Neutral Citation Number: [2025] EAT 77

Case No: EA-2023-000917-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 June 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

PEDER PRÄHL **STEN THOMAS HOFVENSTAM** **PER AGEBÄCK**	**Appellants**
- and –	
SEBASTIAN LAPINSKI	**Respondent**

- -
- -

Paul Nicholls KC (instructed by **Baker McKenzie**) for the **Appellants**
Daniel Stilitz KC and **Patrick Halliday** (instructed by **Brahams Dutt Badrick French LLP**) for the **Respondent**

Hearing date: 18 March 2025
Final post-hearing written submissions: 22 May 2025

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant brought complaints under the **Equality Act 2010** against the Limited Liability Partnership of which he was formerly a member, and a number of individual respondents, including three non-UK-domiciled individuals.

There was no dispute that, as against all respondents, the claimant relied upon causes of action that fall within the jurisdiction of the employment tribunal. It was also common ground that the tribunal had so-called territorial jurisdiction in respect of the complaints, applying **Lawson v Serco** principles, and that there was no other jurisdictional obstacle to the claims against any of the respondents apart from the non-UK-domiciled respondents.

However, the non-UK-domiciled respondents argued that the tribunal lacked international jurisdiction to entertain the claims against them. The decision of the employment tribunal that it did not lack such jurisdiction is upheld.

Notice of the claim was sent to the respondents in compliance with the Employment Tribunals Rules of Procedure. No other service requirement applied. Following the **Brussels Recast Regulation** having ceased to have effect, and the introduction of amendments to the **Civil Jurisdiction and Judgments Act 1982**, from 31 December 2020, a claimant who brings complaints such as these is in no worse a position than they would have been, had the law as it stood prior to 31 December 2020 been applicable. The amendments to the **1982 Act** were intended to, and do, have that preservative effect, including in a case where the claimant was an LLP member, rather than an employee in the narrow domestic-law sense, and including as against individual respondents other than the LLP.

HIS HONOUR JUDGE AUERBACH:

Introduction and Background

1. The claimant in the employment tribunal began a claim raising complaints under the **Equality Act 2010** against seven respondents. The first respondent is a limited liability partnership (LLP). The others are individuals. The LLP and three of the individual respondents put in responses and common grounds of resistance defending the complaints on their merits. The other three individual respondents – Mr Prähl, Mr Hofvenstam and Mr Agebäck – put in responses and common grounds of resistance which asserted that the tribunal did not have jurisdiction over them. They are all domiciled in Sweden and were referred to by the tribunal as "the Swedish respondents."

2. In a reserved decision arising from a preliminary hearing at London Central before Employment Judge Adkin the tribunal held that it does have jurisdiction in relation to the claims against the Swedish respondents. This is their appeal against that decision. I will refer to them as the appellants and to the claimant in the tribunal as such. Before the tribunal the appellants were represented by Paul Nicholls KC and the claimant by Daniel Stilitz KC. Both appeared again at the hearing of this appeal, Mr Stilitz KC now leading Patrick Halliday of counsel. Following the hearing I invited further written submissions on certain points; and I did so again following the promulgation of the decision of Kerr J in **Cable News International Inc v Bhatti** [2025] EAT 61 on 6 May 2025.

3. The brief background, none of which is factually disputed, as such, is as follows. Triton Investment Advisers LLP (the LLP) is part of the Triton Group. From 2015 the claimant was employed by a Swedish company in the group, based in Stockholm. In 2020 he relocated to the UK and became a member of the LLP. In August 2021 he was diagnosed with epilepsy. In August 2022 solicitors acting for the claimant instituted an employment tribunal claim on his behalf against the seven respondents. For each of the three appellants, they gave in the claim form a postal address in Stockholm, Sweden which was their usual business address there. The tribunal posted the notice of claim and claim form for each of them to that address. They do not dispute that they received them.

4. In their common grounds of resistance the appellants asserted that the tribunal "does not have jurisdiction over them as a matter of private international law", referred to as "international jurisdiction". At paragraph 2 this is expanded upon as follows.

> **"The Employment Tribunal has no jurisdiction over the Individual Swedish Respondents for the following reasons:**
>
> **(i) the Individual Swedish Respondents are all Swedish nationals who live and are domiciled in Sweden;**
> **(ii) they were not present in the UK at the time the claim was issued or served;**
> **(iii) the claim was not served personally on them in the UK;**
> **(iv) the claim was not sent by post to an address in the UK at which they were present. Indeed the Claimant quoted an address in Sweden for the Individual Swedish Respondents;**
> **(v) the Individual Swedish Respondents have not submitted to the jurisdiction of the tribunal. By their response, they challenge its jurisdiction."**

The Employment Tribunal's Decision

5. The tribunal's conclusions may be summarised as follows.

6. First, there was no failure properly to serve the appellants. In the context of the **Employment Tribunals Rules of Procedure 2013** (the then current rules) what "service" means is that the tribunal sends the notice of claim, together with the claim form and any attached particulars of claim, to the given respondent at the address given for them in the claim form. The rules as to service in the **Civil Procedure Rules 1998** (as amended) (CPR) do not apply. Rule 8 of the **2013 Rules** envisages that there may be cases with a foreign element. There are no special requirements in those rules for service on overseas parties. Alternatively, as the notice of claim and claim form had, in this case, in fact come to the attention of the three appellants, they fell to be treated as having been delivered to them pursuant to rule 91 of the **2013 Rules**. On that basis, no issue of jurisdiction arose.

