Case No: 2200381/2022

EMPLOYMENT TRIBUNALS

Claimant: Atalian Servest Limited

Respondent: Bidvest Noonan (UK) Limited

Heard at: **London Central (via CVP)** **On:** **1 December 2022**

Before: **Employment Judge Varnam**

Representation
Claimant: Mr N Siddall KC
Respondent: Mr B Cooper KC

JUDGMENT

1. The Claimant's claim under regulation 12 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is dismissed.

REASONS

Introduction

1. This matter was listed for a preliminary hearing to decide whether the Claimant's claim was one that the Tribunal had jurisdiction to consider.

2. I was provided with a statement of facts agreed by both parties, which I reproduce almost verbatim (but with minor deletions of things such as the full registered addresses of the parties) as follows:

   (1) There was a service provision change (within the substantive definitions in regulation 3(1)(b) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE GB') and regulation 3(1) of the **Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006** ('SPC NI'), but subject to the issue of territorial jurisdiction), which took place on 25 October 2021.

(2) The service provision change was from the Respondent to the Claimant.

(3) It is accepted that this was a relevant transfer for purposes of the substantive definition in regulation 2(1) TUPE GB (subject to the issue of territorial jurisdiction).

(4) The relevant transfer was the transfer of 265 employees based in Northern Ireland who were part of the organised grouping of employees carrying out cleaning activities for the client (Tesco) or attached to that organised grouping of employees ('Transferring Employees').

(5) The relevant transfer arose out of a contract between the Claimant and Tesco to provide cleaning, security and catering services for approximately 350 Tesco sites across the United Kingdom. That contract was formed in England and is governed by English law.

(6) All Transferring Employees were employed by the Respondent. Their written statements of terms and conditions refer to Great British statutory provisions such as the Employment Rights Act 1996, Working Time Regulations 1998, and the Health and Safety at Work Act 1974.

(7) All the activities that transferred from the Respondent to the Claimant were carried out across 36 stores and an office all of which were based in Northern Ireland only.

(8) The Claimant took over the contract from the Respondent to provide cleaning services to these 36 stores and office in Northern Ireland.

(9) The Respondent's registered office is situated in England. The Claimant's registered office is situated in England.

(10) The Respondent carries on business in (amongst other locations) England and Wales and Northern Ireland.

(11) The Employee Liability Information ('ELI') which is the subject of the claim was provided via e-mail from the Respondent's employee in Dublin to the Claimant's employee in England.

(12) The Claimant provided information to the Respondent relating to the Transferring Employees; the Claimant alleges that the Respondent failed to comply with regulation 11 of TUPE GB. The Claimant disputes whether all information was provided and questions the accuracy of some details provided.

(13) The Claimant both commenced and completed early conciliation via ACAS on 24 January 2022 and presented its claim to the Employment Tribunals in England and Wales on the same date.

3. The Claimant's ET1 (which, as noted above, was issued on 24 January 2022, which was the last day of the period of three months beginning with the date of the transfer of the Transferring Employees) asserts that there was a service provision change as defined in regulation 3(1)(b)(ii) of TUPE GB. It goes on to assert that various ELI, required to be provided under

regulation 11 of TUPE GB, had not been provided. Based on this, a claim based on regulation 12 of TUPE GB (the text of which is quoted below) is asserted. There is no reference to SPC NI in the ET1.

4. By its ET3, the Respondent denied any breach of its obligations to provide ELI. More pertinently for present purposes, however, it asserted that, by issuing proceedings in a Great British Employment Tribunal[1] relying on TUPE GB, the Claimant had commenced proceedings in the wrong forum. The Respondent's position is that the Claimant should have commenced proceedings in the Northern Ireland Industrial Tribunals, relying on SPC NI.

5. On 15 November 2022, Employment Judge Khan directed that there should be a preliminary hearing to determine the following issue:

   > *Whether the Tribunal has jurisdiction to hear this claim under [TUPE GB] given that the relevant transfer took place in Northern Ireland?*

6. Against the background of the facts set out above, I have been assisted by extensive written and oral arguments from Mr Nicholas M Siddall KC on behalf of the Claimant, and from Mr Ben Cooper KC on behalf of the Respondent.

7. Oral argument consumed almost the entire day, and did not conclude until around 4.40pm. In the circumstances, I reserved my decision, which is hereby delivered.

8. Before turning to set out my conclusions, I express my profuse apologies to both parties for the unacceptable delay in issuing this judgment. This has arisen from circumstances connected with my own professional workload, which has proven considerably greater than anticipated in the period between the hearing and the completion of this judgment. Given the evident importance of this matter to both parties, I have also been keen to review all of the important authorities in some detail, which has not been a quick task to perform.

Relevant Law

9. I begin by setting out my summary of the statute and case law. Much of this is uncontentious. Some of the more straightforward contentious questions of law that were argued before me are also addressed in this summary of the law. The most significant questions, and those bearing directly on the resolution of the question of jurisdiction identified by EJ Khan, are addressed separately.

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[1] Where, in the remainder of this judgment, reference is made to the 'Employment Tribunal', this should be understood to refer to employment tribunals existing in Great Britain pursuant to the Employment Tribunals Act 1996, although I will also use the expression 'Great British Employment Tribunal' from time-to-time, particularly where it is referred to in close proximity to the Northern Irish Industrial Tribunal. At times, I also use the expression 'this Tribunal'; it should be obvious that when doing so I am also referring to the Great British Employment Tribunal.

Jurisdiction of the Employment Tribunal

10. The Employment Tribunal is a statutory body. Unlike, for example, the High Court, it has no inherent jurisdiction. Rather, it has jurisdiction only where statute expressly so provides.

11. The overarching provision governing the jurisdiction of the Employment Tribunal is section 2 of the **Employment Tribunals Act 1996**, which provides as follows:

    Employment tribunals shall exercise the jurisdiction conferred on them by or by virtue of this Act or any other Act, whether passed before or after this Act.

12. A starting point, therefore, in determining whether the Employment Tribunal has jurisdiction is to consider whether an Act confers jurisdiction upon it. As is set out below, however, Mr Siddall on behalf of the Claimant advanced an array of arguments designed to persuade me that merely to begin and end with such an assessment would be an overly simplistic approach. Nonetheless, at this stage of setting out the relevant law, it is in my view appropriate to turn to the two sets of provisions on which the Claimant may rely for its substantive cause of action, namely TUPE GB and SPC NI, and to consider what they say concerning the jurisdiction of this Tribunal.

TUPE GB

13. The provisions of TUPE GB are well-known to English employment lawyers. Nonetheless, I propose to set out in some detail the provisions relied upon in this case

14. I begin with regulation 3 of TUPE GB, which defines the circumstances in which a relevant transfer (in employment lawyers' common parlance, a TUPE transfer) may arise. This provides:

    (1) These Regulations apply to—

    (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

    (b) a service provision change, that is a situation in which—

    (i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

    (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

[…]

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

(4) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a transfer or service provision change howsoever effected notwithstanding—

(i) that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of a country or territory outside Great Britain;

(ii) that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;

(c) a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business

or part transferred ordinarily work outside the United Kingdom.

15. It is not necessary to quote the remainder of regulation 3.

16. As is well-known, there are two basic forms of relevant transfer. One is that set out in regulation 3(1)(a), to which I will refer as a 'business transfer'. The second, set out in regulation 3(1)(b), is a service provision change. It is on the latter that the Claimant, in both its pleaded case and in the agreed statement of facts, relies.

17. It will be seen that there are a number of matters that the Claimant must prove in order to establish that a service provision change has taken place. Most of these are not matters that I could resolve without hearing evidence. However, as the last words of regulation 3(1) make clear, there can be no service provision change for the purposes of TUPE GB unless all of the requirements of regulation 3(3) are satisfied.

18. Those requirements include regulation 3(3)(a)(i), namely that, immediately before the transfer, there should be an organised grouping of employees situated in Great Britain. I note that here it was an agreed fact that the relevant organised grouping of employees was situated in Northern Ireland.

19. If a service provision change is shown to have occurred, then a number of duties fall upon the transferor (here, the Respondent). The relevant duties for present purposes are set out in regulation 11, which provides that:

> *(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer —*
>
> *(a) in writing; or*
>
> *(b) by making it available to him in a readily accessible form.*
>
> *(2) In this regulation and in regulation 12 "employee liability information" means—*
>
> *(a) the identity and age of the employee;*
>
> *(b) those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the 1996 Act;*
>
> *(c) information of any—*
>
> *(i) disciplinary procedure taken against an employee;*
>
> *(ii) grievance procedure taken by an employee,*
>
> *within the previous two years, in circumstances where the Employment Act 2002 (Dispute Resolution) Regulations*

2004(1) apply;

(d) information of any court or tribunal case, claim or action—

(i) brought by an employee against the transferor, within the previous two years;

(ii) that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and

(e) information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).

(3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.

(4) The duty to provide employee liability information in paragraph (1) shall include a duty to provide employee liability information of any person who would have been employed by the transferor and assigned to the organised grouping of resources or employees that is the subject of a relevant transfer immediately before the transfer if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(5) Following notification of the employee liability information in accordance with this regulation, the transferor shall notify the transferee in writing of any change in the employee liability information.

(6) A notification under this regulation shall be given not less than fourteen days before the relevant transfer or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter.

(7) A notification under this regulation may be given—

(a) in more than one instalment;

(b) indirectly, through a third party.

20. The Claimant contends that the Respondent, as transferor, failed to provide the Claimant, as transferee, with the employee liability information required by regulation 11. Of course, as regulation 11(1) makes clear, the obligation to provide employee liability information only arises in respect of people '*assigned to the organised grouping of resources or employees that is the subject of a relevant transfer*', and there must be a relevant transfer within the meaning of TUPE GB before an obligation to provide

employee liability information under TUPE GB can arise. This in turn leads back to regulation 3, and the question of whether there can be a relevant transfer (in the form of a service provision change under TUPE GB) where the organised grouping of employees was situated outside Great Britain.

