LAW PUNDITS

Territorial scope of Equality Act 2010

Territorial scope of the Equality Act 2010

The general jurisdiction of employment tribunals in England, Wales and Scotland

Before determining whether or not rights under the Equality Act 2010 will allow particular persons to make claims under it in particular situations, it is necessary first to look at the question of the general jurisdiction of employment tribunals in England, Wales and Scotland.

Issues as to general jurisdiction, which arise in relation to any employment tribunal claim irrespective of which particular legislation gives rise to the rights which are the subject of any particular claim, concern the features a claim must have before an employment tribunal in England, Wales or Scotland will have jurisdiction to entertain it at all. This is a separate question which must, logically, be considered *before* one looks at the issue of the scope of the application of the rights which derive from any specific piece of legislation such as the Equality Act 2010.

EC Regulation on general jurisdiction

The first port of call in this regard is EC Regulation 44/2001, which has been incorporated domestically by the Civil Jurisdiction and Judgments Order 2001. That regulation contains the following pertinent provisions:
References: EC Regulation 44/2001

Civil Jurisdiction and Judgments Order 2001, SI 2001/3929

- Article 2(1) states that the general rule is that, subject to the remainder of the regulation (the pertinent provisions of which are set out in the bullet points below), persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. This means that:
  References: EC Regulation 44/2001, Art 2(1)

  - a potential respondent domiciled in eg Germany should be sued there
  - a potential respondent that is resident in Member State A, eg Germany, but domiciled in Member State B, eg England, should, in general, be sued in England rather than Germany

- Article 5(5) provides a general exception to Article 2(1): in disputes arising out of the operations of a branch, agency or other establishment, a person domiciled in one Member State **may** be sued instead in the different Member State in which that branch, agency or other establishment is situated; eg where a company domiciled in England has a branch in Germany, and the dispute arises out of the operation of that branch, the company may instead be sued in Germany
  References: EC Regulation 44/2001, Art 5(5)

- Article 18(2) provides an employment-specific rule: where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State. Thus a company domiciled in the USA (or any other location outside the EU altogether) may be sued in a Germany if:
  References: EC Regulation 44/2001, Art 18(2)

  - it has a branch, agency or other establishment in Germany, and
  - the dispute arises out of the operations of that branch, agency or establishment

- Article 19 provides a further employment-specific rule: an employer domiciled in a Member State may be sued either:
  References: EC Regulation 44/2001, Art 19

  - in the courts of the Member State where he is domiciled, or
  - in another Member State, namely:

    - in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
    - if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated

Note that:

- Article 18(2) can only apply where an employee has entered into an individual contract of employment with an employer. It is thus of no application in relation to complainants who have applied for employment, but not got it, eg someone who wants to bring a claim alleging a failure to recruit him because of his race

- Article 19 will likewise not be of assistance to a complainant who would like to sue in a different Member State from that in which the employer he wishes to sue is domiciled, if that complainant was never engaged by and never worked for the employer, because the Article requires regard to be had to the place where he habitually carries out his work or where he was engaged. Those factors cannot assist, for example, in a case where the complaint regards the way in which an unsuccessful application for employment was dealt with by that employer, eg a claim alleging a failure to recruit an individual because of his race

Note also that EC Regulation 44/2001 sometimes confers jurisdiction on more than one Member State at the same time. For example, if a company domiciled in London had a branch in Germany, then in respect of a claim arising out of the operations of that branch, jurisdiction would be conferred on both:

- the United Kingdom, under Article 2(1), because that is where the company is domiciled
- Germany, under Article 5(5), because that is where the branch is situated

In such situations, as regards general jurisdiction:

- the claimant may choose to bring his claim in either Member State
- the Member State in which he brings a claim first will be obliged to accept jurisdiction, and is not entitled to refuse, even if the other Member State upon which EC Regulation 44/2001 also confers jurisdiction would seem the more appropriate one in which to try the case
  References: Lafi Office and International Business v Meriden Animal Health [2001] 1 All ER (Comm) 54

Employment Tribunals Regulations

Having considered the effect of EC Regulation 44/2001, the second thing to look at with regard to the general jurisdiction of employment tribunals is the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, which contain provisions expressly limiting that jurisdiction so that:

- an employment tribunal in England or Wales shall only have jurisdiction to deal with proceedings where:
  References: ET Regulations, SI 2004/1861, Reg 19(1)
  - the respondent or one of the respondents resides or carries on business in England and Wales, **or**
  - had the remedy been by way of action in the county court, the cause of action would have arisen wholly or partly in England and Wales

- an employment tribunal in Scotland shall only have jurisdiction to deal with proceedings where:
  References: ET Regulations, SI 2004/1861, Reg 19(2)
  - the respondent or one of the respondents resides or carries on business in Scotland
  - the proceedings relate to a contract of employment the place of execution or performance of which is in Scotland

The combined effect

Taking into account the effects of EC Regulation 44/2001 and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, it would seem that, so far, this much is clear:

- an employment tribunal in England, Wales or Scotland will have **general** jurisdiction to entertain a claim brought by a complainant against a respondent that carries on business at a branch, agency or other establishment in England and Wales, or in Scotland as the case may be, even if that respondent is domiciled somewhere other than England, Wales or Scotland, provided that the claim arises out of the operations of that branch, agency or other establishment. So foreign companies operating in England, Wales or Scotland may have claims brought against them, where the claim arises out of those British operations, in the employment tribunals of England, Wales or Scotland
- where a claim relates to events taking place in another EU Member State (outside England, Wales or Scotland), and the relevant part of the respondent against whom the claim is brought is situated in that other Member State, an employment tribunal in England and Wales, or in Scotland, will still have **general** jurisdiction to entertain that claim provided the respondent is domiciled in England or Wales, or in Scotland, as the case may be. So a German employee employed in an undertaking in Germany, whose employer is a company domiciled in England, Wales or Scotland, may bring a claim relating to the operations of that undertaking in Germany before an employment tribunal in England, Wales or Scotland, as the case may be
- on the other hand, an employment tribunal in England and Wales, or in Scotland, will **not** have general jurisdiction to entertain a claim where the relevant events occur abroad and the respondent body against whom the claim is to be made has no (or no sufficient) connection with England, Wales or Scotland, ie where:

    - the events took place in another EU Member State (outside England, Wales or Scotland)
    - the relevant part of the respondent against whom the claim is brought is situated in that other Member State
    - the respondent body against whom the claim is to be brought is domiciled somewhere other than England, Wales or Scotland

If, applying the criteria set out above, there is **no** general jurisdiction to bring a given claim before an employment tribunal in England, Wales or Scotland, then that is probably the end of the matter: the claim cannot be brought here.

On the other hand, if there **is** general jurisdiction to bring a given claim before an employment tribunal in England, Wales or Scotland, that only answers the first of two necessary questions. The affirmative answer to this first question regarding **general** jurisdiction in no way impacts upon or provides an answer to the second question in this context, namely: if the claim depends upon rights enshrined in the Equality Act 2010, is the

complainant entitled to rely upon those rights, taking into account the particular facts and matters to which his claim relates?

This latter, separate and distinct question will depend upon determination of the scope of the Equality Act 2010 itself, ie upon its territorial extent and its territorial application.

The difference between an Act's extent and its application

The provisions of an Act of Parliament will have:

- territorial extent: this is the area within which those provisions are law, and
- territorial application: this means the persons and matters in relation to which the provisions operate

The Equality Act 2010 declares its territorial extent expressly, clearly and unequivocally.