7. It was common ground that on 31 December 2020, pursuant to Brexit, what I will call the **Brussels Recast Regulation** (EU No 1215/2012) ceased to be applicable, and amended provisions of the **Civil Jurisdiction and Judgments Act 1982** came into force. The new section 15C provides that, in certain cases, a non-UK-domiciled employer may be sued by an employee in the UK.

8. The tribunal concluded, in the alternative, that the claimant had a good arguable case (which was the applicable test) that the requirements of the new section 15C of the **1982 Act** were satisfied in this case. These new provisions were intended to preserve the substantive principles that had hitherto applied pursuant to the **Brussels Recast Regulation**. For these purposes the claimant's contract with the LLP fell to be treated as a contract of employment, and the provisions of the new section 15C applied to the appellants, as the employees or agents of the LLP. The England & Wales forum had the closest connection with the dispute, and it was desirable for certainty and to avoid multiplicity of proceedings, that the litigation against all respondents take place in England & Wales.

The Grounds of Appeal

9. The grounds of appeal, which I have somewhat edited, are, materially, as follows:

> **(1) Failure to ask the correct question of law in relation to international jurisdiction**
>
> **(i) The Judge's main reason for his decision failed to engage with the correct question of law which was whether the employment tribunal had jurisdiction as a matter of private international law over the Swedish Respondents.**
>
> **(ii) The Judge concluded at paragraphs 106-107 and 112 that the claim had been served on the Swedish Respondents in accordance with the employment tribunal rules … . However, the correct question was whether the employment tribunal had international jurisdiction to enable the employment tribunal to hear a claim brought against these parties who live in Sweden and were, the employment tribunal concluded, domiciled and present in Sweden when they received the claim. The Judge did not ask or address that question. That the claim had been served in accordance with the employment tribunal rules was irrelevant to the question of international jurisdiction, as they are not rules that confer international jurisdiction. Hence by basing his decision on the fact that the claim had been served by the employment tribunal in accordance with the rules, the Judge failed to ask the right question...**
>
> **(iii)The correct question was whether, since the Civil Jurisdiction and Judgments Act 1982 did not confer jurisdiction on the tribunal (see ground 3 below), there was any other rule of private international law which conferred a basis for jurisdiction. As to that, the Judge should have held that the rule was that the employment tribunal could only have jurisdiction if the Swedish Respondents had been served - by being sent the claim - when they were present in the UK. That is the common law rule and, in the absence of any other rule, fell to be applied. The tribunal erred by failing to apply this rule. Had the Judge done so, he would have been bound to conclude that the claims had not been sent to the Swedish Respondents when they were present in the UK and that therefore the tribunal lacked international jurisdiction.**
>
> **(2) Error in concluding that Rule 8 of the tribunal rules conferred international jurisdiction.**
>
> **If, as appears from paragraph 109 …, the Judge concluded that the tribunal had**

> **jurisdiction because of Rule 8, that was in error because Rule 8 is not a rule which confers jurisdiction...**
>
> **(3) Error in holding that the tribunal had jurisdiction over the Claimant under the Civil Jurisdiction and Judgments Act 1982**
>
> **In what the Judge characterised as the alternative case, he erred in concluding that jurisdiction was conferred by section 15C of the Civil Jurisdiction and Judgments Act 1982 because the Judge was wrong to say that there was a good arguable case that the Claimant was an employee under a contract of employment and that the Swedish Respondents were his employer. Section 15C only applies to matters relating to individual contracts of employment and to claims by employees against their employer. It was not open to the Judge to conclude that the Claimant was an employee under an individual contract of employment in circumstances where he was, as the Judge found at paragraph 38, an LLP Member of the First Respondent. An LLP member is not and cannot be an employee … . Once it is recognised that, as an LLP Member, the Claimant was not an employee, the Judge's observation that the tribunal has the closest connection with the dispute was irrelevant… . Further, even if the Claimant was an employee for the purposes of Section 15C, his employer would clearly be the First Respondent … . The Swedish Respondents are employees of, in Mr. Prähl's case the First Respondent, and in Mr. Hofvenstam and Mr. Agebäck's cases a Swedish group entity (Triton Advisers (Sweden) AB), and are not, and could not, have been his employer at law. Hence no claim could lie against them under s 15C since that section relates only to claims by employees against their employer: and it was an error of law to conclude otherwise. The effect of the Judge's conclusion that Section 15C should be read with such "elasticity" as to permit co-workers based in any jurisdiction (EU member states and beyond) to be considered an "employer" would expand the tribunal's jurisdictional remit beyond the position as was under the Recast Brussels Regulation to, in effect, have global effect.**

Discussion

10. Employment tribunals can only entertain complaints invoking causes of action that Parliament has empowered them to consider. Sections 2 and 3 **Employment Tribunals Act 1996** so provide, and use the word "jurisdiction" in that particular sense. I will call that cause-of-action jurisdiction.

11. In almost all cases the cause of action relied upon in the employment tribunal is itself created by legislation (primary or secondary). However, by virtue of regulations made pursuant to what is now section 3 of the **1996 Act**, employment tribunals also have the power to consider certain common law claims for damages for breach of contract. The complaints in this case were brought under the **Equality Act 2010**. There is no dispute that they all invoke causes of action that are, by section 120 (which also uses the word "jurisdiction"), assigned to the employment tribunal.

12. The **2010 Act** extends, in respect of those causes of action, to the whole of Great Britain (see

section 217). In any given case there must be the requisite connection with Great Britain, such as to bring the claim within the territorial grasp of the legislation. In relation to claims for unfair dismissal or under the **Equality Act 2010** (as well as other statutory claims) any issue about that is governed by the principles discussed in the **Lawson v Serco Ltd** [2006] UKHL 3; [2006] ICR 250 line of authorities. (As to their application to discrimination claims see **Hottak v Foreign Secretary** [2016] EWCA Civ 438; [2016] ICR 975 at [48].) That issue is usually referred to as one of territorial jurisdiction. In the present case there is no dispute that the tribunal has territorial jurisdiction to consider the **Equality Act** complaints against all of the respondents, including the appellants.