21. If there was a relevant transfer within the meaning of regulation 3, and a failure to provide employee liability information, then the transferee's remedy is found in regulation 12(1) of TUPE GB, which provides:

> *On or after a relevant transfer, the transferee may present a complaint to an employment tribunal that the transferor has failed to comply with any provision of regulation 11.*

22. It is, I think, common ground that the reference to 'an employment tribunal' can only be to a Great British Employment Tribunal.

23. Schedule 1 of TUPE GB is headed 'Application of the Regulations to Northern Ireland'. As relevant, it provides:

> *1. These Regulations shall apply to Northern Ireland, subject to the modifications in this Schedule.*
>
> *2. Sub-paragraph (1)(b) of regulation 3 and any other provision of these Regulations insofar as it relates to that sub-paragraph shall not apply to Northern Ireland.*
>
> *3. Any reference in these Regulations—*
>
> *(a) to an employment tribunal shall be construed as a reference to an Industrial Tribunal…*

24. I do not consider it relevant to quote further from Schedule 1.

25. It will be seen that paragraph 2 of Schedule 1 expressly disapplies the service provision change form of relevant transfer in Northern Irish cases.

26. On the face of it, paragraph 3(a) of Schedule 1 has the effect of substituting the words 'Industrial Tribunal' for the words 'employment tribunal' in regulation 12(1). It is clear that the reference to 'Industrial Tribunal' is to the Northern Irish Industrial Tribunal. Paragraph 3(a) thus appears to have the effect that jurisdiction in respect of TUPE GB in cases arising in Northern Ireland is conferred on the Northern Irish Industrial Tribunal, and not on the Great British Employment Tribunal. However, in light of Mr Siddall's arguments, I will address this question in more detail below.

<u>SPC NI</u>

27. SPC NI deals with service provision changes in the context of Northern Ireland. As relevant, regulation 3 provides as follows:

> *(1) These Regulations apply to a service provision change, that is a situation in which—*

(a) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(b) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(c) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (2) are satisfied.

(2) The conditions referred to in paragraph (1) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Northern Ireland which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

(3) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a service provision change howsoever effected notwithstanding—

(i) that the service provision change is governed or effected by the law of a country or territory outside Northern Ireland;

(ii) that the employment of persons employed in the organised grouping of employees, is governed by any such law;

(c) a service provision change where persons employed in the business or part transferred ordinarily work outside the United Kingdom.

28. It will be seen that this regulation replicates exactly the provisions of regulations 3(1)(b), 3(3), and 3(4) of TUPE GB, save that regulations 3(2)(a)(i) and 3(3)(b)(i) of SPC NI substitute the words ‘Northern Ireland’ in place of the words ‘Great Britain’ used in regulations 3(3)(a)(i) and 3(4)b)(i) of TUPE GB.

29. Regulation 11 of SPC NI then provides:

> *(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a service provision change —*
>
> *(a) in writing; or*
>
> *(b) by making it available to him in a readily accessible form.*
>
> *(2) In this regulation and in regulation 12 “employee liability information” means—*
>
> *(a) the identity and age of the employee;*
>
> *(b) those particulars of employment that an employer is obliged to give to an employee pursuant to Article 33 of the 1996 Order;*
>
> *(c) information of any—*
>
> *(i) disciplinary procedure taken against an employee;*
>
> *(ii) grievance procedure taken by an employee,*
>
> *within the previous two years, in circumstances where the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004(1) apply;*
>
> *(d) information of any court or tribunal case, claim or action—*
>
> *(i) brought by an employee against the transferor, within the previous two years;*
>
> *(ii) that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee’s employment with the transferor; and*
>
> *(e) information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).*
>
> *(3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.*

(4) The duty to provide employee liability information in paragraph (1) shall include a duty to provide employee liability information of any person who would have been employed by the transferor and assigned to the organised grouping of resources or employees that is the subject of a service provision change immediately before the change if he had not been dismissed in the circumstances described in regulation 7(1), including, where the change is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(5) Following notification of the employee liability information in accordance with this regulation, the transferor shall notify the transferee in writing of any change in the employee liability information.

(6) A notification under this regulation shall be given not less than fourteen days before the service provision change or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter.

(7) A notification under this regulation may be given—

(a) in more than one instalment;

(b) indirectly, through a third party.

30. This is in extremely similar terms to regulation 11 of TUPE GB.

31. Regulation 12(1) then provides that:

On or after a service provision change, the transferee may present a complaint to an industrial tribunal that the transferor has failed to comply with any provision of regulation 11.

32. This is identical to regulation 12(1) of TUPE GB, save that here the complaint is to be presented to a Northern Irish Industrial Tribunal, and not to a Great British Employment Tribunal.

Underlying EU legislation

33. As I have identified, it was common ground here that the form of relevant transfer relied upon by the Claimant was a service provision change, and not a business transfer. This is relevant to the arguments that were advanced before me, because while, in TUPE GB, the two forms of transfer occupies adjacent subparagraphs of the same regulation, their genesis is materially different.

34. The business transfer provisions of regulation 3(1)(a) of TUPE GB derive from European Union legislation. These provisions implemented Council Directive 2001/23/EC ('the Acquired Rights Directive'), Article 2 of which provides, as relevant:

> (a) *This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.*
>
> (b) *Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*

The connection between these provisions and the business transfer provisions of TUPE GB will be readily apparent.

35. The obligation upon transferors, such as the Respondent, to provide employee liability information also, to some extent, echoes the Acquired Rights Directive. Article 3(2) of the Acquired Rights Directive provides that:

> *Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer…*

The language used ('may') is, however, permissive and not mandatory.

36. However, the service provision change form of relevant transfer, in both TUPE GB and SPC NI, is exclusively domestic in origin. Unlike the business transfer provisions, it does not derive from EU law: see, for example, *Hunter v McCarrick* [2013] IRLR 26, per Elias LJ at paragraph 11.

37. A further consequence of the purely domestic derivation of the service provision change was identified by His Honour Judge Burke QC in *Metropolitan Resources Ltd v Churchill Dulwich Ltd* [2009] ICR 1380. At paragraph 27 of his judgment, he said that:

> *In contrast to the words used to define transfer in the 1981 Regulations the new [service provision change] provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact.*

He then went on to make the following observations:

> *28. In this context there is, as I see it, no need for an employment tribunal to adopt a purposive construction…as opposed to a straightforward and common sense application of the relevant statutory words to the individual circumstances before them; but equally and for the same reasons there is no need for a judicially prescribed multi-factorial approach…such as that which has necessarily arisen in order to enable the tribunal to adjudge whether there was a stable economic entity which retained its identity after what was said to be a transfer falling within what is*

now regulation 3(1)(a).

29. In a case in which regulation 3(1)(b) is relied upon, the employment tribunal should ask itself simply whether, on the facts, one of the three situations set out in regulation 3(1)(b) existed and whether the conditions set out in regulation 3(3) are satisfied.

38. I bear these observations in mind when engaging in the exercise of construing TUPE GB.

Jurisdiction

39. Both counsel referred extensively to a variety of authorities and other sources on the question of jurisdiction. I divide this section of the judgment into the following subsections:

(1) Conceptual analysis of jurisdiction
(2) The Employment Tribunal Rules of Procedure 2013
(3) The Civil Jurisdiction and Judgments Act 1982
(4) The Brussels Recast
(5) The Rome Convention
(6) *Lawson v Serco*
(7) The *Bleuse* principle
(8) *Simpson v Intralinks Ltd*
(9) The related issues of applicable law and appropriate forum

Collectively, these cover the key points on which I heard argument, although I have not set out below every source to which I was referred, but have focused on those which have most materially affected my decision.

Conceptual analysis of jurisdiction

40. In her article, 'The extra-territorial reach of employment legislation', *International Law Journal* 2010, 39(4), 355-381, at page 357, Louise Merrett drew a distinction between:

(1) International jurisdiction, meaning the question of whether the English court or tribunal has jurisdiction to hear the case at all, or whether it should be heard in a foreign court. 'English' in the previous sentence is Professor Merrett's word. My view is that the term 'UK' could aptly be substituted, and that the principle of international jurisdiction is not relevant to questions of which UK court or tribunal should hear a claim. I note that the specific examples which Professor Merrett gives in respect of international jurisdiction are all concerned with the relationship between the UK and other nation states, and not with the relationship between intra-UK jurisdictions.

(2) Domestic jurisdiction, namely which court or tribunal within England (or, in my view, within the UK) should hear a matter if England/the UK is the correct international jurisdiction for the matter to be tried in.

(3) Territorial jurisdiction, meaning the question of whether a particular English statute applies to the case in question. Mr Cooper's skeleton argument identifies the question before me as one concerned with territorial jurisdiction.

Professor Merrett's tripartite analysis was adopted by Langstaff J in *Simpson v Intralinks Ltd* [2012] ICR 1343.

41. In due course, I will need to consider which of the three forms of jurisdiction identified by Professor Merrett is actually applicable to this case.

Jurisdiction: The Employment Tribunal Rules of Procedure 2013

42. Rule 8(2) of the Employment Tribunal Rules of Procedure 2013 provides that:

> *(2) A claim may be presented in England and Wales if—*
>
> *(a) the respondent, or one of the respondents, resides or carries on business in England and Wales;*
>
> *(b) one or more of the acts or omissions complained of took place in England and Wales;*
>
> *(c) the claim relates to a contract under which the work is or has been performed partly in England and Wales; or*
>
> *(d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales.*

43. This provision should be read in conjunction with rule 8(3), which sets out the circumstances in which a claim should be presented in Scotland, in terms identical to rule 8(2), save that for the words 'England and Wales' is substituted the word 'Scotland'.

