

**HOUSE OF LORDS**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT  
IN THE CAUSE**

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

[Abridged Version relating to Crofts Only](#)

**[2006] UKHL 3**

**LORD HOFFMANN**

My Lords,

*The issue*

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

Britain. The argument has been over what those limitations should be. Putting the question in the traditional terms of the conflict of laws, what connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair?

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

### *The facts*

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

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

### *The rival formulations*

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

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

17. That is indeed putting the matter in a nutshell. But, as Lord Macnaghten

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

18. Mr Linden, who appeared for Serco Ltd and defended the judgment of the Court of Appeal, was prepared to accept the interpretation of “employment in Great Britain” adopted by the majority of the Court of Appeal in *Crofts*. It could include employees like Mr Crofts who were based in Great Britain, even though they also worked (perhaps most of the time) outside the country. That did Mr Linden’s case no harm. But he was unwilling to extend flexibility to the extent of including employees like Mr Lawson who did not work in Great Britain at all.

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

### *Principles, not rules*

23. In my opinion the question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements. This is a question of the construction of section 94(1) and I believe that it is a mistake to try to formulate an ancillary rule of territorial scope, in the sense of a verbal formula such as section 196 used to provide, which must then itself be interpreted and applied. That is in my respectful opinion what went wrong in the *Serco* case. Although, as I shall explain, I think that there is much sound sense in the perception that section 94(1) was intended to apply to employment in Great Britain, the judgment gives the impression that it has inserted the words “employed in Great Britain” into section 94(1). The difference between Lord Phillips of Worth Matravers MR and the majority of the court in *Crofts v*

*Veta Ltd* was about how these words should be construed. But such a question ought not to arise, because the only question is the construction of section 94(1). Of course this question should be decided according to established principles of construction, giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme. But this involves the application of principles, not the invention of supplementary rules.

### *Peripatetic employees*

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

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

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

959, where Lord Denning MR said, at p 964:

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

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

#### *Crofts v Veta Ltd*

31. Like the majority in the Court of Appeal, I think that Lord Denning’s approach in *Todd v British Midland Airways Ltd* points the way to the answer in *Crofts v Veta Ltd*. It is of course true that British Midland was a British airline and that none of the foreign factors relied upon by Mr Goudie were present. The only foreign factor was that Mr Todd spent more of his time outside Great Britain than in it. But employees of a foreign airline can also be based in Great Britain and in my opinion this was the situation of Mr Crofts. Unless, like Lord Phillips of Worth Matravers MR, one regards airline pilots as the flying Dutchmen of labour law, condemned to fly without any jurisdiction in which they can seek redress, I think there is no sensible alternative to asking where they are based. And the same is true of other peripatetic employees.

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

“(6) In the early 1990s, largely for economic reasons [Cathay Pacific] entered into negotiations with the trade union representing their aircrew with a view to formulating a ‘basings policy’ designed to enable aircrew to live in, and work from, other parts of the world. Negotiations were successful and a ‘Basings Agreement’ was concluded. The agreement provided that a new company would be set up to employ those aircrew who had volunteered for, and been granted, a foreign basing...”

(8) The Basings Policy embodied and/or was operated on (among others) the following principles:

(a) [Cathay Pacific] aircrew who applied successfully for a basing outside Hong Kong would be required to resign their employment with [Cathay] and transfer to the employment of a subsidiary company of [Cathay] (Veta)

(b) Any pilot transferred to a new basing would be allocated a 'home base' from which his...flying cycles would ordinarily commence and at which they would ordinarily commence and ... end.

(c) There was no express requirement for aircrew to reside close to their home base or even within the relevant base area. On the other hand, staff rostered for reserve duty were required to be within two hours travel of their home base for the periods to which that rostered duty related.

(d) Unlike expatriate aircrew living in Hong Kong, those transferring to new bases would not be eligible for financial support in respect of living accommodation and other expenses

(e) Transferring employees would be responsible for their own taxation and immigration arrangements."

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

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

*Fact or law?*

34. Mr Griffith-Jones said that the Tribunal's conclusion was a finding of fact which

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

#### *Disposal*

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

#### **LORD WOOLF**

My Lords,

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

#### **LORD RODGER OF EARLSFERRY**

My Lords,

44. I have had the advantage of reading the speech of my noble and learned friend

Lord Hoffmann in draft. I agree with it and for the reasons he gives I would dispose of the three appeals in the way he proposes.

**LORD WALKER OF GESTINGTHORPE**

My Lords,

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

**BARONESS HALE OF RICHMOND**

My Lords,

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