Neutral Citation Number: [2024] EAT 45

Case No: EA-2021-000063-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 April 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

TWISTDX LIMITED AND OTHERS

Appellants

- and –

DR N ARMES AND OTHERS

Respondents

- -
- -

PAUL NICHOLLS KC and SOPHIE BELGROVE (instructed by Baker & McKenzie LLP) for the **Appellants**

ANDREW WATSON and GRACE CORBY (instructed by Keystone Law) for the **Respondents**

Hearing date: 16 January 2024

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Employment Tribunal did not err in law in refusing to strike out claims against a US company and US based individuals. The respondents failed to establish that there was no reasonable prospect of the Employment Tribunal having international jurisdiction.

The Employment Judge failed to give sufficient reasons for rejecting the application to strike out claims against two UK based individuals. Insofar as it is considered appropriate to pursue that matter it is remitted for reconsideration before the same Employment Tribunal if possible.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the Judgment of Employment Judge Kurrein refusing to strike out claims against some of the respondents. The hearing took place on 2, 3, 4, 5 and 6 November 2020 and thereafter in chambers for an unspecified period of time. The judgment was sent to the parties on 12 March 2021.

2. The litigation is of long-standing and has the feel of a war of attrition, the end of which seems dispiritingly far from view. This should be a matter of concern for the parties. I am certainly concerned about the use of the limited resources of the Employment Tribunal and the EAT.

3. Dr Niall Armes, the first claimant in the Employment Tribunal, founded TwistDX to design and commercially exploit DNA amplification technologies. Dr Armes was the CEO of TwistDX. Mrs Helen Kent-Armes, the second claimant in the Employment Tribunal, was the COO of TwistDX. Where appropriate, I shall refer to Dr Armes and Mrs Helen Kent-Armes as the claimants.

4. In a previous EAT Judgment, Linden J set out the background:

> 6. Dr Armes is a research scientist by background. In 1999, he and others founded a US company – ASM Scientific Inc. – which developed DNA sequencing technology and, which is relevant to the present case, DNA amplification technology, known as Recombinase Polymerase Amplification ("RPA"). RPA is used to diagnose infectious diseases by amplifying the DNA of the target disease.
>
> 7. In due course, a UK company was set up – ASM Scientific Limited – and, in 2008, the names of the US and the UK companies were changed to Twist DX. In 2010, these companies became subsidiaries of a US company known as Alere Inc. and, as part of this transaction, Dr Armes transferred his shares in exchange for an immediate payment of $5.6 million and the right to receive a further $19 million if certain future financial performance targets were met. It appears that tensions in relation to this agreement form at least part of the context for the dispute which is now before the ET but I make no finding in this regard as Dr Armes does not allege that his protected/health and safety disclosures concerned breaches of this agreement.
>
> 8. Alere Inc. was acquired by Abbott Laboratories, a multi-national US company and the second respondent to the proceedings before the ET, on 3rd October 2017. Dr Armes remained the sole Director of Twist DX Limited and was employed as its Managing Director. His wife, Mrs Kent-Armes, was its Chief Operating Officer.

9. In May 2018, Dr Armes and his wife were both dismissed.

The Employment Tribunal claims

5. The claimants assert that they both raised concerns regarding design faults of the DNA amplification technologies and, as a result, were subjected to detriments by corporate and individual respondents, and then were dismissed on 15 May 2018. The claimants submitted claims to the Employment Tribunal (Dr Armes on 16 Oct 2018; Mrs Helen Kent-Armes on 2 November 2018) raising the following complaints:

5.1. automatic unfair dismissal for having made protected disclosures: s103A **Employment Rights Act 1996** ("**ERA**")

5.2. automatic unfair dismissal for having raised health and safety matters: s.100 **ERA**

5.3. "Ordinary" unfair dismissal

5.4. detriment for having made protected disclosures: s47B **ERA**

5.5. Mrs Helen Kent-Armes brought claims of direct sex discrimination and direct discrimination on the grounds of marital status

6. The claims were brought against: corporate entities TwistDX Ltd (a UK company) and Abbott Laboratories (a US corporation); Mr Eppert, Mr Haas and Ms Qiu ("the US individuals") sued as agents of the employer; Mr Macken and Mr Muggeridge ("the UK individuals") also sued as agents of the employer; and two other UK companies and an individual who are no longer parties to the proceedings.

The preliminary hearing

7. On 3 May 2019, Employment Judge Ord directed a Preliminary Hearing to consider, so far as is relevant, "whether or not the Tribunal has territorial jurisdiction to consider complaints" against Abbott Laboratories and the US individuals and whether the complaints against the UK individuals should be struck out because the claimants had shown "no reasonable cause of action" against them.

8. A Preliminary Hearing was listed for 5 days before Employment Judge Warren starting on 21 October 2019. The claimants applied for disclosure in relation to the territorial jurisdiction and agency

issues as a result of which they were not determined at the Preliminary Hearing.

9. Employment Judge Warren heard applications by the respondents to strike out some of the protected disclosures. The application was dismissed. The judgment of Employment Judge Warren was appealed. The appeal was allowed in part by Linden J at a hearing on 21 October 2021. A judgment was substituted dismissing some of the protected disclosures.

10. The relisted Preliminary Hearing in March 2020 was postponed by reason of the Coronavirus pandemic. A Preliminary Hearing for Case Management was held by Employment Judge Laidler who relisted the 5 day Preliminary Hearing to start on 2 November 2020.

11. The Preliminary Hearing was heard by Employment Judge Kurrein. The respondents advanced applications to strike out, notwithstanding that the territorial jurisdiction issue was initially listed as a preliminary issue. A consequence was that Employment Judge Kurrein was not charged with determining as a matter of substance whether there was territorial jurisdiction, but whether the claimants' assertion that there was territorial jurisdiction had reasonable prospects of success.

12. Employment Judge Kurrein was critical of the limited evidence produced by the respondents, particularly about the control exercised by the other respondents over Twist DX. Employment Judge Kurrein made limited provisional findings of fact.