13. The essential underlying premise of the appeal is that where, as here, the particular respondents (now the appellants) were not domiciled in the UK, it was not sufficient that the tribunal has cause-of-action and territorial jurisdiction. The tribunal had to identify the applicable rule of international jurisdiction, by which is meant a rule of private international law distinct from the rules of territorial jurisdiction, and to ascertain whether it had also been satisfied. Prior to 31 December 2020, the applicable source of such rules was the **Brussels Recast Regulation**, but it was common ground, given the timeline, that it did not apply in this particular case.

14. Since then, and in this case, the amended provisions of the **1982 Act** apply, but, say the appellants, they did not confer jurisdiction in respect of these complaints against them. Rule 8 of the **2013 Rules** also did not do so. Compliance with the **2013 Rules** relating to the sending of a Notice of Claim could not and did not confer international jurisdiction. At least originally the appellants argued that, in the absence of any other applicable rule, the common-law rules of service applied, which required each of them to be served within the UK. However, that had also not happened.

15. I start by considering the general background position in respect of litigation in the civil courts (as opposed to the employment tribunal), and putting to one side, initially, what impact the **Brussels Recast Regulation** had, when in force, and what impact the amended **1982 Act** may have now.

16. First, the means by which a defendant is required to answer to a civil court claim, is by service of it in accordance with the CPR. Service "performs a special function: it is the act by which the defendant is subjected to the court's jurisdiction." (*Per* Carr LJ (as she then was) in **R (Good Law Project) v Secretary of State for Health and Social Care** [2022] EWCA Civ 355; [2022] 1 WLR 2339 at [41].) In relation to a non-UK-domiciled defendant service must be effected upon them within the jurisdiction, or permission must be obtained to serve them out of the jurisdiction.

17. Secondly, the putative defendant may contest whether the courts of England & Wales, or of some other state, are better placed to decide the matter. That is the issue still referred to by lawyers by its Latin tag of "*forum non conveniens*". If the England & Wales court is persuaded that the court of another state would be the more appropriate forum in which to litigate, it may decline jurisdiction, and/or permission to serve on the defendant out of the jurisdiction, or stay or dismiss the claim.

18. However, the **Brussels Recast Regulation**, when in force, and where applicable, laid down rules which definitively determined, in a given case, that second issue of forum. Application of them would determine whether the given complaint both may and must be brought in England & Wales or some other state. Employment tribunals were also bound to apply the **Brussels Recast Regulation**, as part of binding EU law. It was common ground before me also that, during that period, no other additional rules or requirements of service applied in respect of employment tribunal claims.

19. How do matters then stand in a case, such as the present, in which, because of the timing of events, the **Brussels Recast Regulation** does not now apply, and the amended provisions of the **1982 Act** are now in force? Mr Nicholls KC argued that it is always necessary to find some rule of international jurisdiction, and for it to be satisfied. Previously that was found in the provisions of the **Brussels Recast Regulation**. Now it is to be found in either the amended provisions of the **1982 Act** (if satisfied), or (possibly – see below), as a fall-back, in the common law requirement for service in the jurisdiction (unless permission be granted for service to be effected out of the jurisdiction).

20. Mr Nicholls KC referred to an article by Professor Louise Merrett: **"The Extra-Territorial Reach of Employment Legislation"** (2010) 39 *Industrial Law Journal* 355. That article focussed on the then current state of the law relating to territorial jurisdiction, and an analysis of **Lawson v Serco**. But it opened by distinguishing that issue from other types of issue that might arise in cases with a "foreign element", including "whether the English court or tribunal has jurisdiction to hear the case at all or whether it should be heard in a foreign court". That was the issue that she referred to as being of international jurisdiction. It arose, she said, in all cases with a foreign element.

21. I observe that, at that time, as the article explained, if a proposed respondent was domiciled not in the UK, but in another EU member state, then that issue indeed arose, and fell to be determined, under the predecessor of the **Brussels Recast Regulation**, being regulation EC 44/2001. But, unsurprisingly, that article, written some years before even the Brexit vote, did not consider how matters might stand in a post-Brexit world; and I do not think anything in it supports the contention that such an issue, distinct from the need for territorial jurisdiction, must necessarily arise in any and every employment tribunal case with a "foreign element" now.

22. Mr Nicholls KC also relied on the decision of the EAT in **Simpson v Intralinks** [2012] ICR 1343, which cited that article. It was also concerned with the significance of the **Brussels Recast Regulation**, which was then in force, and so necessarily had also to be considered notwithstanding that the requirements of territorial jurisdiction were satisfied. In **Powell v OMC Exploration & Production Ltd** [2014] ICR 63, which again arose when the **Brussels Recast Regulation** was in force, the EAT upheld the decision of the tribunal that there was neither territorial jurisdiction, nor international jurisdiction pursuant to it. Those decisions did not, however, consider, and did not have to decide, what the position might be in a post-Brexit world.