44. In his skeleton argument, Mr Siddall contended that since rule 8(2)(a) was satisfied, that was sufficient to determine the question of domestic jurisdiction in the Claimant's favour. However, in my view rule 8(2) does not go anywhere near that far. In the first place, it is merely a rule of procedure and therefore incapable of conferring substantive jurisdiction where that would not otherwise exist. More importantly still, as a reading of the whole of rule 8 (including rule 8(3)) shows, the purpose of rules 8(2) and 8(3) is to indicate whether a claim within the jurisdiction of the Great British Employment Tribunal should be brought within the Scottish or the English and Welsh divisions of that Tribunal. Rule 8 does not have any role at all in determining whether a claim may permissibly be brought in the Great British Employment Tribunals as opposed to the Northern Irish Industrial Tribunal. This is clear from the judgment of His Honour Judge Peter Clark in *Jackson v Ghost Ltd* [2003] IRLR 824. At paragraph 79, he

considered the predecessor provision to rule 8(2)(a), and held that it:

> *…does not confer jurisdiction on the employment tribunal to hear a complaint…it merely determines where [as between England and Scotland], if the ET has jurisdiction the case should heard.*

45. For what it is worth, I am satisfied that if the Claimant is entitled to bring a complaint of a failure to provide employee liability information in the Great British Employment Tribunal, then the claim may properly be brought in England as opposed to Scotland. However, I derive no assistance from rule 8(2) in determining whether or not the Great British Employment Tribunal actually has jurisdiction to hear this claim.

Jurisdiction: The Civil Jurisdiction and Judgments Act 1982

46. Mr Siddall referred me to the Civil Jurisdiction and Judgments Act 1982 ('CJJA 1982'), and in particular to section 16:

> ***16 Allocation within U.K. of jurisdiction in certain civil proceedings.***
>
> *(1) The provisions set out in Schedule 4 (which contains a modified version of Chapter II of the Regulation) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where—*
>
> *(a) the subject-matter of the proceedings is within the scope of the Regulation as determined by Article 1 of the Regulation (whether or not the Regulation would have had effect before completion day in relation to the proceedings); and*
>
> *(b) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Article 24 of the Regulation (exclusive jurisdiction regardless of domicile).*

47. 'The Regulation' is defined in section 1(1) of CJJA 1982 as meaning the Brussels Recast, to which I refer below. As I understood it, it was common ground that these proceedings were within the scope of Article 1 of the Brussels Recast, which provides that '*this Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal'*.

48. Mr Siddall then referred to Schedule 4 to CJJA 1982, which provides that:

> 1. *Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part.*
>
> 2. *Persons domiciled in a part of the United Kingdom may be sued in the courts of another part of the United Kingdom only by virtue of rules 3 to 13 of this Schedule.*
>
> 3. *A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued—*

(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

[…]

(c) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur…

49. It was common ground that the alleged failure to provide employee liability information was, if proved, a statutory tort, and as such that, if I reach the stage of considering Schedule 4 to the CJJA, paragraph 3(c) is applicable.

50. However, Mr Cooper contended that the CJJA was irrelevant. In particular, he drew attention to the use of the words 'courts of law' in section 16(1). As Mr Cooper pointed out, the definitions section (section 50) of the CJJA provides, relevantly, as follows:

"court", without more, includes a tribunal;

"court of law", in relation to the United Kingdom, means any of the following courts, namely—

(a) the Supreme Court,

(aa) in England and Wales, the Court of Appeal, the High Court, the Crown Court, the family court, the county court and a magistrates' court

(b) in Northern Ireland, the Court of Appeal, the High Court, the Crown Court, a county court and a magistrates' court,

(c) in Scotland, the Court of Session, the Sheriff Appeal Court and a sheriff court.

51. I will return to the question of the applicability of section 16 later in this judgment.

Jurisdiction: The Brussels Recast

52. Mr Siddall drew my attention to the fact that the relevant provisions of the CJJA reflect the provisions of the Recast Brussels Regulation (Regulation (EU) 1215/2012) ('the Brussels Recast'). While Mr Siddall did not draw my attention to specific provisions of the Brussels Recast, I note Article 4(1), which provides:

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

53. As Mr Cooper pointed out, the United Kingdom as a whole was, prior to

the UK's withdrawal from the EU ('Brexit'), a Member State. Neither Great Britain nor Northern Ireland is or was in itself an EU Member State.

54. I also note Article 7, which as potentially relevant provides:

> *A person domiciled in a Member State may be sued in another Member State:*
>
> *(1)*
>
> *(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;*
>
> *(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*
>
> *— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
>
> *— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;*
>
> *(c) if point (b) does not apply then point (a) applies;*
>
> *(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur…*

55. The provisions of Article 7 are substantially the same as those of paragraph 3 of Schedule 4 to the CJJA, save that Article 7 applies as between EU Member States, and paragraph 3 applies as between the constituent parts of the UK.

56. In *Simpson v Intralinks Ltd* [2012] ICR 1343, the Brussels I Regulation (the predecessor provision to the Brussels Recast) was applied by the Employment Appeal Tribunal. *Simpson* was decided pre-Brexit, however, and while the CJJA, to the extent that it implemented the Brussels Recast, was retained EU law,[2] the Brussels Recast itself was disapplied in proceedings commenced after 31 December 2020 by regulation 89 of the **Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019**. I therefore doubt that the Brussels Recast in fact continues to apply in relation to Employment Tribunal proceedings commenced after 31 December 2020. However, the precise question of the applicability of the Brussels Recast in light of regulation 89 was not addressed before me, and in the circumstances I shall approach the Brussels Recast as if it were applicable here.

Jurisdiction: The Rome Convention

57. A principle closely connected to, but not synonymous with, questions of

[2] European Union (Withdrawal) Act 2018, section 2.

jurisdiction is the question of the law to be applied. The mere fact that, for example, English law was to be applied would not mean that the Employment Tribunal would have jurisdiction. However, Mr Siddall contended during the course of argument that it would be a relevant factor in considering whether the Employment Tribunal had territorial jurisdiction over the dispute.

58. In respect of the choice of law, Mr Siddall drew my attention to the Rome Convention on the law applicable to Contractual Obligations, which has the force of law in the UK pursuant to section 2 of the **Contracts (Applicable Law) Act 1990**. He particularly cited Article 3(1), which provides as follows:

> *A contract shall be governed by the law chosen by the parties. The choice must be expressed 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.*

59. Mr Siddall also relied on Article 4 of the Rome Convention:

> ***Applicable law in the absence of choice***
>
> *1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.*
>
> *2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.*

60. As I understood it, Mr Siddall’s basic contention was that, for various reasons, the contracts that the Respondent had (prior to the transfer) and which the Claimant now has with the transferring employees was governed by Great British employment law, applying the Rome Convention.

61. Reference was also made in argument before me to the concept of ‘mandatory rules’, which is defined in Article 3(3) of the Rome Convention as ‘rules of the law of that country which cannot be derogated from by contract’. Article 7 provides that:

Mandatory Rules

1. *When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

2. *Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.*

62. I note, however, that Article 1 of the Rome Convention provides that:

The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

The Rome Convention was signed by the United Kingdom as a nation state. As with the Brussels Recast, which appears to deal with the allocation of jurisdiction between the UK and other member states, it appears to me that the Rome Convention is primarily applicable to the choice of laws between the UK and non-UK jurisdictions.

63. An important point to note concerning the Rome Convention is that its scope is limited, as a matter of UK law, to contracts entered into up to 16 December 2009. Thereafter, it was superseded, in respect of contractual obligations, by Regulation (EC) No 593/2008 ('the Rome I Regulation'). While Mr Cooper drew my attention to this fact, I was not referred by either counsel to any of the terms of the Rome I Regulation. The Rome I Regulation is similar in content to the Rome Convention, and given (i) the fact that Mr Siddall addressed me by reference to the Rome Convention, and (ii) my conclusion that nothing in the Rome Convention would assist the Claimant in any event, I continue to refer below to the Rome Convention. I add that both the Rome Convention and the Rome I Regulation remain applicable in the UK as retained EU law.

Jurisdiction: Lawson v Serco

64. I was referred to the judgment of the House of Lords in *Lawson v Serco Ltd* [2006] ICR 250. That appeal concerned three separate claimants who sought to bring unfair dismissal claims, but who were based (entirely in the case of two claimants, and partially in the case of the third) outside the UK. The House of Lords ruled that, while it was generally the case that Great British employment legislation would not apply to employees who worked and were based outside the UK, there would be some exceptions

to this. At paragraphs 37 to 39 of his judgment, Lord Hoffman gave examples of the characteristics that might point to a sufficient connection to Great Britain to allow the claim to be brought here.

65. I note that *Lawson* was entirely concerned with the circumstances in which peripatetic employees and employees based outside the UK could bring proceedings in the Great British Employment Tribunal. Lord Hoffman's speech does not address the instant situation, of the interplay of jurisdiction between constituent parts of the UK.

Jurisdiction: the Bleuse principle

66. In oral argument Mr Siddall placed considerable reliance on the *Bleuse* principle (*Bleuse v MBT Transport Ltd* [2008] ICR 488). *Bleuse* was a case concerned with an attempt by a German national, living in Germany and working solely in mainland Europe (and not Great Britain), but employed by a UK-registered company under a contract which stated that it was governed by English law and subject to the jurisdiction of the English courts, to bring claims of unfair dismissal, breach of contract, unlawful deductions from wages, and for holiday pay in the Great British Employment Tribunal. In respect of the holiday pay claim, which derived from EU law, the Employment Appeal Tribunal concluded that the first-instance Tribunal had erred in dismissing this claim as being outside its jurisdiction.