13. The parties made very lengthy submissions that Employment Judge Kurrein dealt with succinctly:

> The Parties' Submissions.
>
> 40 I received written extensive and detailed submissions from both parties, and heard oral submissions over two days. I am indebted to all Counsel for the thoroughness with which they prepared their respective cases and the clarity with which they were presented.
> 41 I apologise that my brief findings and conclusions do not do them justice.
>
> The Law
>
> 42 I was referred to no less than 31 authorities, as well as the Employment Rights Act 1996, the Equality Act 2010, the Employment Tribunal Regulations 2013 and the Recast Brussels Regulation 1215/2012.

> 43 It is not appropriate in the circumstances of this case to set out the parties' respective positions at length. I do so only briefly.
>
> 44 **The Respondents' Case**
>
> 44.1 R2
>
> 44.1.1 **R2 was not the employer of Cl or C2 and the Recast Brussels Regulation was irrelevant** to it.
>
> 44.2 R3, 4 and 5
>
> 44.2.1 Were **outside the territorial jurisdiction of the Tribunal**: **Regulation 8**, 'Presenting the claim', was **solely concerned with the division of cases between the alternative UK jurisdictions in England & Wales or Scotland**.
>
> 44.3 R6 and 7
>
> 44.3.1 The **claim based on R6 and 7 being agents** of RI for the purpose of PID detriments was **unsustainable**.
>
> 45 **The Claimants' Case**
>
> 45.1 R2
>
> 45.1.1 The **extent of the control exercised by R2 over RI, Cl and C2 was such that it was the 'employer' within Article 20(2) and/or Article 21(2), read with Article 21(1)(b) of the Recast Brussels Regulation**.
>
> 45.2 R3, 4 and 5
>
> 45.2.1 These **Respondents fell fairly and squarely within Rule 8(2)(a) and/or (b) and/or (c) of the Rules of Procedure**.
>
> 45.3 R6 and 7
>
> 45.3.1 The **Respondents acted as agents of R1 within the meaning of S.43B(1A) and of the ERA 1996**. [emphasis added]

14. While the summary of the submissions was succinct, as we shall see, it does identify the dispute between the parties. The EAT should be slow to criticise an Employment Tribunal for concision, which is generally something to be encouraged. Arguments can only be briefly summarised accurately if they have been understood.

15. Employment Judge Kurrein concluded, again very concisely, that the respondents had not established that strike out was appropriate, because they had failed to establish that the claimants had

no reasonable prospect of establishing international jurisdiction:

> 46 As noted above, this is a preliminary hearing dealing with a strike out application under Rule 37.
>
> 47 I have considered the relevant authorities on the subject, in particular:-
>
> > Ezsias v North Glamorgan National Health Trust [2007] IRLR 603
> > Tayside Public Transport Company Ltd v Reilly [2012] IRLR 755
> > Kwele-Siakam v Co-operative Group Ltd UKEAT/0039/17
> > Mbiusa v Cygnet Healthcare Ltd UKEAT/OI 19/18
>
> 48 I have come to the conclusion that there are a great many important and material facts in issue in this case.
>
> 49 I accept have heard relevant evidence on the issues, but that is very far from saying I have heard all the relevant evidence. **In my view the evidence, particularly on the part of the Respondents, is very far from complete. The issue of the extent of R2's control of R1 is plainly hotly contested, but the formal evidence adduced for the Respondents fell far short of what might be given at a full hearing following full disclosure**.
>
> 50 I am also satisfied, based, **I accept, on the rather one-sided evidence I have heard (for which the Respondents can only blame themselves) that the Claimants' case on jurisdiction in respect of R2, and that regarding R3, 4 and 5, is reasonably arguable. So too is their case on R6 and R7, to the extent that they subjected Cl or 2 to detriments, being agents of RI in doing so.**
>
> 51 In all the circumstances of this case **I am quite unable to say that the Claimant's claims against these Respondents have 'no' reasonable prospect of success** —The Respondent's applications must be dismissed. [emphasis added]

The Appeal

16. The respondents appealed, initially on five grounds, in summary:

16.1. Ground 1: the decision fails to comply with Rule 62 **ET Rules**. The judge failed to set out the law and failed to state how he had applied that law to his findings in order to decide the issues

16.2. Ground 2: lack of **Meek** compliance

16.3. Ground 3: error of law regarding jurisdiction over US based Respondents. The judge's conclusion that it was reasonably arguable that the tribunal did have jurisdiction is wrong in law

16.4. Ground 4: the judge was wrong to regard the claim against Mr. Macken and Mr. Muggeridge as being reasonably arguable

16.5. Ground 5: decision that an amendment application be left to the full hearing

17. The matter was considered by HHJ Tucker under the EAT sift procedure. HHJ Tucker's opinion was that there were no reasonable grounds for bringing the appeals. HHJ Tucker noted, in particular, in respect of the refusal of strike out, that the Employment Judge had "expressly not made a final determination". HHJ Tucker was concerned that the respondents were seeking to "establish a final conclusion in this matter without engaging with the litigation process". HHJ Tucker stated "I would encourage the parties to engage in further case management before the Tribunal rather than to engage in further litigation on appeal at this interlocutory stage".

18. The respondents challenged the opinion of HHJ Tucker pursuant to Rule 3(10) **EAT Rules**. Michael Ford KC, Deputy Judge of the High Court, permitted grounds 1-3 to proceed. In respect of grounds 1 and 2 he considered that the reasoning of the Employment Tribunal was arguably insufficient. Judge Ford decided that it was reasonably arguable that the claimants could not be in an employment relationship with Abbott Laboratories in addition to being employed by Twist DX and that it was reasonably arguable that in relation to the US Individuals that "rule 8 [ET Rules] is only about the allocation of jurisdiction within Great Britain and cannot confer territorial jurisdiction on a tribunal which it lacks in the first place". Judge Ford concluded that it was reasonably arguable that the Employment Tribunal erred in law in not striking out the claim against Abbott Laboratories. The other grounds of appeal were dismissed.