23. **Stena Drilling PTE Limited v Smith** [2024] EAT 57 was, however, a post-31 December 2020 case. The **Brussels Recast Regulation** did not apply, and the amendments to the **1982 Act** were in force. Mr Nicholls KC relied on the statement at [14] that "for cases involving individual

contracts of employment commenced after 31 December 2020" sections 15C and 15D of the **1982 Act** "represent the only route through which international jurisdiction may be established." He also relied on the rejection, at [32], of the proposition that "alternative routes to establishing international jurisdiction might exist beyond those provided in sections 15C and 15D of the **CJJA**." For the claimant, Mr Stilitz KC and Mr Halliday noted that, as was recorded at [29] of the judgment in **Stena Drilling**, the employer's case that, post-Brexit, it was necessary to establish international jurisdiction under the amended **1982 Act**, over and above territorial jurisdiction, was conceded by counsel for the employee. The EAT did not therefore have to determine whether that concession was rightly made; and, they submitted, these passages were *obiter* and *per incuriam*.

24. In **Bhatti**, the relevant time frame was such that the **Brussels Recast Regulation** applied. For reasons he set out at [52] – [63] Kerr J concluded that if, in a given case, the respondent is domiciled in an EU state other than the UK, the **Brussels Recast Regulation** could – potentially – require a claimant to proceed against that respondent in the courts of its domicile, even if the connection with Great Britain was sufficient to bring the claim within the grasp of the domestic statute. However, he went on to conclude at [71] that it did not operate in that case to confer rights on the non-EU domiciled respondent to be sued in the courts of its domicile; and there was nothing to prevent the domestic legislation applicable to the claims from also conferring what he called international jurisdiction on the English tribunal to determine them. (He also went on to find that the judge was not wrong to conclude also that, *if* the **Brussels Recast Regulation** needed to be considered, it in any event conferred international jurisdiction on the employment tribunal in that case.)

25. Mr Nicholls KC relied on a passage in **Bhatti** considering the conclusion of the employment judge that the territorial reach of the legislation "itself" also conferred international jurisdiction, which the judge considered was consistent with what Lord Hoffmann said in **Lawson v Serco** at [1]:

> **"Putting the question in the traditional terms of the conflict of laws, what connection between Great Britain and the employment relationship is required to make section 94(1) the appropriate choice of law in deciding whether and in what circumstances an employee can complain that his dismissal was unfair? The answer to this question will also determine the question of jurisdiction, since the Employment Tribunal will have**

> **jurisdiction to decide upon the unfairness of the dismissal if (but only if) section 94(1) is the appropriate choice of law."**

26. Kerr J said:

> **"62. The judge noted academic criticism of that formulation by Professor Louise Merrett in an article in the Industrial Law Journal (2010, at pp.355 et seq.); she had described Lord Hoffmann's words as "potentially confusing" because the issue is not choice of law in a private international law sense, but statutory interpretation. Nevertheless, it does seem to me that Lord Hoffmann was intending to say that where a claim is within territorial scope, the English statutory provision applies; it is the applicable law; and the tribunal necessarily has jurisdiction to try the case applying that law.**
>
> **63. The reasoning is attractive; it has the virtue of simplicity. However, it is difficult to square with *Simpson v. Intralinks Ltd* in which Langstaff J at [8] accepted Professor Merrett's demarcation between, on the one hand, international jurisdiction and, on the other, territorial scope. The two would not be separate in any real sense if international jurisdiction followed automatically from the claim being within the legislative grasp. I discern a tension between Professor Merrett's approach and that of Lord Hoffmann.**
>
> **64. Furthermore, if the Brussels Regulation applies and the respondent is domiciled in an EU state other than the United Kingdom, the Regulation can require the claimant to proceed in the courts of the domicile. In principle, that could be so even if the connection with Great Britain is strong enough to bring the claim within the legislative grasp of the relevant English statutory provisions. The Brussels Regulation (since superseded post-Brexit by added provisions in the Civil Jurisdiction and Judgments Act 1982 (the 1982 Act)) was directly effective and (pursuant to the now repealed European Communities Act 1972) equal in status with a domestic statute.**
>
> **65. I am therefore diffident, despite the Olympian stature of Lord Hoffmann's dictum in *Lawson*, about aligning myself fully with the judge's proposition that "the territorial reach of the Acts themselves … confers such 'international jurisdiction'". I can accept that domestic statutes which have territorial application to a claim do themselves confer international jurisdiction, but only if that jurisdiction is not displaced by the Brussels Regulation or some other principle of private international law with force equal to that of primary domestic legislation, such as the relevant provisions of the 1982 Act; cf. in *Stena Drilling Pte Limited v Smith*, per Lord Fairley at [13]-[14]."**

27. Mr Nicholls KC submitted that this showed that Kerr J, in line with the approach in **Simpson** and in **Stena** at [14], considered that a source of international jurisdiction, as distinct from territorial jurisdiction, must always be found in a case with an international element. However, I do not agree that **Bhatti** so holds, or requires me to proceed on that basis. That is for the following reasons.

28. Firstly, **Bhatti**, to repeat, concerned a time when the **Brussels Recast Regulation** was in force. I respectfully agree with Kerr J that, in such a case, as was also the case in **Simpson** and in

Powell, consideration had to be given to whether, on the facts of the case, its provisions meant that the respondent in question could not be sued in the UK, but had to be sued elsewhere.

29. But Kerr J also considered that domestic statutes which have territorial application to a claim "do themselves confer international jurisdiction", but with the proviso that this was "only" if it is not displaced by the **Brussels Recast Regulation** or "some other principle of private international law with force equal to that of primary domestic legislation …". Kerr J did not hold that there is always a need for some other source conferring international jurisdiction; but, rather, that territorial jurisdiction will be enough *unless* some other instrument with sufficient force *displaces* jurisdiction. That, it seems to me, is the extent of the caveat entered by him to Lord Hoffmann's general approach.