67. The basis for this was set out in paragraphs 52 to 57 of the judgment of Elias J (as he then was):

> *52. The last ground of appeal is that whatever the position with purely domestic rights, a different principle applies when directly effective Community rights are in issue. It is alleged that this principle plainly applies to the right to holiday pay…In a claim against the state or an emanation of the State the Directive can be directly relied upon and any incompatible domestic laws will simply have to be disapplied. There is, however, a limitation on the ability of the courts to give effect to directly effective rights in a case such as this because it is also well established that the direct effect of a Directive cannot be pleaded against private bodies…However, that does not affect the principle of harmonious construction which gives indirect effect to the right. This requires that the domestic courts must, if at all possible, construe the relevant domestic laws so as to give effect to the EU right. This is the well known Marleasing principle: Marleasing SA v La Commercial Internacionale de Alimencation SA [1990] ECR I-4135. This principle applies not only to the law passed to give effect to the EU right, but to the body of domestic law as a whole: see Pfeiffer v Deutches Rotes Kreuz, Kreisferband Waldshut [2004] ECR I-8835. It is only if the domestic legislation cannot sensibly be construed compatibly with European law that the claimant will be denied his rights.*
>
> *53. In this case Ms Kreisberger submits that there is no difficulty about construing the relevant provisions of the Working Time Regulations, which transpose the Directive into domestic law, in a*

manner which gives effect to the EU rights. As with the unfair dismissal provisions, there is no express limitation on the scope of the Working Time Regulations. Any limitation has to be implied, and the implication can allow for the enforcement of EU rights.

54. The premise underlying this argument is that English law - and in particular the Working Time Regulations - is the relevant domestic law for giving effect to the directly effective right. In the circumstances of this case, I think that is right, but it is important to emphasise that this is not by virtue of the fact that the English court is exercising jurisdiction (even if it exclusively has jurisdiction.) In different circumstances foreign law might be the appropriate domestic law to consider. Assume, for example, that the claimant had a contract to drive in Austria and the proper law of the contract was Austrian. He could still bring a claim in the English courts, since the company is domiciled here, but the relevant body of law to be applied would surely be Austrian law (although of course there would need to be evidence about it.) Potentially it could be significant whether it is English or Austrian law if, for example, Austria had not transposed the rights conferred by the Directive into their law, or if their domestic statute could not be construed so as to give effect to the directly effective right.

55. However, in this case English law is the proper law of the contract and that brings in its train the statutory rules relating to the contract. (This is subject to the qualification that an employee can take advantage of more favourable mandatory laws conferred by the legal system of another EU state if, absent the choice of law clause, that system would apply to the contract by virtue of Article 6(2) of the Rome Convention: see Dicey, Morris and Collins "The Conflict of Laws", 14th edn, 2006, para.33-070). As I have said, this does not mean that this body of law is necessarily applicable to the claimant; whether he can take advantage of it depends upon the proper reach of the statutory provision in issue.

56. It follows in my judgment that at least in circumstances where either English law is the proper law of the contract, or where it provides the body of mandatory rules applicable to the employment relationship by virtue of Article 6(2) of the Rome Convention, an English court properly exercising jurisdiction must seek to give effect to directly effective rights derived from an EU Directive by construing the relevant English statute, if possible, in a way which is compatible with the right conferred.

57. In this case, absent any question of EU rights, I would accept that there is no reason to think that the territorial reach of these Regulations would be any different to the limitation found in the Employment Rights Act as interpreted in Serco. However, in my judgment the implied limitation that might otherwise be deemed appropriate must be modified so as to ensure that directly effective rights can be enforced by the English courts. That is so even if on an application of the Serco principles, the base would not be Great Britain. The scope of the provision must be extended to give effect

> *to the directly effective rights under EU law. That law operates as part of the system of domestic law and must be given effect accordingly. I accept the argument of Ms Kreisberger that if this were not done it would mean that the principle of effectiveness would not be satisfied: there would be no effective remedy for a breach of the EU right.*

68. In my view, the effect of *Bleuse* is that (i) where English law is the proper law of the contract and/or provides the body of mandatory rules applicable to the employment relationship pursuant to the Rome Convention, and (ii) the claim before the court or tribunal concerns directly effective rights under EU law, then (iii) the relevant English (or other domestic) statute (here TUPE GB and possibly SPC NI) must be construed so as to give effect to the directly effective EU right if that is possible, and (iv) that may include relaxing any territorial restriction on the applicability of the statute that might otherwise exist. The editors of *Harvey on Industrial Relations and Employment Law* adopt a similar, albeit not identical, summary of the *Bleuse* principle at Division PIII, [101.02], adding that the Claimant must establish a sufficient connection with the EU before the *Bleuse* principle can apply.

69. The *Bleuse* principle was endorsed by the Court of Appeal in *Secretary of State for Children Schools and Families v Fletcher; Duncombe v Secretary of State for Children Schools and Families* [2010] ICR 815. When that case went to the Supreme Court ([2011] ICR 495), Baroness Hale (at paragraph 33) indicated that she was inclined to agree with the approach in *Bleuse*, but that had the appeal in the Supreme Court turned on the point (which it did not) she would have referred the matter to the European Court of Justice. However, it is plain to me that, in the absence of any such referral, this Tribunal is bound by the decision of the EAT in *Bleuse* and of the Court of Appeal in *Duncombe*.

Jurisdiction: Simpson v Intralinks Ltd

70. *Simpson v Intralinks Ltd* [2012] ICR 1343 concerned a claim brought in the Great British Employment Tribunal by an employee based in Frankfurt (but employed by a UK-registered company), seeking to bring a claim in respect of sex discrimination and for equal pay. At first instance, an employment judge concluded that the Tribunal had no jurisdiction, because the law governing the contract of employment was German law, and therefore (the employment judge held) UK law did not apply.

71. On appeal, this decision was reversed and it was held that the Tribunal did have jurisdiction, notwithstanding the fact that the law of the contract was German law. As I read the judgment of Langstaff J in the EAT, this was on the following bases:

    (1) Applying Article 19 of Council Regulation (EC) No 44/2001 ('the Brussels I Regulation'), the then-applicable iteration of what is now the Brussels Recast, he concluded that the employer could be sued in the courts/tribunals of the United Kingdom, because that was the employer's country of domicile: see paragraphs 32-34 of the judgment.

(2) The territorial scope of both the Equal Pay Act 1970 and the Sex Discrimination Act 1975 was wide enough to apply to the claimant in *Simpson*: paragraph 26 of the judgment.

(3) While the effect of the Rome Convention was that German law was the law of the contract (and thus was the law to be applied in determining whether there had been a contract of employment at all), the effect of Article 7 of the Rome Convention was that mandatory rules of UK law could not be excluded, and as such the relevant provisions of the 1970 and 1975 Acts were applicable: see paragraph 54 of the judgment.

Related Issues: Applicable law and appropriate forum

72. Before continuing to discuss territorial jurisdiction, I note two issues which (as Langstaff J made clear at paragraph 5 of his judgment in *Simpson*) are related to, but not synonymous with, the question of whether a Great British (or, indeed, Northern Irish) statute is applicable. These are, first, the question of the applicable law relating to a contract or tort. Second, whether (on the facts of this case) the Great British Employment Tribunal would be appropriate forum in any event.

73. As to the former issue, insofar as the law of the contract or the tort is material, the approach set out at paragraphs 57-63 above will be relevant.

74. As to the question of appropriate forum, Mr Cooper invoked the doctrine of *forum non conveniens* to contend that, even if this Tribunal had jurisdiction to hear the claim before it, nonetheless it should decline to do so, on the basis that the Northern Irish Industrial Tribunal was clearly the more appropriate forum. The doctrine of *forum non conveniens* was most authoritatively set out by Lord Goff of Chieveley in *Spiliada Maritime Corporation v Cansulex Ltd* ('*The Spiliada*') [1987] AC 460 at page 476:

> *The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*

Lord Goff went on to say (at 478):

> *If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.*

75. In order for this Tribunal to decline jurisdiction on *forum non conveniens* grounds, the Respondent would thus need to satisfy me that there was a

clearly more appropriate alternative forum in which this matter could be heard (i.e. the Northern Irish Industrial Tribunal). If it did so satisfy me, then it would be for the Claimant to persuade me that this Tribunal should nonetheless hear the matter.

76. I should make clear that the question of *forum non conveniens* is distinct from, and logically posterior to, the question of whether the Tribunal has jurisdiction to hear the claim. The essence of *forum non conveniens* lies in the Tribunal exercising its discretion to decline to hear the claim, notwithstanding that it would have jurisdiction to do so.

77. In *Lawson v Serco*, at paragraph 24, Lord Hoffman stated that it would be contrary to principle for an unfair dismissal claim to be stayed on the grounds of *forum non conveniens*. The reason for this was that there was no more convenient forum to hear an unfair dismissal claim under section 94 of the **Employment Rights Act 1996** than the Great British Employment Tribunal, because no other court or tribunal had jurisdiction to hear such a claim.

<u>Early conciliation in Northern Ireland</u>

78. In both Great Britain and Northern Ireland, there is a requirement to undergo an early conciliation process prior to bringing a claim to the Employment Tribunal or Industrial Tribunal. Here, the Claimant commenced early conciliation through ACAS in Great Britain on 24 January 2022, and the early conciliation certificate was issued on the same day.

79. The Claimant did not, however, undertake early conciliation in Northern Ireland.

80. TUPE GB contains provisions concerning early conciliation at regulation 12(7), as follows:

    > *Section 18 of the 1996 Tribunals Act (conciliation) shall apply to the right conferred by this regulation and to proceedings under this regulation as it applies to the rights conferred by that Act and the employment tribunal proceedings mentioned in that Act.*

    The ‘1996 Tribunals Act’ is of course the **Employment Tribunals Act 1996**. Section 18 is the provision listing ‘relevant proceedings’, which, pursuant to section 18A(1), may not be issued without first commencing early conciliation through ACAS. The upshot is that a claim under TUPE GB may not be presented to this Tribunal without first undertaking early conciliation through ACAS.

