SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 30

EDI-A547/17

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

in the cause

FERMIN ALDABE

Pursuer

against

THE ADVOCATE GENERAL FOR SCOTLAND

Defender

Pursuer: Party;
Defender: Webster; Morton Fraser LLP

Edinburgh, 23 May 2018

The Sheriff, having resumed consideration of the cause, repels the pursuer's pleas in law; sustains the defender's second plea in law; and dismisses the action; meantime reserves all questions of expenses.

I - Structure

[1] This judgement is structured in the following way.

[2] I begin with a brief summary of what the case is about and how it came before me – Part II.

[3] Thereafter the layout is as follows:

III - the defender's oral submissions in support of the motion for dismissal;

IV - the pursuer's written submissions in support of his motion for summary decree;

V - the pursuer's supplementary oral submissions;

VI - the defender's oral reply thereto;

VII - the pursuer's reply[1];

VIII - grounds of decision; and

IX - disposal.

II - Background

Procedure

[4] This is a claim for damages brought by the pursuer against the Advocate General, as representing certain emanations of the UK state. In particular, the pursuer's case is based on an alleged failure by the Court of Appeal in London to refer a question of European Union ("EU") law to the European Court of Justice ("ECJ") in Luxembourg for a ruling thereon.

[5] The case came before me on the pursuer's motion for summary decree; and the defender's motion for dismissal. (The case had already been to debate on the defender's plea of *forum non conveniens* which was repelled. The case was then continued to allow the parties' respective further motions to be dealt with.)

Authorities/sources

[6] In the course of the hearing, the following sources were mentioned, though not all were specifically cited, in the sense of direct reference being made to them:

a. Treaty on the Functioning of the European Union ("TFEU"), Articles 45 and 267;

[1] These consisted for the most part of a series of questions read out by the pursuer. I did not find this approach helpful in understanding the arguments being presented by him.. I have included the questions for the sake of completeness. Where relevant, I have sought to deal with them in the body of my decision.

b. European Convention on Human Rights ("ECHR"), Article 6;

c. Employment Rights Act 1996 ("ERA"), Sections 13, 95, 104, 115 and 124;

d. *Aldabe* v *Standard Chartered Bank* [2010] 3 SLR ("the Singapore judgement");

e. *Aldabe v Standard Chartered Bank*, Employment Tribunal, Case Number ET 220893/2009, unreported, 4 January 2011 (EJ Wade) ("the Wade judgement");

f. *Aldabe* v *Standard Chartered Bank,* Employment Appeal Tribunal Case Number UKEATPA/0059/11, unreported, 7 March 2012 (His Honour Judge Peter Clark) ("the Clark judgement");

g. *Aldabe* v *Standard Chartered Bank,* Court of Appeal Case Number A2/2012/0846, unreported, 29 June 2012 (Sir Richard Buxton) ("the Buxton order");

h. *Aldabe* v *Standard Chartered Bank,* Case Number A22012/0846, unreported, 3 October 2012 (Tomlinson LJ) ("the Tomlinson judgement");

i. *Blackstone's Employment Law;*

j. *Boukhalfa* v *Germany* [1996] 3 CMLR 22;

k. *CILFIT* v *Ministero della Sanita* [1982] ECR 3415;

l. *Cold Drawn Tubes Ltd* v *Middleton* [1992] UKEAT 26_91_1202 (Appeal No. EAT/26/91);

m. *Commission* v *Belgium* , ECJ, Case C-278/94;

n. *Dhahbi v Italy,* ECtHR, Case C-111/91;

o. *Duncombe & Ors* v *Secretary of State for Children, Schools and Families* [2011] [UKSC 14] and [UKSC 36];

p. *Ex parte Blain* CA 1879 Chancery Division Vol XII 522;

q. *Fallimento Traghetti del Mediterraneo* v *Italy,* ECJ C-2010/335, 10 June 2010, unreported;

r. *Factortame* ECR [1996] I-1029;

s. *Francovich & Anr.* v *Italy* [1991] ECR I-5357;

t. *Greenhorn* v *J. Smart & Co (Contractors) Ltd* 1979 SC 427;

u. *Lawson* v *Serco* [2006] ICR 250;

v. *Kobler* v *Republik Osterrich* (ECJ) [2004] QB 848; [2004] WLR 976;

w. *National Westminster Bank* v *Parry* [2004] EWCA Civ 1563;

x. *Office of Fair Trading (OFT)* v *Abbey National plc & Ors* [2009] UKSC 6**;**

y. *O'Flynn* v *Adjudication Officer*, ECJ, Case C-237/94;

z. *Oxford Online Dictionary;*

aa. *Ravat* v *Halliburton Manufacturing and Services Ltd* 2012 SC (UKSC) 265;

bb. *Schipani* v *Italy* 38369/09;

cc. *Sotgiu* v *Deutchse Bundespost* [1974] EUECJ R-152/73;

dd. *Ullah* v *Special Adjudicator* [2004] UKHL 26;

ee. *Ullens* v *Belgium,* ECtHR, Case 3989/07;

ff. *Vergawen* v *Belgium* 4832/04;

gg. *Walrave & Anr* v *AUCI and Ors*, ECJ Case 36/74.

[7] Where I have managed to establish if the cases mentioned were reported, I have given those citations.

Factual background

[8] The factual background can be briefly summarised.

[9] The pursuer has dual Argentine and Italian nationality.

[10] In August 2008, he came to the United Kingdom as part of a search for work.

[11] As well as exploring prospects in Switzerland, the pursuer entered into discussions with the Standard Chartered Bank, which has its headquarters in London, about a job in their 'Group Market Risk' function in Singapore.

[12] The pursuer was interviewed in London and in due course offered the job in Singapore.

[13] The job was to start on 17 November 2008 but there was some delay in the pursuer taking up his employment as a result of a need to attend training in London.

[14] He arrived in Singapore on 1 December 2008 but there quickly arose a dispute concerning the terms of employment, with the consequence that the appellant began to write out a resignation letter and the respondents, in the shape of the Regional Head of Human Resources in Singapore, wrote a letter withdrawing the offer of employment.

[15] The pursuer brought proceedings in Singapore for wrongful dismissal which was successful in part. In April 2010 the High Court of the Republic of Singapore awarded him notice pay dating from the original start date. The court made a finding as to the reason for dismissal.

[16] In February 2009, the pursuer brought a claim in the United Kingdom employment tribunal for (i) breach of contract and unlawful deductions; (ii) unfair dismissal due to his assertion of a statutory right, relying on Section 104 of the Employment Rights Act 1996; and (iii) holiday pay.

[17] The principal claim was for unfair dismissal. That gave rise to a preliminary issue as to the jurisdiction of the employment tribunal to hear the claim, one question for decision being whether the pursuer's and the employment's connection with Great Britain was sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with his claim.

[18] The employment tribunal dismissed the claim *inter alia* on the grounds that the tribunal lacked jurisdiction to entertain the claim for unfair dismissal.

[19] An appeal against that decision was made to the Employment Appeal Tribunal ("EAT") but dismissed.

[20] The pursuer sought leave to appeal to the Court of Appeal.

[21] As part of his submissions to the Court of Appeal, the pursuer invited the court to make a reference ("allow an appeal") to the ECJ. In refusing the application for leave to appeal, the Court of Appeal refused to make a reference.

The underlying proposition in the present case

[22] Put briefly, the proposition underlying the present case derives from the refusal by the Court of Appeal to make a reference; and in turn is based on the proposition that the Court of Appeal was in error in refusing to do so; as a result of that alleged error, the pursuer says that he has been wrongly deprived of his right to pursue his claim in the UK Employment Tribunal against Standard Chartered Bank; and as a result has not obtained the redress which he believes he would have obtained from that quarter – including an order for re-instatement or re-engagement; that as result he has suffered losses; and the UK, being responsible for the failure to refer and hence those losses, should be ordered to pay damages to him.

The pleadings

[23] Before turning to the submissions, I wish to make a few comments about the pleadings.

[24] The pursuer's pleadings as reflected in the Record are not in proper form. Although craves 4 and 5 are comprehensible, none of them are properly expressed. There are 27 articles of condescendence which are not confined to factual matters but include references to case law and other sources; and legal argument. This is then followed by 'pleas in law' for the pursuer running to a further 114 paragraphs. None of these is in proper form and again there are extensive references to case law and other materials (some of which are included in an Appendix to the Record).

[25] The result is that, instead of a document which summarises simply and clearly the factual and legal basis of the purser's case, the Record is quite the opposite. No doubt this rendered the defender's task in answering the pursuer's case more difficult and time consuming than it might otherwise have been. It has certainly made the court's task in understanding and evaluating the pursuer's case and the propositions which underlie it substantially more difficult.

III – Oral submissions for defender

Background

[26] This case concerns a claim for *Frankovich/Factortame* damages said to arise in respect of the Court of Appeal's refusal to make a mandatory reference to the ECJ under Article 267 of TFEU.

Pleadings

[27] The question which it is said the Court of Appeal should have referred is found at articles 44 and 45 of the Record:

> "44 . In his skeleton arguments P asked the CA, being the national court adjudicating at last instance, to raise "the question"…:
>
> > 'if a British national has access to an employment tribunal then does any EU national employed in the same circumstances have equal access to that same tribunal?'…
>
> 45. Therefore, the CA, being the national court adjudicating at last instance, was bound under TFEU 267 (3) and should have raised the question to the ECJ which was pleaded in bold faces (*sic*) in the skeleton arguments and pleaded in the hearing as well."

[28] The form of the pleadings was worthy of comment. They purported to contain craves, articles of condescendence and pleas in law – but they did not. Which plea in law was it that the court was being invited to sustain?

[29] The rules of pleading were there for a purpose. They were not for amusement or to create artificial barriers but they served a purpose, which was to enable the parties to set out the issues which needed to be resolved. If it was not clear from a party's pleadings which plea in law the court was being invited to sustain, then that party took the consequences of that.

[30] That was a short and simple answer to the issue of relevancy in this case.

[31] Even approaching the pursuer's pleadings in a charitable manner, if the issue was truly whether there was a liability on the defender in the manner set out in the part of the pleadings quoted at paragraph [27] above, support for such a case was not made out on Record.

Facts

[32] The pursuer had been recruited to work for Standard Chartered Bank in its Singapore office.

[33] He having brought a claim against Standard Chartered Bank in the London Employment Tribunal, issues arose as to the Tribunal's jurisdiction. In particular, the question of "territorial jurisdiction" fell to be examined. The Tribunal heard evidence and made findings in fact relevant to that issue: Wade judgement, paragraphs 6.1 – 6.15. The Tribunal concluded that it did not have territorial jurisdiction to hear the pursuer's claim for unfair dismissal: Wade judgement, paragraph 12; and gave reasons for so concluding: paragraphs 12.1 – 12.4.

[34] So, the position was that the Tribunal had carried out a fact-based assessment in order to determine whether the right not to be unfairly dismissed under section 94(1) ERA applied to the pursuer; concluded that it did not; held that there was no jurisdiction; and dismissed his claim.

[35] In passing, it should be noted that the Tribunal made its decision by reference to the approach set out by the Supreme Court in *Lawson.* That law was not changed by the subsequent Supreme Court decision in *Ravat*, which still required a 'facts and circumstances' approach.

