# EMPLOYMENT TRIBUNALS

**COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals**

"**This has been a remote hearing not objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.**"

| **Claimant** | | **Respondent** |
|---|---|---|
| **Ms Carole Tokody** | **v** | **(1) Cover-More Insurance Services (UK) Ltd**<br>**(2) Cover-More Group Ltd** |

**Heard at**: Watford **On**: 6, 7 and 8 July 2021

**Before:** Employment Judge Bloch QC

**Appearances**

**For the Claimant:** In person
**For the Respondent:** Ms S. Omeri, counsel

## RESERVED JUDGMENT ON PRELIMINARY ISSUES

The preliminary issues ordered to be decided by the Tribunal on 17 August 2020 are determined as follows:

1. The English Employment Tribunal has jurisdiction over all elements of the Claimant's claims;

2. The claimant made protected disclosures, (more fully referred to below) in relation to Air Canada, Arsenal, Travelex and Innate (but not otherwise) that may be relevant to a claim of automatic unfair dismissal on grounds that the reason or principal reason for her dismissal was that she had made one or more protected disclosures.

# REASONS

## The preliminary issues

1. On 29 February 2020, Employment Judge Bartlett listed the case for a preliminary hearing on 17 August 2020, in order to determine:

> "Whether any of the claims are outside the jurisdiction in so far as they relate to the USA and Australia."

2. At the Preliminary hearing on 17 August 2020, Employment Judge Smail listed the case for preliminary hearing on 6–8 July 2021 at which the following two questions would be determined:

   2.1 "whether the English Employment Tribunal has jurisdiction over one or more elements of the Claimant's claims;

   2.2 "if it has jurisdiction over the Claimant's claim of unfair dismissal, did the Claimant make any protected disclosures that may be relevant to a claim of automatic unfair dismissal because the reason or principal reason for her dismissal was that she had made one or more protected disclosures."

3. The parties were broadly in agreement that in cases raising the issue of the international and territorial jurisdiction of the Employment Tribunal of England & Wales, there are (at least) three key questions for the Tribunal considering the issue to answer, namely:

   3.1 Can the claimant ("C") bring a claim in England ('the international jurisdiction question')?

   3.2 If so, what is the law applicable to such claim/does "British" employment law apply? (This is how the Respondents ("Rs") formulate the question, C confining itself to "which substantive law is applicable to the agreements and dispute under consideration?)". While this is not a question specifically formulated as a preliminary issue, I shall address it, given its bearing on the third question below.

   3.3 Does "British" employment law indicate that the claims fall within the territorial scope of [in this case] s.103A (and/or s.94) of the Employment Rights Act 1996 ("ERA")? [1]

## The facts – the Agreements

4. The Second Respondent ('R2') is the parent company of the First Respondent ('R1'). It is a company registered in Australia and located in Sydney, New South Wales, Australia. It is a leading travel insurance and assistance provider.

[1] Oddly, C's written Submissions cited the questions as they had been originally formulated by EJ Bartlett and not the subsequent questions formulated by EJ Smail

5. R1 is a wholly-owned subsidiary of R2. Its registered office is located in London, United Kingdom.

6. C was employed from 24 October 2011[2]. She worked latterly as Chief Executive Officer ('CEO') Global – Direct and Fintech on assignment in the UK, until she was dismissed by reason of a purported redundancy on 14 June 2019.

7. C's employment was governed by a series of agreements (the "Cover-More Agreements") to reflect her relationship with R2 and with the other entities to whom she was assigned from time to time.

8. The relevant Cover-More Agreements were the following:

   8.1 UK Employment Agreement with R1 unsigned but dated 10 July 2017;

   8.2 Unsigned UK Assignment Letter dated 8 June 2017 by "Mike Emmett, Group Chief Executive Officer for and on behalf of Cover-More Group" (ie R2);

   8.3 Australian Employment Agreement (with ASTIS Holdings Pty Limited) dated 11 July 2011;

   8.4 Like documents as in 8.1 And 8.2 in 2016 regarding her assignment (before the English assignment) to the USA ("US Employment Agreement" and "US Assignment Letter", respectively).

9. Whilst the UK Employment Agreement and UK Assignment Letter were both unsigned, it was accepted by the parties that these agreements governed C's employment at the times relevant to the present claims.

10. The UK Employment Agreement was in typical form for an English law employment agreement with a senior executive. It provided (for example):

    10.1 For 6 months' notice to terminate by either party (cl 2.1);

    10.2 For continuity of service with service under the Australian Employment Agreement (cl 2.3);

    10.3 That C was to serve R1 as Chief Executive Officer, Direct and Fintech (cl 4.1);

    10.4 That C was to report directly to Chief Executive Officer ("CEO") of R2 (cl 4.2); (this was latterly Michael Emmett (based at the Sydney, Australia office of R2) until about 4 September 2018 after which Hanno Mijer (also based in Sydney) was appointed CEO of R2);

[2] While the Australian Employment Agreement is with ASTIS Holdings Pty Limited the parties seem to be at one in regarding R2 as C's Australian employer (See eg R's Opening Note para 2)

10.5 That C would act as a director of R1 and carry out duties on behalf of any other Group Companies as might be assigned to her by R1 or R2 (cl 4.3(a));

10.6 That she should faithfully and diligently exercise such powers and perform such duties as might from time to time be assigned to her by R1 or R2 (cl 4.3);

10.7 That she would comply with all reasonable instructions given to her by R1 and R2 (cl 4.3);

10.8 That she would promptly make such reports to the Board of directors of R2 in connection with the affairs of R1 or any Group Company on such matters and at such times as were reasonably required (cl 4.3);

10.9 That she would report her own wrongdoing and any wrongdoing of proposed wrongdoing of any other employee or director of R1 or any Group Company immediately on becoming aware of it (cl 4.3);

10.10 That her normal place of work was R1's address in Uxbridge or such other place which R1 or any Group Company might reasonably require (cl 5.1);

10.11 That salary would be paid subject to tax and National Insurance contributions (cl 7);

10.12 That C's employment would be subject to review by the Chief Executive Officer of R2.

11. The UK Employment Agreement contained all the usual provisions of an English law employment agreement – holiday; bonus; outside interests; confidential information; incapacity, intellectual property; termination for gross misconduct; garden leave; termination with payment in lieu of notice; post-termination restrictive covenants; disciplinary and grievance procedures; pension; data protection and other usual ancillary provisions, including, an entire agreement clause and a third party rights clause to the effect that no person other than a party to the agreement might enforce any of its terms.

12. The UK Employment Agreement was to be executed as a deed by "Cover-More Insurance Services (UK) Limited" [R1] acting, by Mike Emmett, Cover-More Group Chief Executive Officer".

13. Cl 30 of the UK Employment Agreement provided:

"

*30.1 This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-*

*contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales;*

30.2 *Each party irrevocably agrees that the Court of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or formation*."

14. Relevant parts of a UK Assignment Letter dated 8 June 2017 addressed to C under the letterhead "Cover-More" (and identified below on the front page as "Cover-More Insurance Services Pty Ltd") but to be signed by "Mike Emmett Group Chief Executive Officer For and on behalf for Cover-More Group" (ie R2), included the following:

14.1 Reference to the Australian Employment Agreement and her assignment on 8 April 2016 with Cover-More Inc for three years;

14.2 The change to the location of C's assignment (from the USA) for the remainder of the assignment period to R1 in Uxbridge, London;

14.3 An outline of C's "Re-assignment only during the Assignment Period" and that the UK Assignment Letter must be read in conjunction with the Australian Employment Agreement and R2's related policies;

14.4 That C would be assigned to R1 on an exclusive full time basis for the remainder of the assignment period which C acknowledged commenced on 8 April 2016 and would continue until it terminated on 7 April 2019 without need for notice; or the assignment could be terminated by either party on 6 months' prior written notice at any time in accordance with the cl 2 of the UK Employment Agreement (or terminated in accordance with the UK Service Agreement or with paragraphs 7 or 16 of the UK Assignment Letter);

14.5 That she would work in the role of CEO, Direct and Fintech at R1 ("Position") or such other positions within the Group as might subsequently be agreed in writing;

14.6 That she would report to and be subject to the reasonable direction and control of the CEO of R2;

14.7 That she would be employed by R1 for the assignment period, unless terminated earlier in accordance with the UK Assignment Letter or the UK Employment Agreement

14.8 That for the assignment period C would be on authorised unpaid leave from her Australian employment;

14.9 That the terms and conditions of the re-assignment would be governed solely by Assignment Letter and the UK Employment Agreement;

14.10 **During the assignment period if there was any conflict of terms between the UK Employment Agreement "or"[3] the UK Assignment Letter, the UK Employment Agreement would prevail;[4]**

14.11 **During the assignment period, if there was any conflict of terms between the UK Employment Agreement "or"[5] the Australian Employment Agreement the UK Employment Agreement would prevail[6];**

14.12 Upon termination of the reassignment and repatriation to Australia with a role with an Australian group entity, the terms and conditions of the UK Employment Agreement and the UK Assignment Letter would cease to apply (subject to the terms thereof) and the usual terms and conditions of the Australian Employment Agreement would be in effect;

14.13 if the assignment terminated earlier than the assignment termination date C would return to Australia and be employed in the Position (or another suitable role) by an Australian company within R2 that was mutually agreed. The return position would be commensurate in seniority with her Position with remuneration commensurate in seniority with the Position and continuity of service and employment by R2 on no less favourable terms.

15. Paragraph 20 of the UK Assignment Letter provided:

> "Assignment Governing Law
> The terms and conditions of your assignment, as outlined in this Letter will be governed by the laws of New South Wales, and your employment in the [R1] Position will be governed by the laws of England and Wales, without reference to rules relating to conflicts of law."[7]

16. The US Assignment Letter provided that:

> "The terms and conditions of your assignment, as outlined in this letter agreement will be governed by the laws of New South Wales, and your employment in the Position will be governed by the laws of the State of New York, without reference to rules relating to conflicts of law"

while the US Employment Agreement provided that:

> "This Agreement will be governed by, and construed under and in accordance with, the internal laws of the State of [New York[8]], without reference to rules relating to conflicts of laws".

[3] sic
[4] My emphasis
[5] sic
[6] My emphasis
[7] My emphasis
[8] Though blank in the version in Exhibit CT4 in the bundle, footnote 5 to that document indicates the agreement

17. Accordingly, the Cover-More Agreements on their face reflected careful consideration of, and agreement regarding (amongst other things):

    17.1 The proper law of each different agreement;

    17.2 Exclusive jurisdiction clauses applicable to each agreement;

    17.3 Conflict provisions to cater for (a) potential conflicts between provisions of the different agreements and (b) prioritisation of the relevant provisions in such a case.

**The pleadings/tribunal documents**

18. By a claim form (ET), presented to the Employment Tribunal on 14 November 2019 C brought claims against R1 and R2 (R2 being described as Cover-More Group Limited) for unfair dismissal. I am satisfied that the claim may fairly be construed as covering both ordinary unfair dismissal (contrary to ERA s.94) and automatic unfair dismissal (contrary to ERA s.103A) that is, that she was dismissed for the sole or principal reason of having made one or more protected disclosures ("whistleblowing")[9]. R1 was described as her employer since 6 August 2017 and she claimed that that she had been employed by ASTIS Holdings Pty Ltd (for present purposes R2 – see above), since 8 October 2015 under the Australian Employment Agreement.