The Act is however silent as to its territorial application, which is, as a result, far less clear and much more difficult to define.

Territorial extent of the Equality Act 2010

As regards the territorial extent of the whole of the Equality Act 2010, ie the area within which its provisions are law, the Act states expressly that:

- the whole Act forms part of the law of England and Wales
  References: EqA 2010, s 217(1)
- apart from section 190 (improvements to let dwelling houses) and Part 15 (ss 198-201 re family property), the whole of the rest of the Act forms part of the law of Scotland
  References: EqA 2010, s 217(2)

  EqA 2010, ss 190, 198-201
- only a handful of the Act's provisions forms part of the law of Northern Ireland:
  References: EqA 2010, s 217(3)

  - section 82 (offshore work)
    References: EqA 2010, s 82
  - section 105(3) and (4) (expiry of Sex Discrimination (Election Candidates) Act 2002)
    References: EqA 2010, ss 105(3), 105(4)
  - section 199 (abolition of presumption of advancement).
    References: EqA 2010, s 199

However the clear ambit of the Act's territorial extent does not answer the question as to its territorial application. The territorial application of a statutory provision (ie the persons and matters in relation to which it operates) may:

- in some cases be more limited than its territorial extent, or

- in other cases extend to persons and/or matters beyond its territorial extent

Equality Act 2010 silent as to its territorial application

The equality enactments which preceded the Equality Act 2010 (eg the Sex Discrimination Act 1975, the Race Relations Act 1976 etc) had express provisions regarding territorial application -- see Discrimination claims by employees -- Scope of legislation: employment at an establishment in Great Britain. By contrast, the Equality Act 2010 is entirely silent on the subject.

The Equality Act Explanatory Notes say as follows:
References: Equality Act Explanatory Notes, para 15 PDF Format

> "As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the Employment Rights Act 1996, the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain."

The reference in those notes to the 'precedent of the Employment Rights Act 1996' is to the development of the caselaw following the repeal of section 196 of the Employment Rights Act 1996.

Section 196 of the ERA 1996, as originally enacted, set out very specific provisions regarding the territorial application of that Act. That section was, however, repealed in October 1999, leaving the ERA 1996 silent as to its territorial application. Rather inevitably, the question arose thereafter before the appellate courts as to what the scope of the Act's territorial application had become subsequent to that repeal.

That question went all the way to the House of Lords, who made a now famous ruling on the point in *Lawson v Serco*, in which the single judgment of Lord Hoffman seeks to provide guidance on how to decide whether a particular matter relating to a particular prospective claimant is or is not within the scope of the territorial application of the ERA 1996.
References: Lawson v Serco [2006] IRLR 289

For reasons which are, with respect, less than clear, the drafters of the Equality Act 2010 have decided nonetheless to leave it once again to employment tribunals (and, inevitably, to the EAT, the Court of Appeal and perhaps the Supreme Court as well) to determine whether or not a particular set of facts and circumstances gives rise to rights under the Act, rather than adopting the more certain route of specifying expressly within the Act what persons and matters are or are not within the scope of its territorial application.

Territorial application: workers and events in England, Wales and Scotland

Obviously, the UK legislature generally only has a right to enact legislation to govern its own territorial jurisdiction -- the law which applies in other jurisdictions is, in general, a matter for the relevant foreign legislature to decide for itself.

Therefore, as a general rule, where a UK Act is silent on its territorial application, it will apply to all persons and matters within its territorial extent (see above), but not to any other persons and matters.

As noted above, the territorial application of a statutory provision may in some circumstances be narrower than that provision's territorial extent. For example, where an Act's overall territorial extent is England and Wales, the territorial application of a specific provision within it might nonetheless be limited expressly to Wales only.

However, in the case of the Equality Act 2010, there is in general **no** reason to take the view that the Act would not apply to any relevant events that:

- take place within the Act's territorial extent, and
- affect a potential claimant who is also, at the time that the event occurs, situated within the Act's territorial extent

In conclusion on that point, it is clear that the protections provided by the workplace provisions of the Equality Act 2010 (ie Part 5, comprising ss 39-83) do cover all potential contraventions of the Act which consist of events that:

- take place in England, Wales or Scotland, and
- affect a potential claimant who is also, at the time that the event occurs, situated within England, Wales or Scotland

In such circumstances, it will almost always be the case also that the employment tribunals in England and Wales, or in Scotland as the case may be, have **general jurisdiction** to entertain a claim relating to such a contravention (see above for further information on the test regarding general jurisdiction), provided that:

- the respondent to the claim is domiciled in England and Wales, or in Scotland, **or**
- the respondent carries on business at a branch, agency or other establishment in England and Wales, or in Scotland as the case may be, even if that respondent is domiciled somewhere other than England, Wales or Scotland, **and** the claim arises out of the operations of that branch, agency or other establishment

Hence in such circumstances, such claims under the Equality Act 2010 relating to workers and events in England, Wales or Scotland may be brought before the employment tribunals:

- in England or Wales if the respondent or one of the respondents resides or carries on business in England and Wales, **or**
  References: ET Regulations, SI 2004/1861, Reg 19(1)
- in Scotland if the respondent or one of the respondents resides or carries on business in Scotland
  References: ET Regulations, SI 2004/1861, Reg 19(2)

In contrast to the territorial application of the Act to persons and events within England, Wales or Scotland, what is much less certain is the extent to which its provisions may apply to events taking place and individuals working **outside** those countries. This issue is considered in the sections of this practice note which begin immediately below.

Territorial application abroad: relevance of Lawson v Serco

In the context of UK unfair dismissal law, as Lord Hoffman confirmed in *Serco*, the standard, normal or paradigm case covered by the provisions is the employee who was working in Great Britain.
References: Lawson v Serco [2006] IRLR 289, para 25

However, Lord Hoffman did not confine the application of the ERA 1996 to that standard case. Rather, he said that in each case of a potential claimant who for one reason or another falls outside that paradigm example, the question will be whether the ERA 1996 should be found to apply nonetheless, 'notwithstanding its foreign elements'.
References: Lawson v Serco [2006] IRLR 289, para 23

In summary, *Serco* held that:

- the right not to be unfairly dismissed generally applies to employees who are working in Great Britain *at the time of their dismissal*, but that
- there are other employees for whom the characteristics of their employment relationship are sufficiently exceptional that the right will also apply to them, for example:
    - sometimes it will be helpful to decide where the worker is based: for example, peripatetic workers, such as airline pilots, international management consultants and salesmen may well properly be seen as being based in Great Britain, and thus entitled to the protection of the ERA 1996. In deciding where the employee's base is, the terms of the contract are not always much help and what has to be looked at is the conduct of the parties and the way they have been operating the contract
      References: Lawson v Serco [2006] IRLR 289, paras 28-31

      Diggins v Condor Marine Crewing Services [2010] IRLR 119
    - in other cases, the concept of base will not be helpful. In such cases, the test will involve a rather vaguer concept of whether, despite the workplace being abroad, there are other relevant factors so powerful that the employment relationship has a closer connection with Great Britain than with the foreign country where the employee works. This would be the appropriate consideration in the case of various expatriate employees, eg:
      References: Lawson v Serco [2006] IRLR 289, para 36
        - those posted abroad by a British employer for the purposes of a business carried on in Great Britain, for example, a foreign correspondent on the staff of a British newspaper posted abroad

who lives there for many years but remains nevertheless a permanent employee of the newspaper who could be posted to some other country

- expatriate employees of a British employer operating within what is effectively an extra-territorial British enclave in a foreign country

Although there is conflicting caselaw on the point (see *Ravat*), Underhill P firmly emphasised in *MOD v Wallis and Grocott* that the collection of categories of 'exceptional' employee working outside Great Britain described by Lord Hoffman in *Serco* (set out above) is **not** intended to be an exhaustive list; they are merely 'illustrations of the operation of a principle which it was not possible to define with precision'.
References: MOD v Wallis and Grocott (UKEAT/0546/08/ZT), para 11

Ravat v Halliburton Manufacturing and Services [2010] IRLR 1053

For further information, see Entitlement to claim unfair dismissal -- Whether employee works in Great Britain.