[36] Before the EAT, the pursuer had argued that his position was more like that of the employee in *Bishop*. That argument was rejected and the Tribunal's reasoning and decision on the issue of territorial jurisdiction affirmed: Clark judgement, paragraphs 4 - 6.

[37] The pursuer's application for permission to appeal the EAT judgement to the Court of Appeal was refused at the sift stage on the basis that the findings of fact by the Tribunal at first instance were fatal to his claim and the conclusion reached was not discriminatory against the pursuer on grounds of nationality or on any other ground: Buxton order.

[38] The pursuer then exercised his right to an oral hearing on his application for permission to appeal. The Court of Appeal held that the question of nationality was not part

of the decision at all. On residence, the Court said that the question of residence was capable of being a relevant factor (in so far as it bore on the question of "sufficient connection") and that if the Tribunal's decision had been determined on that ground alone, the pursuer would have had an arguable case that could amount to indirect discrimination in accordance with *Boukhalfa*, but that given the nature of the exercise which the Tribunal had been undertaking, the question of residence was not decisive: Tomlinson judgement, paragraph 12.

[39] Thus, in summary, the issue of nationality and residence did not form part of the operative decision of the Tribunal at all; or if they did, they were not a material part of it.

[40] It was accepted that the pursuer had asked the Court of Appeal to make a reference to the ECJ. But it was clear from the terms of the Tomlinson judgement that issues of discrimination had been specifically dealt with by the court; and in any event any issue of discrimination was not relevant because it had not been material to the decision taken by the Tribunal.

[41] The Court of Appeal had explained why it could refuse the appeal without making a reference, and that was because any question of discrimination was not a material consideration to the determination of the appeal.

[42] Put another way, no issue of discrimination on the ground of nationality arising, there was no necessity to make a reference; or at least no infringement of EU law in failing to do so.

[43] It should be borne in mind that the claim as articulated was one of damages from the State for not making a reference. It was not a claim for damages in respect of any alleged failure by reason of inadequacy in the reasons given for refusal to make a reference.

[44] If there was no obligation to make a reference, the adequacy or otherwise of the reasons simply did not arise. That was different from the position as expressed in the authorities from the ECtHR in Strasbourg c.f. ECJ in Luxembourg.

Article 267 and preliminary rulings

[45] It was conceded by the defender for the purposes of this case and this debate only that the decision contained within the Tomlinson judgement was a "final judgement" potentially engaging TFEU Article 267 (penultimate paragraph). That notwithstanding, it did not follow that a reference was always mandatory.

CILFIT

[46] One example of a situation where no obligation to make a reference would arise was where there was no genuine dispute between the parties.

[47] Other than that, there was no obligation on a court to refer a question to the ECJ under Article 267 TFEU (formerly Article 177(3) EEC) where (i) the question was not relevant, i.e. if the answer to the question, whatever form it takes, could have no influence on the outcome of the case; (ii) the ECJ has already delivered opinions which covered the question (of community law) which might otherwise be referred; or (iii) it was *acte claire* i.e. the correct application of community law compels recognition so obviously as to leave no room for reasonable doubt: *CILFIT*, paragraphs [4] - [17].

[48] The defender's position in this case was that (i) applied: there was no obligation on the Court of Appeal to make a reference to the ECJ because the question (as articulated by the pursuer) was not relevant as the answer thereto could have no influence on the outcome of the case.

Ravat

[49] The question for this court was this: was the Court of Appeal's decision not to make a reference reasonable?

[50] To answer that question, it was necessary to look at how issue as to territorial jurisdiction under section 94(1) ERA was approached and dealt with by the Court of Appeal.

[51] The approach to be applied to the question before the Tribunal about territorial scope was dealt with by Lord Hope in *Ravat* at paragraphs [26] - [29].

[52] From that, it was clear that the onus was on the pursuer to displace the normal rule that a person working abroad would fall within the territorial jurisdiction of the Employment Tribunal.

[53] But it was clear that the pursuer had showed nothing exceptional in his situation; and that the issues of residence and nationality were not decisive in the decision reached.

Application of principles

[54] The Court of Appeal had applied the correct approach and explained that there was a variety of factors to be taken into account: Tomlinson judgement, paragraph 12.

[55] Two conclusions could be drawn from the foregoing. First, it was clear from the Court of Appeal's approach that no relevant issue arose which required a referral.

[56] Second, there had been no determinative reliance on the issues of nationality and/or residence by the Tribunal or the EAT; or if there had been reliance, it did not amount to a material error in law.

The legal basis for Factortame damages

[57] It was implicit in the pursuer's case that he relies on *Factortame*. He says that the ECJ recognises that a failure on the part of a domestic court to make a mandatory reference can be a failure to give access to EU rights, which in turn gives rise to *Factortame* damages.

Kobler

[58] While that broad proposition was accepted, that was not what *Kobler* did and it was not accepted that there had been any failure in that respect.

[59] Dealing with state liability, the ECJ confirmed that the principle of liability on the part of a member state for damage caused to individuals as a result of breaches of Community Law for which the state was responsible was inherent in the system of the Treaty: *Kobler*, paragraph 30.

[60] The ECJ went on to say that since the judiciary played a central role in the protection of rights derived by individuals from Community rules, the full effectiveness of those rules would be called into question and the protection of those rights would be weakened if individuals were precluded from being able, under certain conditions, to obtain reparation when the rights were affected by an infringement of Community law attributable to a decision of a court of a member state adjudicating at last instance: *Kobler*, paragraph 33.

[61] The ECJ then went on to discuss the conditions governing state liability: *Kobler*, paragraphs 51 – 54:

> "<u>Conditions governing State liability</u>
>
> 51. As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link

> between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties (*Haim*, cited above, paragraph 36).
>
> 52. State liability for loss or damage caused by a decision of a national court adjudicating at last instance which infringes a rule of Community law is governed by the same conditions.
>
> 53. With regard more particularly to the second of those conditions and its application with a view to establishing possible State liability owing to a decision of a national court adjudicating at last instance, regard must be had to the specific nature of the judicial function and to the legitimate requirements of legal certainty, as the Member States which submitted observations in this case have also contended. State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law.
>
> 54. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it. "

[62] Put shortly, it was for the pursuer, in seeking to satisfy the second leg of that test (that the breach was sufficiently serious) to show that in making its decision to refuse to refer the matter to the ECJ, the Court of Appeal had gone badly wrong.

[63] So the first question which arose in this context was: where is the jurisprudence that there is clear EU authority that the jurisdiction of the Employment Tribunal, as articulated in Section 94(1) ERA, is to extend to nationals working outside the EU where there is no material connection between the employment and any member state?

[64] In any event, it was not enough to say that the Court of Appeal had made an error in refusing to make a reference. The failure to do so, if there was one, had to be of sufficient seriousness to justify a claim for damages. There had to be manifest failure to apply the applicable law: *Kobler*, paragraph 53.

[65] Returning to the facts of *Kobler,* it was notable that in the first reference, the disputed payment (a length of service increment) was characterised by the Austrian Supreme Administrative Court as a component of salary. After the first reference was withdrawn, the

same court changed its mind and said that the increment was not a component of salary but a loyalty bonus. But even that *volte face* was not sufficient. *Kobler*, paragraph 123. So a mere mistake by the Court of Appeal was not enough to give rise to state liability.

Relevancy of averments of loss

Causation

[66] It was clear from *Kobler* that in order to bring home liability against the state, there had to be a direct causal link between the failure complained of (in this case, the refusal by the Court of Appeal to make a reference) and the losses said to have been sustained.

[67] It was difficult to know from the pursuer's pleadings what the pursuer is offering to prove. He says that he "would have been employed". That presupposes that he would have been re-employed by Standard Chartered Bank. But the pursuer does not aver that he would have been re-employed – and the reality was that it was not likely that he would be re-engaged by the Bank. In the absence of an averment that there was a direct causal link between the refusal to make a reference and the losses claimed, the pleadings about the latter were all irrelevant.

Specification of particular losses

[68] The pursuer makes a variety of claims:

a. more than three years' salary at SGD (Singapore Dollars) 330,000 per year; bonus of more than SGD 1.6 million and $ (US Dollars) 844,000 plus interest: Record, paragraph 130;

b. a further portion of interest attributable to an earlier period of just over $27,000, including interest: Record, paragraph 131;

c. just under $119,000 in respect of the value of shares which he says he would have received: Record paragraph 132;

d. loss of pay rises of SGD 376,252 and $193,827; and

e. £72,300 for loss of reputation: Record, paragraph 134.

[69] Starting with the averments in paragraph 130 about the bonus, there is no averment that the pursuer would have been paid a bonus during the period in question had he been employed for that period by the Bank.

[70] In addition, it was clear from the contract of employment payment of the bonus was (i) discretionary and dependent on a number of factors and (ii) a "target" bonus as the pursuer himself averred.

[71] How was the pursuer going to prove that he would have received a bonus of the amount claimed? There were no averments at all dealing with that issue.

[72] Exactly the same points arose in respect of the claims made in paragraphs 131 – 134 inclusive.

[73] Furthermore, in relation to the claim based on the share scheme in paragraph 132, this appeared to derive from paragraph 5 of the appendix to the pursuer's employment contract. But the two could not be reconciled. Where did the averred loss come from? Were shares to be allocated every year? We did not know. These averments were irrelevant.

[74] Turning to paragraph 133, it had to be borne in mind that the defender in this case was the State. It had no knowledge of the pursuer; it had not been his employer; it was not a bank; it had no knowledge of the business carried on by Standard Chartered Bank in Singapore or the operations there. So it was for the pursuer to prove that he would have received the pay rises contended for. But there was no notice at all of what he was offering to prove. What were the facts that the pursuer relied on to prove that he would have been

awarded the pay rises contended for? There was a lack of fair notice rendering these averments irrelevant.

[75] In respect of the claims for the alleged loss of reputation and blacklisting set out in paragraph 134, it was necessary to ask: what would the pursuer have been awarded by the Employment Tribunal if his case had been allowed to proceed there? The Tribunal had no power to make the general compensatory payments. In addition, the pursuer does not attribute his loss of reputation to the Court of Appeal's decision not to make a referral.

[76] If these averments were not irrelevant on that ground, there was, in any event, a lack of specification. How was the pursuer going to show that he was "blacklisted"? What does "blacklisting" mean? Where were the averments that the pursuer was the victim of a deliberate concerted attempt to exclude him from this sort of employment?

[77] The defender's second plea in law should be sustained and the action dismissed. If the Court was not with the defender on that proposition, the averments of loss should be excluded from probation.

Minute of Amendment

[78] There was no link between the averments in the proposed Minute of Amendment and the failure by the Court of Appeal to make a reference to the ECJ. The motion to amend should be refused.

Summary

[79] The defender's position could be summarised thus:

a. The terms of Article 267 were subject to the jurisprudence in *CILFIT*;

b. There was no requirement for a reference to be made if there was no relevant issue before the Court of Appeal;

c. the Court of Appeal found that there was no relevant issue before it;

d. the question of territorial jurisdiction was a matter of judgement for the Employment Tribunal, the EAT and the Court of Appeal;

e. there was liability under *Kobler* only if there had been a serious misjudgement which must be manifest;

f. there was no failure in this case;

g. if there was such a failure, it was not manifest;

h. the losses claimed must be shown to have been caused by the breach of EU law relied upon;

i. the averments about the losses were irrelevant through want of specification and/or because they were not caused by the breach complained of;

j. in particular, the pursuer did not make averments about the prospect of him being re-employed by Standard Chartered Bank.