81. Paragraph 10(3) of Schedule 1 to TUPE GB then provides that in Northern Irish proceedings, the following substitution should be made:

    > *In regulation 12 for “Section 18 of the 1996 Tribunals Act” there is substituted “Article 20 of the Industrial Tribunals (NI) Order 1996 No.1921 (NI 18)”.*

82. Article 20 of the **Industrial Tribunals (Northern Ireland) Order 1996** contains a list of 'relevant proceedings'. Article 20A(1) then goes on to provide that:

    Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to the Agency prescribed information, in the prescribed manner, about that matter.

    The remainder of Article 20A is in the same terms as section 18A of the Employment Tribunals Act, and details the steps to be taken during the early conciliation process.

83. 'The Agency' for these purposes is the Labour Relations Agency ('LRA'), a Northern Irish body fulfilling a similar role to ACAS.

84. Given the arguments made by Mr Cooper, I consider it relevant to note that, when Article 20 defines 'relevant proceedings' it makes clear that '*"relevant proceedings" means industrial tribunal proceedings*'.

85. The clear effect of the foregoing, therefore, is that before a claim under TUPE GB can be presented to a Northern Irish Industrial Tribunal, prescribed information must be provided to the LRA and early conciliation must be gone through.

86. SPC NI also imposes an obligation to go through LRA early conciliation: see regulation 12(7) of SPC NI.

Analysis and Decision

<u>Starting Point: The apparent effect of the statutes</u>

87. As I observed early in these Reasons, this Tribunal is a creature of statute, having no greater jurisdiction than that which statute grants to it. It therefore seems to me that the appropriate starting point for this judgment is to consider the domestic statutes, TUPE GB and SPC NI, and to consider whether the claim before me can be brought in this Tribunal (or, if brought, could conceivably succeed) under either of them.

TUPE GB

88. The Claimant's ET1 pleads reliance on TUPE GB, and not on SPC NI. Thus, at paragraph 5 of the Particulars of Claim, it is asserted that:

    …it was accepted that there would be a "relevant transfer" under Regulation 3(1)(b)(ii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006…between the Claimant and the Respondent when the Claimant took over the cleaning services for Tesco at the Relevant Sites on 25 October 2021…

89. Throughout the remainder of the Particulars of Claim, reference is made to TUPE GB. There is no reference to SPC NI.

90. Insofar as the claim is brought under TUPE GB, there appear to be no difficulties in establishing international jurisdiction, as defined by Professor Merrett (see paragraph 40 above). International jurisdiction seems plainly to exist, because it would be nonsensical to suggest that a claim under TUPE GB could be brought in any other jurisdiction (save, if some of Mr Siddall's arguments were correct, possibly the Northern Irish Industrial Tribunal).

91. However, I consider that on the face of it the text of TUPE GB poses insurmountable problems to this claim, in respect of both territorial jurisdiction – i.e. whether TUPE GB has a sufficient territorial scope to apply to a service provision change in respect of employees, all of whom are based in Northern Ireland – and domestic jurisdiction (whether this Tribunal is the proper body within the UK to hear such a claim).

92. Beginning with territorial jurisdiction: on a straightforward reading of TUPE GB, it is impossible to see how it could be construed so as to apply the concept of a service provision change under regulation 3(1)(b) to a transfer where the employees are entirely based in Northern Ireland. I note the following:

    (1) There is no service provision change for the purposes of TUPE GB unless all of the requirements of regulation 3(3) are met. Regulation 3(3)(a)(i) states that there must be an organised grouping of employees situated in Great Britain. In this case, this requirement was simply not met – the Transferring Employees were all based in Northern Ireland.

    (2) In any event, paragraph 2 of Schedule 1 to TUPE GB expressly disapplies regulation 3(1)(b) – the paragraph dealing with service provision changes – in relation to Northern Ireland. Looking for the present only at the wording of the regulations, it seems to me that this is fundamentally inconsistent with any argument that the territorial scope of the service provision change aspect of TUPE GB extends to Northern Ireland.

93. While the claim before me is of a failure to provide employee liability information, and while regulations 11 and 12 of TUPE GB do not themselves contain wording limiting their territorial scope, the provisions that I have quoted appear fatal to the Claimant's attempt to establish territorial jurisdiction. The effect of regulation 3(3)(a)(i) is that, without an organised grouping of employees situated in Great Britain, there is no service provision change for the purposes of regulation 3(1)(b). If there is no service provision change for the purposes of TUPE GB, then there is no relevant transfer under those regulations (there being no pleaded case of a business transfer within regulation 3(1)(a)). As such, the obligation to provide employee liability information cannot arise under TUPE GB (since the obligation can only arise where there has been a relevant transfer within the meaning of TUPE GB), and there can be no prospect of the Claimant's establishing that it has been unlawfully breached. Similarly, paragraph 2 of Schedule 1 disapplies not only regulation 3(1)(b) itself, but also '*any other provision of these Regulations insofar as it relates to that*

sub-paragraph'. That would suffice to disapply regulation 11, insofar as reliance was placed on a service provision change to establish a duty to provide employee liability information.

94. Turning to domestic jurisdiction, it is true that ordinarily the Great British Employment Tribunal will be the correct forum for any claims in respect of TUPE GB. Indeed, regulation 12(1) provides in terms that claims in respect of failure to provide employee liability information should be brought in the employment tribunal. However, this is subject to paragraph 3(a) of Schedule 1, which provides that, in respect of Northern Ireland, references to 'employment tribunal' should be read instead as references to the (Northern Irish) Industrial Tribunal. It follows that, in this case, regulation 12(1) should be read as follows:

> *On or after a relevant transfer, the transferee may present a complaint to a [Northern Irish] Industrial Tribunal that the transferor has failed to comply with any provision of regulation 11.*

The upshot would be that, domestically, this Tribunal lacks jurisdiction because such jurisdiction as there might be has been vested in the Northern Irish Industrial Tribunal.

95. Mr Siddall contended that the need for domestic jurisdiction was established by rule 8 of the Employment Tribunal Rules of Procedure. However, for the reasons set out in paragraph 44 above, I do not consider that this assists me in resolving the issue of domestic jurisdiction. As HHJ Peter Clark made clear in *Jackson v Ghost Ltd*, rule 8 is concerned with where, as between England and Scotland, a claim within the jurisdiction of the Great British Employment Tribunal is issued. It does nothing to establish that any given claim is within this Tribunal's jurisdiction and, for the reasons set out above, I conclude that it is not.

96. Subject to the further arguments of Mr Siddall which I shall go on to address, my view is that on a proper construction, TUPE GB is fatal to the Claimant's claim in this Tribunal. The difficulties inherent in seeking to construe TUPE GB so as to both apply its service provision change provisions to Northern Ireland and to give this Tribunal jurisdiction to hear a complaint arising from a Northern Irish service provision change is brought into sharp relief if one considers how TUPE GB would need to be interpreted and reworded in order to do this:

    (1) Regulation 3(3)(a)(i) would need to be treated as reading 'there is an organised grouping of employees situated in Great Britain [*or Northern Ireland]* which has as its principal purpose the carrying out of the activities concerned on behalf of the client'.

    (2) Paragraph 2 of Schedule 1 would need to be treated as reading 'Sub-paragraph (1)(b) of regulation 3 and any other provision of these Regulations insofar as it relates to that sub-paragraph shall ~~*not*~~ apply to Northern Ireland'.

    (3) Paragraph 3 of Schedule 1 would need to be treated as

reading: 'Any reference in these Regulations to an employment tribunal shall be construed as a reference to an Industrial Tribunal *[or an employment tribunal]*'.

97. Each change would require a construction that fundamentally altered (and, in the case of paragraph 2 of Schedule 1, wholly reversed) the statutory wording.

98. In the course of argument, Mr Siddall disputed that regulation 3(3)(a)(i) amounted to a territorial restriction preventing TUPE GB from applying in Northern Ireland. He drew attention to regulation 3(4)(b)(i), and also to the judgment of His Honour Judge Ansell in *Holis Metal Industries Ltd v GMB* [2008] ICR 464, in which it was held that TUPE GB was capable of applying to a transfer, even where the transferee was located outside the UK (in that case, in Israel). However, I do not consider that either regulation 3(4)(b)(i) or *Holis* has any bearing on the present issue.

99. As to regulation 3(4)(b)(i), I begin by reminding myself of its text:

> *(4) Subject to paragraph (1), these Regulations apply to—*
>
> *[…]*
>
> *(b) a transfer or service provision change howsoever effected notwithstanding—*
>
> *(i) that…the service provision change is governed or effected by the law of a country or territory outside Great Britain…*

100. This provides that where the service provision change provisions in TUPE GB would otherwise apply, they will not be disapplied by virtue of the fact that the service provision change itself is governed or effected by the law of a country or territory outside Great Britain. However, before one gets to the stage of considering regulation 3(4)(b)(i) there needs to be a service provision change within the meaning of TUPE GB. As I have set out above, there was no such service provision change. Regulation 3(4)(b)(i) will not operate to create a service provision change, as defined in regulation 3(1)(b), where one would not otherwise exist.

101. Moreover, I note that regulation 3(4) is expressly subject to regulation 3(1). Regulation 3(1)(b) incorporates, as an express requirement for the existence of a service provision change within the scope of TUPE GB, the requirements of regulation 3(3). These include the requirement for an organised grouping of employees in Great Britain. For the reasons given in the previous paragraph I do not regard regulation 3(4)(b)(i) as being in any way inconsistent with the requirement for an organised grouping of employees in Great Britain, but if it were then I would consider that, given that this requirement is expressly referred to in regulation 3(1), and that regulation 3(4) is subject to regulation 3(1), the requirement for an organised grouping of employees in Great Britain took precedence over regulation 3(4)(b)(i).