Strike Out

19. In **Malik v Birmingham City Council** UKEAT/0027/19 Choudhury J summarised the approach to strike out:

> 29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:
>
> "Striking out
>
> 37.— (1) At any stage of the proceedings, either on its own

> initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> > (a) that it is scandalous or vexatious or has no reasonable prospect of success..."

30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see *Anyanwu & Another v South Bank University and South Bank Student Union* [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of *Mechkarov v Citibank* N.A [2016] ICR 1121, which is referred to in one of the cases before me, *HMRC v Mabaso* UKEAT/0143/17.

31. In *Mechkarov*, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:

> (1) only in the clearest case should a discrimination claim be struck out;
>
> (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
>
> (3) the Claimant's case must ordinarily be taken at its highest;
>
> (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
>
> (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In *Community Law Clinics Solicitors Ltd & Ors v Methuen* UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."

33. A similar point was made in the case of *ABN Amro Management Services Ltd & Anor v Hogben* UKEAT/0266/09, where it was stated that, "If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council* [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out.

20. Applications to strike out are most suited to situations in which it is clear from the pleaded

case that there is a knockout blow, which generally only requires consideration of a very limited number of documents. As HHJ Serota QC put it in **QDOS Consulting Ltd v Swanson** UKEAT/0495/11:

> applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the Applicant can clearly cross the high threshold of showing that there are no reasonable prospects of success.

21. The requirement for the Employment Tribunal to give reasons was considered by Bean LJ in **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 160, [2021] I.C.R. 695, in which he emphasised that the requirement is not to be overemphasised:

> 29. Failure by an employment tribunal to set out even a brief summary of the relevant law is a breach of rule 62(5) of the ET Rules. But I do not think it is a profitable discussion to consider whether it is an error of law, nor whether there has been "substantial compliance" with rule 62(5). It is an error, but the real question in my view is whether the error is material. That is surely what Morison J meant when he said in Kellaway's case that it does not "amount to an automatic ground of appeal".
>
> 30. It has become conventional (and has been made much easier since the invention of word processing) for employment tribunals to include in their decisions the relevant statute law and a summary of what is established by the leading authorities on the relevant subject. But, just as a dutiful recital of the relevant law does not immunise the decision against arguments that the tribunal has erred in its application, so a failure to set out the relevant law does not necessarily mean that there is any substantive error in the tribunal's decision or in the reasoning which leads to that decision, although it does make it more likely that there will be a challenge to the judgment.
>
> 31. The point of rule 62, headed "Reasons", is to enable the parties to know why they have won or lost. In his classic judgment in *Meek v City of Birmingham District Council* [1987] IRLR 250, para 11 Bingham LJ cited with approval the following observations of Sir John Donaldson MR in an earlier case (*Martin v Glynwed Distribution Ltd* [1983] ICR 511, 520):
>
> > "The duty of an industrial tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to the parties to give some explanation of them, but it is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the industrial tribunal addressed its mind and why it reached the conclusions which it did, but the way in which

> it does so is entirely a matter for the industrial tribunal." (Emphasis added.)
>
> 32. I do not know why the employment tribunal in the present case did not set out sections 43A and 43B (and perhaps section 103A) and a brief summary of the most relevant authorities. Such an omission is very unusual in my experience, at least in cases of substance which reach this court on an application for permission to appeal or a substantive appeal itself. But in my judgment, as Mr Reade came close to conceding, this is not a freestanding ground of appeal. Unless the claimant can show that the tribunal made a substantive error of law, the failure to comply with rule 62(5) in itself leads nowhere. I will return to the issue of Meek -compliance at the end of this judgment.

The jurisdiction issues

22. The parties agreed that it is important to differentiate between two concepts that have sometimes been elided in the authorities; whether the court or tribunal has international jurisdiction so that the parties can be brought before it and whether the complaint falls within the territorial reach of the relevant legislation. The parties agree the distinction is as explained by Langstaff J in **Simpson v Intralinks Ltd** [2012] I.C.R. 1343:

> The legal framework
>
> 5. A distinction must be made between each of three matters: (a) the territorial scope of a domestic statute; (b) the applicable law relating to a contract or tort; and (c) the place (forum) where a case is determined.
>
> 6. It is axiomatic that the fact that a United Kingdom statute purports to apply with worldwide effect does not have the consequence that the parties trying their dispute in a foreign jurisdiction must determine it in accordance with the English statute. Nor, depending upon the wording of the statute itself, does it necessarily follow that if the dispute is to be determined in the United Kingdom, it will be determined in accordance with the statute as applicable law, rather than a different system of law which the parties have agreed should be applicable.
>
> 7. As Elias J put it in *Bleuse v MBT Transport Ltd* [2008] ICR 488 , para 46: "the Brussels Regulation is concerned with which courts should hear a claim; it does not affect the content of the substantive law applicable to the claim itself."
>
> 8. In her article in the Industrial Law Journal 2010 (pp 355 et seq) Louise Merrett distinguished between the three quite different contexts in which the word "jurisdiction" was commonly used:
>
> > "First, in all cases where there is a foreign element, the question arises as to whether the English court or tribunal has

> jurisdiction to hear the case at all or whether it should be heard in a foreign court … this is an issue of private international law and will be referred to as international jurisdiction . If the defendant is domiciled in a member state of the European Union, the question of international jurisdiction must be determined by applying the rules of the Brussels I Regulation … Secondly, in domestic cases or in a foreign case where England has international jurisdiction, there may be an issue as to which domestic court or tribunal should hear the case: for example, should the case be heard in the High Court or county court, or in some countries by a court in a particular district? This issue will be referred to as domestic jurisdiction. In employment cases, this issue is of particular significance. That is because of the role of employment tribunals in enforcing employment rights. Broadly speaking, 'normal' common law claims, for example in tort arising from injuries sustained at work, or in contract, are brought in the common law courts … whereas statutory employment rights must be enforced through the employment tribunals … Thirdly, even if the court or tribunal has jurisdiction to hear the claim in both of the senses described above, and English law applies, in the case of statutory employment rights the claimant must show that he falls within the scope of the relevant legislation … most statutory rights have either express or implied territorial limits which must be satisfied … this last issue … will be referred to as territorial scope ."