Motion for summary decree

[80] The pursuer had no real prospect of success. He was not entitled to the remedy which he sought. The defender's position was not "fanciful".

[81] In any event, the defender was entitled to put the pursuer to proof. The defender was not the pursuer's previous employer. The pursuer needed to prove the losses which he averred he had incurred. A key issue was whether he would in fact ever have been re-employed by the Bank. The defender was entitled to require proof of that issue alone. The

pursuer also needed to prove that the Employment Tribunal would have ordered reinstatement or re-engagement.

The proposed question for referral

[82] The question which the pursuer asserted ought to have been referred to the ECJ was set out at paragraph 44 of the Record.

[83] But that was not the right question. The correct question was "*would* a British national have access…". That is because the matter before the Employment Tribunal, the EAT and the Court of Appeal was "Does section 94(1) ERA have extra territorial effect?"

[84] The question as framed by the pursuer presupposed an answer to the question (i.e. that a British national *would* have had access to the Employment Tribunal). But the question under consideration by the Employment Tribunal, the EAT and the Court of Appeal was: does ERA apply? In other words, *is* there jurisdiction?

[85] The result was that the question posed by the pursuer, even if it had been referred and answered, would not have brought about a different result on the question of the Employment Tribunal's territorial jurisdiction.

IV – Written submissions for pursuer[2]

[86] Summary decree in favour of the pursuer should be granted based on two prongs, one based on European Human Rights Law and the other based on EU law, which make it impossible for the defender to defend part of this cause. According to Sheriff Crowe, events

[2] These have been corrected for numerous spelling and grammatical errors. I have sought to render the layout consistent with the other parts of the judgement. Where the written submissions appeared to me to be unclear, I have sought to clarify what I believe the pursuer was seeking to argue, based on the content of his written submissions and his supporting oral submission.

dealt with by the Singapore High Court were *res judicata.* Damages were then certain under ERA 1996.

First Prong: Right to a fair trial under article 6.1 of the European Convention on Human Rights

[87] The pursuer filed a claim before the Employment Tribunal against his former employer, Standard Chartered Bank. The claim and its appeal to the EAT were dismissed for lack of jurisdiction. The pursuer then filed an application to appeal with the Court of Appeal in England and Wales.

[88] Sir Richard Buxton dismissed the application to appeal reasoning that:

> "The decisions in all of *Lawson*, *Duncombe* and *Ravat* demonstrate that the ET's jurisdiction depends, as a matter of fact and assessment, on whether the case is one that the British Parliament can reasonably be assumed to have intended to fall within the employment legislation. But, within that general approach, employees working outside the United Kingdom will not easily qualify: as Baroness Hall of Richmond JSC put it in paragraphs 8 and 16 of her seminal judgment in *Duncombe*, is this one of the exceptional cases in which the employment relationship is overwhelmingly closer to the United Kingdom than to any other system of law. Applying that approach, the findings of fact of the Employment Tribunal are fatal to this claim. That conclusion is not discriminatory against the applicant on grounds of nationality, or for that matter on any other ground. The conclusion follows from his factual circumstances, not from his nationality; and his nationality of a member state of the EU gives him no right to have the domestic law of another member state applied to him in a way that it would not be applied to nationals of that other state."

[89] Relying on English case law rather than EU law, Sir Richard Buxton answered the question of discrimination: the factual circumstances used by the courts below were not discriminatory because a court could use exceptions to the law (those which applies to a small segment of its citizens) to exclude all nationals of other Member States.

[90] The pursuer requested a hearing which was granted and heard before Tomlinson LJ. The pursuer formally raised the question of discrimination to be put to the ECJ in his skeleton arguments (Record CS-38): if a British national has access to an employment

tribunal then does any EU national employed in the same circumstances have equal access to that same tribunal?

[91] This was a very broad question of discrimination and covered all factors considered by the courts below and by Sir Richard Buxton and which included among other factors residency, pre-existing links to the jurisdiction and pre-existing links to the employer.

[92] Under the European Convention on Human Rights, the pursuer had a right to a fair trial.

ECHR Art 6.1 provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[93] Tomlinson LJ was adjudicating at last instance. To ensure a fair trial, he was required to follow the *CILFIT* test detailed in *Dhahbi*: Law – Article 6 § 1: National courts whose decisions were not amenable to appeal under domestic law were required to provide reasons based on the exceptions laid down in the case-law of the ECJ for their refusal to refer a preliminary question to that court on the interpretation of EU law. They should therefore set out their reasons for considering that the question was not relevant, or that the provision of EU law in question had already been interpreted by the ECJ, or that the correct application of EU law was so obvious as to leave no room for reasonable doubt.

[94] This requirement derived from EU case law *Cilfit*. Under *Ullens*, Tomlinson LJ could raise the question to the ECJ or instead. In the specific context of the third paragraph of Article 267 TFEU, this meant that national courts against whose decisions there was no remedy under national law, which refused to refer to the Court of Justice a preliminary question on the interpretation of Community law that had been raised before them, were obliged to give reasons for their refusal in the light of the exceptions provided for in the

case-law of the ECJ. They were thus required, in accordance with the *CILFIT* case-law, to indicate the reasons why they found that the question was irrelevant, that the European Union law provision in question had already been interpreted by the Court of Justice, or that the correct application of Community law was so obvious as to leave no scope for any reasonable doubt. Both *Dhahbi* and *Ullens* are reaffirmations by the ECHR of instances such as *Vergawen* and *Schipani*.

[95] Tomlinson LJ failed to follow these precedents. He did not find the question irrelevant. He answered the question using only British case law. He failed to provide an ECJ case law precedent which answered the question. He failed to provide an explanation why the answer to the question was obvious to him, the ECJ and all other 27 EU national courts. Effectively, he breached ECJ case law *CILFIT* and ECHR precedents *Dhahbi* and *Ullens*.

[96] Tomlinson LJ followed Sir Buxton's reasoning to the letter and answered the question, concluding that the factual circumstances used by the courts below were not discriminatory because a court could use exceptions to the law (which applied to a small segment of its citizens) to exclude all nationals of another Member State:

> "I agree with Mr Aldabe to this extent that, insofar as Judge Wade refers to the circumstance that the applicant is not British, that is not a feature or a factor of any relevance at all. The question of residence is, in my judgment, capable of being a relevant factor in so far as the question of residence has some bearing on the question of sufficient connection, and if the case had been determined against Mr Aldabe on the ground alone that he lacked British residence, then I would agree with him that he would have an arguable case that could amount to indirect discrimination, as explained by the European Court of Justice or Court of Justice in the European Community in Ingrid Boukhalfa v Bundesrepublik Deutchland [1996] EUECJ C-214/94. But in my judgment the exercise upon which the tribunals below were engaged was a far more wide-ranging consideration of all of the factors, in which the question of residence was by no means decisive but was simply one element which inevitably must come into account in an overall assessment of whether or not the claimant and his employment had a sufficiently strong connection with the United Kingdom. That is an exercise of fact-finding upon which an appellate court is

> unlikely to take a different view from that of the tribunal below, unless the tribunal can be said to have erred in its approach to the fact-finding exercise.
>
> I have already, I hope, sufficiently indicated that in my judgment there is here no question of discrimination on grounds of nationality, because it is plain to me that the decision reached by both Judge Wade and Judge Peter Clark in the EAT would have been precisely the same had the applicant been a person of British nationality, which is something that was pointed out by Sir Richard Buxton when he refused permission to appeal."

[97] At paragraphs 12 and 14 Tomlinson LJ states that factors other than residency were not discriminatory and that the courts below could use them without breaching EU law. These factors were identified at paragraph 18 and follow from paragraph 5 of the EAT reasons:

> "Both Judge Wade and Judge Clark gave their reasons for concluding that this was not a case in which Mr Aldabe had been posted abroad by a British employer for the purpose of a business carried on in Great Britain in the sense that he had no pre-existing link either with the employer or with this jurisdiction, so that in no sense was he posted abroad or, as it were, assigned from his existing employment in order to work abroad, but rather he accepted a job or the offer of a job that was based in Singapore and had no element of an expatriate nature such as that described by Lord Hoffmann in paragraph 38 of his speech."

[98] Thus, Tomlinson LJ said that residency was discriminatory; pre-existing links to the employer were not discriminatory; and pre-existing links to the jurisdiction were not discriminatory. The courts could use the latter two criteria (which applied to a small segment of UK citizens) to exclude all nationals of other Member States.

[99] According to *Office of Fair Trading (OFT)* and in line with *CILFIT* a question is irrelevant if it does not affect the outcome of the case. Under *CILFIT* and in the absence of any prior ECJ authority, this depends upon (a) whether the question is relevant to the outcome of the case; and (b) "whether the correct application of Community law is so obvious as to leave no scope for reasonable doubt".

[100] The question was relevant. How could Tomlinson LJ pass judgment unless he was certain that there was no discrimination?

[101] Tomlinson LJ needed to answer the question about the existence of discrimination in order to pass judgment. He could not pass judgment unless an answer regarding discrimination was given for each of the factors used by the courts below and Sir Richard Buxton. Tomlinson LJ embarked on a detailed analysis from paragraphs 12 to 18 to answer each of the three factors and concluded: residency – discriminatory (under EU case law *Boukhalfa*); pre-existing links to the employer – not discriminatory (under British case law *Lawson*); and pre-existing links to the jurisdiction – not discriminatory (under British case law *Lawson*). The latter two could thus be used to exclude all nationals of all other Member States since there was no discrimination.

[102] Tomlinson LJ took it upon himself to conclude that all of the other factors considered aside residency were not discriminatory. Save for residency, this answer matches the answer given by Sir Richard Buxton who stated: "That conclusion is not discriminatory against the applicant on grounds of nationality." Therefore, the question was not irrelevant.

[103] In answering the relevant question of discrimination, Tomlinson LJ only used EU case law to answer the factor of residency. He used only British case law (*Lawson*) to answer the other two factors (pre-existing links). He thus failed to use only EU case law to answer the entire question and in particular for each of the factors. Therefore, the question being relevant, he failed to comply with the requirement to give reasons based only on EU case law precedents.

[104] Of course, Tomlinson LJ did not deem the answer obvious as he embarked on 6 paragraphs or almost two pages of reasoning to arrive at his answer. We find nowhere in his reasons a statement that the question was obvious to the ECJ and rest of the EU national

courts. Therefore, he failed to comply with the requirement to give reasons why the ECJ and the rest of EU national courts would arrive at the same obvious conclusion.

[105] Tomlinson LJ did not refer the question to the ECJ. He found the question relevant. He answered the most important part using only British case law and avoided using EU case law which, as will be shown in the second prong (see below) opposed his conclusions. He did not find the question to be obvious to the ECJ or the rest of EU national courts.

[106] Tomlinson LJ failed to comply with *CILFIT* and thus breached *Dhahbi* and *Ullens*. He deprived the pursuer of his right to a fair trial under Article 6.1 of the European Convention on Human Rights. State liability ensues because this court must do no more or no less than the European Court of Human Rights in *Ullah*:

> "20. ...This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

Second Prong: State Liability under Kobler is satisfied

[107] While concluding that pre-existing links are not discriminatory, Tomlinson LJ also referred to paragraph 38 of Lord Hoffmann's speech in *Lawson*. That part of Lord Hoffmann's speech began at paragraph 35. At paragraph 36 Lord Hoffman pointed out that:

> "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."

