Hilary Term
[2011] UKSC 14
On appeal from: [2009] EWCA Civ 1355

JUDGMENT

Duncombe and others (Respondents) *v* Secretary of State for Children, Schools and Families (Appellant)

before

Lord Rodger
Lady Hale
Lord Mance
Lord Collins
Lord Clarke

JUDGMENT GIVEN ON

30 March 2011

Heard on 17 and 18 January 2011

Appellant
Jonathan Crow QC
Maya Lester

(Instructed by Treasury Solicitors)

Respondents
Nigel Giffin QC
Katherine Eddy
Simon Henthorn
(Instructed by Reynolds Porter Chamberlain LLP)

LADY HALE (with whom Lord Rodger agrees)

1. We are concerned with the employment, by the Secretary of State for Children, Schools and Families, of teachers to work in the European Schools. These are schools set up to provide a distinctively European education principally for the children of officials and employees of the European Communities. The Staff Regulations, made by the Board of Governors pursuant to the Convention defining the Statute of the European Schools, limit the period for which teachers may be seconded to work in those schools to a total of nine years (or exceptionally ten). This is made up of an initial probationary period of two years, and a further period of three years, which is renewable for a further four years.

2. The principal question before us is whether these arrangements can be objectively justified as required by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) ('the Fixed-term Regulations'). This was the measure chosen by the United Kingdom to implement Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP ('the Fixed-term Directive'). The effect of regulation 8 is that a successive fixed-term contract is turned into a permanent employment unless the use of such a contract can be objectively justified.

3. Should the answer to the principal question be 'no', two subsidiary issues arise in the case of teachers who are employed to work in schools outside the United Kingdom. The first is whether the Fixed-term Regulations apply to them. In other words, do they form part of the contractual arrangements between the parties? This may raise questions of European law which might have to be referred to the European Court of Justice. The second is whether the statutory protection against unfair dismissal, given to people employed in Great Britain, applies to them. Without such protection, the teachers would be limited to their contractual rights. If the answer to the principal question is 'yes', however, these questions do not arise.

4. The Employment Tribunal, the Employment Appeal Tribunal and the Court of Appeal have all held that the use of successive fixed-term contracts for these teachers is not objectively justified. In the case of teachers employed to work in schools outside the United Kingdom, the Employment Appeal Tribunal and the Court of Appeal have held that the Fixed-term Regulations do apply. However, this might have been something of a pyrrhic victory, because the Employment Tribunal and the Employment Appeal Tribunal held, applying the test in *Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250, that the teachers were not entitled to make claims for unfair dismissal. This would have meant that they were limited to their contractual notice rights. The Court of Appeal held, applying the principle in *Bleuse v MBT Transport Ltd* [2008] ICR 488 that, nevertheless, it was necessary to extend the remedy of unfair dismissal to them in order to give them an effective remedy for breach of their rights in Community law. The Secretary of State appeals against the decision of the Court of

Appeal, reported at [2010] ICR 815, on all save the *Lawson v Serco* issue and the teachers cross-appeal on that issue.

The background

5. The first European School was established in 1954 for the children of officials of the European Coal and Steel Community, by agreement between the original six Member States. This later became the Statute of the European Schools and Protocol on the Setting Up of the European Schools of 1957. In 1994, the Member States and the European Communities adopted the Convention defining the Statute of the European Schools ('the Schools Convention'), which consolidated, updated and amended the original Statute.

6. The Board of Governors, established under the Convention, is made up of a representative of the European Commission, a representative of each Member State, a staff representative, a parent representative and a representative of the EU Patent Office. The Regulations for Members of the Seconded Staff of the European Schools 1996 (the 'Staff Regulations') were made by the Board pursuant to Article 12 of the Schools Convention. Articles 28 and 29 of those Regulations define the terms for which teachers may be seconded: an initial probationary period of two years (article 28(1)); a further period of three years (article 29(a)(i)); renewable for a further period of four years (article 29(a)(i)); subject to a maximum period of nine years, although a further one year extension may be granted in special cases (article 29(a)(ii)). This is what has come to be referred to as 'the nine year rule'.

7. The nine year rule is an attempt to strike a balance between the need for expertise and continuity in the European Schools and the desire for cross-fertilisation between those schools and the national schools of the Member States; to put it another way, to prevent the European Schools becoming an educational ghetto, isolated from the mainstream of ordinary education. Whether the supposed benefits of the rule outweigh the disruption caused to the lives of the teachers and to the education of their pupils is controversial. The staff committee has for a long time been trying to persuade the Governors to think again but so far without success.