30. Further, Kerr J went on to conclude that the respondent in that case, a non-EU domiciled entity, could not invoke the **Brussels Recast Regulation** at all, as an instrument that might potentially deprive the tribunal of jurisdiction in that case. That led him to conclude at [71] that: "It follows that there was nothing in this case to prevent the primary legislation provisions applicable to the claimant's claims from also conferring international jurisdiction on the English tribunal to determine them." That conclusion runs contrary to the appellants' contention in the present appeal, that there is a positive need, in every case, for some other rule to be identified, and satisfied, conferring international jurisdiction, distinct from the rule which confers territorial jurisdiction.

31. Mr Nicholls KC however submitted that section 120 of the **2010 Act** cannot properly be treated as itself satisfying the requirement for international jurisdiction to be established in respect of a non-UK-domiciled respondent in a post-Brexit **Equality Act** case. That section, he submitted, simply does not address that issue. But, as Kerr J discussed at [62] and [63], whether that is right depends on whether the "territorial reach" issue itself is, in substance, also a choice-of-law issue. Kerr J did not "fully align" himself with the proposition that territorial reach as such always also confers international jurisdiction, (only) because of the caveat or proviso that he articulated at [65].

32. Mr Nicholls KC also submitted that, if the claimant was right that there is no necessary additional requirement of international jurisdiction in respect of statutory complaints of this type, then there would be no control on the ability of worldwide litigants to institute such complaints in the employment tribunal here. However, that overlooks that the requirement for territorial jurisdiction itself provides such a control mechanism. Further, what was rule 12 in the **2013 Rules** provides that a claim may be rejected by a judge if it is one which the judge considers that the tribunal "has no jurisdiction to consider". That might include a claim in respect of which the judge considers there is no cause-of-action jurisdiction, but also, potentially, one in respect of which the judge considers that there is clearly no territorial jurisdiction. See, on this point, the discussion in **Bhatti** at [104].

33. However, Mr Nicholls KC contends that, post-Brexit, the mandatory rules of international jurisdiction, replacing those previously found in the **Brussels Recast Regulation**, and which *must* be satisfied in every case involving a non-UK-domiciled respondent (subject to the possible alternative of service within the jurisdiction), are found in the amended provisions of the **1982 Act**. He relied upon **Stena Drilling** at [13] and [14], and the citation of it in **Bhatti** at the end of [65]. I have already noted what Messrs Stilitz KC and Halliday submit about the status of the discussion in **Stena Drilling**. Further, they submit that the amended provisions of the **1982 Act** are not mandatory, but provide a potential additional permissive route to jurisdiction; or, alternatively, that the present tribunal was in any event correct to conclude that they were satisfied in this case.

34. I observe, once again, that **Bhatti** was concerned with the position pre-31 December 2020. Kerr J's remarks at [65] also went no further than contemplating that, because the **1982 Act** is *primary legislation*, its amended provisions could potentially be a candidate for an instrument that *might* displace the tribunal's jurisdiction in a given case.

35. A further article was published by Professor Merrett in 2021: **"International Employment Cases Post-Brexit: Choice of Law, Territorial Scope, Jurisdiction and Enforcement"** 50 *Industrial Law Journal* 343. In it she states: "…because employment rights are often expressly or

impliedly overriding mandatory rules, they can be applied without consideration of the normal choice of law rules and often the only issue is whether the claimant falls within the territorial scope of the relevant rule." She goes on to observe that in "international employment cases, the nature of the claim will determine which jurisdiction rules apply." Professor Merrett considers that, if the claim is a common law claim in the civil courts, the amended rules in the **1982 Act** and the CPR will apply (and they would also apply to a contract damages claim brought in the tribunal). But if the claim "is to enforce a statutory employment right through an employment tribunal, the traditional common law rules do not apply. Tribunals are created by statute and have their own jurisdiction …".

36. Before I turn to my own conclusions about the provisions of the **1982 Act** as amended, there are two other strands of the argument that I should address.

37. First, the present tribunal held that the appellants had been sent the notice of claim in compliance with the relevant provisions of the **2013 Rules**, or in any event that it could be treated as properly delivered to each of them pursuant to rule 91. The tribunal also considered that there was no requirement for them to be served with the claim in any other way.

38. As I have set out, the grounds of appeal assert that the new section 15C of the **1982 Act** could not be relied upon in respect of the appellants; and that service within the jurisdiction was the only route by which the tribunal could acquire jurisdiction to entertain the complaints against them. Mr Nicholls KC also argued that, while the CPR do not apply to claims in the employment tribunal as such (see CPR 2.1), it would still have been open to the claimant to seek permission from the High Court to serve the tribunal claims on the appellants out of the jurisdiction, as claims made under "an enactment" and falling within the scope of sub-paragraph (20) of PD6B paragraph 3.1.

39. The claimant's position is that the tribunal correctly concluded that the claim had been properly served on the appellants in accordance with the **2013 Rules** and that no other step needed to be taken in order for the tribunal to have jurisdiction in respect of the claims against them.

40. These same issues relating to service also arose in **Bhatti**. For reasons he set out, in particular at [103] to [106], Kerr J concluded that, in the employment tribunal, there is no requirement for permission to serve outside the jurisdiction on a respondent domiciled abroad; and that, as well as the CPR not applying, PD6B is irrelevant. The (only) applicable system for ensuring that a respondent is properly made aware of a claim, is that set out in the employment tribunal's own rules of procedure.

41. In his post-**Bhatti** further written submissions, Mr Nicholls KC observed that the effect of **Bhatti** "may therefore be that the Swedish Respondents had gone too far" in suggesting that service in the jurisdiction could provide an additional ground for jurisdiction; and, in a further rejoinder, he suggested that, as the claimant was not relying on compliance with the tribunal rules as having *conferred* jurisdiction, the issues to do with service do not need to be addressed by me at all.