19. C's claim against R1 was in respect of her redundancy (though she sought her benefits pursuant to Australian law at paragraph 61f. and at paragraph 63f. of the ET1) and on the face of it her claim against R2 was (at least principally) in respect of its termination of her UK Assignment - and therefore the UK Employment Agreement.

20. C appeared before me unassisted but produced written submissions which had apparently been drafted for her benefit by Australian lawyers, as apparently had the ET1. It may be for this reason that the form of the pleading is not entirely familiar from an English employment tribunal perspective. Ms Omeri (who is a dual-qualified barrister practising in England and Australia) explained that for instance it was not necessary under Australian statute law to plead that disclosures were in the public interest – which might explain why this was not addressed in the ET1. Given the predominantly legal nature of the debate before me, although an obviously intelligent litigant, C was able to provide little assistance beyond the written submissions prepared for her.

21. The pleadings of both parties read somewhat oddly in the light of the submissions that were relied on by each of the parties for this preliminary hearing. So (for example) while referring to R1 as her employer from 6

"should be governed by the law in which the Company is incorporated or by the law of the jurisdiction in which the executive will provide services." The company was incorporated in Delaware, but the Claimant provided services in New York. The US Assignment Letter said employment was governed by the laws of the State of New York.

[9] By letter dated 8 December 2020 Rs' solicitors accepted that the claim covered both types of dismissal

August 2017 (paragraph 2.c.) C did not specifically plead that R2 was her employer for the purposes of her claims, referring (paragraph 6) to "the Cover-More Group" (not Cover-More Group Limited) as her employer from 24 October 2011. However, that R2 was (additionally to R1) her employer is core to her written submissions. That said, while the Australian Employment Agreement was with ASTIS Holdings Pty Limited, as noted above, the parties seem to be at one in regarding R2 as C's Australian employer (See eg R's Opening Note para 2). Further, C pleaded (paragraph 38-9) that any redundancy (which is denied) had the effect of terminating her UK Employment Agreement only and did not deal with her rights under the UK Assignment Letter or under the Australian Employment Agreement. C's claims against R2 seem to be (principally) that it had breached the UK Assignment Letter (paragraph 62) and Australian Employment Agreement (paragraph 63.f). The claims were summarised on the ET1 at page 15 [10]as:

21.1 Unfair dismissal as a result of which she claimed compensation from R1 – (and in an unexplained way) R2;

21.2 Breach of implied terms of the UK Employment Agreement (notably, reasonableness, good faith and trust and confidence) as a result of which she claimed compensation from R1;

21.3 Breach of the UK Assignment Letter, ie that termination of the Re-assignment Letter was unfair and also breached like implied terms as are referred to above (reasonableness, good faith and trust and confidence).

22. Despite the references to breaches of implied terms, reading the ET1 as a whole, the primary claims appeared to be a claim of unfair dismissal (and in particular automatically unfair dismissal against both Rs, contrary to ERA s.103A). I shall expand on this below.

23. Having regard to other claims which might fall within the statutory (subject matter) jurisdiction of this tribunal, the claims of breaches of contract might be intended as wrongful dismissal claims (although it appears that C was paid her 6 month's notice) or, possibly, contractual claims under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1624) each being a claim "which arises or is outstanding on the termination of the employee's employment"[11]. Discussion of these points with the parties, especially given that C was unrepresented, did not throw any further light on this aspect of the case. Rs indicated that they did not understand such (contractual) claims to be part of the claims advanced in the ET1.

24. In Rs' "Response Particulars" (the "Response"), Rs relied on R1 as being C's employer at the relevant time (Response/paragraph 3) and contended that the Tribunal did not have jurisdiction to deal with any claims that C said

[10] The document seems to end abruptly at the end of that page but in enquiry I was told that there was/were no missing page/s

[11] subject to a statutory cap of £25,000

arose from her employment in the United States of America or Australia (Response/paragraph 9). (The order of EJ Bartlett referred to above seems to have reflected this formulation). Likewise, the redundancy pleaded (at paragraph 31) was that of R1 and a fair reading of the Response/paragraphs 31, 32 and 36 (in my view) is that it was R1 which dismissed C. That said, Mr Whattam (Group General Counsel of Cover-More) explained in his witness statement that the pleading was in error and that it had been R2 which had dismissed C. This was consistent with the stance taken before me that for the purposes of the present claims, C's only employer was R2. It was contended that while the UK Employment Agreement was not a sham, C's real and only employer was R2.

25. Accordingly, the position of the parties before me was that, while it was common ground that R2 was C's employer, it was disputed whether R1 was (also) C's employer.

26. Especially given that C was unrepresented and that there was no strike-out application before me I had to make the best I could of the unsatisfactory nature of the pleadings. On the face of it, as I have said, the claims seemed to include unfair dismissal under ERA s. 94 but focused more particularly on automatically unfair dismissal claims, seemingly against both Rs under ERA s103A. On this basis the only difference between the two sets of claims was that C was claiming (additional to English law remedies available against both Rs) remedies against R2 available only under Australian law.[12] In this regard I took into account that a key part of the "victimisation" and "unfair treatment" pleaded against R2 was the early termination of the Re-assignment, so that C pleaded:

    26.1 Against R1 that the termination of C's employment was "not a genuine redundancy" but an act of "victimisation and retaliation" against an employee which had in good faith reported concerns that constituted a breach of implied terms (ET1/60);

    26.2 Against R2 that the early termination of the Re-assignment was an act of "victimisation and retaliation" against an employee which had in good faith reported concerns that constituted a breach of implied terms a breach of like implied terms (ET1/ 62);

    26.3 Against R1 unfair treatment and acts of victimisation by R1 (ET1/61) including the redundancy and against R2 unfair treatment and acts of victimisation including the early termination of the assignment and against each respondent other acts pleaded in almost identical terms (cf ET1/61c-f and 63c-f);

    26.4 By way of summary (on the last page of the ET1) C claimed as:

[12] Rs claim that C does not have sufficient continuity of service for an ordinary unfair dismissal claim against R1 (see below)

26.4.1 (against R1) unfair termination of the UK employment resulting in a claim for compensation against both[13] Rs (ET1/64-65); and

26.4.2 (against R2) unfair termination of the Re-assignment (ET1/69);

26.4.3 (against each of R1 and R2) claims of breach of similar implied terms (ET1/66-67 and ET1/70-71).

27. I concluded that on a broad untechnical reading the ET1 contained claims against both Rs of unfair dismissal (ordinary - and constructive ie caused by protected disclosures rather than any genuine redundancy). This conclusion is of course – as regards R2 - consistent with Rs' position that R2 was "the" (only) employer of C and therefore any claim for (constructive) unfair dismissal or "whistleblowing" lies against R2 (alone).

28. That said, it seemed that there were (possibly) other claims pleaded in reliance on implied terms, which might be additional to the unfair dismissal and whistleblowing claims and not merely in support of those claims. Ms Omeri contended on behalf of Rs that the implied terms relied on for the claim against R2 did not exist under Australian law and that I should strike out these claims. However, given the absence of a strike out application before me and absence of evidence of Australian law on the point I did not see how I could go that far. That said, I do regard it as doubtful that the pleaded claims extend to wrongful dismissal and contractual claims, still less tortious claims (see Rs' submissions recorded below), and find (albeit limited) fortification for this view from the fact that Rs seem to have understood the claims in this way (Response paragraphs 36-38).

29. If and insofar as C seeks to rely on other claims than unfair dismissal (automatically unfair or "ordinary") as being included in the ET1, those will need to be identified in the list of issues which I intend to order. On the face of the ET1 these appear to be ancillary to the principal claims and I am satisfied that for the purpose of the issue which I have to decide that it is not necessary now to reach finality on these, since my conclusions would cover any such further (already pleaded) claims.

30. With a view to the tribunal determining the second question articulated by Employment Judge Smail, he gave C three further weeks in which to serve particulars of her alleged protected disclosures upon Rs. C ultimately served such particulars, C had a further opportunity (which she took) to particularise her alleged protected disclosures in her second witness statement dated 12 February 2021 (the first having been dated 10 August 2020, and provided to Rs prior to the preliminary hearing of 17 August 2020).

[13] my emphasis

31. I should add in passing that in the course of argument Rs sought to hold C to positions taken in her first set of written submissions where some points there taken were omitted from her second set of written submissions. It was clear to me that to do justice to the parties I would need look more to the substance of the matters than the positions which the parties have adopted from time to time, when (perhaps giving the complexity of the subject matter) both parties have engaged to some degree in "boxing and coxing" from time to time.

**Facts – History of employment**

32. The facts in this case as stated by C in her ET1 and witness statement were, with relatively minor exceptions (referred to below), common ground and Rs did not cross examine her on them. They are set out below.

33. C is an Australian citizen and lawful resident (though not citizen) of the UK. She pleaded that other than her (then) 16-year old son who lives with her in the UK (and who moved here with her, presumably because of his minority), she had *"no employment, or other familial or personal ties to the United Kingdom"* (ET1/5d);

34. On 16 July 2016, Mr Emmett offered C (and C accepted) an assignment to work as CEO – North America and Global Direct at R2's US subsidiary, Cover-More Inc, based in New York, USA. Cover-More Inc is a wholly owned subsidiary of R2. C was to (continue to) report directly to the CEO of R2 and pursuant to her assignment letter, she would *"continue to be employed by the Australian entity during the assignment and must continue to comply with the policies and procedures of the Second Respondent"* (ET1/12 i))

35. Prior to the anticipated termination of C's US assignment (8 April 2019), on 10 July 2017, C was re-assigned by R2, with her agreement, to the UK. In her witness statement, C explains that these documents were provided to her by the People & Culture Team of R2, based in Sydney, the head of which was Ms Tanya Dawson. C's UK Employment Agreement was intended to be signed by Mr Emmett as was a letter inquiring as to whether C was prepared to opt out of the 48-hour work week.

36. Clause 4.2 of C's UK Employment Agreement required her to (continue to) report directly to the CEO of Cover-More Group Ltd (ie Mr Emmett, in Sydney) Similarly to the position prevailing during her US assignment, during her UK assignment, C continued to be employed by the Australian entity and was required to continue to comply with its policies and procedures.

37. During both her US and UK assignments C was on *"authorised unpaid absence from her Australian employment"* (ET1/12 b and 18e). However, her continuity of service was preserved and her Australian employment law

entitlements to superannuation (employer pension contributions) and long service leave continued while she worked in the USA and then in the UK.

38. For the purposes of this hearing I accept the following facts put forward by Rs:

    38.1 On 23 November 2018, Mr Mijer and R2's Chief HR and People Officer (based in Sydney) Ms Dawson, informed C that her role was at risk of redundancy.

    38.2 On 26 November 2018, Mr Mijer and Ms Dawson conducted a consultation meeting by telephone with C. C then took a period of annual leave until 10 December 2018.

    38.3 By letter dated 14 December 2018 written on letterhead of "Cover-More Insurance Services Pty Ltd" (the "Termination Letter"), following consultation, Ms Dawson informed C that she would be dismissed by reason of redundancy. C was placed on 6 months' garden leave.

    38.4 On 9 January 2019, C's then solicitors, Mishcon de Reya, wrote to Ms Dawson in Australia, submitting an appeal against dismissal on behalf of C.

    38.5 On 7 March 2019, C's appeal was heard by Zurich's Group Head of Regulatory Affairs, Jason Schupp. Mr Schupp wrote to C on 7 April 2019, dismissing her appeal.

    38.6 C's employment accordingly ended on 14 June 2019 and she was paid a redundancy payment and other accrued benefits.

**Continuous service**

39. ERA s.108 disapplies s.94 to employees who have not been continuously employed for a period of not less than 2 years ending with the effective date of termination.