8. The United Kingdom government has also supported a review of the rule, which presents a particular difficulty for the United Kingdom because of the way in which teachers are employed in this country. Most of the teachers in the European Schools are not employed by the schools themselves, but are employed as teachers by the Member States and seconded to work in the European Schools. In most of the Member States, school teachers are permanent employees of the state. At the end of their secondment they return to work in their home countries. In the United Kingdom, however, school teachers are employed either by the local education authority or by the governing body of the school where they work. They are not employed by central government. Hence the Secretary of State employs teachers specifically to work in the European Schools and on fixed-term contracts which correspond to the secondment periods laid down in the Staff Regulations. This of course presents problems for the

teachers, who will have to look for new employment when their terms of employment end. It also presents a problem for the Secretary of State, who has no other work for these teachers once their secondment to the European Schools is over.

The Directive and the Regulations

9. It is important to understand that the Fixed-term Directive is not directed against fixed-term contracts as such. It has two more specific aims, set out in recital (14):

> "The signatory parties . . . have demonstrated their desire to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination, and to establish a framework to prevent abuse arising from the use of successive fixed term employment contracts or relationships."

Those two purposes are spelled out in clause 1 of the annexed Framework Agreement. Clause 4 goes on to deal with the 'principle of non-discrimination' and clause 5 deals with 'measures to prevent abuse':

> "1. To prevent abuse arising from the use of successive fixed term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:
>
> (a) objective reasons justifying the renewal of such contracts or relationships;
>
> (b) the maximum total duration of successive fixed-term employment contracts or relationships;
>
> (c) the number of renewals of such contracts or relationships."

10. The preamble and general considerations in the Framework Agreement recognise that "contracts of an indefinite duration are, and will continue to be, the general form of employment relationship between employers and workers" and also that "they contribute to the quality of life of the workers concerned and improve performance". But they also recognise that "fixed term employment contracts respond, in certain circumstances, to the needs of both employers and workers" and that they

"are a feature of employment in certain sectors, occupations and activities which can suit both employers and workers". But the substantive provisions of the Framework Agreement do not attempt to define the circumstances in which fixed term employment is acceptable. Instead they concentrate on preventing or limiting the abuse of successive fixed term contracts, the abuse being to disguise what is effectively an indefinite employment as a series of fixed term contracts, thus potentially avoiding the benefits and protections available in indefinite employment.

11. When implementing clause 5 of the Framework Agreement, the United Kingdom chose a mixture of options (a) and (b). Regulation 8 of the Fixed-term Regulations deals with "Successive fixed-term contracts":

> "(1) This regulation applies where –
>
> > (a) an employee is employed under a contract purporting to be a fixed-term contract, and
> >
> > (b) the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a)."

Thus the regulation only applies to a fixed-term contract where there has been at least one previous fixed-term contract or to a fixed-term contract which has been renewed. It continues:

> "(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if –
>
> > (a) the employee has been continuously employed under the contract mentioned in paragraph (1)(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and
> >
> > (b) the employment of the employee under a fixed-term contract was not justified on objective grounds –
> >
> > > (i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;
> > >
> > > (ii) where that contract has not been renewed, at the time when it was entered into.
>
> (3) The date referred to in paragraph (2) is whichever is the later of –

(a) the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and

(b) the date on which the employee acquired four years' continuous employment."

12. Thus there is no need for objective justification for the current (that is, renewed or successive) contract unless and until the employee has been continuously employed for four years. But once he has, the latest renewal or successive contract has to be justified on objective grounds. Otherwise the contract will automatically be transformed into a contract of indefinite duration. As such it will still, of course, be terminable by whatever is the contractual notice period on either side.

The individual cases

13. Mr Fletcher was employed by the Secretary of State and seconded to work in the European School in Culham, Oxfordshire, from 1 September 1998 until 31 August 2008. After his two year probationary period, therefore, he was employed for a further three year period, extended for a further four years, and then an additional one year, making the maximum total of ten years in all. His initial offer letter referred to the nine year rule, and stated that the contract was governed by English law and that the English courts had exclusive jurisdiction over it.