102. As to *Holis*, it does not seem to me to be authority for anything

more than the fact that a TUPE transfer is not precluded merely because the transfer is to a foreign country or territory, which is what regulation 3(4)(b)(i) provides for anyway. I do not consider that, in the context of this case, it adds anything to what is in regulation 3(4)(b)(i). I can see that the effect of *Holis* would be that, had the organised grouping of employees in this case been located in Great Britain, and then transferred to Northern Ireland, a service provision change within TUPE GB might well be found to have occurred. But I can see nothing in *Holis* which would have the effect that TUPE GB applies (at least in respect of a service provision change) where the organised grouping of employees has always been located outside Great Britain.

103. In summary, looking only at the wording of TUPE GB, it seems plainly to provide as a matter of construction that a claim deriving from a service provision change said to have affected a grouping of employees in Northern Ireland cannot fall within TUPE GB, and cannot be brought in this Tribunal in any event. At this stage, I remind myself of the comments of HHJ Burke QC at paragraph 29 of *Metropolitan Resources*, to the effect that the Tribunal's focus in a service provision change case is simply on the factual questions of whether one of the situations in regulation 3(1)(b) existed, and, if so, whether the requirements of regulation 3(3) were all met. Applying this approach, the requirements of regulation 3(3) were clearly not all met.

SPC NI

104. I have considered whether the Claimant's case could be rendered arguable and within this Tribunal's jurisdiction if it had been brought under SPC NI. Of course, the claim as pleaded is not brought under SPC NI. In the absence of any amendment, that in itself might prove fatal to an attempt to argue that the Tribunal should hear such a case. However, I have nonetheless considered whether, looking for the present only at the wording of the statute, a claim of breach of the obligation to provide employee liability information could be brought in this Tribunal in reliance on SPC NI.

105. Here, it seems to me that there is no apparent difficulty in establishing either international jurisdiction or territorial jurisdiction. International jurisdiction (as between the UK as a whole and the rest of the world) would be established for the reasons set out at paragraph 86 above. As to territorial jurisdiction, the facts of this case, as alleged by the Claimant, would plainly seem to fall within the scope of SPC NI. So far as I can see, if the facts alleged by the Claimant were proved, a claim of failure to provide employee liability information would succeed under SPC NI.

106. The problem, and in my view apparently an insurmountable problem, is that this Tribunal simply has no jurisdiction to hear the claim under SPC NI. As regulation 12(1) of SPC NI shows, the jurisdiction to hear a claim of a failure to provide employee liability information under SPC NI vests in the Northern Irish Industrial Tribunal. There is nothing to suggest that it vests in the Great British Employment Tribunal. As I have observed more than once, unless statute empowers this Tribunal to hear a claim, it does not have the jurisdiction to hear it.

107. If I were again to adopt Professor Merrett's categories of jurisdiction, this would amount to a failure by the Claimant to establish the existence of domestic jurisdiction. However, to express the issue thus might not fully bring home the difficulties that the Claimant faces in any argument that SPC NI could form the basis for this Tribunal hearing the claim. For this Tribunal to hear a claim relying on SPC NI would amount to this Tribunal arrogating to itself the power to hear claims justiciable in a different legal jurisdiction, but not in this jurisdiction, in circumstances where the analogous claim in this jurisdiction (under TUPE GB) was expressly excluded. To do this would fundamentally disregard the basic principle embodied in section 2 of the Employment Tribunals Act, namely that the Tribunal only exercises that jurisdiction conferred on it by legislation.

108. I should add that, while Mr Cooper addressed the question of whether the Claimant could rely on SPC NI, Mr Siddall's arguments were heavily focused on the contention that the claim could be brought, and could succeed, under TUPE GB, and, as I have said, there was no attempt to amend the claim to plead reliance on SPC NI in the alternative to TUPE GB. The foregoing paragraphs illustrate why any such attempt would have failed.

Preliminary conclusion on the effect of the statutes

109. For the reasons set out above, I am driven to the view that the text of TUPE GB renders this claim hopeless if brought under TUPE GB and before this Tribunal. Similarly, while a claim under SPC NI would, on the face of it, not be hopeless if brought in the Northern Irish Industrial Tribunal, such a claim cannot be brought and is not brought before this Tribunal.

110. This might have been the end of the matter, but Mr Siddall raised a variety of arguments to the effect that the Tribunal did have jurisdiction, at least to hear a claim under TUPE GB. As I have understood them, the key points raised orally and/or in writing were as follows:

(1) CJJA: Reliance was placed on the CJJA, and it was said that this gave the Great British Employment Tribunal international jurisdiction.

(2) *Bleuse:* Reliance was placed on the *Bleuse* principle, which it was said applied to require me to relax the territorial restrictions which, as I have found, exist in TUPE GB.

(3) Sufficiently strong connection: It was contended, particularly in the skeleton argument, that the case had a sufficiently strong connection with Great Britain and Great British employment law to render TUPE GB applicable.

I will address each of these points in turn.

CJJA

111. Mr Siddall argued that the provisions of section 16 and Schedule 4 of the CJJA were sufficient to give the Tribunal international jurisdiction. As I have set out above, I agree that the courts and tribunals of the UK have, collectively, international jurisdiction to hear a claim under TUPE GB.

112. However, I do not consider that either this conclusion, or the provisions of the CJJA, comes remotely close to solving the problems that I have identified in the Claimant's case.

113. First, as regards international jurisdiction, it is in my view necessary to identify what constitutes 'international'. In my view, there are two possible approaches. One is to treat international jurisdiction as being concerned with the relationship between the Great British Employment Tribunal and all external jurisdictions, including Northern Ireland. The other is to treat it as being concerned with the relationship between the UK courts and tribunals as a whole, and foreign nation states. I have adopted the latter approach, and have treated the question of whether this claim should be issued in the Great British Employment Tribunal or the Northern Irish Industrial Tribunal as a matter of domestic jurisdiction. But if I were wrong about that, then the sole effect would be that I would consider (for the reasons that I have given at paragraph 94 above in respect of domestic jurisdiction) that the Great British Employment Tribunal did not have international jurisdiction. Either way, the key point is not so much whether the label of international or domestic jurisdiction is applied. Rather, it is the fact that, in my view, the power to hear a complaint under TUPE GB is vested in the Northern Irish Industrial Tribunal when the transfer occurred in Northern Ireland.

114. Moreover, as regards the provisions of the CJJA, I cannot see that they undermine any of the conclusions that I set out at paragraphs 91-103 above.

115. In the first place, I agree with Mr Cooper's argument that the provisions of the CJJA relied upon by Mr Siddall simply have no application in this case.

116. Section 16 of the CJJA is entirely concerned with determining the allocation of jurisdiction within the UK between courts of law as defined in section 50. 'Court of law' is plainly a term limited to the specific courts identified in the definition of that term within section 50; in other words, it does not include the Great British Employment Tribunal, which is a 'court', as defined in the definition of that term in section 50, but is not a 'court of law'. The same goes for the Northern Irish Industrial Tribunal.

117. It follows that section 16, which is limited to determining jurisdiction between courts of law, has no application to the instant question of precedency between the Great British Employment Tribunal and the Northern Irish Industrial Tribunal. It seems probable that this stems from the fact that the Employment Tribunal and the Northern Irish Industrial Tribunal are both creatures of statute, whose jurisdiction is limited to that expressly conferred upon them, whereas at least some of the courts

deemed 'courts of law' for the purposes of the CJJA 1982 have inherent jurisdiction over a broad range of matters, potentially bringing them into conflict if some provision such as section 16 did not govern the relationship between them. But whether that surmise is right or wrong, what is clearly right is that section 16 and Schedule 4 have no relevance to the questions currently before me.

118. I add that the fact that Schedule 4 itself uses the word 'courts' rather than the expression 'courts of law' does not change this analysis. Schedule 4 becomes relevant only if section 16 is applicable, and, because section 16 is only applicable to points of precedence between 'courts of law', it is not applicable here.

119. Mr Siddall placed reliance on the Brussels Recast. He said that if the effect of the CJJA was that section 16 and Schedule 4 did not apply to the Employment Tribunal, then this would amount to a failure by the Tribunal to apply the Brussels Recast which (as paragraph 21 of *Simpson* makes clear) is applicable in the Employment Tribunal. By reference to the approach of the Court of Appeal in *Jessemey v Rowstock Ltd* [2014] IRLR 368, I was invited to conclude that, if the effect of the CJJA was as I have identified, I should treat this as a drafting error.

120. I do not accept that the Brussels Recast has any bearing on this case. As Mr Cooper pointed out, the Brussels Recast addresses questions of jurisdiction as between member states of the EU. It is not concerned with the question that arises in this case (and with which the CJJA is concerned), as to precedency between courts and tribunals within a member state. Thus in *Lennon v Scottish Daily Record and Sunday Mail Ltd* [2004] EMLR 18, Tugendhat J, at paragraph 15, said that:

> *…no legislation allocating jurisdiction within the United Kingdom will be inconsistent with the Brussels Convention, or the Lugano Convention or the Regulation, because those instruments allocate jurisdiction between member states. Scotland and England are two separate jurisdictions, but they are parts of the United Kingdom, not separate member states.*

This analysis was endorsed by the Court of Appeal in *Kennedy v National Trust for Scotland* [2020] 2 WLR 275 (particularly at paragraphs 44 and 45).

121. Mr Siddall also relied on the text of section 17 of and paragraph 4 of Schedule 5 to the CJJA. In essence, these provide that appeals from the decisions of tribunals are not subject to Schedule 4 of the CJJA. It was said that the absence of any such exclusion in relation to the tribunals themselves indicated that they were subject to Schedule 4.