For reasons expanded upon below, it is highly arguable that Courts and tribunals will interpret the territorial application of the Equality Act 2010 more generously than the House of Lords did in relation to the ERA 1996 in *Serco*. It is probably safe nonetheless to derive the following solely from the principles set out in *Serco*:

- a claim under the Equality Act 2010 which involves 'foreign elements' may be brought and resolved before an employment tribunal in England, Wales or Scotland if:
  - the tribunal has general jurisdiction to entertain the claim (see above) **and**
  - the claim would satisfy the territorial application test in *Serco*

There may, however, be further claims which fail the *Serco* test but still fall within the territorial application of the Equality Act 2010. This is because:

- the *Serco* test provides important general guidance in relation to determining the territorial application of a UK statute that:
  - contains no express provisions regarding territorial application, and
  - enshrines rights which derive from domestic UK law only
- the rights under the ERA 1996 fulfil both these criteria
- by contrast:
  - although the Equality Act 2010 also contains no express provisions regarding territorial application

- it enshrines rights which derive not only from domestic UK law, but also from EU law

This latter point regarding derivation from EU law makes a crucial difference: see immediately below.

Territorial application abroad: relevance of EU equality rights

Some EU law has 'direct effect', which means it is enforceable (in some fashion) directly by EU citizens in their own member state, regardless of whether the member state has introduced specific national laws to implement the provisions. EU law which has direct effect may take the form of provisions in Regulations, Directives, or Treaties.

Where a directly effective provision is contained in a Directive, it cannot be enforced against a private body. An individual is however entitled to enforce directly effective EU rights against the member state in which they reside, in two ways:
References: Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) [1986] IRLR 140

- where the individual is employed by the state (or an emanation of it) he can rely on the EU right against his employer before domestic Courts and tribunals, whether or not that EU right has been implemented, properly or at all, in domestic legislation
- in other cases, if the state has failed, either properly or at all, to implement the EU right in domestic legislation, and an individual suffers damage as a result of that failure, because he was unable to rely upon the EU right in a domestic Court or tribunal against a private body, then the individual may sue the state (a '*Frankovich* claim') for the damages flowing from that failure
  References: Francovich v Italian Republic [1992] IRLR 84

Most EU equality law takes the form of Directives. A provision in a Directive which is sufficiently precise, clear and unconditional will be capable of having direct effect, in the sense described above.
References: Impact v Minister for Agriculture and Food [2008] IRLR 552, para 86 of A-G opinion, paras 66-68 of ECJ judgement

Bleuse v MBT Transport [2008] IRLR 264, para 52

Domestic Courts and tribunals must, if at all possible, construe relevant domestic laws in such a way as to give effect to a directly effective EU right. This is known as the '*Marleasing* principle', and it applies not only to domestic laws passed to give effect to EU rights, but to the body of domestic law as a whole.
References: Marleasing v La Comercial Internacional de Alimentación [1990] ECR I-6363, para 8

Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut [2005] IRLR 137

Kücükdeveci v Swedex [2010] IRLR 346, see paras 44-48 of ECJ judgment

Another fundamental principle of EU law is the 'principle of effectiveness' This requires that the domestic procedural rules in a member state governing actions for safeguarding an individual's rights under EU law must not render the exercise of rights conferred by that law practically impossible or excessively difficult.
References: Impact v Minister for Agriculture and Food [2008] IRLR 552, para 46 of ECJ judgement

Once the UK enacts domestic legislation which is intended to implement directly effective EU rights from a Directive, the relevant parts of the Directive become directly effective in UK law for the purpose of engaging the principle of effectiveness.
References: Duncombe, Fletcher v SoS for Children, Schools and Families [2010] IRLR 331, para 130

As noted above, the territorial application of a UK statute must be determined by implication where, as is the case with the Equality Act 2010, the provisions of the statute are silent on the issue.

Where, as is also the case with the Equality Act 2010, that statute is the domestic implementation of directly effective rights under EU law, the EAT held in *Bleuse* that:
References: Bleuse v MBT Transport [2008] IRLR 264, para 57

- the Court's or tribunal's deliberations in seeking by implication to discern the territorial application of that statute should take into account the '*Marleasing* principle', and determine the scope of that territorial application in such a way as to give effect to those directly effective EU rights, ensuring that they can be enforced by the UK Courts and tribunals
- this is necessary in order to satisfy the principle of effectiveness, as otherwise there would be no effective remedy for a breach of the EU right

The Court of Appeal approved *Bleuse* and confirmed its approach in *Duncombe*, holding:
References: Duncombe, Fletcher v SoS for Children, Schools and Families [2010] IRLR 331, para 130

- under that principle of effectiveness, there is an obligation on the part of the member state to make rights under the Directive effective by providing an effective domestic law forum for enforcement
- that can be done by modification, if necessary, to the extra-territorial or other limitations, which are otherwise a barrier to the enforcement of the EU right

As regards domestic legislation which is silent as to its territorial application, Elias P (as he then was) states in *Bleuse* that, on occasion, this principle can lead to the conclusion that a claimant may rely on that legislation before the UK Courts and tribunals, where it gives effect to an EU right of direct effect, in circumstances in which the *Serco* test would instead lead to the (opposite) conclusion, because of the 'foreign elements' involved, that the facts and circumstances of the claim do not fall within the implied scope of the legislation's territorial application, eg where the base of the employment is not in Great Britain.
References: Bleuse v MBT Transport [2008] IRLR 264, para 57

Put simply, where directly effective EU rights are involved, it may be the case that the territorial application of a UK statute such as the Equality Act 2010 will be interpreted more liberally than would be the case under normal *Serco* principles. For example, in relation to an expatriate employee:

- under *Serco* principles (see above), unless the case involves relevant factors so powerful that the employment relationship has a closer connection with Great Britain than with the foreign country where the employee works, it will not fall within the territorial application of the domestic statute. Hence, for example, any expatriate employee who cannot show that those exceptional factors are present will not (normally) be entitled to rely upon UK unfair dismissal law under the ERA 1996, which rights derive solely from UK law
- by contrast, in the case of a directly effective right under an EU Directive which has been implemented by a UK statute, if the Court or tribunal takes the view that the EU right was intended to apply to all expatriate EU employees, whilst they are working in **any** EU member state, then the *Marleasing* principle may require the Court or tribunal to allow the application of the implementing UK statute, in order to ensure that the underlying EU right is given proper effect

For example, in *Wallis and Grocott*, Underhill P in the EAT took the view that the intention of the Working Time Directive was to confer rights on expatriate employees whilst working **anywhere** within the EU, as it was 'inconceivable' that the Directive would permit the domestic law of a member state to afford lesser rights to employees working in a different member state than it accorded to employees working in its own jurisdiction.
References: MOD v Wallis and Grocott (UKEAT/0546/08/ZT), para 17(4)