14. In 2007, Mr Fletcher claimed that he was a permanent employee by virtue of regulation 8 of the Fixed-term Regulations. The Employment Tribunal made a declaration to that effect on 16 November 2007. The Tribunal went through the documents showing the history of and debates about the nine year rule in some detail. They examined the three reasons for the rule recorded in the Minutes of the Board of Governors in 2002, summarised as: turnover of staff, new staff bringing new ideas, and enrichment of the national systems when teachers returned. They noted that they did not have the benefit of evidence from the 'Troika' of Governors who had last considered the rule and found no evidence to support its supposed benefits: quite the reverse. They therefore rejected the factual justification for the rule.

15. They also rejected the argument that the fact that Staff Regulations laid down the rule was justification in itself. They cited the rulings of the European Court of Justice in *Adeneler v Ellinikos Organismos Galaktos (ELOG)* (Case C-212/04) [2006] ECR I-6057 and *Del Cerro Alonso v Osakidetza (Servicio Vasco de Salud)* (Case C-307/05) [2008] ICR 145 that a difference in treatment could not be justified on the basis that it was provided for "by a general, abstract national norm" but had to be justified by "the existence of precise and concrete factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that the unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for the purpose." They regarded the Staff Regulations in the same light as the Greek national law in *Adeneler* (which simply

provided that fixed-term contracts were justified where national law provided for them). The Secretary of State could not therefore rely upon the Staff Regulations unless these prevailed over the Fixed-term Directive. They held that the Directive prevailed. It followed that Mr Fletcher was entitled to his declaration. Both the Employment Appeal Tribunal and the Court of Appeal dismissed the Secretary of State's appeal.

16. The Court of Appeal heard the case of Mr Fletcher together with that of Mr Duncombe. Mr Duncombe was a teacher at the European School in Karlsruhe, Germany, from January 1996 until 31 August 2006. He too was employed under a series of fixed term contracts to reflect the nine year rule. He brought claims in the Employment Tribunal for wrongful dismissal or pay in lieu of notice, unfair dismissal and a declaration that he was a permanent employee. He failed on the preliminary point that he did not have the right to bring the claims because he was employed outside the United Kingdom. In both the Employment Appeal Tribunal and the Court of Appeal, he succeeded in respect of his claim for wrongful dismissal or pay in lieu of notice, and in the Court of Appeal he also succeeded in respect of his claim for unfair dismissal.

The arguments on the principal question

17. Before the Employment Tribunal the Secretary of State made what, with hindsight, was the fatal mistake of trying to justify the nine year rule on its merits. In other words, he tried to persuade the Tribunal that it was a good thing. This he conspicuously failed to do. The Tribunal was unconvinced by the argument that encouraging a turnover of staff in the European Schools was a way of bringing in staff with up to date experience of teaching in the national systems, thus with new ideas and a fresh outlook, as well as returning teachers to their national systems enriched with a European outlook. Despite the unreality of the Tribunal expecting the Governors of the European Schools to appear before them to explain themselves, it was not suggested until now that this was an exercise upon which the Tribunal should never have embarked.

18. Before this Court, Mr Crow QC on behalf of the Secretary of State contends that it is not for a court or tribunal in one of the Member States to inquire into the factual merits of the nine year rule. The plain fact of the matter is that the Secretary of State has no choice. The United Kingdom has only one vote on the Board of Governors and has so far failed to persuade them that the rule should be changed. It has to employ teachers for the purpose of seconding them to the European Schools and the Schools will only take them on the basis of the nine year rule. All of this is made perfectly plain to the teachers when they are recruited. This in itself is objective justification for employing the teachers on successive or renewable contracts which mirror the periods in the rule.

19. Mr Crow further argues that this is not a question of whether the Staff Regulations 'trump' the Fixed-term Directive, as the Employment Tribunal held that

they had to do if the Secretary of State was to get home on this ground. There is no inconsistency between the two. The Staff Regulations do not dictate the terms of employment of seconded teachers, merely the duration of the period(s) for which they can be seconded to the schools.

20. Furthermore, the reliance in both the Employment Tribunals and the Court of Appeal on the case of *Adeneler* was misplaced. There it was held that a Greek employer could not rely upon a general rule of Greek law as justification. That was in effect allowing a Member State to provide for a general opt-out from the Directive. But that is not this case. It is not argued that the United Kingdom has failed to transpose the Directive properly. The rule in question is specific to the work in question and is made by an international body responsible for determining the terms of that work in circumstances over which the United Kingdom has no control.