42. However, it is clear that the claimant's case, in substance, is that service in accordance with the **2013 Rules** was sufficient to mean that the appellants were required to answer to his claims, in respect of which the tribunal otherwise had jurisdiction. The appellants' case, before the tribunal and in the grounds of appeal, was that compliance with the common-law rules as to service was necessary for the tribunal to have jurisdiction in respect of the complaints against them. Mr Nicholls KC's post-**Bhatti** submissions do not formally abandon that case; and in any event I consider it important to determine the issue, because it forms a part of the wider picture of the post-Brexit landscape.

43. In short, I respectfully agree with Kerr J's analysis and conclusions.

44. In the employment tribunal, what were rules 15 and 16 of the **2013 Rules** provide that, unless the claim has been rejected, the tribunal must send a copy of the claim form, the prescribed response form, and a notice of claim, to the respondent at the address provided. To defend the claim the respondent must then present a response within 28 days of the date on which the copy claim form was sent to it. Failure to do so may lead to judgment being entered under rule 21. All of that must be explained by the notice of claim.

45. These rules perform the same function which the service requirements of the CPR perform in respect of claims in the civil courts. They are the mechanism by which the employment tribunal asserts its jurisdiction over a respondent and enables and requires it to respond to the claim. That they form a complete code, is also reflected in the fact that rules such as 87, 89 and 91 use the words "service" and "delivery" interchangeably. I note also that the rules do provide for delivery/service of documents on non-parties, outside the UK, if permitted by the President (rule 87); and for the tribunal to order substituted service in certain cases (rule 89). But, by contrast, the rules contain no requirement (as they surely could have) to obtain permission – from anyone – to deliver or serve an employment tribunal claim on a respondent at an address outside of the UK.

46. The risk of injustice to a respondent because, for example, despite compliance with rule 15, the claim has not come to its attention, for reasons for which it may not be to blame, can, in an appropriate case, be addressed by the tribunal exercising its powers, conferred by other rules, to extend time for entering a response and/or to reconsider and revoke a rule 21 judgment. Conversely, there may be cases where the respondent may have had actual notice and rule 91 can fairly be applied.

47. Accordingly, the present tribunal was not wrong to conclude that, the **2013 Rules** in this regard having been complied with, no further step was required, by way of service of the claim upon the appellants, in order for them to be subjected to the tribunal's jurisdiction in respect of this claim.

48. As an alternative to his other arguments, the claimant relied upon the proposition that rule 8 of the **2013 Rules** conferred jurisdiction. In so far as the tribunal's decision may be read as agreeing, that is challenged by ground 2. I turn next to that aspect of the argument.

49. In **Bhatti**, at [76], Kerr J reached the conclusion that rule 8 is not a substantive rule conferring jurisdiction, but is concerned with whether a given claim may be brought in England & Wales and/or Scotland (although in that case, for reasons he explained, the tribunal had jurisdiction anyway). I respectfully agree. But I do not think that the present judge in fact did rely upon rule 8 as conferring

jurisdiction. The history, in terms of the rules and the authorities, requires some unpicking.

50. The **2013 Rules of Procedure**, which applied in this case, were found in schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (SI 2013/1237). Rule 8, headed "Presenting the claim", provided:

> "**8.—(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction**
>
> **(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."**

51. The predecessor of rule 8 was regulation 19 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**. In two cases the EAT took the view that the 2001 predecessor of regulation 19 was concerned merely with whether a given claim, in respect of which territorial jurisdiction existed, should be brought in England & Wales or in Scotland. See: **Jackson v Ghost Limited** [2003] IRLR 824 and **Financial Times Limited v Bishop**, UKEAT/0147/03.

52. In **Pervez v Macquarie Bank Limited** [2011] ICR 266 the EAT (Underhill P as he then was) considered regulation 19. The claimant brought discrimination claims relying on legislation which, at the time, conferred rights on persons "employed at an establishment in Great Britain." It was (correctly, it was held), conceded that that test was satisfied in that case [11]. It was also held that there was territorial jurisdiction in respect of an unfair dismissal claim, applying **Lawson v Serco**

[12]. However, it was contended that the tribunal was nevertheless *robbed* of jurisdiction in respect of those claims, against the company which had in fact employed the claimant, by regulation 19, in particular because it did not reside or carry on business in England & Wales.

53. Underhill P considered that the relevant provision of regulation 19 did potentially impact upon the tribunal's jurisdiction. But he went on to observe at [19] that if the correct conclusion was that, by virtue of that provision, the tribunal had no jurisdiction, that would be a "very surprising result. Parliament would have conferred rights on a group of employees but would in respect of one sub-set of that group have failed to provide a forum in which those rights could be enforced."

54. He continued at [21] that: "It is in my judgment wrong in principle that a group of employees, however limited, should notionally enjoy protections which they cannot in fact enforce; and I do not believe that an intention to produce that result should be imputed to the Secretary of State, as the maker of the Regulations, unless it is inescapable." To avoid that result it was necessary to adopt a strained, though not impossible, construction of that provision, and to hold that in the context of that provision the employer was carrying on business in England & Wales by sending the claimant to work there. Accordingly regulation 19 did not have the effect of depriving the employment tribunal of the jurisdiction that it otherwise had to hear the claimant's claims.