Underhill P also held in the same case that in this regard there was no valid distinction to be drawn between the intention of the Working Time Directive and that of the Equal Treatment Directive (76/207/EEC), which was implemented in UK law originally under the Sex Discrimination Act 1975. It was argued in that case that whereas the Working Time Directive conferred directly effective rights on employees outside the member states in which they are sought to be invoked, the Equal Treatment Directive did not do so. Underhill P disagreed, pointing out that neither Directive contains any express provision about territorial grasp. It would seem implicit in his judgment that he therefore took the view that it was likewise the intention of the Equal Treatment Directive to confer rights on expatriate employees whilst working **anywhere** within the EU.
References: MOD v Wallis and Grocott (UKEAT/0546/08/ZT), para 21

Equal Treatment Directive, 76/207/EEC

As regards its workplace provisions, the Equality Act 2010 implements, primarily, the following EU law:

- as regards the protected characteristic of race, the Race Directive
  References: Race Directive, 2000/43/EC
- as regards the protected characteristics of religion or belief, disability, age and sexual orientation, the Equal Treatment Framework Directive
  References: Equal Treatment Framework Directive, 2000/78/EC

- as regards the protected characteristic of sex, the Recast Equal Treatment Directive (which is the successor of the Equal Treatment Directive (76/207/EEC) mentioned in *Wallis and Grocott*)
  References: Recast Equal Treatment Directive, 2006/54/EC
- as regards the principle of equal pay for male and female workers, implemented in the equality of terms provisions of the Act, Article 157 of the Treaty on the Functioning of the European Union (TFEU)
  References: Treaty on the Functioning of the European Union, Art 157

Just like the Equal Treatment Directive (76/207/EEC) mentioned in *Wallis and Grocott*, all three of the Directives listed above, and Art 157 TFEU, all explicitly state that they give expression to the same principle, namely the principle of equal treatment. That principle is a general principle of European Union law.
References: Kücükdeveci v Swedex [2010] IRLR 346, see para 50 of ECJ judgment

Mangold v Helm [2006] IRLR 143, see paras 74-76 of ECJ judgment

It would seem to follow that if Underhill P took the view (as we believe it is implicit in his judgment that he did) in *Wallis and Grocott* that it was the intention of the Equal Treatment Directive (76/207/EEC) to confer rights on expatriate employees whilst working **anywhere** within the EU, he would take the same view regarding the intention of the Race Directive, the Equal Treatment Framework Directive, the Recast Equal Treatment Directive and Art 157 TFEU, since they were all implemented to give expression to the same basic EU right, namely the principle of equal treatment.

If that is right, then it arguably follows that, provided there is *general jurisdiction* to entertain the claim (see above), **any** workplace claim made under the Equality Act 2010 by an expatriate worker will fall within the Act's territorial application and hence may be pursued before an employment tribunal in England and Wales, or in Scotland, as the case may be.

However, there is some suggestion in *Bleuse*, echoed in *Wallis and Grocott*, that there may only be a duty to interpret the territorial application of UK legislation more generously than normal, in order to give effect to directly effective EU rights, where UK law is either the 'proper law of the contract', or where UK law provides the body of mandatory rules applicable to the employment relationship by virtue of Article 6(2) of the Rome Convention. This possible restriction is considered further immediately below.
References: Bleuse v MBT Transport [2008] IRLR 264, para 56

MOD v Wallis and Grocott (UKEAT/0546/08/ZT), para 21

Territorial application abroad: relevance of applicable law and Rome I

Applicable law of a contract

Any contract, including any employment contract, will have a national body of law which governs its operation: this is referred to as the 'applicable law' or 'proper law' of the contract.

Within the EU, the applicable law of a contract is determined by EC Regulation 593/2008, which is usually referred to as 'Rome I'.
References: Rome I

Parties are free to specify, in the express terms of the contract, that a particular body of law governs the operation of that contract, eg by stating 'the proper law of this contract is the law of England and Wales'. Where the parties make that express choice, Rome I state that the law they choose shall indeed be the governing law of the contract, including in the case of employment contracts.
References: Rome I, Arts 3(1), 8(1)

Where the parties to an employment contract do not make an express choice of applicable law:

- the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country
  References: Rome I, Art 8(2)
- where, for some reason, it is not possible to determine the country in which or from which the employee habitually carries out his work, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated
  References: Rome I, Art 8(3)
- however, the law of another country shall apply where it appears from the circumstances as a whole that the contract is more closely connected with that other country than either of the following:
  References: Rome I, Art 8(4)

  - the country in which or from which the employee habitually carries out his work
  - the country where the place of business through which the employee was engaged is situated

Mandatory rules

Certain rules of law, both domestic and EU-based, cannot be derogated from by agreement between the parties to a contract. These 'mandatory rules' will include, in the domestic UK context, statutory provisions which in some fashion govern the operation of contracts and do so regardless of its applicable law. In the EU context, EU rights of direct effect would also fall into this category of mandatory rules. The nature of these mandatory rules is such that parties to a contract cannot be allowed to avoid their effect by specifying that some body of foreign law (which foreign law does not include those rules) is the governing law of the contract.

Rome I deals with such mandatory rules as follows:

- in cases where there is an express choice of law within the contract:
  - where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement
    References: Rome I, Art 3(3)
  - where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law (where appropriate as implemented in the Member State trying the claim) which cannot be derogated from by agreement
    References: Rome I, Art 3(4)
  - in the case of employment contracts, such an express choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable if no such express choice of law had been made. The effect of this provision is as follows:
    References: Rome I, Art 8(1)
    - the rules (under Arts 8(2)-8(4)) for determining the applicable law of an employment contract where no express choice is made are set out above
      References: Rome I, Arts 8(2)-(4)
    - in some cases, although the parties have expressly stated that the law applying to the contract will be that of country X, had they not done so those rules (under Arts 8(2)-8(4)) would instead have applied the laws of country Y
    - where the mandatory rules of country Y are more favourable than the laws of country X, the parties' act in choosing the laws of X to govern the contract may not have the result of depriving the employee of the benefit of any more favourable mandatory rules of country Y which would otherwise apply to him

- in **all** cases, ie whether or not an express choice of law is made by the parties:
  - Rome I defines a category of law it calls 'overriding mandatory provisions'. These are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under EC Regulation 593/2008
    References: Rome I, Art 9(1)

- nothing in EC Regulation 593/2008 shall restrict the application of the overriding mandatory provisions of the law of the country in which a claim is being tried
  References: Rome I, Art 9(2)
- effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application
  References: Rome I, Art 9(3)

Relevance of applicable law of contract to the scope of a statute's territorial application

In *Bleuse*, Elias P (as he then was) raised the possibility that the requirement for UK Courts and tribunals to apply *Marleasing* principles when determining the territorial application of a UK statute, in order to give effect to directly effective EU rights, **may** be limited to cases in relation to which:

- UK law is the applicable law of the contract, or
- although non-UK law has been chosen by the parties to govern the contract, what is now Article 8(1) of Rome I would allow the provisions of that UK statute to apply nonetheless, on the grounds that (i) they are provisions that cannot be derogated from by agreement and (ii) UK law would have been the applicable law had the parties not chosen the non-UK jurisdiction as the body of governing law (see the above section entitled 'Mandatory rules' for a fuller explanation of the operation of Article 8(1))
  References: Rome I, Art 8(1)