9. She commented that it was crucial that those three issues should be considered separately and, at p 359:

> "Just because a claimant satisfies the territorial limits in relation to a particular right and can prima facie assert a substantive employment right, does not mean that the tribunal will have jurisdiction, at least in the international sense, to hear the claim."

23. In **Nica v Xian Jiatong Liverpool University** [2018] I.C.R. 535 HHJ Eady QC, as she then was, stated of the **Recast Brussels Regulation**:

> 15. Turning then to Regulation No 1215/2012 , this is the recast form of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12 , p 1) and is concerned with the question which courts should hear a claim (OJ 2001 L12 , p 1). As such, it does not affect the content of the substantive law applicable to the claim itself, see per Elias J (President) in *Bleuse v MBT Transport Ltd* [2008] ICR 488, para 46:
>
> > "The … Regulation is concerned with which courts should hear a claim; it does not affect the content of the substantive

> law applicable to the claim itself … the fact that the English courts have jurisdiction does not alter the scope of the rights conferred by English law itself …"
>
> …
>
> 18. The Regulation is expressly intended to facilitate the reciprocal recognition and enforcement of judgments of courts and tribunals; it is considered necessary to that end to further provide for a common means of determining the international jurisdiction of the courts and tribunals of the contracting states (see the Preamble to the Regulation and the observations of the Court of Justice in *Owusu v Jackson* (Case C-281/02) [2005] QB 801). The Regulation does not purport to bestow substantive legal rights but addresses the question of the appropriate place where disputes concerning those rights are to be determined. As Langstaff J (President) observed in *Simpson v Intralinks Ltd* [2012] ICR 1343 , para 5, there is a distinction to be made between each of three matters: "(a) the territorial scope of a domestic statute; (b) the applicable law relating to a contract or tort; and (c) the place (forum) where a case is determined" (and see the fuller explanation of this distinction made by Louise Merrett in her article "The Extra-Territorial Reach of Employment Legislation" (2010) 39 Industrial Law Journal 355 et seq, cited by Langstaff J in *Simpson* , at paras 8–9).

24. The respondents contended that the claim against Abbott Laboratories should be struck out because there are no reasonable prospects of the claimants establishing that the Employment Tribunal has international jurisdiction.

25. The parties agreed that the basis for international jurisdiction in respect of Abbott Laboratories must be the **Recast Brussels Regulation**, which was still in force when the claims were brought. So far as is relevant the **Recast Brussels Regulation** provides:

> Recitals …
>
> (14) A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.
>
> However, in order to **ensure the protection of consumers and employees**, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, **certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile**. …
>
> (18) **In relation to insurance, consumer and employment contracts, the weaker party should be protected** by rules of jurisdiction more favourable to his interests than the general rules.
>
> (19) The autonomy of the parties to a contract other than an insurance, consumer or employment contract where only limited autonomy to

determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation. …

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. […]

Article 4

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

Article 5

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter. …

Article 6

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

SECTION 5 Jurisdiction over individual contracts of employment

Article 20

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

2. Where an **employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State**.

Article 21

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

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

(b) **in another Member State**:

> (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
>
> (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.
>
> 2. **An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1**. [emphasis added]

26. The parties agree that for the Employment Tribunal to have international jurisdiction Abbott Laboratories must be the "employer" of the claimants or Twist DX must be a "branch, agency or establishment" of Abbott Laboratories.

27. The claimants had contracts of employment with Twist DX. As a matter of UK law it is hard to see how they could also be employees of Abbott Laboratories. However, the claims were brought when the **Recast Brussels Regulation** was in force, and so we must consider the EU concept of employment. The claimants argue that for the purposes of the **Recast Brussels Regulation**; "the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he receives remuneration": **Holterman Ferho Exploitatie BV v von Bullesheim C-47/14** [2016] IRLR 140 (CJEU) at paragraph 41 and **Bosworth and another v Arcadia Petroleum Limited and Others** [2020] ICR 349 (CJEU) at paragraph 24; and that whether such a relationship exists must be assessed "on the basis of all the factors and circumstances characterising the relationship between the parties": **Holterman Ferho** at paragraph 46 and **Bosworth** at paragraph 26.

28. The claimants argue that individuals have been treated as employees of companies with whom they do not have a traditional contract of employment.

29. The claimants rely on **Samengo-Turner and others v J & H Marsh & McLennan** [2007] EWCA Civ 723, [2008] I.C.R. 18. Employees of a UK company had also entered into an incentive award scheme under which they assumed obligations to repay the award if they engaged in detrimental activity in respect of US group companies. The Court of Appeal accepted the employees

contention that the US entities were to be treated as "employer" and so an anti-suit injunction was granted prohibiting action against the employees in the US Courts. Tuckey LJ held:

