwilling to extend flexibility to the extent of including employees like Mr Lawson who did not work in Great Britain at all.

19. Indeed it may be said that with the exception of Mr Crow's submissions for the Foreign Office and the Ministry of Defence, all the formulations of principle advanced by counsel were so closely tailored to the needs of their clients that without some rather artificial patching and mending they could not exclude some cases which did not seem likely to have been within the "legislative grasp" or include other cases which did. For example Mr Reynold QC, who appeared for Mr Botham, said that in addition to the standard case of the employee who ordinarily works in Great Britain, section 94(1) should apply to cases in which a British-based employer recruited an employee from the resident British labour pool to work abroad. In the latter case, the question was whether the employment relationship was "forged and ultimately rooted" in Great Britain. But this formulation has two disadvantages. First, it is expressed in the metaphors of forging and rooting. Experience shows that rules formulated in terms of metaphors always cause trouble when it comes to their interpretation and the more striking the metaphor, the more likely it is to distract attention from the real issues in the case. Secondly, it is wide enough to include all cases in which British employees are recruited by a British employer to work abroad, even if the business in which they work is indistinguishable (apart from ownership) from any similar business operating under the employment laws of the foreign country.

20. Mr Lawson's case against Serco Ltd was in many respects similar to that of Mr Botham: both had been recruited in Great Britain to work abroad. But Mr Algazy did not favour forging and rooting. Instead he propounded a more complicated rule which required that certain conditions be satisfied in respect of both parties to the employment relationship. They had to be present in Great Britain or owe allegiance to the Crown. This was based upon what the Court of Appeal had said in *Ex p Blain; In re Sawers* (1879) 12 Ch D 522 about territoriality in the context of bankruptcy jurisdiction. However, its application to the employment relationship requires a good deal of adaptation of those simple concepts and Mr Algazy was obliged to introduce somewhat artificial refinements to make it work, such as deeming the employer to be present in Great Britain through the presence of the employee and introducing a wide variety of factors as relevant to "allegiance to the Crown".

21. The issues in the *Crofts* case were rather different. While Lawson and Botham might be called expatriate employees, working abroad in circumstances in which their work nevertheless had strong connections with Great Britain, Mr Crofts was perhaps an extreme example of a peripatetic employee, whose work constantly took him to many different places. Both Mr Griffith-Jones QC for Mr Crofts and Mr Goudie QC for Veta Ltd were agreed that the question of whether section 94(1) applied depended upon taking into account a number of different factors but they disagreed over what the decisive factors should be. Mr Griffith-Jones attached most importance to the fact that by the terms of his contract and the way it was actually being operated at the time of his dismissal, Mr Crofts was based at Heathrow. Mr Goudie on the other hand said that the decisive factors were the places from which he was managed, where he was paid and where the aircraft that he flew belonged and were licensed – all of which, in this case, were Hong Kong.

22. Mr Crow, on the other hand, accepted that the policy of section 94(1) required that Mr Botham, as an expatriate employee serving his country in a civilian capacity on a military base abroad, should be entitled to the benefit of the law of unfair dismissal applicable to Great Britain. He therefore consented on behalf of the Ministry of Defence to Mr Botham's appeal being allowed. But this concession made it difficult to formulate a crisp principle, such as the Court of Appeal had done in *Serco*, which would exclude the general run of people working abroad but include Mr Botham. He therefore submitted that the test should be whether the employment relationship had a closer connection with Great Britain (or perhaps with the British system of employment law) than with any other country or system of law. In deciding the closeness of the connection, a large number of factors might have to be taken into account – Mr Crow listed 24 but was willing to give house room to a couple more suggested in the course of argument – although of course in most cases the place where the employee worked was likely to be the decisive factor. In Mr Botham's case, this was outweighed by the fact that he was in all respects an established UK civil servant working on a base in Germany which in practice, if not international law, was virtually an extra-territorial piece of the United Kingdom.

Principles, not rules

23. In my opinion the question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements. This is a question of the construction of section 94(1) and I believe that it is a