40. Parties cannot contract out of or into continuity of service for the purposes of claims such as unfair dismissal and redundancy entitlement brought under the ERA since it is a purely statutory concept: Collison v BBC [1998] ICR 669 at 673A.

41. Accordingly it seems that C has insufficient continuous service to bring an "ordinary" (ie ERA s. 94) unfair dismissal a claim against R1, since it seems that she commenced her assignment in the UK no earlier than 22 June 2017 (the date C indicated she obtained a right to work in the UK) or 5 August 2017 (when C arrived in the UK) and it terminated on 14 June 2019 slightly less than 2 years after either date. C pleaded (ET1/14) that she relocated to the UK on 6 August 2017. The unsigned UK Assignment Letter was dated 8 June 2017 and the unsigned UK Employment

Agreement dated 11 July 2017. As a result, although this was not one of the preliminary questions for me to decide, so that I do not decide it, it seems clear that any claim for unfair dismissal under ERA s.94 would lie against R2 only.

## International jurisdiction

42. In determining whether it has international jurisdiction to hear C's claims of automatic unfair dismissal (or ordinary unfair dismissal), the Employment Tribunal must first consider whether, in accordance with international law (as it applied to the UK when C brought her claim), it has jurisdiction to hear a claim against R2 in the UK.

43. The cornerstone provision for deciding the initial question as to the appropriate jurisdiction is the recast Brussels I Regulation 1215/2012[14] ("BR") and in particular Section 5 (Articles 20-23).

44. Art 67(1)(a) of the Brexit Withdrawal Agreement[15] provides that BR applies in respect of legal proceedings instituted before the end of the transition period, namely 31 December 2020 (Article 126 thereto). Thus, BR is and will remain applicable to these proceedings.

45. BR Art 4 under Chapter II Section 1 (General Provisions) provides:

"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

'Domicile' is defined by Article 63 :

"For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

a. statutory seat;
b. central administration;
c. principal place of business."

46. BR Art 6 (under the heading *"General Provisions"*) provides:

"1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

47. BR Art 8 provides that a person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place

[14] Officially titled Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

[15] Officially titled "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community" - 2019/C 384 I/01 .

where one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. This is consistent with paragraph 21 of the BR Preamble: "In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions…" Although this Preamble does not focus on the position between a Member State and a Non-Member State, it seem to me that the underlying rationale is equally applicable in that case too and the unrestricted terms of BR Art 8 appear wide enough to cover this situation.

48. Since R1 has its statutory seat, central administration or principal place of business in the UK, it is domiciled in the UK. That much was common ground between the parties. However Rs contended that R1, whilst the employer under the Service Agreement under which C was employed in the UK, was not C's employer and therefore not the correct respondent to the claims. Rs referred to the fact that R2 does not have its statutory seat, central administration or principal place of business in the UK (or anywhere else to which BR applies). These are located in Sydney, New South Wales, 2060, Australia. It was therefore not domiciled in the UK and Art 6(1) applied. As a result, they contended that jurisdiction of the Employment Tribunals of England & Wales must be determined in accordance with domestic case-law.

49. BR makes special provision for certain classes of contracts where particular classes of person are regarded as needing particular protection, including employees under employment contracts.

50. Recital 18 of BR provides:

> "In relation to…employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules".

51. BR Art 20 (in Section 5) states (so far as is relevant):

> "1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer point 1 of Article 8.
>
> 2. 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."

52. BR Art 21 (referred to in BR Art 6) states:

1. "An employer domiciled in a Member State may be sued:

    (a) in the courts of the Member State in which he is domiciled; or
    (b) in another Member State:

    (i) in the courts for the place where or from where the employee **habitually carries out his work or in the courts for the last place where he did so**[16]; or

    (ii) 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.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1."

**BR Art 20.2: Is there an 'individual contract of employment'/ is this a dispute "arising out of the operations of the branch, agency or establishment"?**

53. Rs appeared to accept that the Tribunal had (at least in in principle) international jurisdiction in regard to any claims against R1. That was undoubtedly correct given that:

    53.1 R1 was unquestionably domiciled in this jurisdiction; and

    53.2 The exclusive jurisdiction (and proper law) clauses in the English Employment Agreement and supportive provisions of the UK Assignment Letter pointed exclusively to this jurisdiction.

54. However, as indicated above, Rs' key contentions were that:

    54.1 C's individual contract of employment was with R2 and not R1;

    54.2 There was no international jurisdiction regarding R2 (which was not domiciled here); while it was conceded that R2 had an establishment in the UK, namely R1, Rs contended that the dispute in this case did not arise out of the operations of R1.

55. Therefore, while the parties were (ultimately) agreed that R2 was an employer of C, the key disagreement between them was as to whether R1 was (also) C's employer. Given that Rs approach was (in my judgment) in this respect a departure from its pleaded case, unsurprisingly C's submissions were largely directed towards showing that R2 was (also) her employer. Therefore, C's detailed submissions showing that there that there was an individual contract of employment with R2 largely echoed the submissions by Rs on this point.

[16] My emphasis

56. That said, given certain important ancillary questions which arise, (especially as to whether the UK Assignment Letter was part of the alleged contract of employment between C and Rs and as to the relationship between the UK Employment Agreement (and to a lesser extent the US Assignment Letter) and the Australian Employment Agreement) I intend to set out the legal principles relied on by C in this connection as applied to the facts of the case. These are in my judgment a correct statement of the applicable principles to be applied to the agreed facts of this case.

**C's submissions on international jurisdiction question – contract of employment with R2/ dispute arising out of operations of R1?**

57. The phrase "individual contract of employment" was considered by the High Court in **WPP Holdings Italy S.r.l. v Benatti** ([2006] EWHC 1641 (Comm)) where Field J said [at 69]:

> "…the objective criteria of an employment contract…are (i) the provision of services by one party over a period of time for which remuneration is paid; (ii) control and direction over the provision of the services by the counterparty; and (iii) integration to some extent of the provider of the services within the organizational framework of the counterparty. In applying these broad criteria I think regard must be had particularly to the terms of the contract; the conduct of the parties is relevant too. Further, in recognition of the fact that the exercise is one of fact and degree and quite different relationships may share to a considerable extent some of the criteria, the court should use as reference points a paradigm of a contract of employment (eg a contract under which a clerk works full time in an office) and a paradigm of a contract for services(eg contract under which an architect agrees to design a number of houses as in [Schenavai v Kreischer [1987] ECR 239]). The court should also keep in mind the underlying policy of Section 5 - the protection of parties to a contract who are weaker from a socio- economic point of view than the other party."

58. Each of the different Cover-More Employment Agreements contained terms for the provision of services by C to each of the named counterparties (and t R2 and other group compa nies) for which remuneration was paid, terms for control and direction of C, and integration within the organisational framework of the counterparty (and R2's group).

59. An employee having multiple employers at the one time is not novel: see **Samengo-Turner v J & H Marsh & McLennan (Services) Ltd** ([2007] EWCA Civ 723) [at 33].

60. The Australian Employment Agreement was still on foot when C was living and working in the UK: According to the UK Assignment Letter (and the US Assignment Letter) C was on authorised unpaid leave from her Australian employment; and:

    60.1 C continued to perform her US role until May 2018 and was Director and President of Cover-More Inc until she resigned her directorship on 11 February 2019 (C's Statement at 22);

60.2 Whilst not a named counterparty to any of the Employment Agreements (the UK Employment Agreement and the US Employment Agreement) , R2 was (also) her employer.

61. C set out a number of factors in her Statement which, applying **WPP Holdings Italy S.r.l. v Benatti**, pointed to R2 also being one of her employers:

*Provision of services for remuneration…*

61.1 C's duties and responsibilities were all directed to, and benefited, the R2 and the interests of its subsidiaries and group;

61.2 C's relocation to London was for the primary benefit of the R2;

61.3 R2 had incentive plans which provided C with remuneration in the event the objectives set by R2 were achieved ;

61.4 R2 approved C's monthly pay allowances and living expenses business expense claims, trave l and holidays and place of work;

*Control and direction over the provision of the services…*

61.5 C's performance objectives were set by the R2 and all performance reviews were conducted by, R2;

61.6 C reported only to Group CEO and Board of R2;

*Integration in the organizational framework…*

61.7 C was a member of the R2's Senior Leadership Team and had a global role

61.8 C had employees of multiple subsidiaries of R2 reporting to her ( a contentious point referred to below);

61.9 R2 had sole authority over C' employment terms, including all decisions related to her assignment to the US , r elocation to London remuneration and short- and long-term incentives;

61.10 R2 wholly controlled R1, Cover-More Inc and Astis Holdings Pty Limited with respect to the employment of C ; and,

61.11 The Board of R2 appears to have made the decision to terminate the Claimant's employment without reference to any of R1, Cover-More Inc or ASTIS Holdings Pty Limited.

62. The terms of the UK Employment Agreement indicated that R2 was (also) C's employer. R2 is specifically defined in that contract as "Cover-More" and its board of Directors as "Board". Clause 2.3 refers to "employment with Cover-More Group Limited". The Claimant had a number of specific employment duties directed to R2 ("Cover-More") including: carry out assigned duties (cl 4.3(a)), faithfully and diligently exercise powers and perform assigned duties (cl 4.3(e)), and comply with reasonable and lawful directions (cl 4.3(f)). She was contractually required to report directly to R2's Group CEO (cl 4.2) and its Board (cl 4.3(g), (h)), including having duties to report any wrongdoing of R1 or its directors.

63. Linked to the UK Employment Agreement (and the US Employment Agreement) were the LTI Plan and STIP Invitation agreements with R2. Though expressed as not being part of C's employment terms, these agreements conferred financial benefits on C in exchange for the delivery of employment related outcomes for R2. C's entitlement to participate in the STIP Invitation (page 7) and the LTI Plan (page 5) only continued for so long as she remained employed by R2's "Group" (as defined in clause 2.1 on page 7 of the LTI Plan).

64. The Termination Letter also stated in paragraph 2(d) that the Claimant "will remain employed by Cover-More Group during this period".

65. C submitted that based on these factors R2 should be treated as an employer of C for the purposes of Section 5 of B R.

66. C further submitted that if the principles of **WPP Holdings Italy S.r.l. v Benatti** were applied to the terms of the UK Assignment Letter (and the US Assignment Letter) (together the ("**Assignment Letters**") a conclusion could be reached that both were also contracts of employment or 'related to' contracts of employment for the purp oses of BR Section 5 . These agreements were between C and R2, and contain many of the provisions one would expect to see in a contract of employment such as, commencement date; appointment to a role with a specific title; reporting lines, location of work; details of duties and responsibilities; remuneration and benefits; leave entitlements; pension arrangements; conduct-related termination terms; and obligations to comply with employment related policies and procedures.

67. C further relied on decided cases as reinforcing the conclusion that the Assignment Letters were contracts of employment or 'related to' contracts of employment for the purposes of Section 5.