> 30. The claim in the New York proceedings is for breach of the bonus agreement. Did the terms of that agreement become part of the claimants' contracts of employment? Mr Rosen accepts, as he must, that the bonus agreements are connected to the claimants' employment by MSL but submits that they are free-standing and, as such, the judge was right to find that they do not have the hallmarks of contracts of employment.
>
> 31. I have only summarised the terms of the bonus agreement. But from those terms which I have quoted or referred to I can demonstrate why it is that I do not accept Mr Rosen's submissions. The recital refers to the award as an incentive "to remain with" MMC or any of its subsidiaries or affiliates. Payment of the award is subject to "your continued employment". The notice, non-solicitation, confidentiality, disclosure and co-operation covenants given to "the company", which of course included MSL, add to and in some cases differ from the terms of the claimants' original contracts of employment with MSL. The non-exclusivity covenant (para 9 above) purports to deal with any such conflict. The modified notice and non-solicitation covenants in schedule II D for UK employees are given only to MSL as it is the UK company in the MM group employing the claimants. In short I cannot see how it can be said that the claimants' bonus agreements do not relate to their contracts of employment. They are part of them. One cannot ascertain the terms upon which they were employed without looking at both the original contracts and the bonus agreements.
>
> 32. So, given that the claim in New York relates to the claimants' individual contracts of employment, has it been brought by "an employer" within the meaning of article 20? Mr Rosen's submission is simple: it has not; the employer, MSL, is not a plaintiff in those proceedings. Mr Dunning submits that this cannot be right. The claimants have assumed obligations under the bonus agreements to all the companies in the MM group in matters relating to their contracts of employment. In these circumstances any company in the group selected to sue should be regarded as the employer for the purpose of Regulation 44/2001, otherwise its objectives will not be fulfilled. Mr Rosen countered by saying that these arguments put a strained and unnecessary construction on Section 5 and by ignoring the separate corporate identities of the various companies in the MM group they involved piercing the corporate veil. His construction achieved certainty by giving effect to the exclusive New York jurisdiction clause. The bonus agreements had a close connection with New York because the plan was administered and subject to regulation there. The claimants were not employees who needed protection because they were senior well-paid executives.
>
> 33. **At first sight Mr Rosen's main submission appears formidable. As a matter of English law at least, MSL is the claimants' employer and MMC and JC are not.** It is of course possible for an employee to have two or even more employers but that is not the way the case is put. But on

> further consideration I do not think Mr Rosen is right. **The question of whether MMC and GC should be regarded as employers for the purpose of Section 5 has to be considered together with the fact that their claim in New York is a claim relating to a contract of employment brought against English employees. It is an employment claim against the employees and one would expect such a claim to be made by an employer. MMC and GC have only been able to sue in the right of and as if they were employers because of the wide definition of "the company" in the bonus agreement and so I think they should be regarded as employers for the purpose of Section 5**. MSL, who also come within this wide definition, could only have sued in England to enforce the terms of the claimants' employment. MMC and GC as companies within the same group have an economic interest in the contracts containing those terms and their enforcement and should be subject to the same jurisdictional restraint as MSL. **I do not think that this is a strained construction. It simply recognises the reality of the situation without adopting an over formalistic approach.** A similar approach to construction was taken by this court in the recently reported Beckett Investment Management Group Ltd v Hall [2007] ICR 1539.
>
> 34. Nor does this construction pierce the corporate veil in any real way. Regulation 44/2001 is only concerned with the allocation of jurisdiction. The fact that MMC and GC should be treated as employers for such purposes does not mean that they should be so treated for any other purpose.
>
> 35. **A construction of Section 5 in the way I have indicated gives effect to the objectives of the Regulation. It achieves certainty and avoids multiplicity of proceedings by ensuring that all those companies in the MM group who wish to sue on the terms of the bonus agreement are required to sue in the courts of the employees' domicile**. Otherwise MMC and any other company in the MM group could sue in New York and MSL would have to sue in England. **The English courts have the closest connection with the dispute, concerning as it does the claimants' activities during their employment and receipt of the award in England.** The fact that the plan is administered and regulated in New York is of no relevance to the present proceedings. **This construction also offers the claimants protection from proceedings in jurisdictions other than that of their domicile. Section 5 applies to all employees irrespective of any particular need for protection.** But if these claimants are entitled to be sued here I can well understand why they feel the need to be protected from the proceedings in New York. [emphasis added]

30. Thus the US entities were treated as the employer of the employees for the purposes of the **Recast Brussels Directive** although they were not for the purposes of UK employment law. The contractual arrangements between the US entities and the employees was treated as a component of their individual contracts of employment.

31. In **Petter v EMC Europe Ltd** [2015] EWCA Civ 828, [2015] IRLR 847, Mr Petter was

employed by a UK company with an ultimate parent company in Massachusetts (EMC). His contract of employment incorporated the EMC employee handbook, which contained a key employee agreement, which included a 12-month non-competition undertaking in favour of EMC and its subsidiaries. A substantial part of Mr Petter's remuneration resulted from a restricted stock unit agreement operated by ECM. After Mr Petter left and started work for a competitor proceedings were brought against him in Massachusetts. The Court of Appeal upheld the determination of the High Court that ECM was to be treated as the employer for the purposes of the **Recast Brussels Directive**:

> 16. For these reasons I am satisfied that each of the RSU agreements constituted a contract between Mr Petter and EMC under which he agreed to comply with the conditions of the key employee agreement, but **I also agree with the judge that the creation of that additional contractual relationship did not make EMC Mr Petter's employer in the sense in which that term is generally used in English law. However, like the judge, I do not think that provides an answer to the question we have to decide. It was common ground that the expressions 'employer', 'employee' and 'employment' as used in Section 5 of the Regulation must be given an autonomous meaning, which may not be the same as that which domestic law would give them** (a point more recently reaffirmed in *Mahamdia v People's Democratic Republic of Algeria* case C-154/11 [2013] ICR 1, at paragraph 42). One difficulty in this case is that, apart from *Samengo-Turner*, there is very little authority on the meaning that should be given to those expressions and none in the jurisprudence of the Luxembourg court.
>
> 17. In *WPP Holdings Italy SRL v Benatti* [2006] EWHC 1641 (Comm), [2007] 1 All ER (Comm) 208 Field J identified three characteristics of a contract of employment for the purposes of Section 5 of the Regulation. They were: (i) the provision of services by one party over a period of time for which remuneration is paid; (ii) control and direction over the provision of the services by the counterparty; and (iii) integration to some extent of the provider of the services within the organisational framework of the counterparty. Those indicia were derived from such authority as existed on the distinction between contracts of employment and contracts for the provision of services. In my view they are helpful, but it is of equal importance to have regard to the judge's exhortation to bear in mind that the underlying policy of Section 5 is to protect employees because they are considered from a socio-economic point of view to be the weaker parties to the contract. This has recently been reaffirmed by the Court of Justice in *Mahamdia v Algeria*, at paragraphs 46 and 60.
>
> 18. **Mr Bloch accepted that the expressions 'employer' and 'employee' might have to be construed more broadly than they would be in domestic law, but he submitted that there was nothing to suggest that they should be construed so broadly as to encompass a situation in which there was no contractual relationship between the parties of the**