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

24. On the other hand, the fact that we are dealing in principles and not rules does not mean that the decision as to whether section 94(1) applies (and therefore, whether the Employment Tribunal has jurisdiction) is an exercise of discretion. The section either applies to the employment relationship in question or it does not and, as I shall explain later, I think that is a question of law, although involving judgment in the application of the law to the facts. One may contrast the case of *In re Paramount Airways Ltd* [1993] Ch 223 in which the Court of Appeal decided that the provisions of the Insolvency Act 1986 for setting aside transactions at an undervalue had, as a matter of construction, world-wide application but that the court had a discretion to refuse to make an order in a case not sufficiently connected with England. Section 94(1), on the other hand, does not have world-wide application and the court must give effect to its implied territorial limitations. Nor is there any basis for the exercise of a discretion. Although rule 10(2)(h) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI 2004/1861 gives the Tribunal a general power to stay any proceedings, I think that it would be contrary to principle for an application under section 94(1) to be stayed on the ground of forum non conveniens. There is no other more convenient forum in which such a claim can be litigated because no other tribunal has jurisdiction to hear a claim under section 94(1): compare *British Airways Board v Laker Airways Ltd* [1985] AC 58. There may be tribunals in other countries which have jurisdiction to hear similar claims but that is not the same thing. I shall deal later with the question of double claiming.

The standard case: working in Great Britain

25. Having said that, I am sure that Pill LJ was right in saying that what Parliament must have intended as the standard, normal or paradigm case of the application of section 94(1) was the employee who was working in Great Britain. As I said earlier, the fact that Parliament in 1971 and subsequently until 1999 thought that ordinarily working in Great Britain was an appropriate criterion for territorial scope remains indicative of what the general intent is likely to have been. Section 196(3), however, attributed decisive importance to whether "under the employee's contract of employment" he ordinarily worked outside Great Britain. This emphasis on the contract rather than the factual position at the time of dismissal was in accordance with the prevailing attitude to the employment relationship in the early 70s. It was seen simply as a matter of contract, the terms being agreed at the inception of the employment relationship. In *Wilson v Maynard Shipbuilding Consultants* AB [1978] ICR 376, 385C, Megaw LJ said that this made good sense:

> "It means that the question whether or not this important statutory right exists is settled at, and can be ascertained by reference to, the time of the making of the contract."

26. In practice however this concentration on the original contract could produce arbitrary and counter-intuitive results when, as often happens, the contract allowed the employer to direct where the employee would work. In *Carver v Saudi Arabian Airlines* [1999] ICR 991 Mrs Carver was employed as a flight attendant under a contract made in 1986. It said nothing about where she was to work, but she was trained in Jeddah and then spent four years based in Bombay. She then moved to London, where she remained based at Heathrow until she resigned in circumstances which she said amounted to an unfair constructive dismissal. The Court of Appeal held that section 94(1) did not apply because the original contract had contemplated that she would be based at Jeddah.

27. Since 1971 there has been a radical change in the attitude of Parliament and the courts to the employment relationship and I think that the application of section 94(1) should now depend upon whether the employee was working in Great Britain at the time of his dismissal, rather than upon what was contemplated at the time, perhaps many years earlier, when the contract was made. I would therefore expect Mrs

Carver's case to be decided differently if it came before the courts today. The terms of the contract and the prior history of the contractual relationship may be relevant to whether the employee is really working in Great Britain or whether he is merely on a casual visit (for example, in the course of peripatetic duties based elsewhere) but ordinarily the question should simply be whether he is working in Great Britain at the time when he is dismissed. This would be in accordance with the spirit of the Posted Workers Directive, even though that Directive is not applicable to the right not to be unfairly dismissed.

Peripatetic employees

28. As *Croft v Veta Ltd* shows, the concept of employment in Great Britain may not be easy to apply to peripatetic employees. The Act continues to make specific provision for one class of peripatetic worker, namely mariners, but I do not think that one can draw any inferences about what Parliament must have intended in relation to other peripatetic workers such as airline pilots, international management consultants, salesmen and so on. The solution adopted under the old "ordinarily works outside Great Britain" formula was to ask where the employee was based. In *Wilson's* case [1978] ICR 376, which concerned a management consultant, Megaw LJ said, at p 387:

> "In a case such as the present it appears to us that the correct approach is to look at the terms of the contract, express and implied (with reference, it may be, to what has happened under the contract, for the limited purpose which we have expressed above) in order to ascertain where, looking at the whole period contemplated by the contract, the employee's base is to be. It is, in the absence of special factors leading to a contrary conclusion, the country where his base is to be which is likely to be the place where he is to be treated as ordinarily working under his contract of employment. Where his base, under the contract, is to be will depend on the examination of all relevant contractual terms. These will be likely to include any such terms as expressly define his headquarters, or which indicate where the travels involved in his employment begin and end; where his private residence – his home – is, or is expected to be; where, and perhaps in what currency, he is to be paid; whether he is to be subject to pay National Insurance Contributions in Great Britain. These are merely examples of factors which, among many others that may be found to

> exist in individual cases, may be relevant in deciding where the employee's base is for the purpose of his work, looking to the whole normal, anticipated, duration of the employment."