21. The respondent teachers are understandably aggrieved that the Secretary of State should now be putting his case rather differently from the way in which it was put in the Tribunals and Court below. But they have to grapple with the argument. Mr Giffin QC argues that the Staff Regulations are incompatible with the Directive. The Directive is there to give effect to the proposition that the norm is indefinite employment. If therefore there is an indefinite need for the work which the employee is doing, then prima facie the worker should be kept on an indefinite contract. It defeats the object to keep changing the workers doing the same job. The exceptions, where fixed-term contracts may be justified, relate to the specific short term or seasonal nature of the work being done. (Thus, for example, it was justified for the European Parliament to employ people on short term contracts to coincide with the Parliamentary sessions: see the judgment of the European Union Civil Service Tribunal in *Aahyan v European Parliament* (Case F-65/07) (unreported), 30 April 2009.) There is therefore no escape from a factual inquiry into the evidence to see whether the practice is really justified. A practice *can* be justified because it is complying with a rule, but only if the rule itself is justified. The Employment Tribunal has found that this one is not and there is no right of appeal from that factual finding.

22. Furthermore, he argues, all the Member States are bound by the Directive and by a general duty to co-operate with one another in furthering its purposes. Their representatives on the Board of Governors cannot therefore use the power to make Staff Regulations in a way which means that Member State employers will be using fixed-term contracts in contravention of the Directive. In short, the United Kingdom should be taking a tougher line with the Board, and invoke the dispute resolution mechanism, as the teachers have argued, rather than complain that it is between a rock and a hard place.

Discussion of the principal question

23. The teachers' complaint is not against the three or four periods comprised in the nine year rule but against the nine year rule itself. In other words, they are complaining about the fixed-term nature of their employment rather than about the use

of the successive fixed-term contracts which make it up. But that is not the target against which either the Fixed-term Directive or the Regulations is aimed. Had the Secretary of State chosen to offer them all nine year terms and take the risk that the schools would not have kept them for so long, they would have had no complaint. Employing people on single fixed-term contracts does not offend against either the Directive or the Regulations.

24. This is therefore the answer to Mr Giffin's attractive argument: that fixed-term contracts must be limited to work which is only needed for a limited term; and that where the need for the work is unlimited, it should be done on contracts of indefinite duration. This may well be a desirable policy in social and labour relations terms. It may even be the expectation against which the Directive and Framework Agreement were drafted. But it is not the target against which they were aimed, which was discrimination against workers on fixed-term contracts and abuse of successive fixed-term contracts in what was in reality an indefinite employment. It is not suggested that the terms and conditions on which the teachers were employed during their nine year terms were less favourable than those of comparable teachers on indefinite contracts.

25. It follows that the comprehensive demolition by the Employment Tribunal of the arguments for the nine year rule is nothing to the point. It is not that which requires to be justified, but the use of the latest fixed-term contract bringing the total period up to nine years. And that can readily be justified by the existence of the nine year rule. The teachers were employed to do a particular job which could only last for nine years. The Secretary of State could not foist those teachers on the schools for a longer period, no matter how unjustifiable either he or the employment tribunals of this country thought the rule to be. The teachers were not employed to do any alternative work because there was none available for them to do.

26. The *Adeneler* case is not in point. That concerned a national rule which provided a general 'get-out' from the requirements of the Directive. It is not a question of whether the Staff Regulations 'trump' the Directive. There is no inconsistency between them. The Staff Regulations are dealing with the duration of secondment, not with the duration of employment. In those circumstances it is questionable whether there is any duty of co-operation between the Member States. It appears that the Board of Governors did not see any conflict between the Staff Regulations and the Directive.

27. This is scarcely surprising. The United Kingdom could have chosen to implement the Directive by setting a maximum number of renewals or successive fixed-term contracts, for example by limiting them to three. It could equally have chosen to implement the Directive by setting a maximum duration to the employment, for example by limiting it to nine or ten years in total. It is readily understandable why the alternative route of requiring objective justification after four years was taken: this is more flexible and capable of catering for the wide variety of circumstances in which a succession of fixed term contracts may be used. Unless a very short maximum total had been chosen, it is more favourable to employees than the alternatives. But the fact

that the alternatives would have been equally acceptable ways of implementing the Directive is yet another indication that the target is not fixed term employment as such.