67.1 In **Samengo-Turner v J & H Marsh & McLennan (Services) Ltd** ([2007] EWCA Civ 723 the Court of Appeal held that an action to enforce the terms o f a bonus agreement setting out the conditions under which employe es were to participate in a Special Long Term Incentive Grant was a matter relating to individual contracts of employment within Article 18 of the Judgments Regulation (predecessor to BR) even though the obligation to work was contained in a separate employment contract. In the Court of Appeal's view, the terms of the bonus agreement related to and were part of the contract of employment, so that one could not ascertain the terms upon which the employee was engaged without looking at both the original employment contract and the bonus agreement. The Court said at 29:

> "So is the claim made in New York a matter relating to the claimants' individual contracts of employment? It is obviously a "matter" and the word "individual" is apparently used to make it clear that section 5 does not apply to collective agreements. The words "relating to" are used throughout the Regulation. For the purposes of deciding this case it does not seem to me that they need to be given a wide meaning. The question is simply whether the claim is based on a contract of employment. The contract need not be in one document or made at one time. An agreement varying or adding to the terms of an earlier contract of employment will obviously become part of that contract even if on its own it does not contain all the terms one would expect to find in such a contract."

67.2In **Duarte v The Black and Decker Corporation** [2007] EWHC 2720 ( QB) the High Court considered a letter agreement, a "Long Term Ince ntive Plan", which was governed by the laws of the State of Maryland, and between an employee and a parent company based in Maryland ,USA. One of the questions for the High Court was whether the letter agreement was a contract of employment for the purposes of Article 6.1 of Rome I[17]. Field J found that it was a contract of employment, stating at 52:

> "The LTIP agreement was obviously intended to operate as part of an overall package of Mr Duarte's employment terms.I also think that it cannot have been the intention of the framers of the Convention to allow Article 6 to be circum-vented by hiving off certain aspects of an employment relationship into a side agreement which, standing alone, would not amount to an individual employment contract because neither party promises to work for the other."

67.3 In **Petter v EMC Europe Ltd** [2015] EWHC 1498 (QB) the High Court held that EMC Corporation, a Massachusetts based parent company was "an employer" despite, as a matter of English law, Mr Petter having a contract of employment with a subsidiary and not with EMC Corporation. The Court also found

[17]Rome Convention on the Law Applicable to Contractual Obligations, Regulation (EC) No 593/2008 ("Ro me I")

that an agreement providing a grant of Restricted Stock Units was to be considered a contract of employment. The Judge indicated that a separate agreement which came into existence only because a person is an employee, which may be cancelled or rescinded if they ceased to be an employee, which contained terms that were also in an employment agreement, and which used language that linked the parent,the employee and the employment agreement together, beca me part of the contract of employment.

68. C submitted that it could not be said that each of the various Cover-More Agreements were stand-alone agreements that could be read independently of each other. They were bound up together as one agreement by the conduct of the parties and also by their own written terms:

68.1.The UK Employment Agreement refered to "The Employee's employment with Cover- More Group Limited which commenced on 24 October 2011", relocation and "assignment" benefits, a move from the USA, a "Relocation Period" and US and Australian taxes (Schedule 1). These concepts could not be understood without reference to, at the very least, the UK Assignment Letter;

68.2 The UK Assignment letter referred in may places to the UK Employment Agreement (eg. paragraph 6), and in the opening paragraph referred to the Claimant's US assignment and employment with Cover-More Inc. It provided in the opening preamble that "*the terms and conditions associated with the change to the location of your assignment from the USA Host Company to Cover-More Insurance Services (UK) Ltd ("UK Host Company") in Uxbridge, London for the remainder of the Assignment Period ("Reassignment")… must be read in conjunction with your Australian Employment Agreement*". The Australian Employment Agreement was then mentioned again in paragraph 6 of that letter;

68.3 The US Assignment Letter referred in several paragraphs to the US Employment Agreement (eg 3, 4, 6, 7) and said in the opening paragraph that it must be read in conjunction with "*your current Australian employment agreement with the Group (Australian Employment*)". The term "Group" was defined therein as "Cover-More Group Limited". The Australian Employment is then also mentioned in paragraphs 3, 11 and 17;

68.4The US Employment Agreement was provided under the header of "Cover-More Group Limited" and referred to the US Assignment Letter in clauses 5(a), (e), (g) and (h), 11(a), 13 and attached it as Annex A;

68.5 The Assignment Letters came into existence only because the Claimant was an employee of R2 and the group companies and they were designed to further the interests of the R2 and its group;

68.6The Assignment Letters could be cancelled or rescinded if C ceased to be an employee of a subsidiary of R2 and they contained terms that were replicated into the local employment agreements. The language used across the documents linked together firmly R2, C

and each of the Cover-More Agreements. All of the Cover-More Agreements were, in the language of FieldJ in **Duarte [**at 52 ]"obviously intended to operate as part of an overall package of [C's] employment terms".

69. C finally relied on the decision in the ECJ in **<u>Pugliese v Finmeccanica</u>** [2004] All ER (EC) 154 where an employee had contracts of employment with different employers in different Member State. The ECJ said she might be able to sue one employer in the Member State where she was working for the other if the former had an interest in her working for the latter. The Court said [at 24]:

"…the existence of that interest does not have to be strictly verified according to formal and exclusive criteria, but must be determined in an overall manner taking into consideration all the facts of the case".

The ECJ added that relevant factors might include the fact that the conclusion of the second contract was envisaged when the first was being concluded, the fact that the first contract was amended on account of the conclusion of the second contract, the fact that there is an organisational or economic link between the two employers, the fact that there is an agreement between the two employers providing a framework for the coexistence of the two contracts, the fact that the first employer retains management powers in respect of the employee, and the fact that the first employer is able to decide the duration of the employee's work for the 2nd employer."

70. Applying the factors in **<u>Pugliese</u>** to the facts and circumstances of C's employment in the UK, R2 had a clear interest in her working for R1 in England, (just as it had had a clear interest in her working in the United States) and had created all of the framework and documentation to make that happen. Accordingly, following **<u>Pugliese</u>**, R2 could be sued in England in relation to her employment in the UK.

<u>Does the claim "relate to" the individual contracts of employment</u>

71. C's submitted that it was appropriate to take a broad approach based on whether there is a "*material nexus*" between the claim and the individual contracts of employment relying on **<u>Bosworth and another v Arcadia Petroleum Ltd</u>** [2016] EWCA Civ 818 at 67:

71.1 C had an individual contract of employment with R1, and one or more contracts of employment with R2 at the time she was dismissed;

71.2 The substance of her claim was wholly based on alleged breaches of those contracts of employment and the mandatory laws applicable to them, including those related to unfair dismissal and redundancy (discussed further below);

71.3 C submitted that there was a direct and material nexus between her claim and the Cover-More Agreements (collectively and individually as her contracts of employment)
that satisfied the "relates to" criteria in BR.

**Rs' submissions on international jurisdiction question – was there an individual contract of employment with R1 and does this dispute arise out of the operations of R1?**

72. As set out above, Rs contended that there was no individual contract of employment with R1, only one with R2. Rs relied on many of the same factors relied on by C above to show that the contract of employment was "really" with R2, notwithstanding the existence of the UK Employment Agreement with R1, (while C relied on these factors to how that R2 was an additional employer). She referred to the decision of the First Chamber of the ECJ in **<u>BU v Markt 24</u>** Case C-804/19 in confirming that in regard to an "individual contract of employment", "subordination" was an important defining element (providing services under the direction of another in return for remuneration). Ms Omeri confirmed that Rs position would have been the same even if the claim had been brought solely against R1.

73. Rs focussed in particular on the following:

73.1 The decision to place C's role at risk of redundancy was that of Mr Mijer, who was CEO of R2;

73.2 The redundancy consultation process was managed by Ms Dawson, who was an employee of R2 and based in Australia;

73.3 Alternative employment for C was sought by Ms Dawson throughout R2;

73.4 C's 'dismissal letter' was written by Ms Dawson on an R2 letterhead;

73.5 C's appeal was submitted by her solicitors to Ms Dawson at R2's office in Sydney;

73.6 C's appeal was heard by R2's Mr Schupp, who was based in Zurich, Switzerland;

73.7 That C appears to accept, in her pleadings, that Mr Mijer and Ms Dawson terminated her employment.

74. It was perfectly logical, Rs contended, that C's role would be made redundant by R2, since she was merely "on assignment" in the UK. Further, the assignment had been at Mr Emmett's suggestion. C describes this as R2 'inducing' her to re-locate from the USA to the UK. C plainly understood that she required R2's consent to be "on assignment" as she understood herself to be on authorised unpaid leave from R2 while on assignment. Her Australian employment

continued and her Australian employment entitlements to superannuation and long service leave were preserved during both of her assignments. In addition, she was at all times required to report directly to Mr Emmett and then Mr Mijer of R2 in Australia. If C were no longer employed by R2, she could not be "on assignment" for it.

75. Further, Ms Omeri submitted: "In relation to Article 20(2), [Rs] accept that [R1] is at least an "establishment" of [R2]. However, [Rs] denied that C's claim is a dispute *"arising out of the operations of the branch, agency or other establishment"* [ie R1]. It was [R2] that dismissed C by reason of redundancy in view of Ms Morton taking over the substance of C's role from Sydney. This automatically brought C's UK assignment to an end."

**Discussion – was there an individual contract of employment with R1 and does this dispute arise out of the operations of R1**

76. As appears above, key to Rs' submissions (both in regard to the international law and territorial jurisdiction questions) was an attempt to side-step the existence and effect of the UK Employment Agreement specifically put in place to regulate C's employment in the UK, and at the heart of which was the English jurisdiction (and English proper law) clause and primacy given to the UK Employment Agreement under the UK Assignment Letter.

77. In essence, Rs submission were that because of the control by R2 of the contractual relationship with C that R2 was the "real" employer of C. So, Rs alleged that it was R2 (and not R1) that terminated the UK Service Agreement between C and R1.

78. Rs' submissions were in my judgment unsustainable:

    78.1 the case law regarding the definition of an "individual contract of services" eg emphasising the elements of control or subordination, while helpful to identify the existence of such a contract with R2, could not and did not negative the existence of such a contract (also) with R1. The cases show that the issue is not binary - there may be two or more employers;

    78.2. As a matter of contract it was not possible for R2 to terminate a contract between C and R1 because R2 was not party to *that* contact (and because that contract expressly excluded the possibility of 3rd parties exercising any rights in relation to it);

    78.3 The fact that an officer of the R2 made the decision to terminate C's employment points in my judgment not to his or her acting on behalf of R2 but to his or her exercising some de facto (or de jure) power on behalf of the R1, being the only legal person who could terminate that contract. It is not uncommon that such powers would be exercised in practice by officers of the holding company and wholly consistent with the contractual structure put into effect in the present case. Indeed (as set out above) it was

intended that Mike Emmett, Chief Executive Officer of R2 would execute the UK Employment Agreement and UK Assignment Letter on behalf of R1 – not on behalf of R2;

78.4 The Australian factors referred to above (especially control by/reporting to the Group CEO) were not some deeper reality or practice, displacing the UK Employment Agreement[18] but fully envisaged by and contractually provided for in the various agreements which remained in force and which are referred to in detail above. The one example to the contrary relied on by Rs ie that C did not become part of a bonus scheme of R1 as envisaged by the UK Employment Agreement is an exception which rather proves the rule. It is wholly insufficient in itself to support the proposition that in practice the contractual arrangements were displaced by the realities of C's employment. (Ms Omeri pointed out that in the *Fuller* case (referred to below) the claimant also had a local service contract. However, she was unable from the case report to point to its terms and it is not clear that there was there the contractual structure present in the current case with English exclusive jurisdiction and primacy given to the English Employment Agreement. If that were the case I would have expected that to feature prominently in the judgment. Accordingly, I can derive little assistance from the presence of an English service agreement in that case);

79. Accordingly, while I accept that R2 was both by virtue of the continuation of the Australian Employment Agreement and as a matter of reality (how the English Employment Agreement was operated in practice) an employer of C, that does not mean that the UK Employment Agreement, carefully negotiated between C and R1 (and supported by the UK Assignment Letter) was displaced or replaced – unless the UK Employment Agreement was a sham - and neither Rs nor C contended that to be the case.