29. As I said earlier, I think that we are today more concerned with how the contract was in fact being operated at the time of the dismissal than with the terms of the original contract. But the common sense of treating the base of a peripatetic employee as, for the purposes of the statute, his place of employment, remains valid. It was applied by the Court of Appeal to an airline pilot in *Todd v British Midland Airways Ltd* [1978] ICR 959, where Lord Denning MR said, at p 964:

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

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

Crofts v Veta Ltd

31. Like the majority in the Court of Appeal, I think that Lord Denning's approach in *Todd v British Midland Airways Ltd* points the way to the answer in *Crofts v Veta Ltd*. It is of course true that British Midland was a British airline and that none of the foreign factors relied upon by Mr Goudie were present. The only foreign factor was that Mr Todd spent more of his time outside Great Britain than in it. But employees of a foreign airline can also be based in Great Britain and in my opinion this was the situation of Mr Crofts. Unless, like Lord Phillips of Worth Matravers MR, one regards airline pilots as the flying

Dutchmen of labour law, condemned to fly without any jurisdiction in which they can seek redress, I think there is no sensible alternative to asking where they are based. And the same is true of other peripatetic employees.

32. The Employment Tribunal made certain "primary findings of fact", at para 5:

> "(6) In the early 1990s, largely for economic reasons [Cathay Pacific] entered into negotiations with the trade union representing their aircrew with a view to formulating a 'basings policy' designed to enable aircrew to live in, and work from, other parts of the world. Negotiations were successful and a 'Basings Agreement' was concluded. The agreement provided that a new company would be set up to employ those aircrew who had volunteered for, and been granted, a foreign basing…
>
> (8) The Basings Policy embodied and/or was operated on (among others) the following principles:
>
> (a) [Cathay Pacific] aircrew who applied successfully for a basing outside Hong Kong would be required to resign their employment with [Cathay] and transfer to the employment of a subsidiary company of [Cathay] (Veta)
>
> (b) Any pilot transferred to a new basing would be allocated a 'home base' from which his…flying cycles would ordinarily commence and at which they would ordinarily commence and … end.
>
> (c) There was no express requirement for aircrew to reside close to their home base or even within the relevant base area. On the other hand, staff rostered for reserve duty were required to be within two hours travel of their home base for the periods to which that rostered duty related.
>
> (d) Unlike expatriate aircrew living in Hong Kong, those transferring to new bases would not be eligible for financial support in respect of living accommodation and other expenses
>
> (e) Transferring employees would be responsible for their own taxation and immigration arrangements."

33. Having considered these and other facts, such as the way in which the Veta pilots were managed from Hong Kong, the Tribunal in paragraph 23 of its decision reached the following conclusion:

> "Pursuant to the Basings Policy the Veta applicants were required to resign their [Cathay] employment and did so irrevocably. They were allocated new bases on the footing that they would remain their indefinitely. They were repatriated from Hong Kong and ceased to be resident there. Their tours of duty began and ended in London. Even if a flying cycle began elsewhere, the tour of duty began when they reported to London Heathrow for the purpose of being 'positioned' to the port from which the flying cycle was to commence. They were paid a salary designed to reflect a lower cost of living than that experienced in Hong Kong. In short, the centre of their operations was, quite manifestly, London."

Fact or law?

34. Mr Griffith-Jones said that the Tribunal's conclusion was a finding of fact which the Employment Appeal Tribunal (and your Lordship's House on appeal) had no jurisdiction to disturb. Like many such decisions, it does not involve any finding of primary facts (none of which appear to have been in dispute) but an evaluation of those facts to decide a question posed by the interpretation which I have suggested should be given to section 94(1), namely that it applies to peripatetic employees who are based in Great Britain. Whether one characterizes this as a question of fact depends, as I pointed out in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929, upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review. I would be reluctant, at least at this stage in the development of a post-section 196 jurisprudence, altogether to exclude a right of appeal. In my opinion therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect. In the present case I think not only that the Tribunal was entitled to reach the conclusion which it did but also that it was right. I would therefore dismiss Veta's appeal.

Expatriate employees

35. The problem of what I might call the expatriate employees is rather more difficult. The concept of a base, which is useful to locate the workplace of a peripatetic employee, provides no help in the case of an expatriate employee. The Ministry of Defence accepts that Mr Botham fell within the scope of section 94(1), but his base was the base and the base was in Germany.