28. For these reasons I would allow the appeal of the Secretary of State on the principal issue. In those circumstances, there is no need to consider the other issues which arise in the case of Mr Duncombe and the other teachers who were employed to work in schools outside the United Kingdom. But they are both important points to which a large proportion of the argument before us was directed.

The remedies issue

29. There is now a great deal of European Union law addressing employment rights. This is not surprising as the free movement of workers is one of the fundamental rights in the Union. Mr Crow argues that these are rules designed for the protection of employees and should thus be subject to the same jurisdictional rule which applies to the protection given in our domestic law against unfair dismissal. That protection only applies to employment in Great Britain and the principles governing when an employment should be held to be in Great Britain and when it should not were laid down by the House of Lords in *Lawson v Serco*.

30. It is not enough, however, simply to characterise the rules of European law relating to employment as 'employment protection'. They are designed in part for that purpose, of course, but they are different from the law of unfair dismissal in at least three ways. First, of course, they have their source in the law of the European Union and not simply in the domestic law of the United Kingdom. Secondly, that law is designed to offer workers the same or similar protection wherever they are working in the area covered by European Union law. They must not lose the rights that they have accrued in one of the Member States because they choose to work in another Member State; nor should they have lesser rights than other workers in the country where they go to work. Thirdly, therefore, the rights which workers have are enforceable as part of the contractual arrangements between them and their employers.

31. The question then becomes one of incorporation into those contracts. In what circumstances does a contract of employment between a United Kingdom employer and a worker who is employed to work outside the United Kingdom incorporate the protection given by European Union law? It may be that it is not enough simply to provide that the contract is governed by English law (or by the law of some other jurisdiction within the United Kingdom). Would a person employed to work in China, for example, be able to claim the benefit of all the domestic law which emanates from the European Union?

32. It is not necessary to attempt to answer that question, because we are concerned with a person employed by an employer in the United Kingdom to work in another country within the European Union. Is it to be expected that there should be gaps in

the protection offered to such workers? In other words, that they would be protected if employed by an employer in the country where they work, but not if employed by an employer in their home country? Two people doing exactly the same work would enjoy very different protection. This seems, on the face of it, an unlikely conclusion. On the other hand, there would still be differences between the two employees. One would be covered by the European Union law as implemented in the country where they both worked; the other would be covered by the law as implemented in the country where his employer was based. These would not always be identical, as the example of the Fixed-term Directive shows. But the context of the European Schools shows that there may be European workers from different European countries who are subject to different contractual arrangements. At least, on this view, they would all have the benefit of the minimum requirements imposed by European Union law.

33. I would therefore be inclined to agree with the Tribunals and the Court of Appeal that Mr Duncombe and other teachers employed by the Secretary of State in European schools abroad are covered by the Fixed-term Regulations. But the intended scope of the protection given by the Directive, and others like it, is a question of European Union law to which a uniform answer should be given throughout the Union. We have not been shown any authority which indicates that the answer is *acte clair*, however obvious we might think the answer to be. Had it been necessary to answer the question, therefore, it would probably be necessary to refer it to the European Court of Justice.

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

The cross appeal

35. As already indicated, the scope of protection against unfair dismissal is a different question. This does not originate in European Union law. It is a remedy devised by Parliament to fill a well-known gap in the protection offered to employees by the domestic law of contract. It does not form part of the contractual terms and conditions of employment. The Employment Rights Act 1996 no longer specifies the employments to which the right not to be unfairly dismissed in section 94(1) applies – whether to employees actually doing their work wholly or mainly within Great Britain or to employees who are based here or to some other employments as well.

36. In *Lawson v Serco* the House of Lords held that it applied to employment 'in Great Britain' but that there were some exceptional circumstances in which people who performed their work wholly or mainly outside Great Britain were nevertheless protected. However, it was not enough that the employer was based here. Something more was needed. This might be provided by the fact that an employee was posted abroad for the purpose of a business conducted, not in the foreign country, but here at home: for example, a foreign correspondent of a British newspaper (para 38). It might also be provided by the fact that an employee was working "within what amounts for practical purposes to an extra-territorial British enclave in a foreign country" (para 39): for example, a civilian employee working on a British military base in Germany or an RAF base on Ascension Island.