80. I therefore accept C's submissions above that both R1 and R2 were C's employers at the relevant times including at the date of termination of her employment.

81. For the reasons submitted by C, I also reject that submission that the dispute before me was not one "arising out of the operations of the ….establishment within the meaning of Art 20.2" . In my judgment, taking a broad approach based on whether there is a "*material nexus*" between the claim and the individual contract of employment (and in any event, on the basis of the simple language of BR Art 20.2):

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[18] As in Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC, (mentioned by Ms Omeri but not in the list of authorities)

81.1 the hiring and (more significantly) the dismissal of C as a (senior) employee of R1 was quite obviously something arising out of the operations of R1, being a branch or establishment of R2;

81.2 Rs' submission appears to flow from, or at least be to be connected with, the broader submission that R1 was not C's employer, which I have rejected.

**Other bases of international jurisdiction**

82. **BR Art 21** provides:

> "An employer domiciled in a Member State may be sued:
>
> (a) in the courts of the Member State in which he is domiciled; or
> (b) in another Member State:
>
> (i) in the courts for the place where or from where the employee **habitually carries out his work or in the courts for the last place where he did so**[19]

83. In this regard R relied on **Crew Employment Services Camelot v Gould** UKEAT/0330/19/VP. In that case the claimant had been working in the UK at the time of his dismissal, but the focus was upon determining where he "habitually carrie[d] out his work" The current President of the EAT, Choudhury J stated in this regard, at [14]:

> *"The test for determining the place where the employee habitually carries out his work is thus to determine the place where or from which the employee performs the essential duties of his service vis-à-vis his employer. Failing other criteria, that will be the place where the employee works the longest and it will only be otherwise where the subject matter of the dispute is more closely connected with a different place of work. That test is to be interpreted broadly. In considering this issue, the court or tribunal might consider various factors ….*

84. Rs contended that during her work for R2 from October 2011 until June 2019 (almost 8 years), C did not "habitually" work in the UK, where she spent fewer than 2 of those 8 years and during which time she took direction exclusively from Mr Emmett in Sydney

85. In my judgment (even) applying this passage, the place where C performed the essential duties of her employment was the UK and the dispute is most connected with "British" law. It is only "failing other criteria" that it is appropriate to count the number of years of employment, as Rs contend. In my judgment this dispute is more closely connected with the UK than Australia. The criteria which point to the UK include her employment here for (approximately) the last two years of employment; that the service agreement under which she was employed by R1 contemplated her working here (as she did) and that she was dismissed from her employment here by

[19] My emphasis

R1 on the basis of a purported redundancy here. I have rejected the submission that R2 was capable of or did purport to dismiss C from her employment the service agreement, However, even if that were not the case, at the very least it is clear that the UK was the last place where C habitually carried out her work within the meaning of Art 20. While Ms Omeri initially submitted that the "or" in the courts for the last place where he did so should be restrictively read, she very fairly conceded (having consulted the French text) that this was not the case and that the phrase should be disjunctively read to the effect that the courts had jurisdiction if either the employee habitually carried out his work here or if the UK was the last place where she habitually worked. I accordingly find the tribunal has (international) jurisdiction under Art 21 (as well as under Art 20).

86. **BR Art 8**: this article is in my judgment also relevant. It provides that a person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In my judgment the claims in this case as against are obviously so closely connected with the claims against R1 (which is domiciled in the UK) that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

87. **BR Art 23**: This provides yet another basis for the exercise of international jurisdiction by this tribunal, providing:

> "The provisions of this Section may be departed from only by an agreement:
> (1) which is entered into after the dispute has arisen; or
> (2) which allows the employee to bring proceedings in courts other than those indicated in this Section."

88. The exclusive jurisdiction clause in the UK Employment Agreement provides for the exclusive jurisdiction of the courts of England and Wales and under art 23(2) this provides an alternative basis for international jurisdiction against R1 and (via Article 8) against R2.

**Other international jurisdictional points**

89. Rs initially emphasised clause 11.2 of the Australian Employment Agreement, submitting that C had selected the courts of New South Wales as those having jurisdiction over any disputes arising from her employment with R2, contending that Art 23 of BR precluded C from bringing her claim in the Employment Tribunals of England & Wales. However, in the course of the hearing Rs (sensibly in my view) abandoned this contention deleting paragraphs 43, 46 and 47 from Rs' written submissions.

90. Rs made alternative submissions based on the possibility that on its true construction the ET1 pleaded causes of action in contract or tort which might subject to the law of New South Wales since the governing law of the

contract (or tort) was not English (or British). While I accept (see above) that the nature of the claims against R2 are not clear, in my judgment:

90.1 Once it is accepted that R2 is an employer in relation to C's British employment (along with R1) no question of extra-territoriality in the sense referred to by Rs arises. The matters giving rise to the claims all or principally occurred (or at least had their effect) in England in relation to C's English employment in England;

90.2 The fact that one or other aspect of the relief requires the application of Australian law, when looked at in the wider context of the claims being English law statutory claims for whistleblowing and redundancy, is insufficient to outweigh the "pro-British" factors referred to above. It is in no way unusual for an English court (or tribunal) to apply the law of another country (ERA s 204 provides *"(1) For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not."*) and that it all the more the case in regard to limited issues, which are subsidiary to the main English law claims.

**Conclusion on international jurisdiction**

91. Accordingly I find that this tribunal has (international) jurisdiction on each of the following grounds:

91.1 In respect of R1, under BR Art 21.1 (a) (R1 being domiciled in the UK), alternatively under BR art 23(2);

91.2 In respect of R2 under:

91.2.1 BR Art 20.2 on the basis that there was an individual contract of employment with R2 and the dispute before this tribunal arises out of the operations of R1 being a branch or establishment of R2; and

91.2.2 BR Art 21.2 on the basis that the UK was the place where or from where the employee habitually carried out her work or was the last place where she did so; and/or

91.2.3 BR Art 8 in that the claims in this case as against R2 are closely connected with the claims against R1, in respect of which there is jurisdiction (as set out in paragraph 91.1 above) and it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.

**Does British employment law apply to C's claim for unfair dismissal?**

92. It is worth setting out in one place the different contractual provisions to which C and R (or related parties) agreed. In relation to the 'law chosen by the parties', the Cover-More Agreements provided:

UK Employment Agreement

> "30.1 This agreement and **any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims)** shall be governed by and construed in accordance with the law of England and Wales."

<u>UK Assignment Letter</u>

> "20. Assignment Governing Law
> The terms and conditions of your assignment, as outlined in this Letter will be governed by the laws of New South Wales, and your employment in the UK Host Company Position will be governed by the laws of England and Wales, without reference to rules relating to conflicts of law."

<u>US Assignment Letter</u>

> "18. Assignment Governing Law
> The terms and conditions of your assignment, as outlined in this letter agreement will be governed by the laws of New South Wales, and your employment in the Position will be governed by the laws of the State of New York, without reference to rules relating to conflicts of law."

<u>US Employment Agreement</u>

> "12. Governing Law.
>
> This Agreement will be governed by, and construed under and in accordance with, the internal laws of the State of [New York[20]], without reference to rules relating to conflicts of laws".

<u>Australian Employment Agreement</u>

> "11.2 Governing law
>
> This Agreement is governed by the laws of New South Wales and each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of New South Wales."

## Agreed principles regarding proper law

93. Rs rightly pointed out that, in relation to this question, BR is irrelevant.

94. Rs accepted (and contended) that, if the Tribunal finds that it has international jurisdiction to hear C's claim, British employment law must apply since the right not to be unfairly dismissed is derived from a statute which is an overriding provision of English law: see ERA s.204 quoted above. However there were certain potential qualifications to Rs' position which are referred to below, so that I shall notwithstanding the

[20] Though blank in the version in Exhibit CT4, footnote 5 to that document indicates the agreement "should be governed by the law in which the Company is incorporated or by the law of the jurisdiction in which the executive will provide services." The company was incorporated in Delaware, but the Claimant provided services in New York. The US Assignment Letter says employment is governed by the laws of the State of New York so that has been adopted.

concession briefly survey the underlying principles on which the parties were agreed (at least in principle).

95. The question as to which system of law applies to the dispute and the contracts under consideration by the Tribunal is guided by Article 6 of the Rome Convention on the Law Applicable to Contractual Obligations, Regulation (EC) No 593/2008 ("Rome I"). Rome I was incorporated into the law of the United Kingdom via the *Contracts (Applicable Law) Act 1990*. Pursuant to Article 66(a) of the Brexit Withdrawal Agreement, Rome I shall apply in respect of contracts concluded before the end of the transition period (31 December 2020).

96. The overriding principle is that, subject to certain exceptions, a contract is governed by the law chosen by the parties: Article 3.1 of Rome I:

> "A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract."

97. Article 6 of Rome I specifically concerns "Individual employment contracts" and provides:

> "..(1) Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice."

98. The phrase "*individual employment contract*" should be given the same meaning in the context of Rome I as it is in BR.

99. Australian statutory claims must be subject to Australian law.

**R's submissions on proper law**

100. As indicated above, Rs accepted that if the Tribunal finds that it has international jurisdiction to hear C's claim, "British" employment law must apply since the right not to be unfairly dismissed is derived from a statute which is an overriding provision of English law: see ERA s.204.

101. Given my understanding of the ET1, I do not need to consider Rs' alternative submissions based on the possibility (contrary to their primary case) that there are also non-statutory contractual or tortious claims advanced. Even if there were, these appear to be subsidiary to the principal claim of unfair dismissal contrary to ETA s103A and would not affect my decision on jurisdiction. What law the Tribunal would need to apply to any such claims (ie English or Australian) will be a matter for the Tribunal at the full merits hearing but I anticipate this may be resolved by agreement of the parties (or failing agreement) a further preliminary

hearing. I intend to give appropriate directions by a separate case management order

**C's submissions regarding proper law**

102. C of course relied on the specific choices of the C and R1 expressed in clauses 30.1 and 30.2 of the UK Employment Agreement:

1. *This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales;*

2. *Each party irrevocably agrees that the Court of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or formation*."

103. Whilst clause 11.2 of the Australian Employment Agreement also provided for that agreement was governed by the laws of New South Wales and the exclusive jurisdiction to the courts of New South Wales, the UK Assignment Letter pointed the way to resolve any potential conflict in paragraph 6, bullet point (c):

> *"For the avoidance of doubt… (c) during the Assignment Period, if there is any conflict of terms between [UK Employment Agreement] or the Australian employment agreement then again the [UK Employment Agreement] shall prevail;"*

104. C therefore submitted that under Article 6 of Rome I, it was for the Courts of England and Wales to settle this dispute, having regard to agreements that will be governed individually by the laws of England and Wales, New South Wales (and New York).

105. C also relied on the conduct and documentation issued by Rs during the termination process also illustrates clearly that they deliberately chose the Courts of England and Wales as having jurisdiction over any disputes arising therefrom. In this respect the R's conduct was consistent with clause 30.1 (and clause 30.2) of the UK Employment Agreement.