In summary, Elias P said this:
References: Bleuse v MBT Transport [2008] IRLR 264, paras 54-56

- on the facts of *Bleuse*, it was not in dispute before the EAT that English law was the applicable law of the relevant employment contract
- that 'brings in its train' the English statutory rules relating to the contract (unless, under what is now Article 8(1) of Rome I, the mandatory rules of another jurisdiction would have applied had the parties not chosen English law, and the claimant wishes to rely on those rules instead of the UK statutory rules -- see the above section entitled 'Mandatory rules' for a fuller explanation of the operation of Article 8(1))
  References: Rome I, Art 8(1)
- however, this does **not** mean that any particular provision of any particular UK legislation will necessarily be applicable to the claimant; whether he can take advantage of it depends instead on the scope of the territorial application of the statutory provision in issue

- in *Bleuse*, the directly effective EU right to holiday pay was the right under consideration. That right is contained in the Working Time Directive
  References: Working Time Directive, 2003/88/EC
- on the facts of *Bleuse*, the domestic UK Working Time Regulations were the relevant domestic provisions for giving effect to the directly effective EU right to holiday pay
  References: Working Time Regulations 1998, SI 1998/1833
- the reason that the domestic UK Working Time Regulations were the relevant domestic provisions was because English law was the applicable law of the relevant employment contract. It was **not** because of the mere fact that the English Court was exercising jurisdiction in hearing the case, even if it had exclusive jurisdiction: in different circumstances foreign law might be the appropriate domestic law to consider (even before a UK Court of tribunal). For example, where a claimant had a contract to drive in Austria, and the proper law of the contract was Austrian, but his employer was domiciled in England, he could still bring a claim in the English Courts (as the company is domiciled here), but the relevant body of law to be applied would be Austrian law
- it follows that '**at least in circumstances where**' either English law is the proper law of the contract, or where it provides the body of mandatory rules applicable to the employment relationship by virtue of what is now Article 8(1) of Rome I, an English court properly exercising jurisdiction must seek to give effect to directly effective rights derived from an EU Directive by construing the relevant English statute, if possible, in a way which is compatible with the right conferred
  References: Rome I, Art 8(1)

In *MOD v Wallis and Grocott*, Underhill P in the EAT has also confirmed that the question of the applicable law of the contract formed 'part of the premise of Elias P's reasoning in *Bleuse*'.
References: MOD v Wallis and Grocott (UKEAT/0546/08/ZT), para 21

However, the question that remains unanswered on the current state of the authorities, is whether, in interpreting the territorial scope of the Equality Act 2010, the Court of tribunal will only be required to use *Marleasing* principles to expand that scope beyond that which would be suggested by *Serco* in cases where the applicable law of the contract (or the relevant law under what is now Article 8(1) of Rome I) is the law of England and Wales, or the law of Scotland, as the case may be.

We would suggest that there are significant reasons to believe that no such restriction should apply:

- the wording of Elias P's (as he then was) judgment in *Bleuse* does **not** state that *Marleasing* principles will not apply where the applicable law is not that of the UK. Rather, he puts it the other way around, stating that those principles **will** potentially apply '**at least** in circumstances where' where UK law is the applicable law of the relevant employment contract. His judgment is silent on the point of whether *Marleasing* might also apply in determining the territorial application of a statute in some cases where the applicable law is foreign

- on the facts of *Bleuse*, there were reasons for the EAT to look at the employment contract, and hence at what body of law governed it: working time rights, such as the right to holiday pay, are the sort of rights which will naturally form part of a worker's contractual terms
- by contrast, equality rights, such as those protected by the Equality Act 2010, and by the EU law which the Act implements, will often not depend upon the existence of any contractual term
- for instance, an employee's right not to be directly discriminated against by his employer because of race is (unlike a right to holiday pay) most unlikely to be recorded in a term of his employment contract, and the right will exist whatever the contract says. Indeed, it is arguable that the existence of that right is not dependent upon the existence of the contract at all
- as a further example, consider a person applying for employment (but not yet engaged by the prospective employer). He too will have a directly effective EU right not to be directly discriminated against by the employer to whom he is applying because of race. Yet there will be no relevant contract in existence between the parties, and so:

    - the issue of applicable law of contract does not even arise
    - rights under Article 8(1) of Rome I, which likewise depend upon the existence of an employment contract, will also be irrelevant
      References: Rome I, Art 8(1)

- in *MOD v Wallis and Grocott*, Underhill P expressed the view that it was the intention of the Equal Treatment Directive to require member states to accord the rights conferred by it on expatriate employees whilst working **anywhere** within the EU. Although, following the reasoning of *Bleuse*, he limited that requirement on a Member State to cases involving employees working within the EU under contracts of which that Member State's law was the proper law (or the applicable law under what is now Article 8(1) of Rome I), it is arguable that that limitation is inappropriate, both in relation to the rights that formerly existed under the Equal Treatment Directive, and equally now as regards the directly effective EU rights implemented by the Equality Act 2010:
  References: MOD v Wallis and Grocott (UKEAT/0546/08/ZT), para 21

    - the directly effective EU rights implemented by the Equality Act 2010 (see above), just like the earlier Equal Treatment Directive, were all implemented to give expression to the same basic EU right, namely the principle of equal treatment
    - there is therefore no reason to suppose the intention of the various Directives etc underlying the Act was any different to the intention (as stated by Underhill P in *MOD v Wallis and Grocott*) of the Equal Treatment Directive
    - many of those directly effective EU rights underlying the Equality Act 2010 exist whether or not there is a relevant contract in existence (for reasons discussed immediately above)

- in conclusion, it is therefore arguable that the issue of applicable law of contract, or applicable law under Article 8(1) of Rome I, should in fact be an irrelevance when considering the territorial application of some, or perhaps all, of the workplace provisions of the Equality Act 2010

However, some workplace rights under the Equality Act 2010 **do** relate to the terms of an actual or prospective contract, eg in the context of employment:

- it is unlawful for an employer to discriminate against a person as to the terms on which the employer offers a person employment (see Employment events which give rise to prohibited conduct claims -- Recruitment)
  References: EqA 2010, s 39(1)(b)
- it is unlawful for an employer to discriminate against one of its employees as to the employee's terms of employment (see Employment events which give rise to prohibited conduct claims -- During employment)
  References: EqA 2010, s 39(2)(a)

Also the equality of terms provisions under the Act clearly relate to an existing contract: see Equality of terms -- overview.

It is possible that a distinction might be drawn between rights under the Equality Act 2010 which relate to a contract (such as those just listed) and those that do not, whereby:

- the territorial application of rights relating to a contract would only be extended on *Marleasing* principles where UK law is either:
  - the applicable law of the contract, or
  - the relevant law under Article 8(1) of Rome I, whereas
- the territorial application of rights in relation to which there is no relevant contract would be extended on *Marleasing* principles in all appropriate cases

However it is difficult to see the logic of drawing such a distinction. If a directly effective EU equality right was intended to cover all workers in any EU Member State, why should the ability to enforce such a right in a given Member State depend upon whether or not a contract is involved, or indeed on what the applicable law of that contract might be?

The alternative argument is that, as regards directly effective equality rights implemented by the Equality Act 2010, both the concept of applicable law of contract, and the rules of Rome I generally, are irrelevant. This would mean that *Marleasing* principles should be applied by UK Courts and tribunals in interpreting the territorial application of the Act whenever that is required to give proper effect to a directly effective EU right, irrespective of whether a contract is involved and irrespective of the applicable law of any relevant contract that exists.