37. Lord Hoffmann, with whom all the other members of the committee agreed, was not able to think of any other examples: they would have to have equally strong connections with Great Britain and British employment law (para 40). Mr Giffin makes a strong case that this is another example: a British worker working for the British government within an international enclave who has no-one else to whom he can turn for protection. But this last cannot be enough on its own: otherwise every person employed abroad by a British employer would be able to claim. They too have no-where else to go. A British national locally engaged to work in the British Embassy in Rome would be protected: yet Lord Hoffmann had no doubt that *Bryant v Foreign and Commonwealth Office* (unreported) 10 March 2003 was rightly decided (para 39). The question is whether Parliament intended that they should have the extra protection afforded to employees who are based in this country.

38. It is not necessary for us to decide the point for the purpose of the questions of European Union law which were put before us in this appeal. However, we have been told that the point is still relevant for the purpose of unfair dismissal claims based upon other grounds. Accordingly we intend to reserve our decision upon the cross appeal to a later date.

Conclusion

39. I would therefore allow the Secretary of State's appeal and hold that it was objectively justified to employ these teachers on the current fixed term contracts and accordingly that these were not converted into permanent contracts by the operation of regulation 8 of the Fixed-term Regulations.

LORD MANCE

40. I agree with Lady Hale that this appeal should be allowed on the principal issue for the reasons she gives. I also agree with her view on the remedies issue and that our decision on the cross appeal should be reserved.

LORD COLLINS

41. I also agree with Lady Hale that this appeal should be allowed on the main issue for the reasons she gives. I would prefer to express no view on the very interesting and difficult questions which arise on the remedies issue and reserve our decision on the cross appeal.

LORD CLARKE

42. I agree with Lady Hale that the appeal should be allowed on the principal issue for the reasons she has given.

Hilary Term
[2011] UKSC 36
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JUDGMENT GIVEN ON

15 July 2011

Heard on 17 and 18 January 2011

Appellant	*Respondents*
Jonathan Crow QC Maya Lester (Instructed by Treasury Solicitors)	Nigel Giffin QC Katherine Eddy Simon Henthorn (Instructed by Reynolds Porter Chamberlain LLP)

LADY HALE, DELIVERING THE JUDGMENT OF THE COURT

1. This is the judgment of the court, composed of Lady Hale, Lord Mance, Lord Clarke and Lord Collins. Lord Rodger of Earlsferry presided over the panel which heard this case on 17 and 18 January 2011 and took part in our deliberations and decision upon the appeal: [2011] UKSC 14. His sudden illness and untimely death have sadly prevented him from taking any part in our deliberations and decision upon the cross-appeal.

2. The case relates to the unusual employment status of teachers employed by the Secretary of State for Children, Schools and Families to work in the European Schools. The main issue in the appeal was whether the terms of that employment fell foul of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) which implemented Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. This Court handed down judgment on 30 March 2011 allowing the appeal of the Secretary of State on that issue: [2011] UKSC 14. We reserved judgment in the cross-appeal of the teachers. The issue in the cross-appeal is whether their employment is covered by the protection against unfair dismissal conferred by section 94(1) of the Employment Rights Act 1996.

3. It is fair to say that had this issue stood alone it is unlikely that permission would have been given to bring an appeal to this Court. It is common ground that the basic principle was laid down by the House of Lords in *Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250. It is also common ground that these teachers' employment does not fall within either of the specific examples given in *Lawson* of people employed by British employers to work outside Great Britain who would be protected from unfair dismissal. The question is whether there are other examples of the principle, of which this is one.

4. There were three cases heard together in *Lawson v Serco*. Mr Lawson was employed by Serco as a security supervisor at the British RAF base on Ascension Island, which is a dependency of the British Overseas Territory of St Helena. Mr Botham was employed as a youth worker at various Ministry of Defence establishments in Germany; under the NATO Status of Forces Agreement of 1951 he was part of the civil component of British Forces in Germany and treated as resident in the UK for various purposes. Mr Crofts was a pilot employed by a company which was a wholly owned subsidiary of, and provided aircrew for, Cathay Pacific Airways Ltd, the Hong Kong airline; but he was based at Heathrow under the airline's "permanent basings policy".