[108] That demonstrates that the hurdle which the pursuer had to overcome was a very considerable one.

[109] Tomlinson LJ explicitly concluded that the pursuer would have to fulfil unusual circumstances to access the ET and that the pursuer must be subjected to a considerable hurdle. But more than 91% of national workers were not required to satisfy either of them or do so more easily[3].

[110] In particular, National workers were not required to work for the purpose of the business carried on in Great Britain. They were not required to have their families living in the UK. They were not required to be recruited in Britain. They were not required to have their contract rooted or forged in the UK. They were not required to be dismissed in the UK. They were not required to have pre-existing links to the jurisdiction or pre-existing links to the employer.

[111] As Tomlinson LJ noted at paragraphs 9 and 15, the pursuer was required to fulfil all these conditions which are akin to residency. But more than 91% of national workers were not required to fulfil any of them at all. By the mere fact of living in Britain they were automatically entitled to sue their employers in the UK. These requirements were, as noted by the ECJ in *Commission* v *Belgium,* akin to residency or covert forms of residency/nationality.

[112] In his ruling, Tomlinson LJ imposed on the pursuer more conditions than required of 91% of national workers. Also, Tomlinson LJ required the pursuer to satisfy conditions which were more easily satisfied by 91% of national workers.

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3 The pursuer's position was that judicial notice should be taken that only 8.6% or 5.5m out of 63.7m Britons live outside the UK. Or equivalently, that the vast majority of British nationals live and work in the UK while the vast majority of other EU nationals do the same in their respective countries. Only 2.9m EU migrants live in the UK or less than 1% of the non-British EU population.

[113] In addition, Tomlinson LJ went beyond *Lawson* and set out a new test which required pre-existing links with the jurisdiction or pre-existing links with the employer in order to fall into the expatriate category described in *Lawson*.

[114] EU Workers who migrated to the UK to find employment opportunities were migrant workers. The Oxford Dictionary defined migrant worker as:

> "A person who moves to another country or area in order to find employment, in particular seasonal or temporary work."

[115] The migratory nature of the worker makes it more difficult for them than national workers to have pre-existing links with the jurisdiction and less likely to have pre-existing links with a British based employer.

[116] Tomlinson's test[4] was satisfied by more than 91% of national workers by merely living in the UK but it was satisfied only by a minute number and fraction (less than 1%) of EU workers residing outside the UK. Therefore, this test was more easily satisfied by national workers than by other EU workers.

[117] Therefore, Tomlinson LJ conceded in his reasoning that the pursuer was to be subjected to more requirements than 91% of national workers or that 91% of national workers satisfied those requirements more easily than migrant workers like the pursuer. This was further compounded by Tomlinson LJ's concession at paragraph 15 of his reasons that the pursuer required pre-existing links that more than 91% of national workers satisfied more easily than other EU workers.

[118] Tomlinson LJ's reasoning breached EU law precedent preventing covert forms of discrimination: *O'Flynn*:

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4 Which requires pursuer to satisfy all factors considered by the courts below as well as pre-existing links to the jurisdiction and employer.

> "18. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers…or the great majority of those affected are migrant workers… where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers… or where there is a risk that they may operate to the particular detriment of migrant workers..."

[119] Tomlinson LJ's test failed each of the three categories forbidden under *O'Flynn*. First, it affected at most 9% of national workers but it affected more than 99% of other EU workers. Second, due to the same population statistics, it was more easily satisfied by national workers that reside in the UK than by other EU workers who do not reside in the UK. Third, the same population statistics, and as shown in the pursuer's case, there was a risk that the test operates to the detriment of other EU workers.

[120] Furthermore, the Tomlinson LJ test was akin to the condition of prior residency. They were naturally satisfied through residency. British based employers were more likely to hire persons living close to the place of employment. Residency was the primary way to establish links with the jurisdiction. One usually gets hired and fired where one lives, and one generally lives with one's family.

[121] By symmetry, Tomlinson LJ's test implied that this court also adjudicates in Romanian courts. That the clerk for this hearing has jurisdictional links to Bulgaria. That the solicitor for the defender professes her legal acumen in Latvia while her counsel does so too or resides in each of the 28 member states. In order not to breach *O'Flynn*, Tomlinson LJ's test implied that everybody in this hearing must simultaneously have links to the jurisdiction or employer in each of the 28 member states. Who here can claim to satisfy this requirement? If not, then the UK cannot impose such requirements on all other EU nationals since discrimination is guaranteed.

[122] Tomlinson LJ used a small segment of national workers to exclude all workers from other EU member states. He then breached EU case law where a materially identical test (graduating from a Belgian secondary school) was deemed discriminatory: *Commission* v *Belgium*:

> "28. Thus, among others, conditions applied without distinction which may be more easily fulfilled by national workers than migrant workers are prohibited…
>
> 29. The same applies to the condition at issue here, which is akin to a condition of prior residence, and which will be fulfilled more easily by the children of Belgian nationals than by those of nationals of another Member State.
>
> 30. The fact that that condition applies also to young Belgians who complete their secondary education outside Belgium does not affect that finding."

[123] Tomlinson LJ breached EU case law by using a very small segment of national workers who worked outside the UK to exclude or risk excluding from the ET all workers from other EU member states.

[124] Tomlinson LJ breached EU case law by 1) subjecting the pursuer to hurdles not required of most national workers, 2) subjecting the pursuer to standards more easily satisfied by most national workers, 3) subjecting the pursuer to standards only satisfied by national workers 4) subjecting the pursuer to covert residency requirements more easily satisfied by national workers, and 5) risking exclusion from the ET of all workers from other EU member states.

[125] Under *Kobler*, a court adjudicating at last instance which failed to raise a question of EU law creates a liability for the Member State if three conditions are met: 1) the right infringed confers rights on individuals, 2) there is a breach of EU case law and 3) there is a direct causal link between the breach and the damages.

[126] It follows from the foregoing that the principle according to which the Member States are liable to afford reparation of damage caused to individuals as a result of

infringements of Community law for which they are responsible is also applicable where the alleged infringement stems from a decision of a court adjudicating at last instance. It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation.

[127] As to the conditions to be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State is responsible, the Court has held that these are threefold: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct, causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties.

[128] An infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter.

[129] As noted in the first prong, Tomlinson LJ breached EU case law: *CILFIT*. In addition, he also breached EU case law: *O'Flynn* and *Commission v Belgium,* which are only exponents of a plethora of rulings forbidding discrimination spanning 45 years.

[130] *CILFIT* conferred the right under TFEU 267 to have the question referred to the ECJ or to be given reasons why it should not be referred. *O'Flynn* and *Commission v Belgium* conferred the right under TFEU 45 not to be discriminated on the basis of one's nationality. Therefore both breaches were meant to confer rights on individuals. So, the first condition under *Kobler* was met in all three breaches.

[131] Both *CILFIT* and *O'Flynn*/*Commission* v *Belgium* were trite EU case law precedents, affirmed many times over and both were breached by Tomlinson LJ. Thus, the second condition under *Kobler* was also met for both breaches.

[132] Finally, there was a direct causal link between Tomlinson LJ's breaches and the pursuer's inability to obtain damages as a result of an unfair dismissal. The pursuer lost his right to a trial before the ET only because Tomlinson LJ refused to refer the question to the ECJ. Had Tomlinson LJ referred the question to the ECJ, the pursuer would have accessed the ET. No one else but Tomlinson LJ was responsible for the pursuer's loss of a right to a fair trial before the ET. Therefore, the third condition under *Kobler* was also met.

[133] Therefore pursuer satisfied all three conditions under *Kobler* paragraph 51 and the defender acquired a liability and was responsible for damages under *Kobler* paragraph 50.

Damages under ERA 1996

[134] The pursuer filed a claim in the Singapore High Court against his former employer which was adjudicated by Chong JC who found the following:

a. The pursuer entered agreement with his employer with commencement date 17 November 2008 with a base salary of USD250,000 and USD170,000 as target bonus: Singapore judgement, paragraphs 3, 4.

b. The employer refused to pay wages from 17 November 2008 to 1 December 2008, paragraphs 16, 17. The pursuer upheld his right not to suffer unlawful wage deductions between 9.05 am and 11.25 am on 1 December 2008, as a result of employer's refusal to pay those wages, the pursuer started writing his letter of resignation: Singapore judgement, paragaphs 16, 21.

c. that the employer had four reasons to dismiss pursuer and listed them in the following order a) **pursuer's unreasonable demand to be paid wages from 17 November 2008 to 1 December 2008**, b) pursuer's refusal to attend the right start session, c) pursuer's misconduct by raising his voice at defendant's employees, d)

pursuer's intention to resign on his first day at work: Singapore judgement paragraph 43;

d. Chong JC dismissed b), c) and d) as valid reasons and found the dismissal was wrongful: Singapore judgement, paragraphs 67, 71, 75, 76.

[135] Chong JC found at paragraphs 40, 68, and 129(a) that pursuer's demand to be paid wages from 17 November 2008 to 1 December 2008 was justified since he did not agree to amend the commencement date; and ordered the employer to pay among other wages from 17 November 2008 to 1 December 2008. The employer dismissed the pursuer only because the pursuer upheld his right not to suffer wage deductions which he did not agree to either in writing or verbally. Had the pursuer not defended his right not to suffer deduction, he would not have been dismissed.

[136] Chong JC also found that the line manager would not have dismissed if human resources had not have misrepresented events leading up to his decision: Singapore judgement, paragraph 71.

[137] Based on Chong JC's findings, the pursuer was dismissed while asserting his statutory right under ERA, section 13(1) not to suffer wage deductions not agreed to in writing. Therefore the dismissal is also unfair under ERA 1996, section 104(1)(b), because the pursuer was asserting his statutory right: ERA, section 13(1).

[138] The pursuer had amended his initial claim before the ET to include a claim for re-engagement. In addition, the ET would have had the obligation to ask pursuer if he wanted to be reinstated or re-engaged: ERA section 112. Failure to do so would have been an error of law. The pursuer would have agreed to either reinstatement or re-engagement to seize the opportunity to re-enter the financial industry. Under ERA sections 113, 114(2)(a) and/or 115(2)(d), the pursuer would have been entitled under his ET claim to receive wages

including bonus and interest from the date of dismissal on 1 December 2008 to the date of re-engagement on 3 October 2012.

[139] At paragraph 3 of his reasons, Chong JC found that the pursuer's base salary was USD 250,000[5] as well as a target bonus of USD 170,000.

[140] That amounts to SGD 1,638,355 + USD 844,001 plus interests from the day the present writ was filed as confirmed in *Selfridges Ltd* v *Malik* [1997] UKEAT 1352/96/2404 and which is excluded from any limitation under ERA 1996 s124(3).

The impracticability defence fails

[141] The pursuer was dismissed for disputing wages owed with his employer. Nothing else took place in the span of 3 hours from the commencement of his employment. Under ERA sections 13, 104 and 114/115, Parliament intended to give employees the necessary means to ensure that they did not suffer unlawful wage deductions without the fear of losing their employment. It made no sense to encourage employees to dispute owed wages over two weeks at the risk of losing their permanent employment.