106. C further contended that the conduct and documentation issued by Rs during the termination process also illustrated that they deliberately chose the Courts of England and Wales as having jurisdiction over any disputes arising therefrom. In this respect Rs' conduct was consistent with clauses 30.1 and 30.2 of the UK Employment Agreement:

106.1 R2 pleaded in paragraph 36 of the Response that: "the Claimant's employment with the Second Respondent was terminated at the same time and for the same reason as her employment with the First Respondent". The Termination Letter stated in paragraph 2(d) "you will remain employed by Cover-More Group during this period"; referenced cl 16 (in paragraph 2), cl 18 and cl 19 (in

paragraph 7) of the UK Employment Agreement; in paragraph 6, reflected the redundancy provisions set out in ERA ss.162 and 227; referred to the P45 (in paragraph 5); and referred to National Insurance contributions (in paragraph 5);

106.2 The "Employee Redundancy Estimate" enclosed with the Termination Letter noted that the redundancy pay, tax and other statutory obligations were all calculated "in accordance with UK Government Legislation";

106.3 Whilst the Termination Letter and the Employee Redundancy Estimate did refer to "Australian Long Service Leave", that was only because this was provided for in clause 2.3 of the UK Employment Agreement, as follows:

> ... "*2.3 The Employee's employment with Cover-More Group Limited* [R2] *which commenced on 24 October 2011 counts towards the Employee's period of continuous employment with the Company*"*;*

106.4 Nowhere did the Termination Letter specifically reference any other contract or obligation of the parties that was governed by the laws of New South Wales or New York.

106.5 It was clear from the Termination Letter, the Employee Redundancy Estimate, and the employment termination process itself, that all aspects of the termination were in substance and form rooted in English law.

**Discussion regarding proper law**

107. I accepted the parties' submissions in this regard (or primary submission in the case of Rs) and concluded that under Article 6 of Rome I, it was for the Courts of England and Wales to decide this dispute, having regard to agreements that will be governed individually by the laws of England and Wales, New South Wales (and New York).

108. As I have indicated I regard the claims as (at least primarily) as being English statutory claims of unfair dismissal (under ERA ss. 94 and 103A, respectively).

109. That said, if an insofar as C seeks remedies (only) under Australian statute law, they must be decided under Australian law. That does not in my judgment affect either of the jurisdictional questions (above and below) which I must decide.

**<u>Does C fall within the territorial scope of s.103A ERA</u>**

110. Rs set out the relevant case law (below) which I accept sets out the principles I must apply.

111. Since the repeal of s.196, the ERA is silent as to its territorial reach. The fundamental question is therefore one of statutory construction. The question is whether, in the particular circumstances of each case, Parliament can be presumed reasonably to have intended the claimant to fall within the legislative grasp or intention of the statutory provision in question, notwithstanding the foreign elements in the case.

112. The foundational judgment concerning the territorial scope of s.94(1) of the ERA, was that of the House of Lords in *Lawson v Serco Ltd* [2006] ICR 250 in which Lord Hoffman stated:

> "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.
>
> ……the only question is the construction of section 94(1). Of course this question should be decided according to established principles of construction, giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme. But this involves the application of principles, not the invention of supplementary rules.
>
> 24. On the other hand, the fact that we are dealing in principles and not rules does not mean that the decision as to whether section 94(1) applies (and, therefore, whether the employment tribunal has jurisdiction) is an exercise of discretion. The section either applies to the employment relationship in question or it does not and, as I shall explain later, I think that is a question of law, although involving judgment in the application of the law to the facts.

113. In relation to the principles to be applied in order to determine whether s.94(1) applies to any given facts, working in Great Britain was described as *"the standard case."* In this respect Lord Hoffmann said:

> "…I think that the application of section 94(1) should now depend upon whether the employee was working in Great Britain at the time of his dismissal, rather than upon what was contemplated at the time…when the contract was made…The terms of the contract and the prior history of the contractual relationship may be relevant to whether the employee is really working in Great Britain or whether he is merely on a casual visit…but ordinarily the question should simply be whether he is working in Great Britain at the time when he is dismissed…" (at [27], p.261).

114. However, Lord Hoffmann went on to refer to other examples where the employee was not working in Great Britain but nevertheless fell within the territorial scope of the ERA. For example, in relation to British nationals posted abroad ('Expatriate employees'), Lord Hoffmann stated:

> "Something more is necessary. Something more may be provided by the fact that the employee is posted abroad by a British employer for the purposes of a business carried on in Great Britain. He is not working for a business conducted in a foreign country which belongs to British owners or is a branch of a British business, but as representative of a business conducted at home. I have in mind, for example, a foreign

> correspondent on the staff of a British newspaper, who is posted to Rome or Peking and may remain for years living in Italy or China but remains nevertheless a permanent employee of the newspaper who could be posted to some other country." ([37] – [38])

115. Similarly, Lord Hoffmann said at [39]:

> "Another example is an expatriate employee of a British employer who is operating within what amounts for practical purposes to an extra-territorial British enclave in a foreign country. This was the position of Mr Botham working in a military base in Germany. And I think, although the case is not quite so strong, that the same is true of Mr Lawson at the RAF base on Ascension Island. While it is true that Mr Lawson was there in a support role, employed by a private firm to provide security on the base, I think it would be unrealistic to regard him as having taken up employment in a foreign community in the same way as if Serco Ltd were providing security services for a hospital in Berlin…Although there was a local system of law, the connection between the employment relationship and the United Kingdom was overwhelmingly stronger.'

116. The focus in ***Lawson*** upon whether the employee was working in Great Britain (at least at the time of his dismissal) or, if not, demonstrating *"something more"* in order to show a strong connection with Great Britain was modified six years later, in ***Ravat v Halliburton Manufacturing and Services Ltd*** [2012] UKSC 1. In that case, the connection of the employment relationship to Great Britain (rather than the physical location of the employee) became the focus of the analysis. In that regard, the Supreme Court held at [27]:

> "…the starting point…is that the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of sec 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified."

117. Later EAT cases have emphasised that the 'strong connection test' requires not only a strong connection (of the employment relationship) to Great Britain but also to British employment law.

118. So, in ***Fuller v United Healthcare Services Inc & Anor*** UKEAT/0464/13/BA (4 September 2014) the EAT upheld the Employment Tribunal's finding that it did not have jurisdiction to hear the Claimant's claim. The Claimant was employed by the First Respondent which was a company incorporated in the USA and headquartered in Minnesota. He was a US citizen whose home was in Texas. By his contract of employment, he was paid in US dollars. He was offered a newly created role of managing director of a subsidiary of the American parent which was incorporated in the UK (and with which he had a contract of employment – see [6]). His focus was to be on growing the Respondent's business in the UK, Europe and the Middle East. The EAT (Lady Stacey) noted that the Employment Tribunal had determined that the Claimant was in the obverse situation from claimants in the leading cases (including ***Lawson***) in that he was not working abroad and seeking to

invoke UK legislation; rather he was seeking to invoke UK legislation because he was present in the UK on business for much of his time. Further, the EAT recorded (at [18]) that:

> "The EJ correctly directed herself…'that ordinarily working in the UK at the time of his dismissal is the strongest possible indication that Parliament would intend the claimant to fall within the legislative grasp of section 94(1) of [ERA].' She decided however that it was not absolutely determinative and concluded that in the overall context of the extent of work undertaken in the UK and of all the circumstances there was insufficiently strong connection with the UK and UK employment law to enable it to be said that Parliament would reasonably have intended the claimant to have the right to present an unfair dismissal complaint to an Employment Tribunal in the UK. She found that 'Overwhelmingly the strongest connection both in the deliberate intention of both parties to the employment relationship, as contractually expressed, and in the factual outworkings (sic) of that contract was to the United States.'" (at [18]).

119. The EAT held (at [42]) that:

> "It is clear…that all the circumstances of the individual must be considered. These include, but are not limited to, the terms of the contract, the applicable law, the place of performance of the work, and the living arrangements of the employee. Only once these facts have been ascertained can the ET stand back and consider what connection if any there is to Great Britain, and importantly, with British employment law. Only then can the ET decide if Parliament can reasonably be said to have intended the territorial scope of the legislation to include the situation of the claimant."

120. In the case of ***Olsen v Gearbulk Services Ltd*** UKEAT/0345/14/RN (28 April 2015), the then President of the EAT (Langstaff J) said (at [37]):

> "Intuitively, it might be supposed that a person working within the jurisdiction for any substantial period of time should attract the law of that jurisdiction to the work he does, and the working relationships he has, at least within the territory of that jurisdiction. However,…the Tribunal did not see the Claimant, on the facts found, as someone who regularly worked in an office in Great Britain and only irregularly elsewhere: but instead saw him as a person who was based in Switzerland, in order to perform an international job. That took him more to the United Kingdom than to any other single jurisdiction…The model which the Tribunal had in mind, therefore, was not that of the worker in the UK who occasionally worked elsewhere, nor one who was based in the UK, but one who was based outside the UK, who could discharge his obligations wherever in the world he chose – here finding it more convenient to do so to a substantial degree in the UK…"

121. In relation to the 'strong connection test' referred to by Lord Hoffmann in ***Lawson***, Langstaff J further said (at [39]):

> .. "To focus on the connection which an employee has not just to Great Britain but also to British employment law moves away from attaching sole importance to the place where an employee habitually, physically works. The

> need to consider British employment law as well as connections with Great Britain originates at paragraph 40 in the speech of Lord Hoffmann in Lawson. It was taken up by Lord Hope in Ravat…and began to occupy centre stage in Fuller…There may be a stronger case for supposing that Parliament intended peripatetic workers with an international role in a global business to be governed by the law which they had agreed to adopt as to their contract, and hence, dismissal from contract, and therefore those rights which related centrally to the contract…"

122. Rs also relied on the decision in *Lodge v Dignity & Choice in Dying & Anor* UKEAT/0252/14/LA (4 December 2014). In that case the claimant moved to Australia, with the consent of the respondents, for family reasons and continued to work remotely wholly and exclusively for the respondents' London operation. The EAT reversed the Employment Tribunal's ruling that the claimant did not fall within the territorial scope of s.94(1). In so doing, the EAT said (at [21] – [22]):

> "True it is that Ms. Lodge does not fall foursquare within the posted employee referred to at paragraph 40 of Lord Hoffmann's opinion in Serco. However, the examples there given are just that…all of the work done by the Claimant from her computer in Melbourne was for the benefit of the Respondents' London operation…The fact that, to their credit, the Respondents permitted the Claimant to work remotely from Australia for family reasons makes her situation no different from the employee posted to work abroad with his or her consent."

123. The EAT also concluded that the fact that it was not disputed that the claimant had no right to bring her claim in Australia was a relevant factor as was the fact that a grievance raised by the claimant was dealt with in London.

124. In *Gould* (*see above*), Choudhury J held at [16]:

> "The essential question to be determined, therefore, is the sufficiency of connection between the employee's employment and Great Britain and British employment law. Underhill LJ's analysis in Jeffreys (sic) focused (understandably, given the facts of that case) on the situation of the employee who was "truly expatriate" in the sense of both living and working abroad. The present case concerns an employee working for at least part of the time in the UK…"

125. In relation to the manner in which this question should be determined, Choudhury J held, at [48]:

> "The findings made by the Tribunal as to the real nature of the relationship between the various parties involved were part and parcel of "the intense consideration of the factual reality of the employment in question" that is required in "[a]n assessment of the strength of the connection with Great Britain and British employment law": per Gross LJ in Foreign and G Commonwealth Office and ors v Bamieh [2019] IRLR 736 at [65]. If the factual reality of the employment relationship is such that real control emanates from a source that is potentially indicative of a stronger connection with a particular jurisdiction, then that is clearly a relevant factor to be taken into account…"

126. On the matter of "real control," Choudhury J held, at [33]:

> "I do not accept Mr Ohringer's submission that the Tribunal took account of an irrelevant factor, namely the location of the person instructing him. In principle, it may be relevant, in the case of an internationally mobile employee, to consider where instructions are received: see Noreuiga at [63] (cited above at paragraph 13). The fact that the instructions came from Mr Borodin, rather than from the employer in law, does not render those instructions irrelevant. One can envisage many situations where, for organisational or other reasons, instructions to an employee emanate from a client of the employer or a third party..."