55. Rule 8 of the **2013 Rules** differs from regulation 19 of the **2004 Regulations** in a number of ways. Rule 8 forms part of the Rules of Procedure, not the governing regulations. Within those Rules, it forms part of a section headed "Starting A Claim" and is headed "Presenting the claim". While rule 8(1) stipulates that a claim "shall" be started by presenting a claim as indicated there, rules 8(2) and (3) each indicate that it "may" be presented as provided there.

56. Next, and importantly, the substantive provisions are different. The two parts of regulation 19 stipulated that the tribunal "shall only have jurisdiction" to deal with proceedings in England & Wales (or Scotland) if the following provisions applied. The difficulty that arose in **Pervez** was that,

potentially, despite there being territorial jurisdiction, on a literal reading, none of these options applied. The provisions of the regulation were potentially not aligned with the underlying law on territorial jurisdiction, and it was necessary to construe them in a way that ensured alignment.

57. By contrast rule 8 contains no wording to the effect that the tribunal "shall only have jurisdiction." Rather, rules 8(2)(d) and 8(3)(d), in terms, do not determine jurisdiction, but apply in a case where the tribunal *does* have territorial jurisdiction by virtue of a connection with Great Britain. In using that language, these provisions, which were introduced, in point of time, after the decision of the House of Lords in **Lawson v Serco**, echo its overarching formula, so that there is no misalignment. Accordingly, in a case where, in accordance with **Lawson v Serco**, there is territorial jurisdiction, by virtue of the requisite connection with Great Britain, these provisions then indicate how to determine whether, in light of that basis of jurisdiction, the particular claim may be presented in England & Wales or in Scotland (or, potentially, if there is a connection partly with both, either).

58. I conclude that, while rule 8(2)(d) and 8(3)(d) do not confer jurisdiction, if it does not otherwise exist, nor do they rob the tribunal of jurisdiction, if it otherwise does. In fact, I do not think that the present tribunal held otherwise. Rather, at [109] of its decision it made the point that rule 8 "envisages that there may be cases with a foreign element". That is not a statement that the rule itself confers jurisdiction, but a correct observation, that the rule proceeds on the *premise* that there may be cases which have a foreign element, which the tribunal has jurisdiction to consider.

59. I come now to the substantive arguments, and my conclusions, in relation to the provisions of the **1982 Act**, as amended. To coincide with the **Brussels Recast Regulation** ceasing to have effect on 31 December 2020 new sections 15A to 15E were introduced by the **Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019** (SI 2019/479). Specifically, new sections 15C and 15E(2) provide as follows:

> "**15C.—(1) This section applies in relation to proceedings whose subject-matter is a matter relating to an individual contract of employment.**
>
> **(2) The employer may be sued by the employee—**

(a) where the employer is domiciled in the United Kingdom, in the courts for the part of the United Kingdom in which the employer is domiciled,
(b) in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so (regardless of the domicile of the employer), or
(c) if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom or any one overseas country, in the courts for the place in the United Kingdom where the business which engaged the employee is or was situated (regardless of the domicile of the employer).

(3) If the employee is domiciled in the United Kingdom, the employer may only sue the employee in the part of the United Kingdom in which the employee is domiciled (regardless of the domicile of the employer).

(4) Subsections (2) and (3) are subject to rule 11 of Schedule 4 (and rule 14 of Schedule 4 has effect accordingly).

(5) Subsections (2) and (3) do not affect—
(a) the right (under rule 5(c) of Schedule 4 or otherwise) to bring a counterclaim in the court in which, in accordance with subsection (2) or (3), the original claim is pending,
(b) the operation of rule 3(e) of Schedule 4,
(c) the operation of rule 5(a) of Schedule 4 so far as it permits an employer to be sued by an employee, or
(d) the operation of any other rule of law which permits a person not domiciled in the United Kingdom to be sued in the courts of a part of the United Kingdom.

(6) Subsections (2) and (3) may be departed from only by an agreement which—
(a) is entered into after the dispute has arisen, or
(b) allows the employee to bring proceedings in courts other than those indicated in this section.

(7) For the purposes of this section, where an employee enters into an individual contract of employment with an employer who is not domiciled in the United Kingdom, the employer is deemed to be domiciled in the relevant part of the United Kingdom if the employer has a branch, agency or other establishment in that part of the United Kingdom and the dispute arose from the operation of that branch, agency or establishment.

15E … (2) In determining any question as to the meaning or effect of any provision contained in sections 15A to 15D and this section—
(a) regard is to be had to any relevant principles laid down before IP completion day by the European Court in connection with Title II of the 1968 Convention or Chapter 2 of the Regulation and to any relevant decision of that court before IP completion day as to the meaning or effect of any provision of that Title or Chapter, and
(b) without prejudice to the generality of paragraph (a), the expert reports relating to the 1968 Convention may be considered and are, so far as relevant, to be given such weight as is appropriate in the circumstances."

60. To recap, the appellants contend, first, that, it was not sufficient in order for the tribunal to have jurisdiction in respect of the complaints against them, that it had cause-of-action and territorial jurisdiction. Because they are non-UK-domiciles, an applicable rule of international jurisdiction also

had to be satisfied. Apart from (possibly) common-law service (which did not happen) the only other potential avenue was the new section 15C. But, they contend, that section was not satisfied in relation to them because it only applies to employees, and only in respect of a claim against the employer. However, it could not apply in respect of the appellants because (a) the claimant had been a member of an LLP, not an employee under a contract of employment; and (b) in any event none of the appellants was his "employer". None of them had any contract with him at all.