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

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

38. Something more may be provided by the fact that the employee is posted abroad by a British employer for the purposes of a business carried on in Great Britain. He is not working for a business conducted

in a foreign country which belongs to British owners or is a branch of a British business, but as representative of a business conducted at home. I have in mind, for example, a foreign correspondent on the staff of a British newspaper, who is posted to Rome or Peking and may remain for years living in Italy or China but remains nevertheless a permanent employee of the newspaper who could be posted to some other country. He would in my opinion fall within the scope of section 94(1). The distinction is illustrated by *Financial Times Ltd v Bishop* [2003] UKEAT 0147, a decision of the Employment Appeal Tribunal delivered by Judge Burke QC. Mr Bishop was originally a sales executive working for the Financial Times in London. At the time of his dismissal in 2002 he had been working for three years in San Francisco selling advertising space. The Employment Tribunal accepted jurisdiction on the ground that under European rules it had personal jurisdiction over the Financial Times: see article 19 of Regulation EC 44/2201. But that was not a sufficient ground: the Regulation assumes that the employee has a claim to enforce, whereas the question was whether section 94(1) gave Mr Bishop a substantive claim. Having set aside this decision, the EAT was in my opinion right in saying that the findings of fact were inadequate to enable it to give its own decision. The question was whether Mr Bishop was selling advertising space in San Francisco as a part of the business which the Financial Times conducted in London or whether he was working for a business which the Financial Times or an associated company was conducting in the United States: for example, by selling advertising in the Financial Times American edition. In the latter case, section 94 would not in my view apply. (Compare *Jackson v Ghost Ltd* [2003] IRLR 824, which was a clear case of employment in a foreign business).

39. Another example is an expatriate employee of a British employer who is operating within what amounts for practical purposes to an extra-territorial British enclave in a foreign country. This was the position of Mr Botham working in a military base in Germany. And I think, although the case is not quite so strong, that the same is true of Mr Lawson at the RAF base on Ascension Island. While it is true that Mr Lawson was there in a support role, employed by a private firm to provide security on the base, I think it would be unrealistic to regard him as having taken up employment in a foreign community in the same way as if Serco Ltd were providing security services for a hospital in Berlin. I have no doubt that *Bryant v Foreign and Commonwealth Office* [2003] UKEAT 174, in which it was held that section 94(1) did not apply to a British national locally engaged to work in the British Embassy in Rome, was rightly decided. But on Ascension there was no local community. In practice, as opposed to constitutional theory, the base was a British outpost in the South Atlantic. Although there was a local

system of law, the connection between the employment relationship and the United Kingdom were overwhelmingly stronger.

40. I have given two examples of cases in which section 94(1) may apply to an expatriate employee: the employee posted abroad to work for a business conducted in Britain and the employee working in a political or social British enclave abroad. I do not say that there may not be others, but I have not been able to think of any and they would have to have equally strong connections with Great Britain and British employment law. For the purposes of these two appeals, the second of these examples is sufficient. It leads to the conclusion that the appeals of both Mr Lawson and Mr Botham should be allowed.

Double claiming

41. Finally I should note that in the case of expatriate employees, it is quite possible that they will be entitled to make claims under both the local law and section 94(1). For example, the foreign correspondent living in Rome would be entitled to rights in Italian law under the Posted Workers Directive and although the Directive does not extend to claims for unfair dismissal, Italian domestic law may nevertheless provide for them. Obviously there cannot be double recovery and any compensation paid under the foreign system would have to be taken into account by an Employment Tribunal.

Disposal

42. I would dismiss the appeal in *Crofts v Veta Ltd* and allow the appeals in *Lawson v Serco Ltd* and *Botham v Ministry of Defence*. The latter two cases must be remitted to the Employment Tribunals for hearings on the merits.

LORD WOOLF

My Lords,

43. Having had the advantage of reading in advance the opinion prepared by my noble and learned friend Lord Hoffmann, I too would dismiss the appeal in *Crofts v. Veta Limited* and allow the appeals in *Serco Limited v. Lawson* and *Botham v. Ministry of Defence*.

LORD RODGER OF EARLSFERRY

My Lords,

44. I have had the advantage of reading the speech of my noble and learned friend Lord Hoffmann in draft. I agree with it and for the reasons he gives I would dispose of the three appeals in the way he proposes.

LORD WALKER OF GESTINGTHORPE

My Lords,

45. For the reasons given in the opinion of my noble and learned friend, Lord Hoffmann, with which I agree, I would dismiss the appeal in *Crofts v Veta Limited* and allow the appeals in *Serco Limited v Lawson* and *Botham v Ministry of Defence*.

BARONESS HALE OF RICHMOND

My Lords,

46. For the reasons given in the opinion of my noble and learned friend, Lord Hoffmann, I too would dismiss the appeal in *Crofts v Veta Limited* and allow the appeals in *Serco Limited v Lawson* and *Botham v Ministry of Defence.*