127. Choudhury J further emphasised the relevance of the connection of the employment relationship to other jurisdictions at [43], where he held:

> "…It seems to me that it is almost inevitable that in assessing whether there is a sufficiently strong connection with the claimed jurisdiction, the Tribunal will consider the strength of connection with other jurisdictions to see if the territorial pull is in fact exerted in the opposite direction."

128. Rs further relied on *Jeffrey v British Council* [2019] ICR 929, in which the Court of Appeal held that in the case of protected rights arising out of an employment relationship with a foreign element, the dispositive question was whether the relationship was within the jurisdiction, rather than depending on the chance of where a particular act (including dismissal) was done.

**C's submissions on the territorial jurisdiction point**

129. C relied on the following as showing a sufficiency of connection between the employee's employment and Great Britain and British employment law, that:

    129.1 C was ordinarily working in the UK at the time of her dismissal - "…the strongest possible indication that Parliament would intend the claimant to fall within the legislative grasp of section 94(1) of [ERA]";

    129.2 C's claims related to a period from August 2017 to 14 June 2019 when she was living, working and based in England, and specifically relates to the point in time at which her employment was terminated. They did not relate to any period of time that the Claimant lived or worked in Australia or the United States.

    129.3 The parties chose the courts of England as the court of exclusive jurisdiction over disputes arising under the UK Employment Agreement with R1 and chosen law as English law;

    129.4 In the layers of contracts applicable to C the parties gave primacy to the UK service agreement;

    129.5 The Claimant was not a peripatetic or expatriate employee, or *"merely on a casual visit"* to England. From August 2017, and at the material time of her termination:

a. she had an employment contract with English domiciled company, governed by the laws of England and Wales;
b. she had physical and legal ties to England (C's Statement at 37-44); but see Rs' contentions to the contrary below;
c. her base was in England (C's Statement at 54);
d. she spent the majority of her time in England (C's Statement at 44);
e. she performed work for the Second Respondent in the United Kingdom and the Second Respondent carried on business there via R1;
f. she supervised staff in England (C's Statement at 77(a) and (c)); but see Rs' contentions to the contrary below;
g. she was paid in GBP, into a UK bank account (C's Statement at 48); and,
h. she paid UK income taxes and made NIC contributions (C's Statement at 49).

**Rs' submissions on territorial jurisdiction**

130. Rs relied on the following factors as showing an insufficiency of connection with the jurisdiction of the tribunal that R2: (a) had its registered office in Australia; (b) directed the Claimant from Australia; (c) made decisions about her employment from Australia; (d) had its HR department in Australia; and (e) left several employment agreements on foot that were governed by the laws of New South Wales and New York.

131. Put in more detail Rs relied on the following factors, that :

**Fixed term assignment**:

1. It was R2 that posted C abroad;
2. The intention of the parties was that her assignment would be for a fixed term, so that C would be returned to her employment in Australia once the assignment ended;
3. The UK assignment provided for payment by R2 for two business class airfares enabling her to return to Australia each year;
4. C was on assignment in the UK at the suggestion of the CEO of R2 who was based in Australia (Mr Emmett);
5. At all times, during both of her assignments, C was a member of the Senior Leadership Team of R2. C had to obtain authorised unpaid leave from R2 in order to be on assignment outside of Australia and away from R2; C's employment with R2 continued during her assignment and she was expected to continue to comply with its policies and procedures;

**R2's Control**: C's employment was in practice under R2's control, so that:

6. Termination of her employment could only occur under the direction of the Board of R2 and that R1's directors in late 2018 had no authority over her employment and (C believed) they had no idea of the terms upon which she was employed or terminated by R1;
7. At all times while on assignment (anywhere ie in the USA and in the UK) C was required to report directly to R2's CEO based in Australia (**[70]** and **[85]**). C *"…did not report or answer to, in any capacity or at any time, any director or other person at the First Respondent"* While on assignment in the UK, Mr Emmett approved C's salary each month. At [47] of her statement of 12 February 2021, although C believed that *one of R1's employees in the UK processed the actual payments through R1's bank account and payroll system."*;

8. Paragraph 2 of the UK Assignment Letter and clause 4.1 of the UK Employment Agreement provided that C was appointed to the role of 'Chief Executive Officer, Direct and Fintech' at the First Respondent. In reality she performed that role for R2, and had done so since at least 14 November 2016**,** when her title changed from 'Chief Executive Officer North America and Canada' to 'CEO, Financial Institutions and Direct…"

9. Mr Emmett was responsible for C's performance reviews and for reviewing her salary. By contrast: *"[C] did not have any performance measures set for [her] by the First Respondent, {nor were any of [her] objectives specifically linked to the First Respondent*) and *"R1 had no role in assessing, approving or communicating [C's] performance reviews, incentives or pay rises."* C received bonuses and incentives through agreements into which she had entered with R2 *Contrary* to paragraph 9 of the UK Assignment Letter and Clause 10 of the UK Employment Agreement, C did not participate in any bonus or incentive plan operated by R1 (Rs submitted that this was significant, demonstrating that the UK contractual documents did not reflect the reality of C's working arrangement while on assignment);

10. C *"…was not responsible for any of R1's employees and none of them reported to [her]…"* C never worked from or even attended R1's offices;

11. C's UK Employment Agreement was drafted by and provided to C by Ms Dawson and her team and that it and its costs were approved by the board of R2. C negotiated the "final terms" of her UK assignment with Ms Dawson. C had no discussions about her UK assignment with anyone at R1 Mr Emmett was to be the counter-signatory to C's UK Employment Agreement;

12. The rent for the UK rental properties was processed by Ms Dawson in Sydney and that C's housing expenses, relocation expenses and school fees were paid for by R2 and that *"The Chief HR & People Officer [ie Ms Dawson] was personally responsible for approving these which were paid through R1's payroll . C not seek or receive any expense approvals from any person at the First Respondent."*;

13. *C* had *no familial or personal ties to the United Kingdom and the* home(s) in which C lived while on assignment in the UK were rental properties;

14. While C paid income tax to HMRC in respect of the time she spent working in the UK, that was merely a consequence of British tax law and not of British employment law. As a result, it cannot render C's employment relationship with R2 strongly connected to British *employment* law.

15. C's entitlements to superannuation and long service leave (pursuant to Australian law) were preserved while she was on assignment *"As provided for in paragraph 15 of the UK Assignment Letter..., I received quarterly payments of Superannuation into my Australian Superannuation Fund via one of Cover More's Australian companies"*). C's UK assignment was therefore carefully crafted *around* her Australian employment and benefits *it* attracted. Indeed, the Assignment Letter itself says: *"This letter outlines your Re-assignment…and must be read in conjunction with your Australian Employment Agreement and the Group's related policies, including those notified to you from time to time."*

132. Rs contended that the connection of the employment relationship between R2 (and even R1 which was merely a vehicle of R1) and C to Great Britain and British employment law was not sufficiently strong for it to be able to be said that Parliament would regard it as appropriate for the territorial scope of the ERA to extend to C. Rs submitted that despite C residing in the UK, when the Tribunal takes account of all of C's circumstances and the Tribunal "stands back" (*Fuller* per Lady Stacey) and considers what connection there was to Great Britain and importantly to British employment law, it would find that there is in fact none at all in C's case. While this may seem a counter-intuitive proposition for Rs to advance or the Tribunal to endorse, in fact it is the natural result of the application of the principles enunciated in the case-law, particularly in *Fuller* and *Olsen*.

133. Rs relied on the detail of various cases to show that on the facts of those cases the Court or tribunal had decided one way or the other on the question of jurisdiction. So, Rs submitted that it was clear from C's own evidence, that R1 was merely a vehicle for furthering the interests of R2 in a much more patent way than was the UK subsidiary for which Mr Fuller

worked *"The regional and global executives would negotiate contracts for the benefit of the group, and typically, the licensed subsidiary located in the home country of the Distribution Partner would be used as the primary contracting party. We did not ask permission from the subsidiaries to create contracts in their name, and all large contracts were negotiated by members of the legal team in Australia."*). The point was further reflected in C's evidence concerning the unprofitability of R1, which was supported financially by R2. In view of C's work being entirely for the benefit of R2, it would be inconsistent with the decision in *Fuller* if C were to be held to be entitled to avail herself of British employment law where Mr Fuller was not.

134. Rs also relied upon the decision of the EAT in *Olsen*, in which Langstaff J emphasised (on the basis of the earlier decision in *Fuller*) the fact that the question whether someone falls within the territorial scope of the ERA is not limited to the connection (of the employee) to Great Britain. Given that it must also consider the strength of the connection of the employment relationship to British employment law (*Olsen* at [38]), this moved away from attaching sole importance to the place where an employee habitually, physically works.

135. However, and in any event, Rs did not concede that C "habitually" physically worked in the UK if the entirety of her employment with R2 was taken into account. Taking account of the entirety of C's employment with R2 was consistent with the broad interpretation of the 'habitually' test referred to by Choudhury J in *Gould* at [14] (cited above at paragraph 41). C had been employed by R2 from 2011 until 2019, that is, for a total of 8 years. Of those years, C spent fewer than 2 years working in the UK.

136. In *Jeffrey v British Council* [2019] ICR 929, Underhill LJ held at [78] that the fact that a British Council employee was posted to Bangladesh for 4 years "has to be seen in the context of an overall contract which envisaged Mr Jeffery moving countries from time to time, as he had throughout his career with the Council…It is important to appreciate that Mr Jeffery was not someone engaged to work in a particular overseas location." Rs submit that, equally (in the obverse) C was not engaged by R2 to work in the UK.

137. Accordingly Rs contended that whether one considered C's personal connections to the UK (*"no employment, or other familial or personal ties to the United Kingdom"*) or the connection between her employment relationship and British employment law, either and both were extremely weak. Rs therefore contended that the connection of the employment relationship between R2 (and even R1 which was merely a vehicle of R2) and C to Great Britain and British employment law was not sufficiently strong for it to be able to be said that Parliament would regard it as appropriate for the territorial scope of the ERA to extend to C.

138. I should add that the parties made conflicting submissions as to whether (and, if so, to what extent) C could bring claims under Australian law in respect of the matters pleaded in the ET1. Rs submitted that C was entitled to bring a "General Protections claim," in respect of adverse action allegedly taken against her, including dismissal, in the Fair Work

Commission of Australia, pursuant to s.365 of the *Fair Work Act 2009.* C's (final) submission was that she could not bring such claims.

**Discussion regarding territorial jurisdiction**

139. In my judgment the difference between the parties as to the availability of Australian law remedies was not one which I could or should seek resolve:

140.1 There was no independent expert report on Australian law before me and no other independent expert evidence; Ms Omeri, although qualified under Australian law was an advocate for Rs and therefore (with respect) could not be said to be independent in this respect;

140.2 It seemed inappropriate to apply any presumption of English law applying in the absence of evidence of Australian law, given that the relevant claims were said by the parties, to be based on Australian statute law and what I understood from Ms Omeri, namely that Australian and English employment law had material differences (eg as to the requirement for disclosures to be in the public interest – referred to elsewhere in these Reasons);

140.3 (Of lesser significance than the above two points) while the parties presented a substantial bundle of 21 statutory and case authorities (with two further case authorities later sent to me by Rs – which in my view did not materially advance matters) the bundle did not contain Australian statutes or case authorities.