kind envisaged in *WPP v Benatti*. In my view, however, there is no reason to make what is no more than an assumption based on domestic law views of what is required for the relationship of employer and employee to exist. When seeking to interpret European legislation it is important to ascertain the purpose which it is designed to achieve, since that is likely to provide a surer guide to its meaning than a close scrutiny of the words used. In the present case the purpose of Section 5 is identified in recitals 18 and 19, which state as follows:

> 18. In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.
>
> 19. The autonomy of the parties to a contract *other than an insurance, consumer or employment contract where only limited autonomy to determine the courts having jurisdiction is allowed*, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.' (Emphasis added.)

19. **These two recitals make it clear that even a principle as important as party autonomy is required to give way to prescriptive rules in favour of the protection of employees as the weaker parties in disputes relating to contracts of employment. In those circumstances it is necessary to interpret the whole of Section 5 in a way that will most effectively afford employees the degree of protection which those who framed the Regulation intended them to receive. That is most likely to be achieved by looking at the substance of the relationship rather than the legal structure within which it sits.**

20. This brings me back to the provisions of Section 5 and in particular Article 20(1) which provides that 'In matters relating to individual contracts of employment jurisdiction shall be determined by this Section.' 'Relating to' is an expression capable of being given a broad interpretation. The decision of this court in *Alfa-Laval Tumba AB v Separator Spares International Ltd* [2012] EWCA Civ 1569, [2013] ICR 455 demonstrates that a dispute may 'relate to' a contract of employment even though the claim itself sounds in tort. If in the present case one asks whether the dispute between Mr Petter and EMC 'relates to' his contract of employment, it is not difficult to see that in reality and substance it does. Although he may have had no right in law to receive an award of stock units, I have little doubt that he, and for that matter both EMC and EMC Europe, regarded such awards as intrinsically bound up with his contract of employment. They were made available to him as an important employee and were intended to act as a reward for past efforts and an incentive to make efforts in the future. They were probably also viewed by EMC as a way of retaining highly valued employees. The awards were made by EMC as the parent company both for its own benefit and for the benefit of the subsidiaries by whom recipients were employed. A dispute between Mr Petter and EMC over the terms on which awards of stock were made to him as an employee of EMC Europe is a dispute of a kind in which he is properly to be described as the weaker party and thus entitled to protection in accordance with the purposes of Section 5. Leaving aside the

> decision in *Samengo-Turner*, therefore, I am satisfied that the dispute between Mr Petter on the one hand and EMC and EMC Europe on the other is one that 'relates to his contract of employment' within the meaning of Article 20(1) and that both EMC and EMC Europe are to be regarded as his employers for the purposes of the Regulation.
>
> 20. That conclusion is reinforced by the decision in *Samengo-Turner*. The facts in that case are strikingly similar to those of the present case. The court accepted in that case that the expressions used in the Regulation have to be given an autonomous meaning and that one of the objectives of the Regulation is the protection of employees as the weaker party in disputes with employers relating to their contracts of employment. The court clearly had no doubt that the bonus agreements (equivalent to the RSU agreements in the present case) related to the claimants' contracts of employment, which was sufficient to bring the disputes within the scope of Article 20(1) and thereby Section 5 as a whole. Whether MMC and GC were to be regarded as the claimants' employers was, perhaps, a more difficult question, but again, the court considered that since MMC and GC were entitled to sue under the bonus agreements, and because the claims were claims relating to the claimants' contracts of employment, they were to be regarded as their employers for those purposes. This was the court's view even though neither MMC nor GC could be regarded as the claimants' employers under English law. Despite some minor differences in the language of the agreements, I can see no substantial ground of distinction between *Samengo-Turner* and the present case. In my view, not only does it reinforce the conclusion to which I have come, **it is binding authority for the proposition that a company which provides benefits to employees of associated companies within the same group may be regarded as an employer for the purposes of the Regulation if it provides those benefits in order to reward and encourage those employees for the benefit of their immediate employer and the group as a whole**. [emphasis added]

32. Thus, the concept of employment for the purposes of the **Recast Brussels Regulation** could possibly include a situation in which there was no contract between the "employee" and the "employer".

33. The other possibility was that TwistDX is a "branch, agency or other establishment" of Abbott Laboratories. The respondents rely on a number of opinions of Advocates General in the Court of Justice that suggest that a branch, agency or other establishment cannot have separate legal personality or authority to fix matters such as working hours. In **De Bloos v Bouyer** C14-76 [1977] 1 CMLR 60 the Advocate General was of the opinion that:

> Thus it may be said that characteristics of a branch are, on the one hand, a certain autonomy and, on the other, being subordinate to the parent company and subject to the control of that company. Particular

> characteristics are **the absence of its own legal personality** and the authority to act on behalf of the parent company. An agency is similar but its autonomy is certainly less marked. [emphasis added]

34. The Court was more circumspect:

> **One of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body.** It is clear from both the object and the wording of this provision that the spirit of the Convention requires that the concept of 'establishment' appearing in the said Article shall be based on the same essential characteristics as a branch or agency. It is, in consequence, impossible to extend the concepts of branch, agency or other establishment to the grantee of an exclusive concession whose operations are of the kind indicated by the national court. [emphasis added]

35. In **Somafar v Saar-Ferngas** [1979] 1 CMLR 490 the Court of Justice held:

> As regards the first issue, **the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension**. [emphasis added]