5. Section 94(1) of the Employment Rights Act 1996, which grants employees the right not to be unfairly dismissed, no longer contains any geographical limitation. Parliament had repealed the previous exclusion of employees (mariners working on British ships apart) who ordinarily worked outside Great Britain in 1999 and put nothing in its place. But it was agreed that section 94(1) could not apply to all employment anywhere in the world. But to what did it apply? Lord Hoffmann, with whom all the other members of the appellate committee agreed, emphasised that this was a question of law (para 34), and that it was a matter of applying a principle rather than inventing a rule (para 23). The "standard, normal or paradigm case" was an employee working in Great Britain at the time of the dismissal (paras 25, 27). Also covered were "peripatetic employees" who might spend much of their time outside Great Britain but were nevertheless based here (para 30).

6. The problem of "expatriate employees", who worked or were based abroad, was more difficult (para 35). Lord Hoffmann agreed with counsel for the Ministry of Defence that it might well be correct to describe the cases in which section 94(1) could exceptionally apply to employees working outside Great Britain as those where "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". But "like many accurate statements, it is framed in terms too general to be of practical help". So he tried to identify the characteristics which such an exceptional case would ordinarily have (para 36). First, it would be very unlikely that the right would apply unless the employee was working for an employer who was based here; but many British companies carry on businesses in other countries, so something more would be needed (para 37). The something more might be that the employee was posted abroad for the purpose of a business carried on in Great Britain, such as the foreign correspondent of a British newspaper (para 38). Another example was an employee working "within what amounts for practical purposes to an extra-territorial British enclave in a foreign country" (para 39). There might be other examples, but he could not think of any, and "they would have to have equally strong connections with Great Britain and British employment law" (para 40).

7. According to these principles, all three employees in *Lawson v Serco* were covered by the legislation: Mr Crofts because he was based in Great Britain, and both Mr Botham and Mr Lawson because they were working for British employers in what amounted to a British enclave. In the latter two cases, although there was a local system of law "the connection between the employment relationship and the United Kingdom was overwhelmingly stronger" (para 39). On the other hand, he had no doubt that *Bryant v Foreign and Commonwealth Office*, unreported, 10 March 2003, was correctly decided: there the Employment Appeal Tribunal held that section 94(1) did not apply to a person (who happened to be a British national) locally engaged to work in the British embassy in Rome (para 39).

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

9. The Employment Tribunal rightly held that neither of Lord Hoffmann's specific examples applied to teachers employed by the British Government to work in European Schools abroad. The Tribunal thought that their employment was much more firmly rooted in the European Schools than in Great Britain. However, the teachers' argument is that, although their actual work might have strong connections with the particular school in which they were employed, their employment relationship had virtually no connection with the system of law in the country in which that particular school happened to be. They were not employed in a British enclave but they were employed in an international enclave. There is no applicable international system of employment law to which they can turn. In this respect they are very similar to Mr Lawson and Mr Botham, where there was a local system of law, but "the connection between the employment relationship and the United Kingdom was overwhelmingly stronger".

10. The teachers also draw attention to the similarities between their case and that of Mrs Wallis and Mrs Grocott: see *Ministry of Defence v Wallis and Grocott* [2011] EWCA Civ 231. This case is of interest, first, because of the agreed statement of facts between the Ministry of Defence and the claimants, which was relied upon by the employment judge; and second, because on facts very similar to the present case, the Employment Tribunal, Employment Appeal Tribunal and Court of Appeal reached a different conclusion.

11. Mrs Wallis was employed by the Ministry of Defence as a library assistant at the international school attached to the Supreme Headquarters Allied Powers Europe (SHAPE) in Belgium. Mrs Grocott was employed by the Ministry of Defence as a school secretary in the British section of the Armed Forces North International School attached to the Joint Forces Command (JFC) in the Netherlands. Both SHAPE and JFC are entities within the structure of NATO. The claimants were recruited to these jobs because they were the wives of armed forces personnel working at SHAPE and JFC. Both were dismissed from their jobs when their husbands left the British armed forces (although they continued to work for NATO at SHAPE and JFC respectively in a civilian capacity). According to the agreed statement of facts in the case, the Ministry of Defence regards it as desirable for the harmony of the family life of those engaged in the forces, or the civilian component accompanying them, that there are employment opportunities open to their spouses and other dependants and so actively tries to recruit them.

Their contracts of employment are governed by English law and the Ministry of Defence goes to considerable lengths to reassure such employees that their terms and conditions are essentially English. They pay neither British nor local taxes, but do pay British national insurance contributions. These employees are in a different category from "directly employed labour". The latter are employees engaged locally with the help of the host state, who are engaged on local (host state) labour terms, regardless of their nationality, and pay local taxes.