140. I therefore approach the matter on the basis that C may have statutory claims (and possibly even other claims) which she could bring against R2 under Australian law.

141. While Ms Omeri submitted that the Australian claims based on implied terms were bound to fail as a matter of Australian law, given that there was no strike out application before me, (and no independent evidence regarding Australian law) I have to approach this matter on the basis of the existing pleadings (as unsatisfactory as they might be from an English law employment tribunal perspective).

142. As set out above, I have construed the ET 1 as containing unfair dismissal claims against both Rs (under ERA s,103A and/or s.94). To the extent that Australian law provides for further remedies (pleaded in the ET1) than those pleaded under English law, this is an "Australian" factor of weight both regarding the international and territorial jurisdiction questions to be weighed (together with other "Australian" factors) in the balance against the "British" factors.

143. In performing my required task I need to focus extensively on the facts of the case before me and a detailed comparison of the decisions in other cases is not likely to assist, especially when it is not clear exactly what all the comparable relevant facts were in those cases.

144. I do not regard it a necessary to resolve the differences between the parties as what ties C had with this jurisdiction and whether or not she supervised any employees of R1. These points may be ones of nuance and I am prepared to accept for the purposes of this decision that C had little or no personal and familial ties in the UK and played little or no role in supervising R1's employees but in any I do not regard these factors as having great significance in the overall balance of "Australian" against "British factors" in the context of what I consider are other more weighty factors.

145. Standing back and taking matters in the round, I accept C's submission that the factors put forward by Rs are not sufficient to displace the other relevant factors pointing towards British territorial jurisdiction. In my judgment the employment relationship at the time of termination had a substantially closer relationship with Britain than any other jurisdiction.

146. I do so because of the factors relied on by C, weighing them against those relied on by Rs above. However, in looking at matters in the round I am persuaded in particular by the following:

146.1 That C was ordinarily working in the UK at the time of her dismissal - "…the strongest possible indication that Parliament would intend the claimant to fall within the legislative grasp of section 94(1) of [ERA]";

146.2 C's claims related to a period from August 2017 to 14 June 2019 when she was living, working and based in England – and not as a peripatetic employee - and specifically related to the point in time at which her employment was terminated. They did not relate to any period of time that the Claimant lived or worked in Australia or the United States;

146.3 The contractual structure put in place by the parties for C's employment in the UK giving exclusive jurisdiction to the English courts, applying English law to the UK Employment Agreement and giving primacy to that agreement where there was conflict with UK Assignment Letter and the Australian Employment Agreement;

146.4 Standing back and considering whether the claims in these proceedings have a greater connection to the employment law of Great Britain or that of Australia, in my judgment Rs are right in regarding it as counter-intuitive to point to Australian law (see above) but the matter goes beyond intuition when full force is given to the existence of the UK Employment Agreement and that the claims arise from matters which occurred solely during C's employment under that agreement;

146.5 I regard the above factors as outweighing Rs' points that R1 was the "vehicle" of R2 and that R2 was in control of and directing C who reported to it - and the other points referred to in paragraphs 131-132 above; I do not regard it as unusual, in the case of a senior employee of a multinational organisation, that such control and direction should come from a parent company in another jurisdiction and that the employee should continue to have a role in, and ties with, the parent company organisation during a fixed term

assignment with the subsidiary - and in this case the parties, being of course, fully aware of these factors, intended and carefully agreed that employment relationship while she was in the UK would be closely associated with the UK and governed by its legal system;

146.5 Whilst the possibility of "Australian" (statutory) claims against R2 being brought in the UK was not contemplated by the suite of agreements (and indeed contrary to the Australian Employment Agreement and the UK Assignment Letter) I bear in mind that this is only one aspect of the broader unfair dismissal claims against the Rs (as I have understood the ET1). As matter of international jurisdiction I have held that the BR employee-protectives provision as well as BR Art 8 have this effect and while the considerations of territorial jurisdiction are not the same, it is not entirely surprising to reach the same conclusion regarding territorial jurisdiction. In my judgment in looking at the legal system with which the dispute has it closest connection, I should not be deterred by the fact that one or other remedy is available (only) under Australian statute or law. It is not unusual for the courts of this jurisdiction to apply the law of another jurisdiction – and in this case it would be on limited issues which are subsidiary to the main issues in the case.

147. Accordingly, I find that parliament intended C to have protection and rights under the 1996 Act and that this Tribunal has jurisdiction to hear and adjudicate all of the claims arising out of her termination, including any that may relate to Australia. (The same would be true in regard the USA but no such claims were identified to me).

**Protected Disclosures**

148. ERA s.43B provides:

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
> (a) that a criminal offence has been committed, is being committed or is likely to be com. mitted,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

149. In relation to the 'public interest' criterion, in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731, the Court of Appeal held, at [36] *per* Underhill LJ:

> "…the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace

disputes should not attract the enhanced statutory protection accorded to whistleblowers even, as I have held, where more than one worker is involved…"

150. Various other cases were cited to me which are not necessary for me to recite given that in my judgment this dictum of Underhill LJ sets out the kernel of the approach that I should take in regard to the dispute over the element of public interest in this case.

**Rs' submissions regarding protected disclosures**

151. Rs contended that:

151.1 In her particulars, C did not identify any of the obligations in ERA s.43B(1) which she contended her alleged disclosures tended to show had been breached, were being breached or were likely to be breached;

151.2 C did not advance any basis for any potential assertion that she reasonably believed that her alleged disclosures were made in the public interest. On the contrary they appeared to be of a wholly private nature.

152 Rs indicated that they would strongly object to C being given any further opportunity to particularise her alleged protected disclosures. She ha' had four opportunities so far on the following occasions:

152.1 In her original pleadings (particularly since C indicated to the Tribunal on 6 July 2021 that she had had legal advice);

152.2 Following the order of Employment Judge Smail which required, at [1.1] that C disclose particulars of *"any protected disclosures she made within the meaning of Part IVA of the Employment Rights Act 1996…"* Rs contended that there could have been no mistaking of the meaning ie that he meant anything other than that C should disclose particulars of how any disclosures she alleges she made qualify for protection under the ERA; (that said, I am not certain that C would have appreciated that this referred to the public interest element of the alleged disclosures but in the event, (as appears below) nothing turns on this point);

152.3 In response to Rs pointing out that C had not provided any particulars of any protected disclosures in its strike out application of 8 December 2020; and

152.4 In her revised statement of 12 February 2021.

**Discussion regarding protected disclosures**

153 While I had some considerable sympathy with these points by Rs, I drew to the attention of the parties the decision in Ibrahim v HCA International Ltd [2019] EWCA Civ 2007 in which the Court of Appeal remitted a claim to the employment tribunal for it to make further findings of fact, as the claimant had not been directly asked about his subjective belief as to whether his disclosures were in the public interest. Particularly as the claimant in that case was not represented, he had to be given a proper opportunity to explain his case. To avoid such an outcome, given that there had been no cross-examination on the point I asked the claimant (subject to further questioning by Ms Omeri if she so wished - which she did not take up) to explain what she meant by " wrongdoing of a director" in paragraph 57 of her witness statement (in regard to which she had made disclosures). She explained that following the purchase by Zurich Group of the shares of Cover-More, Mike Emmett, the Group Chief Executive Officer and director of R2 had been ill-disposed to Zurich and given instructions to the claimant and/or other staff with the purpose and/or effect of losing business opportunities and/or of soliciting her and other staff away from R2 with a view to future competition against R2; she referred in particular to the following disclosures:

154.1 **Air Canada**: Mr Emmett, had out (in her view out of spite) instructed the claimant and or other staff not to bid in response to a request for proposal by Air Canada, telling C that Air Canada could get the relevant underwriting arrangements from a competitor of Zurich, when the whole purpose of Zurich buying the Cover-More business was to obtain new underwriting opportunities; she believed that this disclosure was in the public interest, Zurich being a multi-million dollar company and the second or third largest general insurer in the world which had spent 100s of millions of dollars buying the shares of Cover-More in order to become one of the largest travel insurance providers in the world; the opportunity was worth 15-20 million US dollars, if it proceeded;

154.2 **Arsenal Partnership**: Mike Emmett insisted in spending some US $4.5 million in relation to a project for the football club which he supported when he knew that it was not financially viable; he admitted to C that while he and she knew that the project would never pay for itself, Zurich did not know this - and so, in C's view, he was misleading Zurich;

154.3 **Travelex**: Mr Emmett let US $20-$30million of business be lost to Cover-More when a client, Travelex, complained that they were unhappy with how the account was being managed; Mr Emmett, to whom C escalated the complaint, could have taken steps to safeguard this business but did not do so. He was happy to let this business go, which it did to an American competitor, and C regarded his conduct as negligent, stepping away from an obligation to maximise the return on Zurich's investment;

154.4 Innate: when Zurich proposed to take over Cover-More, Mr Emmett proposed to C and other senior managers that they should resign and create a new competing business with him in order to compete with Cover-More.

154 C regarded her disclosure each of these matters to be in the public interest accepting that other matters which she had reported did not necessarily amount to wrongdoing, being more in the nature concerns about the way the company was being managed.

155 Whilst Rs contended that C had not identified the legal obligation referred to in ERA s43B (1) (b) in respect of which there had been a breach, in my judgment it was clear (without spelling it out in technical terms) that C had been alleging that Mr Emmett had breached his directors' (fiduciary or statutory) obligations to act in the best interests of the company of which he was a director and had instead either out of spite or self-interest acted against the interests of R2. It was further clear that C believed that these disclosure were in the public interest namely, they were not merely an expression of her concerns about the way the company was being managed (or "in the context of private workplace disputes" as stated in *Chesterton* above) but related to perceived serious breaches of duty by a senior director with substantial financial implications for the major investor. This being her subjective belief, given the seriousness of these perceived breaches and the seniority of Mr Emmett, it is difficult to conclude that this belief was not (objectively) reasonable for her to hold within the meaning of ERA s43B (1) and she was not cross-examined or questioned by Rs regarding her belief or the reasonableness to hold such belief.

156 So, in relation to the four matters referred to above (but not any other disclosures) I conclude that C believed that the disclosures were in the public interest, as she said, and that such belief was reasonably held. I should add that in my judgment her failure specifically to plead the public interest belief (or the particular duty breached) was an error, probably arising out of the different requirements of Australian law (referred to above) rather than for any reason which could fairly cast doubt on what she told the tribunal when asked about these matters.

## Conclusion

157 Accordingly, I determine the preliminary issues ordered by the tribunal on 17 August 2020 as follows:

158.1 The English Employment Tribunal has jurisdiction over all elements of C's claims;

158.2 C made protected disclosures, namely in relation to Air Canada, Arsenal, Travelex and Innate (but no others) that may be relevant to a claim of automatic unfair dismissal on grounds that the reason or principal reason for her dismissal was that she had made one or more protected disclosures;

158 I have referred to the difficulties in understanding C's ET1 from an English law perspective and have made provision in a separate order for the parties to seek agree a list of issues (and associated matters).

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Employment Judge Bloch QC

Date: 31 August 2021

Sent to the parties on: .17 September 2021.......
THY

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For the Tribunal Office