36. In **Blanckaert v Trost** [1982] 2 CMLR 1, the Court of Justice stated:

> [8] The first question asks in substance whether a commercial agent (*Handelsvertreter*) who is a business negotiator (*Vermittlungsvertreter*) within the meaning of section 84 et seq. of the German Commercial Code is to be considered as an 'agency' or 'other establishment' within the meaning of Article 5 (5) of the Convention.
>
> [9] As the national court correctly observes, the Court stated in its judgment of 6 October 1976, Case 14/76, *De Bloos v. Bouyer*, 5 that **one of the essential characteristics of the concept of a branch or agency is the fact of being subject to the direction and control of the parent body**.
>
> [10] The Court did not have occasion in that decision to identify the factors enabling it to be determined whether or not an undertaking or other business concern is subject to the direction and control of a parent body, because the main dispute concerned the relationship between the grantor and the grantee of an exclusive sales concession, and the national court had stated that the grantee was not subject to either the direction or the control of the grantor.
>
> [11] Furthermore, in its judgment of 22 November 1978, Case 33/78 *Somafer*, 6 the Court stated that 'the concept of a branch, agency or other

> establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.'
>
> [12] From the grounds given in those two judgments, and especially from the rule that a 'branch, agency or other establishment' within the meaning of Article 5 (5) must appear to third parties as an easily discernible extension of the parent body, it is clear that the dependency on the direction and control of that parent body is not established when the representative of the parent body is 'basically free to organise his own work and hours of work' (section 84 (1), last sentence, of the German Commercial Code) without being subject to instructions from the parent body in that regard; when he is free to represent at the same time several rival firms producing or marketing identical or similar products and, lastly, when he does not effectively participate in the completion and execution of transactions but is restricted in principle to transmitting orders to the undertaking he represents. Those three factors preclude a concern having all those characteristics from being considered as the place of business having the appearance of permanency as an extension of the parent body.

37. I do not accept that the decisions of the Court of Justice establish an absolute prohibition on a branch, agency or other establishment having legal personality.

38. While the reasoning of the Employment Tribunal was brief it is clear why Employment Judge Kurrein concluded that the respondents had failed to show that there were no reasonable prospects of the claimants establishing that the Employment Tribunal had international jurisdiction to hear the complaint against Abbott Laboratories. Employment Judge Kurrein identified the respondents' assertion that there was no reasonable prospect of the claimants establishing international jurisdiction because "R2 was not the employer of C1 or C2 and the Recast Brussels Regulation was irrelevant" and the claimants response that the "extent of the control exercised by R2 over R1, C1 and C2 was such that it was the 'employer' within Article 20(2) and/or Article 21(2), read with Article 21(1)(b) of the Recast Brussels Regulation". It is clear that Employment Judge Kurrein preferred the arguments of the claimants, holding that "I accept, on the rather one-sided evidence I have heard (for which the Respondents can only blame themselves) that the Claimants' case on jurisdiction in respect of R2 … is reasonably arguable".

39. While the reasoning is brief the respondents can be in no real doubt as to why they lost. They lost because Employment Judge Kurrein considered that the claimants' case on international jurisdiction was properly arguable.

40. I am not persuaded that there is any error of law in the decision of Employment Judge Kurrein that it was arguable that Abbott Laboratories could be an employer of the claimants in the autonomous sense applied for the purposes of the **Recast Brussels Regulation**. Much of the argument before me was put as if I had to determine the point of substance. However, I have to consider whether there was any error of law in Employment Judge Kurrein concluding that the claimants' contention that Abbott Laboratories fell within the international jurisdiction of the Employment Tribunal was arguable. I consider the above authorities demonstrate that Employment Judge Kurrein was entitled to conclude that it was arguable that Abbott Laboratories could be treated as the claimants' employer for the purposes of the **Recast Brussels Regulation**. While I agree with Judge Ford who said on the sift "it is reasonably arguable that the claimants could not also be in an employment relationship with AL and the cases on dual employment, such as *Samengo Turner* [2008] ICR 18 and *Petter v EMC* [2015] IRLR 847 are distinguishable because, for example, no payments were made by AL to the claimants" I also consider that the contrary is also reasonably arguable.

41. While a number of opinions of Advocates General are against it, I am also not persuaded that it is unarguable that Twist DX might be a branch, agency or other establishment or Abbott Laboratories. I also accept that the Employment Tribunal was entitled to conclude that the respondents had not provided sufficient factual background for it to consider the question properly.

42. I am troubled that this decision leaves the point of substance undecided. However, I have concluded that it is an inevitable result of the way in which the matter was argued in the Employment Tribunal. It was only argued as a strike out application despite the fact that Employment Judge Ord had directed it be determined as a preliminary issue. I raised my concern with the parties that the only matter before me was that of whether the claimants' claim against Abbott Laboratories was unarguable because the Employment Tribunal was bound to hold that it did not have international

jurisdiction. Mr Nicholls stated that he was content to seek to establish that the claimants' claims were unarguable.

43. I also do not have sufficient factual findings, from the decision of the Employment Tribunal or from uncontested evidence, to determine the matter of substance. The authorities make it clear that determination of international jurisdiction involves consideration of the relationship between the putative employees and employer(s) including matters such as control that are, to a degree, fact sensitive.

44. The claimants accept that they cannot rely on the **Recast Brussels Regulation** to establish that the Employment Tribunal had international jurisdiction over the US individuals. The claimants contend that international jurisdiction is established by Rule 8 of the **ET Rules 2013**:

> 8.— Presenting the claim
>
> (1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.
>
> (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.
>
> (3) A claim may be presented in Scotland if—
>
> (a) the respondent, or one of the respondents, resides or carries on business in Scotland;
>
> (b) one or more of the acts or omissions complained of took place in Scotland;
>
> (c) the claim relates to a contract under which the work is or has been performed partly in Scotland; 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 Scotland.