[142] The defender cannot argue that it was impracticable to re-engage or reinstate pursuer. As noted by the case management hearing, pursuer wanted to be re-engaged. As noted above, under ERA section 112 and *Blackstone Employment Law* 2012, 24.04-05, the ET judge had the obligation to query if pursuer also wanted to be reinstated.

[143] Re-engagement and reinstatement would follow even if the employer had objected because, 1) the pursuer wanted to continue to work with his employer, *Blackstone*

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5 Converted at SGD/USD 1.50 as confirmed by the contract (Record CS-4).

Employment Law 2012, 24.09-24.12 and 2) it was practicable, *Blackstone Employment Law* 2012, 24.13-24.15.

[144] There was no loss of trust and/or confidence, risk to other employees or other factors apt to deprive the pursuer of a reinstatement/reengagement order: *Blackstone Employment Law* 2012 24.15. During cross examination, the pursuer's former line manager stated he would not have dismissed if HR had not mis-represented events to him: Singapore judgement, paragraph 71).

[145] Furthermore, everything took place within the first 3 hours of the pursuer's employment, leaving little possibility for pursuer to carry acts which would justify loss of trust or risk to other employees. During that period, the pursuer's only act was to beg the employer to pay him what was due under the contract. Nothing else.

[146] Sheriff Crowe confirmed in the last hearing that matters adjudicated by Chong JC were *res judicata*. The employer, using one of the best Singapore Law firms, Rodyk & Davidson, gave it its best during the Singapore proceedings to justify dismissal and listed all possible arguments, behaviour and act to justify dismissal. The defender could not possibly bring anything new to the table that has not been already decided by Chong JC.

[147] The defender is unable to point where in his ruling did Chong JC found that pursuer was putting others at risk or endangering those around him or in his care. Nowhere in that ruling can it be found that the pursuer engaged in unusual behaviour of the type needed to deny the reinstatement/re-engagement order. Nowhere does it state that the pursuer dealt drugs, engaged in sexual activities with minors or others, administered drugs without a prescription, put employees or others in a headlock, threatened or endangered other employees or similar acts that would enable an ET judge to reasonably find that the

employer lost trust or/and confidence or that there was risk to other employees. The pursuer only asserted his statutory right to be paid what was owed.

[148] The pursuer was and still is capable of carrying out any front office, middle office and back office jobs banking job: *Blackstone Employment Law* 2012, 24.15. He has performed in all these three sectors while working for institutions like Credit Suisse Group, Banca Intesa (at the time Italy's largest bank) and a most prestigious London hedge fund prior to joining employer. He has performed as a risk manager, analyst, quant developer and quant analyst as well as a java, VBA and C/C++ programmer. The pursuer can price any financial asset which can be priced including derivatives such as CDOs, CDSs, exotic options in FX, interests, credit, equities and commodities among others.

[149] The former employer was large and did not require close working relationships. Judicial notice should be taken that Standard Chartered Bank was one of the largest multinational banks with 80,000 employees offering at any one time over 1,500 jobs on their website. It had today close to 169 positions open related to analyst jobs, 47 positions open related to quant developer jobs and 305 positions open related to risk management. Therefore, the pursuer could have been re-engaged in any of those positions for which he was and still is very capable of performing.

[150] Even if the pursuer's position was taken at the time, it would not be taken into account by the Court: *Blackstone Employment Law* 2012, 24.16. In any case, the employer was so large that it could offer the pursuer a very large number of positions. Furthermore, the pursuer made very clear to his former employer, very early on, that he wished to be re-engaged. The former employer would have had to dismiss any replacement employee in favour of pursuer: *Blackstone Employment Law* 2012, 24.17.

[151] The pursuer had not been at fault: *Blackstone Employment Law* 2012, 24.18. He only pleaded to his former employer to pay what was owed under the contract. Dismissal occurred only because HR's misrepresented events to the pursuer's line manager (Chong JC paragraph 71).

[152] Finally, the pursuer had no beef with anybody working with employer: *Blackstone Employment Law* 2012, 24.19. Not even HR. He has worked in a front office and gone through two mergers and knows that today's enemy is tomorrow's best friend. He has thick skin and bears no grudges because they serve no purpose in the banking industry where everybody has big *egos*. In banking it is best to forgive but not to forget and the pursuer has incorporated that philosophy.

[153] Also, any sums paid by his former employer to the pursuer as a result of Chong JC's ruling was owed under the contract and needed not be repaid in order to re-engage or reinstate: *Blackstone Employment Law* 2012, 24.19.

[154] For all these reasons, a defence of "impracticability" would fail. The pursuer was willing and capable to perform; the former line manager did not lose trust/confidence in the pursuer; the former employer had plenty of positions available; the pursuer was not at fault; no money was owed to the former employer; and the pursuer had no grudge with any other employee. Therefore, the matter being *res judicata,* the defender is unable to come up with anything that could remotely come close to justifying impracticability.

[155] The pursuer only sought to get employer to pay two weeks of wages. This happened the moment the pursuer started performing his employment contract and spanned for three hours until he was unfairly dismissed. Nothing else happened during that period. Employees should not lose their permanent employment only because they asserted their statutory right to defend their wages as Parliament intended. Reinstatement/re-engagement

is mandatory in such circumstances. Therefore the impracticality defence would have failed and defender must pay what employer would have had to pay under ERA, section 114/115.

V - Oral Reply to defender's submissions

[156] The question which the pursuer says it should have been referred to the ECJ, set out in paragraph 44 of the Record, was raised in his notice of appeal.

[157] A question having been raised to the Court of Appeal, it must be referred: *CILFIT, Kobler.*

[158] Residence is not a relevant consideration: *Lawson.*

[159] *Blaine* conflicts with EU Law.

[160] The interpretation applied to section 94(1) conflicted with EU Law.

[161] The error made by Tomlinson LJ was very simple. The UK can discriminate against its citizens as it wishes. But it cannot discriminate against citizens of other EU states. For example, as soon as the fact of somebody being Italian is brought into the equation, the test applied by cases such as *Lawson* is discriminatory: *O'Flynn*.

[162] The pursuer's case was not about residency. It was about all the factors which prevented him from getting jurisdiction.

[163] The question was broad. It meant that all the factors which were taken into account prevented him from accessing the Employment Tribunal.

[164] It was apparent that the EAT had taken into account not just residency but also pre-existing links to the employer: Clark judgement, paragraph 5.

[165] But when it came to a case concerning an Italian employee for example, it was necessary to forget the approach set out in *Lawson,* et cetera.

[166] Under the approach set out in *Lawson*, the vast majority of UK nationals could apply successfully to the Employment Tribunal.

[167] But discrimination on grounds of nationality was forbidden.

[168] The pursuer came to the UK for employment. But he came on an equal footing with only 10% of Italians rather than 90% of UK workers. The big mistake by Lord Justice Tomlinson was to use only 10% of the workforce.

[169] The number of non-British EU citizens working in the UK is smaller than the total number of EU citizens residing outside UK in the EU. There are about 2.5 million EU workers living in the UK. That represents about 1% of the EU citizens living outside the UK.

[170] About 5 million UK citizens work outside the UK. That is about 8% of the UK population. Lord Justice Tomlinson used that imbalance to discriminate.

[171] The test being applied was akin to one of residency and as such it affected more EU workers than UK workers and was discriminatory: *O'Flynn.*

[172] In the same way, Sir Richard Buxton used a small subset which was not typical.

[173] The precedents in both *O'Flynn* and *Commission* v *Belgium* were ignored by Lord Justice Tomlinson.

[174] An infringement of community law stemming from a decision or a court adjudicating at last instance gave rise to the right to reparation: *Kobler,* paragraph 50.

[175] That was what had happened in this case: Record paragraphs 44 – 46.

[176] There had also been a breach of the pursuer's Article 6 ECHR rights: Record paragraphs 124 – 125.

[177] It was accepted that the breach must be serious: *Kobler*, paragraphs 51; 53 - 55.

[178] But that was established where there was a manifest breach or the case law of the ECJ: *Kobler*, paragraphs 56.

[179] In the present case, the cases of *O'Flynn* and *Commission* v *Belgium* should have made it obvious that there was discrimination.

[180] There were also the cases of *Sotgiu* and *Boukhalfa* which had been referred to in the pursuer's skeleton argument before the Court of Appeal.

[181] Any test more easily satisfied by UK nationals was forbidden. That could be discrimination against migrant workers: *Commission* v *Belgium*.

[182] It was accepted that the pursuer was not a migrant worker[6]. But EU law applies when the employment relationship is entered into in the EU: *Walrave,* page 1421.

[183] The contract was formed and entered into in London: Wade judgement, paragraph 6.11; Clark judgement, paragraph 1; Record, paragraph 40.

[184] The pursuer had a signed copy of his contract on his laptop before he left London.

[185] Both overt and covert discrimination were unlawful: *O'Flynn,* paragraph 17.

[186] It was clear from the Clark judgement that both parties were in London when the relationship was entered into.

[187] Turning to the issue of causation, this court was competent to deal with the pursuer's claim for damages: *Kobler,* paragraph 46. It was accepted that there had to be a direct causal link between the breach of the obligation incumbent on the state and the loss or damage sustained by the injured party: *Kobler*, paragraphs 51 and 52. But the question as to what damages should be awarded was a matter of EU law: *Kobler*, paragraph 57.

[188] In any event, it was clear from the decision in Singapore that the pursuer was unfairly dismissed.

[6] In terms of his written argument, the pursuer initially asserted that he was a migrant worker. I queried whether that was so if the phrase was used in a technical, EU law sense. On the second day of the hearing, I understood the pursuer to make the concession noted.

[189] The pursuer's employment contract was subject to Singapore law expressly but also to EU Law. Once EU Law applies, the Convention applies because there is an international element.

[190] In relation to the pursuer's entitlement to claim for loss of bonus, it was obvious that if he was offered a bonus of SGD 170,000, that was what his employers expected to pay him. He was relying on an internal email dated 5 November 2008 which showed that his job offer was SGD 220,000 with SGD 170,000 "target".

[191] The decision of the Court of Appeal did not comply with the requirement to explain why the question posed by the pursuer was irrelevant: *Ullens*, paragraph 62.

[192] For a question to be irrelevant, it would need to be held that EU law had no application to it. But the question was not irrelevant.

[193] The defender had not shown that:

a. EU Law could be ignored: *CILFIT*;

b. the question was not raised during the hearing (before the Court of Appeal);

c. Lord Justice Tomlinson had fulfilled his duty.

[194] Thus, the defender had not shown that the question raised before the Court of Appeal was irrelevant.

[195] The conditions imposed in relation to establishing reparation for loss must not make it impossible or excessively difficult to obtain reparation: *Kobler*, paragraph 58.

[196] Given the findings in the Singapore judgement, which were *res judicata*, the pursuer was entitled to reparation: *Kobler*, paragraph 30.

[197] The rules applied in *Lawson* and the other related cases may operate to the disadvantage of foreign nationals.

[198] So far as the minute of amendment was concerned, it was reasonable to assume that the pursuer would have been reinstated. The chance of that was more than zero. He would have gone on to work for Standard Chartered Bank for at least two years.

[199] The question of how to evaluate quantum in this case was itself a question of EU law and should be referred to the ECJ. The court was invited to refer that question.