In conclusion on this point, on the current state of the law, in determining the territorial application of provisions of the Equality Act 2010, the relevance of the principle of applicable law, or what the relevant law might be under Article 8(1) of Rome I, remains

uncertain. It will take further rulings by domestic UK appellate tribunals and Courts, and/or by the ECJ, before this issue is clarified.

Territorial application abroad: where claims may be possible in two Member States

In some situations, explored in greater detail above, EC Regulation 44/2001 confers general jurisdiction in relation to a dispute on more than one EU Member State.

In such situations the claimant may choose in which Member State to bring his claim. The Member State in which he brings a claim first will be obliged to accept jurisdiction, and is not entitled to refuse, even if the other Member State upon which EC Regulation 44/2001 also confers jurisdiction would seem the more appropriate or convenient one in which to try the case.
References: Lafi Office and International Business v Meriden Animal Health [2001] 1 All ER (Comm) 54

EC Regulation 44/2001 will confer dual jurisdiction in respect of the disputes which underlie certain claims which might be brought in the UK under the Equality Act 2010. For example:

- where a German employee is employed at a German branch of a company domiciled in England, general jurisdiction will be conferred on both the UK and Germany where the dispute arises out of the operation of that branch, eg where the employee claim his employer directly discriminated against him because of race in the course of some element of that branch's operations
- if the employee first lodges a claim under the Equality Act 2010 with an employment tribunal in England, then:
  - EC Regulation 44/2001 obliges that tribunal to accept general jurisdiction to try it, even if it takes the view that Germany would be the more appropriate country in which to resolve the dispute
  - the domestic ET Regulations also allow the claim to be made in England, because the respondent resides there
    References: ET Regulations, SI 2004/1861, Reg 19(1)

- however, the fact that the English employment tribunal has **general** jurisdiction to try the claim, and is obliged to accept that jurisdiction and allow the claim to proceed, tells us nothing regarding the separate question of whether, on the facts of the claim, the territorial application of the relevant provisions of the Equality Act 2010, under which the claim is brought, in fact covers the claimant. If the facts and matters of the claimant's claim do not fall within the scope of the Act's territorial application, the UK tribunal (having accepted jurisdiction to try the case) will simply find against him and dismiss his claim
  References: Bleuse v MBT Transport [2008] IRLR 264, paras 54-55

The facts of the above example highlight a further difficult and unresolved issue relating to the scope of the Equality Act 2010's territorial application:

- as noted in relation to the example just discussed, the fact that there was dual general jurisdiction for the dispute, and that one Member State with jurisdiction was the UK, does not assist with the separate question of determining whether the scope of the territorial application of the Equality Act 2010 covers the claim
- in that example, the right underling his claim (not to be discriminated against on grounds of race) is a directly enforceable EU equality right. It applies just as much to workers in Germany as it does to those in the UK
- the claimant in the example could have brought a claim to enforce that right in Germany instead. It is arguable that it would have been more appropriate for him to have done so
- the argument that the claim would more appropriately and/or conveniently have been brought in Germany is no ground whatsoever for a UK tribunal to decline jurisdiction to try the claim where the claimant in fact brings a claim first in England
- however, when it hears the claim, should the English tribunal take into account such arguments (regarding relative appropriateness and convenience of competing Member States in which the claim might have been brought) in determining whether or not the territorial application of the Equality Act 2010 extends to cover the facts and matters involved in the claim?

There are some passages in the authorities which indicate that such considerations may be relevant in determining territorial application:

- in *Bleuse*, Elias P (as he then was) says 'The scope of the provision [*under the Working Time Regulations relating to holiday pay*] must be extended to give effect to the directly effective rights under EU law. That law operates as part of the system of domestic law and must be given effect accordingly. I accept the argument of [*the claimant's advocate*] that if this were not done it would mean that the principle of effectiveness would not be satisfied: there would be no effective remedy for a breach of the EU right.' It would appear that Elias P accepts that there would otherwise be no alternative effective remedy for a breach of the EU right on the grounds that:
  References: Bleuse v MBT Transport [2008] IRLR 264, para 57

  - English law was the relevant domestic law for giving effect to the directly effective right
    References: Bleuse v MBT Transport [2008] IRLR 264, para 54
  - that 'brought in its train' the statutory rules relating to the contract, such as the Working Time Regulations
    References: Bleuse v MBT Transport [2008] IRLR 264, para 54
  - hence (although the claimant had worked in Germany and Austria rather than the UK) neither German nor Austrian law were the 'relevant domestic law for giving effect to the directly effective right', even though the directly effective right would also apply to workers in Austria and Germany

- in *Duncombe*, Mr Duncombe was employed by the UK Secretary of State for Children, Schools and Families at a European school, established by the EU, in Germany. His contract contained an English choice of law clause. He sought to bring a claim of unfair dismissal in the UK, in order to enforce his directly effective EU rights under the Fixed-term Work Framework Directive. His claim was initially rejected because, applying *Serco*, his employment was not based in Great Britain. In overturning that finding, Mummery LJ, giving the only reasoned judgment, said 'The only reason for denying him that remedy for this dismissal is that he worked outside Great Britain. If he does not have that remedy, he will have no remedy anywhere for the denial of his EC derived right. It is necessary for him in such circumstances to have that remedy, if that EC right is to have any effect'
  References: Duncombe, Fletcher v SoS for Children, Schools and Families [2010] IRLR 331, para 146

  Fixed-term Work Framework Directive, 1999/70/EC

These passages suggest that the need to use *Marleasing* principles to extend the reach of UK legislation arises partly because there is no other route by which the relevant directly effective EU right may be enforced. This factor appears to be said to be relevant on account of the EU 'principle of effectiveness' (discussed above).

The passages might also implicitly suggest that where there **is** an alternative Member State, other than the UK, in which a remedy for the breach of a directly effective EU right might be sought instead and, in particular, if that alternative Member State can be shown to be a more appropriate and/or convenient place to enforce the right, this very fact might lead a UK Court or Tribunal **not** to extend the territorial application of the relevant UK implementing legislation in order to allow a claim to be brought here which otherwise would not fall within the scope of that domestic legislation.

However, in both *Bleuse* and *Duncombe*, it would appear that the conclusion that there was no alternative Member State in which the right might have been enforced derived from the importance attached to what the applicable law of the employment contract was (in both cases it was English law). In *Duncombe*, it had been argued on Mr Duncombe's behalf that:
References: Duncombe, Fletcher v SoS for Children, Schools and Families [2010] IRLR 331, paras 135, 136

- the UK was the only country 'with which, and with the employment law of which, Mr Duncombe [had] any connection'
- 'Mr Duncombe's employment had no relevant connection with the system of law of the country (Germany) in which the European School at Karlsruhe is located'
- 'There was no system of international employment law applicable in the enclave of the European School'
- 'Of the national systems of employment law that might be regarded as applicable, the British system was the only sensible answer'

If, as we suggest above may be the case, both the concept of applicable law of contract, and the rules of Rome I generally, should in fact be viewed as irrelevant when considering the territorial application of provisions of the Equality Act 2010 which implement directly effective EU equality rights, it follows that, in both *Bleuse* and *Duncombe*:

- English law, and in particular the English domestic legislation which implemented the relevant EU rights, would have enjoyed no special status such as to lead it to be preferred over the legislation implementing the same rights in Germany or Austria in the case of *Bleuse*, or in Germany in the case of *Duncombe*
- the relevant directly effective EU rights could also have been enforced in one of those other relevant alternative Member States, instead of in the UK

If the concept of applicable law of contract, and the rules of Rome I generally, **are** irrelevant in this context, would a UK tribunal still be entitled to decline to extend the territorial application of the Equality Act 2010 in cases where:

- another Member State also had general jurisdiction to entertain the claim, and
- the relevant directly effective EU equality right could also have been enforced in that other Member State, and
- it appeared to the UK tribunal that that other Member State was clearly the more appropriate and/or convenient country in which to enforce that right?