12. The employment judge rightly rejected the argument that the women were working within a British enclave. Rather, they were working within an international enclave. But their employment was so closely connected to England as to be within section 94(1) of the Employment Rights Act 1996. They were "piggy-backed" by their husbands into the same terms and conditions as employees of the British armed forces posted to serve abroad, who undoubtedly fall within the *Botham* exception. They were thus in a quite different position from the locally engaged "directly employed labour" such as Mrs Bryant: Mrs Bryant's connection with England was just the fortuitous one of nationality in what would otherwise be a standard case of directly employed labour.

13. That reasoning was described as "unimpeachable" by Underhill J in the Employment Appeal Tribunal and accepted by the Court of Appeal. Elias LJ said this: "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" (para 46). Mummery LJ also rejected the Ministry of Defence submission that this would be to "export" British unfair dismissal law to a foreign country and 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" (para 35).

14. The teachers in this case point out that they too have been recruited to work in an international enclave and have even stronger links with Britain and British employment law. They have not been recruited simply because they are the dependants of British personnel posted abroad, but as British public servants to be posted abroad. Furthermore, although they were not being employed abroad for the purpose of a British undertaking conducted here, nor were they being employed for the purpose of a foreign branch of a British undertaking, they were being employed to fulfil the obligations which the United Kingdom government had undertaken to other European Union states under the Statute of the European Schools.

15. In this case, the Secretary of State was content simply to argue that it fell within neither of the cases identified as exceptional in *Lawson v Serco*: the teachers worked entirely overseas in a *sui generis* international establishment and this was not a strong enough connection with Great Britain and its employment law. The Court of Appeal had been right to defer to the judgment of the specialist Employment Tribunal. In applying for permission to appeal in the case of *Wallis and Grocott*, the Ministry of Defence argues that aspects of the employees' personal lives have been wrongly labelled employment factors, so as to supply the necessary connection between the employment and British employment law, and that the decision fails to respect the employment laws of the countries in which the women were employed. The Ministry also makes some *in terrorem* arguments about the potential consequences of adding these further examples to those in *Lawson v Serco.*

16. In our view, these cases do form another example of an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal. This depends upon a combination of factors. First, as a *sine qua non*, their employer was based in Britain; and not just based here but the Government of the United Kingdom. This is the closest connection with Great Britain that any employer can have, for it cannot be based anywhere else. Second, they were employed under contracts governed by English law; the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Although this factor is not mentioned in *Lawson v Serco*, it must be relevant to the expectation of each party as to the protection which the employees would enjoy. The law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by Parliament in order to fill a well-known gap in the protection offered by the common law to those whose contracts of employment were ended. Third, they were employed in international enclaves, having no particular connection with the countries in which they happened to be situated and governed by international agreements between the participating states. They did not pay local taxes. The teachers were there because of commitments undertaken by the British government; the husbands, in *Wallis and Grocott*, were there because of commitments undertaken by the British government; and the wives were there because the British government thought it beneficial to its own undertaking to maximise the employment opportunities of their husbands' dependants. Fourth, it would be anomalous if a teacher who happened to be employed by the British government to work in the European School in England were to enjoy different protection from the teachers who happened to be employed to work in the same sort of school in other countries; just as it would be anomalous if wives employed to work for the British government precisely because their husbands were so employed, and sacked because their husbands ceased to be so

employed, would be denied the protection which their husbands would have enjoyed.

17. This very special combination of factors, and in particular the second and third, distinguishes these employees from the "directly employed labour" of which Mrs Bryant was an example. There, the closer analogy was with a British, or indeed any other company, operating a business in a foreign country and employing local people to work there. These people are employed under local labour laws and pay local taxes. They do not expect to enjoy the same protection as an employee working in Great Britain, although they do expect to enjoy the same protection as an employee working in the country where they work. They do, in fact, have somewhere else to go. (It would indeed be contrary to the comity of nations for us to assume that our protection is better than any others'.) To admit the cases before us as another example of the principle laid down in *Lawson v Serco* is scarcely to extend those exceptional cases very far or to offend against the sovereignty and equality of nations.

18. For those reasons, the cross-appeal is allowed and the case will return to the Employment Tribunal. It follows that the application of the Ministry of Defence for permission to appeal on this point in the cases of *Wallis and Grocott* will be dismissed.