[200] Finally, objection was taken to the defender relying on its Rule 22 note. It had been sent to the defender by email rather than with a wet signature. That was unfair.

VI - Reply for defender

Rule 22 note

[201] This was the third day of a diet of debate. The note had been intimated in August 2017 and there could be no prejudice to the pursuer in that respect.

Minute of Amendment

[202] In addition to the matters mentioned earlier, the following points were relevant.

[203] This action had been raised at the end of the quinquennium. The Minute of Amendment was intimated almost two years after that. It was only being moved now. This was the appropriate time for objection to be taken thereto: *Greenhorn*. This constituted an attempt to introduce a new claim outside the prescriptive period. It should be refused.

[204] If it were not to be refused on the grounds that it seeks to introduce a claim which has prescribed, it should in any event be refused on the grounds of potential prejudice to the defender. The points previously taken in relation to the defender's lack of knowledge of the pursuer and the banking world in which he operated in Singapore were relevant here also.

[205] Furthermore, the nature of the claim made was unduly remote from the basis on which the pursuer's action was being prosecuted. The pursuer's ability to obtain alternative employment would be dependent on a number of factors.

[206] In passing, the defender did not accept the Singapore judgement was in any way binding. There was no prospect of *res judicata* arising in respect of (i) on the one hand an action between the pursuer and the present defender and (ii) on the other an action between the pursuer and Standard Chartered Bank in another jurisdiction.

[207] The United Kingdom's hands were not tied by a decision of the court in Singapore. Whatever may have been the evidence in the Singapore case, the Bank's employees might take a different view now of the issue of reinstatement.

[208] It was clear that a direct causal link between the loss claimed and the failing complained of must be established: *Kobler*.

[209] The motion to amend should be refused.

Motion to make reference

[210] The pursuer's motion to refer a question to the ECJ about the correct approach to be taken in the valuation of claims should not be considered at this stage. If the court was considering such a step, the appropriate procedure would be for the court to fix a hearing so that parties could make representations.

[211] In any event, the defender's position was that no question of EU Law arose.

The EAT's ruling on place of recruitment

[212] It had been suggested that the EAT had departed from the ET's judgement on this issue: Clark judgement, paragraph 1. But that paragraph was simply a short introductory

one. There was no suggestion elsewhere in the Clark judgement that the findings of fact made in the Wade judgement were in any way interfered with.

The issue before the Court of Appeal

[213] The pursuer's proposition seemed to be that in light of the decisions of the Employment Tribunal and the EAT the following question arose: had there been direct or indirect discrimination under EU Law on the grounds of nationality, either expressly or impliedly?

[214] The Court of Appeal's decision was that that question did not arise. There was no issue of EU Law which touched on the construction or interpretation of a UK Statute. In other words, the court found that in the application of section 94(1) ERA as interpreted by the decisions of the Supreme Court, the position would be the same whether one was British or Italian.

[215] When the Court looked at the issue of territorial jurisdiction, it was not looking at the issue of nationality at all; and it was not looking at the question of residence in the abstract, but rather in the context of the employment arrangements for an individual employee.

[216] The question before the Court of Appeal was the issue of "employment link": *Rabat.*

[217] It made no difference if an employee was Italian or British. An Italian could come and work here. That was what the Court of Appeal said: Tomlinson judgement, paragraph 12.

[218] The pursuer was suggesting that the Court of Appeal had imposed an additional requirement for pre-existing links. That was not part of the test. Whether or not there were pre-existing links did not matter.

[219] The decisions in *Lawson* and *Ravat* were consistent with EU Law. There was no discriminatory context. The question of residence was relevant in relation to the question – was the employee working in the UK?

[220] A prior connection with the employer can be satisfied by somebody who is a UK national or somebody who is not: *Ravat*, paragraphs [27] – [29].

Article 6 argument

[221] It was accepted that there was an obligation on the court to give reasons. But in this context, Article 6 added nothing to the common law position. The Court of Appeal gave reasons for its decision. The context was clear: Tomlinson judgement, paragraphs 12 – 14

Loss

[222] The pursuer had to show how the various heads of loss arose on the basis of the alleged failure by the Court of Appeal to make a reference.

[223] The pursuer seemed to accept, if not concede, that there were no pleadings setting out the facts from which it might be inferred that he had a prospect of success before the ECJ; that if, in due course, his case was allowed to proceed before the Employment Tribunal that he would have been successful on liability; that the Employment Tribunal would have been persuaded to make an order for reinstatement or re-engagement.

[224] The pleadings contained no offer to prove facts from which inferences could be drawn about bonuses, share entitlements, increases in salary or blacklisting.

[225] This court was not bound by the findings of the Singapore court. By contrast, the fact of litigation between the pursuer and Standard Chartered Bank in Singapore was a relevant factor in this case in relation to questions of loss.

[226] In his submissions on the issue of loss, the pursuer had described himself as a "superstar". Ultimately, however, he appeared to accept that it was at least possible that his former employers, even if an order for reinstatement or re-engagement had been made, might not have complied with it. So how was the pursuer going to prove that as a matter of probability he would have been successful in the Employment Tribunal with his request for an order for reinstatement or re-engagement; and that if such an order were made, his former employer would have complied?

Expenses

[227] Expenses should be reserved meantime.

Further procedure

[228] If the court was not with the defender, a proof before answer should be fixed.

VII - Reply for pursuer

Minute of amendment

[229] The Minute had only been lodged two weeks after the expiry of the five year period. It contained only minor additions which were not new averments and flowed from the averments already made. There had been a problem with sending documents and the pursuer had had to coordinate with the court as to how the amendment should be done.

Singapore judgement

[230] The events as found in the Singapore judgement were *res judicata*.

Causation

[231] This court should assume that the Employment Tribunal would have adjudicated in the pursuer's favour.

Loss

[232] Where was the case law that there must be a direct causal link between the losses claimed and an order for reinstatement?

EAT decision on formation of contract

[233] The EAT had corrected the decision of the Employment Tribunal: Wade judgement paragraphs 6.11 and 12.4; Clark judgement, paragraph 1.

CILFIT

[234] There was no case law about *CILFIT*. This was an EU law claim.

Tomlinson judgement

[235] The question before the Court of Appeal flowed from the decision of the EAT, which was determined by the pursuer's lack of pre-existing links to the UK or the employer: Clark judgement, paragraph 5.

[236] The Court of Appeal approached the question in the same way: Tomlinson judgement, paragraphs 15 – 18.

[237] The factors used by both judges were exactly the same, namely that there was no jurisdiction because the pursuer did not live in the UK and did not have pre-existing links with the employer.

[238] The issue of pre-existing links was dealt with extensively in the Record.

Loss

[239] In applying rules for evaluating claims, a national court was not entitled to apply rules which made it extremely difficult for the pursuer to prove his loss. In principle, the pursuer's primary remedy (before the Employment Tribunal) of an order for reinstatement or re-engagement must be kept in mind.

Loss of bonus etc.

[240] The pursuer proposed to amend to seek to protect these heads of claim.

Expenses

[241] The pursuer agreed that expenses should be reserved meantime.

Other issues/questions

[242] The following points/questions arose:

a. The burden was on the defender.

b. Has the defender shown that under EU law the question raised through skeleton arguments can be ignored and the *CILFIT* test need not be applied?

c. Has the defender shown that the question was not raised verbally during the CA hearing?

d. Has the defender shown that Tomlinson LJ did not bother to perform his duty and read the question in the notice of appeal or the question in the skeleton arguments?

e. Has the defender shown that under EU law the question raised in the notice of appeal which was pleaded at paragraph 23 is exempted from the *CILFIT* test?

f. Has the defender shown that the questions raised to the CA as pleaded at paragraph 23 and 24 and 44 of the record were irrelevant or has it only shown that the CA found only the factor of residency irrelevant?

g. Has the defender shown that *O'Flynn* or the 17 precedents therein pleaded at paragraph 68 or *Sotgiu* pleaded at 69 of the record as well as *Commission v Belgium* does not apply to pursuer?

h. Has the defender shown that *Walgrave* pleaded at 31 of the record does not apply to pursuer and that the rules of non-discrimination do not protect pursuer?

i. Has the defender not shown that *Boukhalfa* pleaded at 30 of the record does not apply to pursuer and that the rules of non-discrimination do not protect pursuer?

j. Has the defender shown that and that the rules of non-discrimination do not protect pursuer were not breached?

k. Has the defender shown that employer would not have re-engaged?

l. Has the defender shown that under EU law the equity relief sought under the original claim must be quantified using ERA 1996 to re adjudicate the matter?

m. Has the defender shown how under EU law the court of last resort can answer part of the question and deem the rest of it irrelevant?

n. Has the defender shown under EU law how equity relief damages are quantified under *Kobler*?

o. Has the defender shown under EU law that the quantum under *Kobler* is determined by adjudicating the matter again even though it is *res judicata* or are the damages claimed in the original claim automatically awarded?

p. Has the defender shown under EU law how is the quantum of the claim against the member state determined under *Kobler*?

q. Has the defender shown under EU law that employees whose employment relationship was entered into in the EU protected under the rules of non-discrimination and do these include the ECJ case law regarding TFEU articles 18 and 45 as well as its predecessors TEC articles 7 and 48? Including but not limited to *O'Flynn* and *Commission* v *Belgium* as well as those cited within those cases?

r. Has the defender shown under EU law there is no breach of EU case law if the court of last resort uses less than 10% of UK nationals to deprive nationals from other EU member states access to the ET?

s. Has the defender shown under EU law there is no breach of EU case law when criteria such as those used by the ET, EAT, Sir Richard Buxton and Tomlinson LJ which are more easily satisfied by the vast majority of UK nationals but not satisfied by the vast majority of nationals of other member states?

t. Has the defender shown under EU law there is no breach of EU case law when criteria such as those used by the ET, EAT, Sir Richard Buxton and Tomlinson LJ where there is a risk that they may operate to the particular detriment of migrant workers including those whose employment relationship was entered into in the EU to perform outside the EU?

u. Has the defender shown under EU law there is no breach of EU case law when criteria such as those used by the ET, EAT, Sir Richard Buxton and Tomlinson LJ which essentially affects migrant workers including those whose employment relationship was entered into in the EU to perform outside the EU?

v. Has the defender shown under EU law there is no breach of EU case law when criteria such as those used by the ET, EAT, Sir Richard Buxton and Tomlinson LJ where the great majority of those affected are migrant workers including those whose employment relationship was entered into in the EU to perform outside the EU?

w. Has the defender shown under EU law there is no breach of EU case law if the limit the liability under *Kobler* to the amount under the original claim?

x. Has the defender shown under EU law there is no breach of EU case law when liabilities are excluded which have a direct causal link to the breach of the obligation incumbent on the state just because they arose after said breach?

y. Has the defender shown that it would be futile to allow pursuer to subpoena Sir Richard Buxton and Tomlinson LJ to determine which question was raised?

z. Has the defender shown that it would be futile to allow pursuer to subpoena Sir Richard Buxton and Tomlinson LJ to determine whether the question was irrelevant?

aa. Has the defender shown that it would be futile to allow pursuer to subpoena Sir Richard Buxton and Tomlinson LJ to determine whether the question was fully answered as required under *Dhahbi*/*CILFIT*?

bb. Has the defender shown that it would be futile to allow pursuer to subpoena Sir Richard Buxton and Tomlinson LJ to determine whether the factors used were discriminatory under *Kobler*?