Once again, on the current state of the law, the answer to this question remains unclear, and it will take further rulings by domestic UK appellate tribunals and Courts, and/or by the ECJ, before this issue is clarified.

In the meanwhile, we would suggest that:

- if our argument above is correct, that applicable law of contract and Rome I ought to be considered irrelevant in determining the scope of territorial application of provisions under the Equality Act 2010, it is difficult to see what **other** basis there could be for preferring the domestic legislation of one Member State over another as a means of enforcing a right in a case where:
  - EC Regulation 44/2001 confers general jurisdiction on both Member States, and
  - the relevant directly effective EU equality right is intended to apply to workers in both those Member States
- little harm would be done by allowing a worker, in this situation, to choose in which of those Member States he wishes to bring his claim:
  - the Member State in which he brings his claim first will be fixed with a duty to try the claim under EC Regulation 44/2001, as it may not decline that general jurisdiction which has been conferred upon it (even if the other Member State would have been a more convenient or appropriate country in which to try the claim)

References: Lafi Office and International Business v Meriden Animal Health [2001] 1 All ER (Comm) 54

- once he has brought his claim in that first Member State, he will not be entitled to pursue a parallel claim in the other one (as that would be an abuse of process)

- having chosen the first Member State as the location in which to pursue his claim (as he was entitled to do under the general jurisdiction rules of EC Regulation 44/2001), it would seem somewhat absurd if that Member State's Court or tribunal which is trying the claim could then find against him on the basis that the relevant directly effective EU equality right ought instead to have been pursued under the domestic legislation of the other Member State, in circumstances where it appears to be the intention of the EU legislature that the right should apply to workers in **any** EU Member State
- there are therefore good practical arguments as to why UK tribunals should be prepared to extend the territorial application of the Equality Act 2010 to cover such claims, even where it appears that another foreign Member State would have been a more convenient or appropriate location in which to seek to enforce the relevant directly effective EU equality right

This issue is not purely academic, it has significant practical importance:

- as Elias P (as he then was) pointed out in *Bleuse*, the question of which Member State's domestic law applies might make a real difference where:
  References: Bleuse v MBT Transport [2008] IRLR 264, para 54

  - one Member State had implemented the directly effective EU rights in its domestic law and the other had not, or
  - it was impossible to construe the domestic law of one Member State so as to give proper effect to the directly effective EU right, whereas it was possible so to construe the domestic law of the other

- as a matter of fact, some EU Member States have a much better record of implementing Directives (either effectively or at all) in their domestic legislation than others

Take, as an example, a national of an EU Member State called Otherland, who happens to be of black African ethnicity. He is employed by a UK-domiciled company in its branch located in Otherland. He was recruited in Otherland, and has always worked in the branch there. His contract of employment expressly states that the applicable law is that of Otherland. In the course of his employment, his employer refuses to consider him for a promotion because of his ethnic origins. Otherland has failed to implement the Race Directive in its domestic laws, which makes it very difficult (or perhaps impossible) for him to bring his claim in the Courts or tribunals in Otherland. Can it really be correct that he would not be covered by the provisions of the Equality Act 2010, and hence not able to enforce his rights in the UK, despite the fact that:

- the UK employment tribunal undoubtedly has general jurisdiction to try the claim, and
- the directly effective EU equality right upon which he wishes to rely is intended to cover all workers in all Member States?

Working on ships or hovercraft, and seafarers

NOTE: TRANSITIONAL PROVISIONS ONLY

Part 5 of the Equality Act 2010 (ss 39-83), which contains current equality law relating to the workplace, only applies in such circumstances 'as are prescribed' to:
References: EqA 2010, s 81

- work on ships
- work on hovercraft, and
- seafarers

There is a power (under section 81 of the Equality Act 2010) to make secondary legislation, relating to work on ships, work on hovercraft and seafarers, which would prescribe those circumstances.

However, as at the time that the core of the Act came into force (1 October 2010), no such legislation had been made.

Instead, transitional provisions were made on 20 September 2010, which came into force on 1 October 2010, simultaneously with the Equality Act 2010.
References: Equality Act (Commencement No 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010, SI 2010/2317

In essence, the effect of these transitional provisions is that all of the workplace law contained in the following enactments will continue to be the only operative UK equality law relating to (i) work on ships, (ii) work on hovercraft and (iii) seafarers, until new regulations under section 81 of the Equality Act 2010 come into force:
References: SI 2010/2317, Art 11(1), Sch 3

- the Equal Pay Act 1970
- the Sex Discrimination Act 1975
- the Race Relations Act 1976
- the Disability Discrimination Act 1995
- the Sexual Orientation Regulations 2003, SI 2003/1661
- the Religion or Belief Regulations 2003, SI 2003/1660
- the Age Regulations 2006, SI 2006/1031

The supportive legislative machinery to this pre-Equality Act 2010 law, eg provisions relating to discrimination questionnaires and compromise agreements, contained in various subordinate legislation, is also preserved in respect of work on ships, work on hovercraft and seafarers (only) until new regulations under section 81 of the Equality Act 2010 come into force.
References: SI 2010/2317, Art 11(3), Sch 4

As regards the territorial scope of the pre-Equality Act 2010 legislation listed above, unlike the Equality Act 2010 itself, that older legislation did have:

- explicit detailed provisions covering territorial application generally, and
- specific detailed provisions covering territorial application with regard to work on ships, aircraft and hovercraft in particular

Under the transitional provisions, those specific detailed provisions covering territorial application will continue to apply, but only insofar as they relate to:

- work on ships
- work on hovercraft, and
- seafarers

For further information on their operation, see Discrimination claims by employees -- Working on ships, aircraft and hovercraft.

New draft regulations, the *Equality Act (Work on Ships and Hovercraft) Regulations 2011*, designed to prescribe the circumstances in which the workplace provisions of the Equality Act 2010 will apply to seafarers working on ships and hovercraft, are now available, following a Government announcement on 13 May 2011.
References: May 2011 draft: Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011

Written statement, 13 May 2011, Mike Penning MP

These regulations have not yet been approved by Parliament, and the date on which they will come into force is not yet known. For further information, see our news analysis report of 24 May 2011.