122. I disagree with this analysis for the following reasons:

(1) As is set out above, section 16 and Schedule 4 are expressly limited in their application to 'courts of law'. This in turn is a defined term, distinct from 'courts', and not including the Employment Tribunal. If Mr Siddall were right that the effect of section 17 and paragraph 4 of

Schedule 5 was to implicitly apply Schedule 4 to the Employment Tribunal, then this would be inconsistent with the express provisions of section 16 and the express definition of 'courts of law'. I do not consider that an implied meaning could override an express definition in this way.

(2) In any event, I do not agree with Mr Siddall's conclusions on the significance of paragraph 4 of Schedule 5. The significance of this paragraph is that, as Mr Cooper put it in oral argument, the higher up an appeal goes, the more likely it is that a court of law (as defined in the CJJA) will become involved. Thus, in Great Britain, appeals from the Employment Tribunal go to the Employment Appeal Tribunal, and from there to the Court of Appeal (in England and Wales) or the Court of Session (in Scotland). The EAT is not a court of law for the purposes of the CJJA, whereas the Court of Appeal and the Court of Session are. As such, the Employment Tribunal and EAT are not, on my analysis, subject to Schedule 4, but the Court of Appeal and Court of Session usually are. It seems to me that the clear purpose of paragraph 4 of Schedule 5 is to ensure that proceedings that begin in tribunals, and are not subject to Schedule 4, do not later become subject to Schedule 4 because the appeal process takes them before a court of law as defined. This is a far more plausible construction, in my view, than that which would result from Mr Siddall's approach, under which (in the example I have given) Schedule 4 would apply so long as proceedings were before the Employment Tribunal or EAT, but would then cease to apply (for no readily apparent reason) once the case reached the Court of Appeal or Court of Session.

123. It follows that I do not consider that the CJJA has any relevant application here. However, even if I am wrong about that, it does not seem to me that the CJJA greatly assists the Claimant's case. Even if Mr Siddall had been able to persuade me that the effect of the CJJA was that the Respondent could in principle be sued in the Great British Employment Tribunal (and possibly thereby avoid the difficulties identified at paragraph 94 above), I do not see how that would get round the problems identified at paragraphs 92-93 above – namely, that there must be an organised grouping of employees in Great Britain before there can be a service provision change for the purposes of TUPE GB, and that in any event the provisions of TUPE GB in respect of service provision changes do not apply to Northern Ireland

Bleuse

124. Mr Siddall contended that the *Bleuse* principle meant that the tribunal should disapply the territorial restrictions that exist in relation to TUPE GB, such that it could apply to a transfer taking place in Northern Ireland. His argument was that (i) the obligation to provide employee liability information was a matter of EU law, pursuant to Article 3(2) of the Acquired Rights Directive, (ii) this obligation had direct effect, (iii) accordingly, the Tribunal was bound to construe TUPE GB in such a manner as to give effect to the Claimant's directly-effective right to employee liability information (and to bring a claim if this was not provided), and (iv) this could only be done by construing TUPE GB such

that it applied to the instant transfer, notwithstanding the matters referred to above.

125. I do not accept this argument. It seems to me to be fundamentally flawed for several reasons.

126. First, I do not accept that the obligation to provide employee liability information in this case arose because of or was subject to EU law. As is set out at paragraphs 36-37 above, the service provision change form of relevant transfer is an entirely domestic piece of legislation. It follows that *Bleuse*, which is concerned with ensuring the enforceability of EU-derived rights, is not applicable.

127. Mr Siddall's response to this was to point out that, while the service provision change form of transfer is entirely domestic in origin, the obligation to provide employee liability information is provided for in Article 3(2) of the Acquired Rights Directive. However, in my view that is not a sufficient answer to the point. For one thing, as I have observed already, Article 3(2) is expressed in permissive, not mandatory, terms. So it is hard to see how it gives rise to a right that this Tribunal must give effect to.

128. But even if this issue were overcome, I do not consider that Article 3(2) can be read as giving the Claimant in this case a right to employee liability information under EU law. This is clear from an analysis of the Acquired Rights Directive as a whole. In particular:

(1) Article 3(2) provides for measures to ensure '*that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee <u>under this Article</u>*' (emphasis added). It is thus clear that Article 3(2) does not apply to every transfer of rights and obligations, but only to one occurring under Article 3. If Article 3(2) does impose an obligation to provide employee liability information, it does so only when rights and obligations have transferred pursuant to Article 3.

(2) Article 3(1) sets out the scope of the rights and obligations which will be transferred, as follows (emphasis added):

> *The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of <u>a transfer</u> shall, <u>by reason of such transfer</u>, be transferred to the transferee.*

From this, it is plain that the rights and obligations transferring under Article 3 (and thus, putatively, giving rise to an obligation under Article 3(2)) are limited to those arising by reason of 'a transfer' within the meaning of the Acquired Rights Directive.

(3) Article 1 sets out the scope of the Directive as follows:

> *(a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.*

(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(4) This definition of transfer for the purposes of the Directive is the same as the business transfer form of transfer under TUPE. It does not encompass a service provision change. It follows that it is only a business transfer which amounts to a transfer for the purposes of the Directive, and that a service provision change is not a transfer for the purposes of the Directive. Since Article 3(2) only applies to a transfer within the meaning of the Directive, it follows in turn that the obligation under the Acquired Rights Directive to provide employee liability information does not apply to a service provision change, which is not a transfer for these purposes.

129. Even if I were wrong to conclude that Article 3(2) does not give rise to the right to employee liability information in service provision change cases, I would nonetheless consider that *Bleuse* is not applicable, because I do not consider that any right created by Article 3(2) would be directly effective.

130. In order for EU legislation to be directly effective, it must, at the very least be (i) clear and precise, (ii) unconditional and unqualified, and (iii) capable of taking effect without further implementing measures by member states: see *N.V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Neder-Landse Tariefcommissie* [1963] CMLR 105, and the commentary in *Harvey on Industrial Relations and Employment Law*, Division L, [90].

131. In my view, none of these criteria are met here. As to the first, Article 3(2) provides that '*Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article*'. This is not remotely clear or precise as to what the 'appropriate measures' that Member States might adopt might be.

132. Similarly, I cannot conclude that Article 3(2) is unconditional and unqualified. If nothing else, it seems to me to be qualified by the permissive 'may', on which I have already commented. The effect of Article 3(2) is subject to the substantial caveat that it does not actually require any action to be taken.

133. Finally, Article 3(2) is not capable of taking effect without further implementing measures. Indeed, it refers in terms to further implementing 'appropriate measures' being adopted. Plainly further measures would be necessary to give effect to the broad and nebulous provisions of Article 3(2).

134. A yet further reason why the *Bleuse* principle has no application here is that the underlying purpose of the *Bleuse* principle is to ensure that effect is given to directly-effective EU rights. However, there is no doubt

that if, contrary to the foregoing paragraphs, the right to receive employee liability information in cases of a service provision change is both an EU right and a directly-effective one, it has been given effect to by the UK. In both Great Britain and Northern Ireland, transferees have a clear route to enforce the right to receive employee liability information. Unlike *Bleuse* itself, this is not a case in which the Claimant will be deprived of a remedy in respect of its EU rights if the Tribunal does not disapply the territorial restriction. Ultimately, all that has happened is that the UK has, as it is entitled to, allocated the power to enforce the putative directly-effective EU right between its domestic[3] courts and tribunals – specifically, allocating the power to enforce failures to provide employee liability information in respect of Great British employees to the Great British Employment Tribunal, and allocating the same power in respect of Northern Irish employees to the Northern Irish Industrial Tribunal. The Claimant had a clear route to enforce its rights in the Northern Irish Industrial Tribunal, and nothing in *Bleuse* requires that it also be given the ability to enforce that right in a different domestic tribunal. Absent EU rules governing the matter,[4] the allocation of jurisdiction between domestic courts is a matter for individual member states (see the judgment of the CJEU in *SL v Vueling Airlines SA* [2021] 1 WLR 2479, at paragraph 39).

135. In short, I find that *Bleuse* is wholly irrelevant to this case. The right sought to be enforced is not an EU right. If it is an EU right then it is not directly-effective. And in any event the UK has provided an appropriate route to enforcement of the right that does not require the disregarding of the territorial restrictions in TUPE GB.

<u>Sufficiently strong connection</u>

136. In his skeleton argument, Mr Siddall contended that territorial jurisdiction could be derived from what was said to be the strong connection between the transfer in this case and Great Britain and Great British employment law. It was said that, while little direct guidance could be derived from *Lawson v Serco Ltd* and the cases that followed it, these did provide some assistance in showing when a sufficiently strong connection to Great Britain and Great British employment law would exist. At paragraph 32 of his skeleton argument Mr Siddall detailed the factors that were said to demonstrate the closeness of the connection.

137. I do not consider that it is necessary in this case to consider the closeness of the connection. This is because, unlike, for example, *Lawson v Serco*, there is in this case an express territorial restriction, precluding the service provision change aspects of TUPE GB from applying in Northern Ireland. Where there is no express territorial restriction, the Tribunal must consider what the extent of the implied territorial restriction is (see paragraph 6 of Lord Hoffman's speech in *Lawson*), and the closeness of the connection to Great Britain will be a central part of that. However, there is no need to assess any implied restrictions, where the

[3] By which, in this context, I mean domestic to the UK, as opposed to a non-UK nation state, and thus encompassing both Great Britain and Northern Ireland.

[4] For the sake of completeness, I add that I am satisfied that there are no EU rules governing this matter. As I have set out above, the Brussels Recast, for example, is concerned with the allocation of jurisdiction between member states, not within member states.

statute itself contains an express restriction. However close the connection of this case to Great Britain might be, this cannot overcome the fundamental points that (i) the transfer of employees took place in Northern Ireland, (ii) the part of TUPE GB relied upon in support of the claim (regulation 3(1)(b)) is disapplied in Northern Ireland, (iii) in any event, there is no organised grouping of employees in Great Britain so as to give rise to a service provision change for the purposes of TUPE GB, and (iv) jurisdiction over any claim that may exist under TUPE GB vests in the Northern Irish Industrial Tribunal, not in the Great British Employment Tribunal.