cc. Has the defender shown that it would be futile to allow pursuer to bring productions worth 4 days of testimony in the Singapore courts to determine the

loss of benefits the pursuer reasonably expected to have had but for the dismissal as required under s123 and s117(3)?

dd. Has the defender shown that it would be futile to allow pursuer to subpoena witnesses from Standard Chartered Bank to determine the loss of benefits the pursuer reasonably expected to have had but for the dismissal, as required under s123 and s117(3)?

ee. Has the defender shown that it would be futile to allow pursuer to bring productions worth 4 days of testimony in the Singapore courts to ensure the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d)? as required under s124?

ff. Has the defender shown that it would be futile to allow pursuer to subpoena witnesses from Standard Chartered Bank to ensure the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d) as required under s124?

gg. The defender's argument that the claim has not been properly pleaded was not part of the original preliminary pleas and the pursuer has not had the benefit of time to ruminate on them.

hh. Has the defender shown that the pursuer has not pleaded the *Kobler* prong from paragraphs 47 to 51?

ii. Has the defender shown that the pursuer has not pleaded the first *Kobler* test from paragraphs 53 to 56?

jj. Has the defender shown that the pursuer has not pleaded the second *Kobler* test in particular the EU breach of EU case law from paragraphs 57 to 96?

kk. Has the defender shown that the pursuer has not pleaded the second *Kobler* test in particular the one assessing and weighing many factors to determine the seriousness of the breach from paragraphs 97 to 110?

ll. Has the defender shown that the pursuer has not pleaded the third *Kobler* test from paragraphs 111 to 124?

mm. Has the defender shown that the pursuer has not pleaded the *CILFIT* test from paragraphs 71 to 72?

nn. Has the defender shown that the pursuer has not pleaded the *Dhahbi* test at paragraph 125?

VIII - Grounds of decision

Pleadings

[243] Leaving aside any technical requirements as to form, the way that written pleadings in our system are intended to operate (at their most basic level) is that the party who is making a claim must set out (i) the legal remedy he seeks/asks the court to grant him (the crave); (ii) the factual basis on which his claim proceeds (the matters he is offering to prove set out in the averments in the condescendence); and (iii) the legal proposition (the plea(s) in law) which link(s) (ii) to (i).

[244] In addition, a party must give what is called 'fair notice' of the basis of his claim. In other words he must set out in sufficient detail the alleged facts on which his case proceeds. The level of detail required depends on the nature and circumstances of the case. But a pursuer must always offer to prove at a minimum the essential elements of the type of claim being made. So, for example, if a claim is being made for damages for an alleged breach of contract, a pursuer must aver that there was a contract; what term is said to have been

breached; what the conduct amounting to breach was (e.g. doing something not permitted or not doing something required); in what way these caused the loss for which damages are claimed; and how the damages claimed are arrived at.

[245] Similarly, if a claim is made in respect of an alleged failure to comply with another type of legal obligation, a pursuer must aver the nature of the obligation; the nature of the alleged failure to comply with it (e.g. doing something not permitted or not doing something required); in what way this caused the loss for which damages are claimed; and how the damages claimed are arrived at.

[246] It is not possible to arrive at a formula for the level of detail required which is of universal application in all cases, but the test which the court applies may broadly be stated to be this: assuming for the sake of argument that the pursuer manages to prove everything which he offers to prove, 'is he entitled (in law) to the remedy he seeks?'; and 'has he given fair notice of his case?'

[247] If the answer is 'no' to either of these questions, then the action is irrelevant and may be dismissed. [Sometimes the result is that only part of the action is deemed to be irrelevant, in which case that portion of the case is not allowed to go forward to proof (an evidential hearing)].

[248] A related issue is the question of onus. In most cases (and in this one) the rule is that it is for the pursuer to aver and (if the case proceeds to proof) to prove his case. Contrary to the pursuer's approach as urged on the court, the onus is on the pursuer; not on the defender. So for example, where the pursuer asserts that it should be assumed that the employment tribunal would have adjudicated in his favour (para [231], above) that is simply not the case. It is for the pursuer to aver facts from which that result might be inferred.

[249] With that introduction, I now turn to look at the key parts of the pursuer's case.

Was there an obligation to make a reference?

[250] It was common ground that the Tomlinson judgement was a final judgement, potentially giving rise to a claim based on a failure to make a reference and that the terms of Article 267 were subject to the jurisprudence in *CILFIT*.

[251] In determining whether there was a failure in the putative obligation to make a reference it is necessary to consider a number of different propositions.

Did a question of EU law arise at all?

[252] If I understood him correctly, the pursuer ultimately asserted that *Duncombe, Lawson* and *Ravat* were all wrongly decided; and that in applying that line of authority to his case, the Court of Appeal (approving the ET and the EAT and Sir Richard Buxton) had imposed certain requirements upon him as an EU national which were not applicable to a British national and thereby directly or indirectly discriminated against him contrary to EU Law on the grounds of nationality, either expressly or impliedly; and that that question (as to whether there had been discrimination) should have been referred to the ECJ.

[253] So it appears that the underlying question is whether it is correct to say that that line of authority from the Supreme Court contains some unlawful discriminatory content which infected the Court of Appeal decision (and those preceding it) in the pursuer's case.

[254] Section 94(1) ERA simply says: "An employee has the right not to be unfairly dismissed by his employer".

[255] Starting with *Lawson*, it was accepted by all parties in that case that the scope of that section must have implied territorial limits: paragraph 6. The approach is one of construing the words of the statute according to principles, not rules: paragraph 23. The paradigm case

is the employee working in Great Britain: paragraph 25. In cases where the employee works abroad, the correct approach is to focus on whether there are powerful factors which lead to the conclusion that the *employment relationship* has a closer connection with Great Britain than with the foreign country where the employee works: paragraph 36 (emphasis added).

[256] This point was taken up by Lady Hale in *Duncombe*: paragraph 8. And remarks of Lord Hope in *Ravat* make the same point: paragraph 28.

[257] In my view, the proposition that these cases were wrongly decided cannot be entertained simply because the pursuer so asserts. More importantly for the purposes of the present case, these cases demonstrate that in arriving at a decision on the scope of the territorial jurisdiction of the employment tribunal in relation to claims for unfair dismissal, the focus is the closeness (or otherwise) of the *employment relationship* (which relationship gives rise to the right to make a claim for unfair dismissal) with Great Britain. That is not the same as the closeness (or otherwise) of the *employee's relationship* with Great Britain. It respectfully appears to me that the pursuer in this case has failed to appreciate that distinction. Furthermore, it is clear that in answering the question as to the connection (or otherwise) of the employment relationship with the UK, there are a variety of factors which may be relevant in that exercise: *Ravat*, paragraph 32.

[258] It is clear, in my opinion, that the employment tribunal undertook a broad fact finding exercise (based, of course, on evidence placed before it by both parties) seeking to find the answer to the question about how close the employment relationship between the pursuer (the claimant) and his former employer (the respondent) was: Wade judgement paragraphs 12.4. (In passing, I observe that the type of material which the tribunal might have to consider in a case, such as the pursuer's, where the employment relationship had no

sooner begun than it ended may be different from that which might be considered in a case where the employment relationship had subsisted for a material period of time.)

[259] Likewise, in my opinion it is clear that the EAT was entirely focused on the closeness or otherwise of the employment relationship. In particular, where the EAT said:

> "…the question for the (employment tribunal) Judge was whether (the pursuer's) connection with Great Britain was sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the Tribunal to deal with his claim…"

it is clear that that was the pursuer's connection with Great Britain *as an employee*: Clark judgement, paragraphs 6.

[260] In my opinion, it is patent that the issue was approached in the same way at the sift stage of the application to the Court of Appeal: Buxton order, lines 1 – 9.

[261] The question of discrimination was touched on at that stage also and rejected. In passing, I observe that the judge alluded to the point that the pursuer's argument would mean that as an EU (but non-British) national, his approach would give him a right to pursue a claim for unfair dismissal which would not be available to a British national. I put the same point to the pursuer whose answer was that the UK government was entitled to discriminate against its own citizens but could not discriminate against citizens of other EU countries. But in my view, that response misses the point, which is that the application rationale of the approach set out in the line of authority from the Supreme Court means that nationality is not a determining – or indeed relevant – factor.

[262] Coming to the decision which gives rise to the present claim, the Court of Appeal reviewed the approach taken by the employment judge and the facts found by her. In disposing of the appeal, the Court specifically dealt with the question of discrimination.

[263] In particular, Tomlinson LJ made it clear that nationality was not a matter of any relevance at all; and in relation to residence, he accepted that if that had been a determining factor, then the pursuer would have had an arguable case based on indirect discrimination: Tomlinson judgement, paragraph 12.

[264] But two further observations are necessary. Firstly, it is made clear that even if, for the sake of argument, it was accepted that the employment tribunal and the EAT had wrongly attached some weight to the question of nationality, the result would have been the same: Tomlinson judgement, paragraph 14. In other words, it was the combined effect of the *other factors* bearing on the issue of "closeness or otherwise of the employment relationship" which were determinative. Secondly, the question of residence was but a factor to be considered in the context of "sufficient connection": Tomlinson judgement, paragraph 12. Again, it was not a determinative factor.

[265] A further matter highlights the problem with this part of the pursuer's case. Mr Webster criticised the form of the question which the pursuer says should have been referred. In my opinion, he was right to do so. The question as formulated by the pursuer pre-supposes that the Court of Appeal would have ruled in favour of a person who was a British national and who had been resident in the UK but otherwise whose circumstances were identical to those of the pursuer. In my view, that is not the case.

[266] In relation to the question of nationality, it would have made no difference if the pursuer was British, Italian or any other nationality for that matter. The question of nationality was simply irrelevant to the question before the court. The question of residence was a factor in the broader question under consideration in the particular circumstances of the pursuer's case. It was a legitimate matter for the tribunal to consider as part of that exercise, but again it was not determinative. In other words, had the tribunal been

considering a claim brought by a dismissed employee who was a British national and who had been resident in the UK but whose circumstances were otherwise identical to those of the pursuer, it would have come to the same conclusion: no jurisdiction. Thus, the question as formulated by the pursuer was not one which gave rise to a question of discrimination contrary to EU law.

[267] In my opinion, all of the foregoing is clear from the terms of the judgements referred to in the pursuer's pleadings and leads to the conclusion that no question of EU law requiring a referral arose at all before the Court of Appeal. On that ground alone, the pursuer's case is irrelevant.

What if matters are not so clear cut?

[268] Assuming for the sake of argument that I am wrong in concluding that the Court of Appeal was not in error, what then?

[269] In my opinion, there is still a significant difficulty for the pursuer in terms of *Kobler*. I agree with the defender's submission that it is for the pursuer to show the breach was sufficiently serious.

[270] In my opinion it is clear that for there to be liability arising from a decision of the national court adjudicating at last instance, the bar is set at a high level: *Kobler*, paragraphs 53 – 56. In particular, I note that such liability will be incurred "… Only in the exceptional case where the court has manifestly infringed the applicable law.": *Kobler*, paragraph 53 (emphasis added); and "… an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court of Justice in the matter:…": *Kobler*, paragraph 56 (emphasis added).