Work on aircraft

Note, however, that (with the exception of the Race Relations Act 1976) the pre-Equality Act 2010 law also contained specific detailed provisions covering territorial application with regard to work on **aircraft**. The transitional arrangements do not cover work on aircraft, and so:

- the workplace provisions of the Equality Act 2010 (Part 5, ss 39-93) , rather than the old law, apply to work on aircraft
- the transitional arrangements do not preserve the specific detailed provisions covering territorial application under the old law in relation to any work on aircraft, and so the territorial application of the Equality Act 2010 as regards work on aircraft will be determined in the same way as with all other types of work (except work on ships, work on hovercraft and seafarers), as discussed above in all the earlier sections of this practice note

Effect of Marleasing and Bleuse

Note, however, that in *MOD v Wallis and Grocott*, Underhill P found it appropriate, in effect, to ignore the express territorial limitation imposed by section 6(1) of the Sex Discrimination Act 1975, in order to give effect to the directly effective rights under EU law implemented by that domestic provision, following the principle explained in *Bleuse*, that:
References: MOD v Wallis and Grocott (UKEAT/0546/08/ZT)

Bleuse v MBT Transport [2008] IRLR 264, para 57

- the Court's or tribunal's deliberations in seeking by implication to discern the territorial application of that statute should take into account the '*Marleasing* principle', and determine the scope of that territorial application in such a way as to give effect to those directly effective EU rights, ensuring that they can be enforced by the UK Courts and tribunals
- this is necessary in order to satisfy the principle of effectiveness, as otherwise there would be no effective remedy for a breach of the EU right

For further detail regarding the operation of this *Bleuse* principle, see Territorial application abroad: relevance of EU equality rights, above.

In *MOD v Wallis and Grocott* Underhill P considered the fact that the Sex Discrimination Act 1975 contained express territorial limitations, whereas the relevant domestic legislation being considered in *Bleuse* and *Duncombe* was, in both cases, silent as to its territorial application. He confirmed that this made no difference: the *Bleuse* principle is strong enough to require disapplication of express territorial limitations where appropriate.
References: MOD v Wallis and Grocott (UKEAT/0546/08/ZT), para 19

Likewise, Mummery LJ in *Duncombe* confirmed that, where appropriate, the *Bleuse* principle would require 'modification, if necessary, to the extra-territorial or other limitations, which are otherwise a barrier to the enforcement of the EC right', which phrase certainly appears to encompass ignoring or adapting express territorial application provisions.
References: Duncombe, Fletcher v SoS for Children, Schools and Families [2010] IRLR 331, para 130

It follows that the limits imposed by the current (transitional) express provisions regarding territorial application with regard to work on ships, work on hovercraft and seafarers are similarly open to challenge under the *Bleuse* principle.

Offshore work

Special provisions apply to 'offshore work', which is defined as work for the purposes of:
References: EqA 2010, s 82(3)

- activities in the territorial sea adjacent to the United Kingdom
- activities (as mentioned in the Petroleum Act 1998) connected with the exploration of, or the exploitation of the natural resources of, the shore or bed of the waters listed below or the subsoil beneath it:
  References: Petroleum Act 1998, ss 11(2)(a), 11(8)(b)-(c)

- waters in an area designated under section 1(7) of the Continental Shelf Act 1964
  References: Continental Shelf Act 1964, s 1(7)

  Orders: SI 1987/1265, SI 2000/3062, SI 2001/3670
- waters, to be specified by Order, which are situated in a foreign sector of the continental shelf, or which comprise any part of a cross-boundary field (no such Order yet exists)
  References: Petroleum Act 1998, ss 10(8)

- activities (as mentioned in the Petroleum Act 1998) carried on, in the same waters which are listed immediately above, from, by means of or on, or for purposes connected with, any installation which is or has been maintained, or is intended to be established, for the carrying on of any of the following activities:
  References: Petroleum Act 1998, ss 11(2)(b), 11(3), 11(8)(b)-(c)

  - the exploitation or exploration of mineral resources in or under the shore or bed of those waters
  - the exploration of any place in, under or over those waters with a view to the storage of gas in such a place
  - the conversion of any place in, under or over those waters for the purpose of storing gas
  - the storage of gas in, under or over those waters or the recovery of gas so stored
  - the unloading of gas at any place in, under or over those waters
  - the conveyance of things by means of a pipe, or system of pipes, constructed or placed on, in or under the shore or bed of those waters
  - the provision of accommodation for persons who work on or from an installation which is or has been maintained, or is intended to be established, for the carrying on of the first three (installation-based) activities listed immediately above

- acts or omissions (as mentioned in the Energy Act 2004) taking place on, under or above a 'renewable energy installation' (as defined) situated in:
  References: Energy Act 2004, ss 87(1)(a), 87(4), 104(3)-(5)

  - tidal waters and parts of the sea in or adjacent to Great Britain up to the seaward limits of the territorial sea
  - waters in a 'Renewable Energy Zone', as defined
    References: Energy Act 2004, s 84(4)

    Marine and Coastal Access Act 2009, s 41(3)

    Designation of Area Order 2004, SI 2004/2668

- acts or omissions (as mentioned in the Energy Act 2004) taking place on, under or above those same waters in relation to a 'related line' (which means certain electric lines, or parts of electric lines, as defined)
  References: Energy Act 2004, ss 87(1)(b), 87(4), 87(6), 87(7)

  Electricity Act 1989, s 4(3E)

Where the above definition of offshore work applies, the work in question may be employment, contract work, a position as a partner or as a member of an LLP, or an appointment to a personal or public office.
References: EqA 2010, s 82(4)

The workplace provisions of the Equality Act 2010 (ie Part 5, comprising ss 39-83) apply to offshore work as if the work were taking place in Great Britain, unless it:
References: Equality Act (Offshore Work) Order 2010, SI 2010/1835, Art 2

- takes place in 'the Northern Irish Area' (as defined in the Civil Jurisdiction (Offshore Activities) Order 1987)
  References: Civil Jurisdiction (Offshore Activities) Order 1987, SI 1987/2197, Art 1(2)
- is in connection with a ship which is in the course of navigation or a ship which is engaged in dredging or fishing ('dredging' does not include the excavation of the sea-bed or its subsoil in the course of pipe laying)

Hence, except for those defined exceptions, claims relating to offshore work under the Equality Act 2010 will be able to be brought and resolved in the UK Courts or tribunals, as appropriate, since such claims will fall within the scope of the Act's territorial application.

Jurisdiction for hearing claims relating to offshore work is divided up between the Courts and employment tribunals as follows:

- as regards (i) activities in the territorial sea adjacent to the United Kingdom and (ii) the activities listed above which are mentioned in the Petroleum Act 1998:
  References: EqA 2010, ss 82(3)(a), 82(3)(b)

  Equality Act (Offshore Work) Order 2010, SI 2010/1835, Art 3

  - the employment tribunal in England and Wales shall have jurisdiction to determine a complaint arising from an act taking place in 'the English area' (as defined in the Civil Jurisdiction (Offshore Activities) Order 1987), as if the that act had taken place in England and Wales
    References: Civil Jurisdiction (Offshore Activities) Order 1987, SI 1987/2197, Art 1(2)
  - the employment tribunal in Scotland shall have jurisdiction to determine a complaint arising from an act taking place in 'the Scottish area' (as defined in the Civil Jurisdiction (Offshore Activities) Order 1987), as if that act had taken place in Scotland

References: Civil Jurisdiction (Offshore Activities) Order 1987, SI 1987/2197, Art 1(2)

- as regards the acts and omissions listed above which are mentioned in the Energy Act 2004:
  References: EqA 2010, s 82(3)(c)

  Equality Act (Offshore Work) Order 2010, SI 2010/1835, Art 4

  - the High Court shall have jurisdiction to determine a claim arising from an act taking place in 'the English area' (as defined in Article 4(3) of the Equality Act (Offshore Work) Order 2010), as if that act had taken place in England or Wales
  - the Court of Session shall have jurisdiction to determine a claim arising from an act taking place in 'the Scottish area' (as defined in Article 4(3) of the Equality Act (Offshore Work) Order 2010), as if that act had taken place in Scotland