138. It is true that Article 4 of the Rome Convention provides that 'the contract shall be governed by the law of the country with which it is most closely connected'. However, if it was being argued before me that this has any bearing on the question of whether a claim can be brought under TUPE GB in respect of a service provision change affecting employees based exclusively in Northern Ireland, then I reject that argument. As I have already observed, the Rome Convention is concerned with determining the relevant law of a contract, as between nation states. In that regard, there is no difficulty in finding that the laws of the United Kingdom as a whole are the applicable laws here. But the Rome Convention has no bearing on the question of the interpretation of domestic UK legislation.

139. In these circumstances, the close connection argument cannot solve the Claimant's problems.

Simpson v Intralinks

140. Although it did not appear to form a freestanding basis for Mr Siddall's submission that this Tribunal had jurisdiction, Mr Siddall placed substantial reliance at various times on the judgment in *Simpson*. In case it proves necessary, I therefore briefly record why I do not consider that anything in *Simpson* alters my views.

141. The key point is that it seems to me that the EAT in *Simpson* was concerned with a fundamentally different question from that with which I am concerned. In *Simpson*, it was accepted that the Great British Employment Tribunal had territorial jurisdiction to determine the Claimant's equal pay and sex discrimination claims – i.e. the scope of the relevant legislation was wide enough to apply to an employee living and working in Germany. The question was whether the Tribunal had international jurisdiction. By applying the Brussels I Regulation and the provisions of the Rome Convention concerned with mandatory rules, the EAT concluded that the Employment Tribunal did have international jurisdiction.

142. As noted above, my view is that questions of international jurisdiction are between the UK as a whole and other nation states. Similarly, that is what the Brussels Recast and the Rome Convention are concerned with. It is also quite clear from a reading of Langstaff J's judgment in *Simpson* that he was concerned with the question of jurisdiction as between the UK and Germany, and that he was not considering questions of jurisdiction between the UK's various domestic

tribunals.

143. By contrast, here I am concerned with whether a piece of purely domestic legislation – the service provision change under TUPE – is wide enough in scope to extend not only to Great Britain but also to Northern Ireland. That is a question of territorial jurisdiction, which is not what *Simpson* was concerned with. I am not in any way concerned with international jurisdiction between the UK and a foreign nation state. Rather, I am dealing with exclusively domestic matters, and more specifically with the question of which domestic legislation (TUPE GB or SPC NI) might apply, and which domestic Tribunal has jurisdiction to hear the matter. Ultimately, while much of *Simpson* affords helpful clarification of matters such as the distinction between international, domestic, and territorial jurisdiction, the matters in issue in that case were fundamentally different from this case, and as such the essential reasoning in *Simpson* was concerned with different matters from those before me.

144. I should add, given that Mr Siddall's oral submissions referred on a number of occasions to 'mandatory rules', which was of course a key point in *Simpson*, that I do not consider that the mandatory rules provisions in the Rome Convention have any bearing on my decision. Not only is the Rome Convention not concerned with questions of the territorial scope of UK legislation, or with the allocation of jurisdiction within domestic UK tribunals, but I am unable to see how, even if these difficulties were overcome, the Claimant would be able to invoke the mandatory rules provisions to bring this claim within the jurisdiction of this Tribunal. Put simply, it cannot be a mandatory rule, pursuant to TUPE GB, that the Respondent provide employee liability information to the Claimant, because TUPE GB is, on its own wording, inapplicable in this case. It may be that the obligation to provide employee liability information under SPC NI is a mandatory rule, but SPC NI contains express provision for questions arising from it to be determined in the Northern Irish Industrial Tribunal. Even if something is a mandatory rule within a country, that does not mean that it must be justiciable in every one of that country's courts or tribunals (see paragraphs 50-51 of *Simpson*, in which it was held that the High Court did not have jurisdiction to hear the sex discrimination claim in that case, notwithstanding the Sex Discrimination Act being a mandatory rule for Rome Convention purposes).

Forum non conveniens

145. As I have mentioned, Mr Cooper maintained a fallback position that, if I found that this Tribunal had jurisdiction to hear the claim, I should nonetheless decline to hear it (and presumably either strike it out or stay it) on the grounds of *forum non conveniens*.

146. Given my conclusions above, I do not reach the stage of considering *forum non conveniens*, and this doctrine has not ultimately been a part of my decision. However, I make the following observations:

(1) The claim has been brought under TUPE GB, and Mr Siddall's arguments on behalf of the Claimant focused on TUPE GB. If I had upheld those arguments and concluded that a claim under TUPE GB

could be brought in this Tribunal in respect of the transfer in this case, then I do not consider that *forum non conveniens* could possibly be established. In those circumstances, there would, *ex hypothesi*, be a claim under TUPE GB, issued in the correct Tribunal.

(2) If, however, the claim had been brought under SPC NI, and if the fundamental jurisdictional problems identified at paragraphs 104-108 above had somehow been overcome, then in my view *forum non conveniens* would plainly be established. There would in those circumstances be a clearly more appropriate forum to hear this case, namely the Northern Irish Industrial Tribunal. That Tribunal would be clearly more suitable to hear this case than this Tribunal, because (i) it is the Tribunal to which jurisdiction to hear claims under SPC NI is granted, and (ii) it is generally preferable for claims to be heard in the jurisdiction whose law is being applied, albeit that this is not an absolute rule (see *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337, per Lord Mance at paragraph 46), and this militates in favour of the Northern Irish Industrial Tribunal applying Northern Irish law. Applying the second limb of the test in *The Spiliada*, I would have gone on to conclude that there were no special circumstances by reason of which this Tribunal should nonetheless hear the matter. In particular, I would have concluded that the fact that the Claimant would now be out of time to bring a claim in the Northern Irish Industrial Tribunal was not a special circumstance justifying this Tribunal hearing the claim. This is because I consider that the fault for that rests entirely with the Claimant, for failing to issue these proceedings in Northern Ireland in the first place, and I do not consider that rescuing the Claimant, a large organisation with an in-house legal department and access to specialist external advice, from the consequences of its own errors would amount to a special circumstance.

147. As such, if I had had before me a claim under SPC NI, and if I had found that this Tribunal had jurisdiction to hear such a claim, then I would have stayed this claim.

Early conciliation

148. Mr Cooper also argued that, if this Tribunal both had jurisdiction and the claim should not be stayed on *forum non conveniens* grounds, then the Tribunal still lacked jurisdiction on the basis that the Claimant had failed to engage in early conciliation. The basis for this was said to be that, while the Claimant had gone through ACAS early conciliation, it had not gone through LRA early conciliation in Northern Ireland. As is set out above, claims under TUPE GB and SPC NI may not be brought in the Northern Irish Industrial Tribunal unless there has previously been LRA early conciliation.

149. However, it is important to reiterate the extent of the prohibition. As is made clear in Article 20A of the Industrial Tribunals (Northern Ireland) Order 1996, the prohibition is on bringing ‘relevant proceedings’ before going through LRA early conciliation. Article 20 in turn defines relevant proceedings as being ‘industrial tribunal proceedings’. In other words, the prohibition on bringing proceedings without LRA early conciliation is by

reference to the specific tribunal (the Northern Irish Industrial Tribunal), and not by reference to the proceedings being, for example, concerned with events that have happened in or are connected to Northern Ireland. The requirement to go through LRA early conciliation is applicable only in respect of a claim brought in the Northern Irish Industrial Tribunal. The 1996 Order does not in any way restrict the ability to bring such claims in the Great British Employment Tribunal.

150. If I had got to the stage where Mr Cooper's argument that there should have been LRA early conciliation was relevant then, *ex hypothesi*, I would already have concluded that the Great British Employment Tribunal had jurisdiction to hear the Claimant's claim, and that it should exercise that jurisdiction. In those circumstances, it does not seem to me that anything in Articles 20 and 20A of the 1996 Order, which, as I say, impose prohibitions on bringing a claim in the Northern Irish Industrial Tribunal, would be relevant, because the proceedings have not been brought in that Tribunal, and the 1996 Order imposes no prohibition on bringing proceedings in the Tribunal that these proceedings have in fact been brought in. Had this claim been brought (as I consider it should have been) in Northern Ireland, then the failure to undertake LRA early conciliation would in all likelihood have been fatal, however.

151. I also have sympathy for the point made in paragraph 65 of Mr Cooper's skeleton argument, that the fact that I am considering whether a provision clearly designed to regulate the bringing of proceedings in Northern Ireland can be applied to proceedings in Great Britain illustrates the absurdity of the contention that this Tribunal should assume a jurisdiction which statute so clearly allocates to the Northern Irish Industrial Tribunal.

Conclusion

152. For the reasons set out above, I consider that the claim has been brought in the wrong Tribunal and under the wrong regulations. If there is a claim here, it arises under SPC NI, and such a claim falls within the exclusive jurisdiction of the Northern Irish Industrial Tribunal. A claim under TUPE GB must inevitably fail, for all the reasons that I have given.

153. I gave some thought to whether the correct order, in light of this conclusion, was to dismiss the claim or to strike it out. Dismissal would be appropriate if the Tribunal lacked jurisdiction, but it occurred to me that, since the claim is brought under TUPE GB, the Tribunal has power to hear the claim (whereas a claim under SPC NI, for example, would be one that the Tribunal had no power to hear at all, and therefore truly outside the Tribunal's jurisdiction), and that the facts set out above mean that the claim must inevitably fail, such that it should be struck out as having no reasonable prospect of success. Ultimately, I concluded that the distinction may be of academic interest but is of no great practical significance. I have accordingly dismissed the claim, but if that is for any reason the wrong approach then I would have struck out the claim.

Employment Judge **Varnam**
3 January 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
9 January 2024

FOR THE TRIBUNAL