45. The respondents contend that Rule 8 **ET Rules 2013** is concerned with determining whether proceedings should be brought in England and Wales or Scotland. They point to a number of authorities to support that contention, in particular **Jackson v Ghost** [2003] IRLR 824 and **Financial Times v Bishop** UKEAT014703. However, a different approach was adopted by Underhill J (President) as he then was in **Pervez v Macquarie Bank Ltd (London Branch)** [2011] ICR 266 when he considered the predecessor rule:

> 14. The legislation in question confers (exclusive) jurisdiction to determine claims to enforce the rights conferred by them (in the employment field) on the employment tribunals: see section 54 of the 1976 Act, regulation 28 of the 2003 Regulations and section 111 of the 1996 Act. It might be thought that it necessarily followed that the employment tribunal had jurisdiction to entertain the claimant's claims. But unfortunately it is not as simple as that. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, which are the Regulations by which the tribunals are established, contain their own provision as to territorial jurisdiction. Regulation 19, which is headed "Jurisdiction of tribunals in Scotland and in England & Wales" reads, so far as concerns England and Wales (and so far as relevant for present purposes):
>
> > "(1) An employment tribunal in England or Wales shall only have jurisdiction to deal with proceedings (referred to as "English and Welsh proceedings") where—(a) the respondents or one of the respondents resides or carries on business in England and Wales; (b) had the remedy been by way of action in the county court the cause of action would have arisen wholly or partly in England and Wales …"
>
> The judge held that the effect of regulation 19 was that the tribunal had no jurisdiction. She said, at paras 30–31 of the reasons:
>
> > "30. In accordance with the facts MCSL does not reside or carry on business in England or Wales, and if the remedy had been by way of action in the county court, the causes of action, both the dismissal and the discrimination, arose wholly in Hong Kong.
> >
> > "31. Thus the claimant's causes of action arose in Hong Kong, and accordingly I decided that, by regulation 19 of the 2004 Regulations, the employment tribunal does not have jurisdiction to deal with proceedings against MCSL …"

> 15. Before I consider the claimant's challenge to that reasoning, I should make two background points about regulation 19(1).
>
> (1) **The heading to the regulation suggests that its purpose was simply to regulate the distribution of jurisdiction between tribunals in England and Wales on the one hand and Scotland on the other**; and indeed for that reason in two cases prior to the decision of the House of Lords in *Lawson v Serco Ltd* [2006] ICR 250 this tribunal held that it (or, strictly, its identically worded predecessor) could not be regarded as having been intended to define the legislative grasp of the 1996 Act: see *Jackson v Ghost Ltd* [2003] IRLR 824 , paras 72–83, and *Financial Times Ltd v Bishop* (unreported) 25 November 2003 , paras 46–52. **Accordingly it may also be that neither the draftsman of the 2004 Regulations nor the draftsmen of the various substantive statutes conferring jurisdiction on the employment tribunal had in mind the potential impact of the wording of regulation 19(1) on cases with a "non-GB" element. But the fact remains that that wording does on its face have such an effect**, and Mr Berkley did not argue that regulation 19 could simply be ignored because it was not concerned with the situation which arises in this case.
>
> (2) Although, as will appear, no point arises directly on head (b), its broad effect is that the employment tribunal will have jurisdiction in respect of a particular claim if the acts or omissions which it is necessary to establish in order to constitute a cause of action, or any part of them, are alleged to have occurred in England or Wales. Why it was thought necessary to consider that inquiry on the hypothetical basis of an action in the county court is unclear: the answer must lie somewhere deep in the legislative history, but this was not explored before me. [emphasis added]

46. Employment Judge Kurrein summarised the respondents' contention that the US individuals "Were outside the territorial jurisdiction of the Tribunal" and that "Regulation 8, 'Presenting the claim', was solely concerned with the division of cases between the alternative UK jurisdictions in England & Wales or Scotland" and the claimants' response that the US individuals "fell fairly and squarely within Rule 8(2)(a) and/or (b) and/or (c) of the Rules of Procedure". Employment Judge Kurrein concluded that "the Claimants' case on jurisdiction in respect of … R3, 4 and 5, is reasonably arguable."

47. Again, the respondents can be in no doubt why they lost. Employment Judge Kurrein accepted that the claimants' case on international jurisdiction in respect of the US individuals was arguable. I also consider there was no error of law in Employment Judge Kurrein's decision on this matter. The respondent has not persuaded me that Underhill J's analysis is unarguable. Again, I agree with Judge

Ford that "It is reasonably arguable that, as a matter of law, rule 8 is only about the allocation of jurisdiction within Great Britain and cannot confer territorial jurisdiction on a tribunal which it lacks in the first place: see *Jackson v Ghost* [2003] IRLR 824" but I also consider that the contrary is also arguable. It is best that the final determination in this case is made once there is greater clarity as to the precise factual circumstances.

48. I also note that the respondents contend in the skeleton argument for this hearing that where the "Regulations do not apply, one has to consider the common law rules, but they have not been invoked by the Claimants". It would not be satisfactory for this important point of principle to be determined without a clear determination of the factual situation, full argument and consideration of what the alternative sources of international jurisdiction might be.

49. Finally, I accept that it is not possible to discern why Employment Judge Kurrein concluded that the agency argument in respect of the UK individuals is arguable without any analysis of the pleaded cases against them and why they were arguable. The appeal is allowed to that extent although as the other jurisdictional issues will have to be determined as a matter of substance careful consideration will have to be given to the proportionality of seeking again to strike out the claims against the UK individuals. Insofar as the application for strike out of the claims against the UK individuals is remitted to the same Employment Tribunal if the Employment Judge is still sitting (the claimants' representatives understand he has retired) as much of the decision has been upheld and the Employment Judge will be familiar with this case. Thereafter, case management of the claims to their final determination will be a matter for the Employment Tribunal. It will be a matter for the Employment Tribunal to decide whether the international jurisdiction issue be listed as a preliminary issues and to ensure that when that issue is determined as a matter of substance it has the necessary evidence and submissions to enable it to determine the issue.