[271] So, as Mr Webster put it, where is the clear EU authority that the jurisdiction of the Employment Tribunal, as articulated in Section 94(1) ERA, is to extend to nationals working outside the EU where there is no material connection between the employment and any member state?

[272] The pursuer does, in his pleadings and arguments, seek to formulate a case to the effect that the decision of the Court of Appeal flew in the face of EU jurisprudence. But in my opinion, his averments, and the arguments underlying them, are elaborate, not to say convoluted (even if they are not plain wrong). Accordingly, on that ground alone, it cannot be said that there was a manifest failure on the part of Tomlinson LJ. For example, it is clear that he took account of the issue of possible discrimination and had an appreciation of the relevant case law: Tomlinson judgement, paragraph 12.

[273] The pursuer referred to a number of cases and other sources in his attempt to demonstrate that there was a body of jurisprudence which the Court of Appeal did not, but should have, taken account of.

[274] I do not propose to deal with them all but shall comment on some by way of example. In relation to *Kobler* itself, Mr Webster observed that even the *volte face* by the Austrian Court was not sufficient. In my opinion, the approach by the ECJ in that case gives a flavour of how the word 'manifest' is to be interpreted: *Kobler*, paragraphs 120 - 124. Even if the Court of Appeal made a mistake, that is not enough to give rise to state liability.

[275] The pursuer also relied on the case of *O'Flynn*. But in that case, the discrimination arose from an express territorial condition applicable to the payment of Social Fund funeral expenses. In my opinion, no such condition was created by the Supreme Court in *Lawson,* etc., or applied by the Court of Appeal in the pursuer's case. Likewise *Sotgiu*, *Boukhalfa* and *Commission* v *Belgium* were cases where there was an express rule or condition which had

discriminatory effect. That factual difference between those cases and the present one is material.

[276] Accordingly, even if I am wrong in concluding that the Court of Appeal made no error of law, in my opinion, the pursuer cannot, on the averred facts in this case, cross the hurdle created by the decision in *Kobler*.

Pursuer's averments of loss

Causation

[277] Having set out his position on what might be called the factual and legal issues pertaining to liability, the pursuer deals with the link between the putative failure by the Court of Appeal to make a reference and his claim: paragraphs 114 *et seq* of the Record.

[278] I had some interesting exchanges with the pursuer about this aspect of his case. The pursuer appeared to be reluctant to accept that the way in which the question of loss should be approached was to ask the question: what would have happened if the Court of Appeal had not failed in its putative duty to make a referral? (i.e. to create a hypothesis based on a referral being made). But that is the way in which the pursuer pleads his case: Record paragraphs 114; 116; and 117 *et seq*.

[279] The pursuer and I differed in our views both in relation to the (i) steps involved in that hypothesis and (ii) the probable outcome of those steps, individually and cumulatively.

[280] The starting point is to assume that a referral would have been made.

[281] The pursuer proceeded on the basis that if that had happened, the ECJ would have ruled in his favour; that his claim in this case would then be calculated by reference to the outcome of a hypothetical claim brought before the employment tribunal for unfair

dismissal which would have been resolved in his favour and would have included an order for reinstatement or re-engagement which would have been complied with.

[282] In my opinion, that is to grossly oversimplify the position.

[283] Dealing firstly with the question of a referral, it is my understanding that the ECJ is not obliged to accept a referral. It is the arbiter as to which cases are allowed to proceed before it. If that is correct (and I concede I am not certain of it), the pursuer would need to address it by averring facts from which it could be inferred that the referral, if made, would have been accepted. (In this connection, I refer also to the criticisms of the actual wording of the question which the pursuer says should have been referred.)

[284] Secondly, assuming that the referral was made and accepted, the pursuer would need to prove that the referral would have been resolved in his favour. He does make averments addressing this issue at paragraph 114 of the Record, but in my view they lack specification.

[285] Thirdly, the pursuer would need to prove that as a result of the failure to make a referral, he had been deprived of the right to make a tribunal claim which would have been allowed to proceed to a hearing. In this connection, account must be taken of matters such as the likelihood of the pursuer's former employers continuing to resist the claim; and potentially doing so successfully.

[286] (In passing, I observed in reviewing the papers for the purposes of preparing this judgement that the tribunal gave three reasons for declining jurisdiction, namely (i) "issue estoppel"; (ii) abuse of process; and (iii) want of territorial jurisdiction: Wade judgement, paragraphs 10, 11 and 12. The EAT dealt with two of those issues, namely (i) estoppel and (iii) territorial jurisdiction: Clark judgement, paragraph 3. Accordingly, on the information available to me, it is by no means clear that even if the pursuer had been vindicated on the

question of territorial jurisdiction, the claim would have proceeded any further because it appears that the decision to dismiss it on the grounds that it constituted an abuse of process has never been appealed, and thus appears to stand unchallenged. But perhaps I am missing something.)

[287] Instead, the pursuer's averments suggest that his hypothesis is that his claim would inevitably have been allowed to proceed; and would inevitably have been successful and would inevitably have led to an order for reinstatement and/or re-engagement.

[288] The reality is that none of that was ever certain and thus has to be evaluated as a matter of probability. But the pursuer does not aver facts from which, if it were proved, it is possible for this court to make such an assessment. The mere assertion by the pursuer that it would be so is not sufficient.

[289] I initially understood the pursuer not to be willing to accept at all that the creation of a hypothetical model was the appropriate way to address this issue. Ultimately, I understood him to accept that general point in principle, but his position evolved into one based on *Kobler*, paragraph 58 which says:

> "Subject to the existence of a right to obtain reparation which is founded directly on Community law where the conditions mentioned above are met, it is on the basis of rules of national law on liability that the state must make reparation for the consequences of the loss and damage caused, with the proviso that the conditions for reparation of loss and damage laid down by the National legislation must be not less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation…".

[290] The pursuer's position was that accordingly, the question of causation of loss was a question of EU law; that there was a lack of clarity as to how claims of this type should be evaluated; and that I should make a reference on that point to the ECJ.

[291] Taking the last proposition first, it is not appropriate for a national court to be invited to, or to make a reference, to the ECJ "on the hoof". Issues as to whether an issue

appropriate for reference arise at all; and if so what the precise point is and how any question should be formulated are matters which require the most careful consideration. On that ground alone, I refuse the pursuer's motion for me to make a referral.

[292] In any event, the following points fall to be made. Firstly, in my opinion the law is clear. Reparation for loss and damage caused is to be evaluated according to the rules of national law. In the present case, that is Scots law. Secondly, the approach outlined by me above and discussed with the pursuer at length during the hearing is entirely consistent with the way in which "similar domestic claims" would be approached. There is well-developed jurisprudence about how damages are to be evaluated where a claim is based on 'the loss of a chance (or opportunity)'. That is the basis of the pursuer's case: that he lost the chance to have a referral made which in turn deprived him of the chance to bring a claim before the employment tribunal in London.

[293] A large proportion of reparation cases involve the evaluation of matters of uncertainty (e.g. 'how long would an employee have continued working?'; 'would the employee have been promoted?') and the conversion of that evidence into a monetary value. Some cases are relatively straightforward; others are more difficult. But in practice, such claims are not impossible or excessively difficult to make or sustain.

[294] In relation to the question as to whether his claim for unfair dismissal would have been successful, the pursuer also asserted that the facts of the case as found in the Singapore judgement were *res judicata*.

[295] In my opinion, that contention demonstrates a misunderstanding on the pursuer's part as to the nature of the plea of *res judicata.* Firstly, as Mr Webster observed, the plea can only arise where the same parties are involved in the two cases. But the pursuer's case in Singapore was against his former employers; and his case here is against the UK state.

Therefore, whatever facts may have been adjudicated on in the first of these cases do not automatically fall to be treated as proved fact in the second case. Secondly, *res judicata* is a plea available to a defender. The proposition underpinning it is that a matter in dispute between the defender and the pursuer has already been tried and determinative resolved by an earlier decision and should not be revisited in a second case. The extent to which findings of fact in a case brought by the pursuer in Singapore against his former employers should be treated as binding (or even determinative of those facts) in a case brought by the pursuer in this court against the UK state is a different matter entirely and has nothing to do with *res judicata*.

Specification

[296] In my opinion, the criticisms made by Mr Webster of the averments of loss were well made. The general point is this: the hypothesis on which the pursuer's claim in this case proceeds is that as the result of the Court of Appeal's failure to make a reference, the pursuer was deprived of the opportunity of making a successful claim before the employment tribunal. That hypothesis requires him to aver and prove (as a matter of probability), amongst other things, that his claim would have been successful and that the tribunal would have been persuaded to make particular orders and/or awards in his favour. It does not do for the pursuer simply to assert that he would have been awarded a particular pay rise; or a particular bonus when these are plainly matters which would have been determined by his employers based, presumably, on a wide range of factors such as the pursuer's performance. Accordingly, in my view the pursuer's averments of loss are wholly lacking in specification and not apt to be admitted to probation.

Pursuer's motion for summary decree

[297] I can deal with this aspect of the case shortly. On the basis of my conclusions set out above, the pursuer's case is irrelevant and falls to be dismissed (see below). Accordingly, in those circumstances, there is no basis on which the requirements of Chapter 17 of the Ordinary Cause Rules could be satisfied. The motion is refused.

Pursuer's minute of amendment

[298] I would not have refused the minute on the basis of timing alone as it appears to me to be the expansion of a case already made. But the pursuer himself links the reservations expressed by recruiters to the fact that he had had an altercation with his employer. Thus, I agree with Mr Webster that absent averments properly dealing with causation, the minute does not advance the pursuer's position.

[299] Furthermore, the new averments are subject to the same criticisms as those made in respect of the other heads of claim. It does not suffice to make bald assertions. For example, the pursuer must give proper notice of the facts which he offers to prove to show that recruiters expressed reservations: When were these reservations expressed? Who by? In what terms? In what context? These are all matters which are in the pursuer's knowledge but not in the defender's.

Adequacy of reasons - Ullens

[300] The pursuer contended that the reasons given by the Court of Appeal did not adequately explain why no question of EU law arose for determination; and that that failure was in itself a breach of EU law.

[301] Mr Webster submitted that in the circumstances, *Ullens* added nothing to the requirements of the common law to give reasons and that the reasons were adequate.

[302] In my opinion, the Court of Appeal did properly explain its reasons for its decision. The judge explicitly identified the issue before the tribunal and the approach taken by it; approved both; considered the issue of discrimination and dealt with that also. He specifically dealt with the relevance (or otherwise) of nationality and residence. In my respectful opinion, the reasoning was succinct and sufficient.

Other issues

[303] A number of other issues were touched on in argument. In my view, none of them is determinative and I deal with them briefly.

EAT's ruling on place of recruitment

[304] I do not agree that paragraph 1 of the Clark judgment corrects or otherwise alters the findings in the Wade judgement. That is to read too much into what is a brief introductory paragraph. The factual basis of the decision remained unchanged and was endorsed by the EAT.

Rule 22 Note

[305] Although not received as a hard copy, the pursuer had had timeous sight of it. There was no prejudice.

Obligation to refer

[306] The pursuer submitted that a question having been raised to the Court of Appeal, it must be referred: *CILFIT, Kobler.* I do not agree: *CILFIT*, paragraph [9].

IX - Disposal

[307] I shall repel the pursuer's pleas in law; sustain the defender's second plea in law; and dismiss the action. All questions of expenses are reserved meantime.