61. The tribunal concluded that there was no need to satisfy the provisions of section 15C at all; but, alternatively, if there was, then there was a good arguable case (which was all that was required) that its provisions were satisfied. In summary, the intention of the new provisions of the **1982 Act** was to provide continuity of protection, and the principles that had applied under the **Brussels Recast Regulation** continued to apply. As to whether the claimant should be treated as having a contract of employment, the tribunal, citing **Petter v EMC Europe Ltd** [2015] EWCA Civ 828; [2015] IRLR 847, considered that the focus should be on the substance of the relationship rather than the legal structure in which it sits; and, having regard to a number of features of the evidence, he had a good arguable case in that regard, including that there was the necessary degree of subordination.

62. As to the argument that, in any event, none of the appellants was the claimant's employer, the tribunal considered that **Samengo-Turner v J & H Marsh & McLennan Limited** [2007] EWCA Civ 723; [2008] ICR 18 offered an analogy and that there should be a "degree of elasticity" in the definition of employer for these purposes, in particular where that leads to the litigation taking place in one jurisdiction. The English forum of the employment tribunal had the closest connection with the dispute. There were features that supported a good arguable case that all of the appellants were agents or employees of the first respondent, and it was desirable for certainty and to avoid multiplicity of proceedings that the claimant not have to sue the appellants separately in Sweden.

63. As I have described, the claimant's case, accepted by the tribunal, was that there was in fact no need to show compliance with section 15C at all. The analysis in Professor Merrett's 2021 article

provides some support for that argument (although her 2010 article took issue with Lord Hoffmann's characterisation of territorial jurisdiction as a "choice of law" issue). The discussion in **Stena Drilling** is relied upon by the appellants, though the point was conceded. The analysis in **Bhatti** postulates that territorial jurisdiction *may* be sufficient, but might potentially be qualified or displaced by primary legislation, such as the amended provisions of the **1982 Act**.

64. My starting point is the backdrop of the **Brussels Recast Regulation**. It was intended to provide an EU-wide uniform set of rules for determining the allocation of jurisdiction in a given case. But it also contained distinct provisions in relation to certain kinds of claims because, in the words of recital (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".

65. It is also abundantly clear that the intention of the amendments to the **1982 Act** made by the **2019 Regulations** was to continue to maintain that approach to claims in the employment sphere. As the explanatory memorandum puts it at paragraph 2.6:

> **"The rules continue the particular protections offered to consumers and employees domiciled in the UK by the Brussels Ia Regulation, including a right to be sued in relation to a consumer, or employment, dispute only in the part of the UK in which they are domiciled (regardless of the domicile of the other party), and a right to sue the other party in such a dispute in parts of the UK with relevant connections – all of which largely obviates the need for the consumer, or employee, to sue abroad in such cases (with the attendant expense and difficulty for this category of economically weaker parties which having to sue outside their own forum brings)."**

66. At paragraph 7.1 the memorandum says that the instrument "retains and restates" rules contained in the **Brussels Recast Regulation** in cases brought "by employees who work or have worked in the UK"; and at 7.19 it is stated:

> **"The rationale for retaining and restating the approach to jurisdiction in consumer and employment cases contained in the Brussels Ia Regulation (as described above) reflects the protective nature of these rules towards parties who are traditionally seen as economically weaker and perhaps less legally aware than their opponents (so, suppliers and sellers, and employers). The rules ensure that the consumer or employee should in general not have to sue, or be sued, in a jurisdiction which is unfamiliar to him in terms of, for example, language. These rules applied not only to suppliers or sellers, and employers, domiciled in the EU, but also those who were not so domiciled, and this approach is continued. These protective rules are not available in the common law and statutory provision of England and Wales and Northern Ireland,**

> **and only to a more limited extent in Scotland, apart from the Brussels regime, and so the Government has chosen to retain them."**

67. The new section 15C effectively replicates Article 21 of the **Brussels Recast Regulation**, including its references to "employer" and "employee". It is true that the amendments introduced do not include a further provision replicating Article 8(1), which provided that a person domiciled in a member state may be sued "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". But it is clear, I think, from the explanatory memorandum, that the purpose of these provisions was to ensure the continued avoidance of multiplicity of claims in cases brought against more than one party arising out of the same circumstances; and there is no sign that it was the intention of Parliament deliberately to introduce new provisions that are more restrictive, and require claimants to have to bring separate claims against some respondents in another state.

68. It is also noteworthy that, in relation to claims in the civil courts, the CPR have also been amended by other regulations, so that, in a case where section 15C applies, there is no requirement to seek permission to serve outside of the jurisdiction. So, where the section applies, there is no room for a jurisdictional obstacle to be raised by a non-UK-domiciled party, either on the basis that such permission was required, or on the basis that England & Wales is not the appropriate forum.

69. Further, the general approach of Underhill P in **Pervez** is pertinent here. I would be slow to infer that Parliament had intended positively to remove or curtail the right of a claimant to bring a claim against a respondent for which it had earlier provided that a remedy should be available, in a case where territorial jurisdiction was established, except by the clearest of words. True it is that, in that case, the EAT was concerned with the interpretation of secondary legislation in the form of rules of procedure, and in this case the amendments are to primary legislation in the form of the **1982 Act**. However, those amendments were themselves brought about by a statutory instrument made pursuant to the **European Union (Withdrawal) Act 2018**; and the interpretation argued for by the appellants

would have the effect of curtailing the impact of the primary substantive legislation – in this case the **2010 Act** – which has specifically provided for co-liability of employees and agents in certain cases, pursuant to sections 109 and 110, on which this claimant seeks to rely.

70. Nor do I consider that the substantive wording of section 15C unavoidably points to the conclusion that it deprives the claimant of the right to pursue these claims against the appellants, because he did not have a contract of employment, and/or they were not in any event his "employer".

71. Importantly, new section 15E(2) provides that, in determining any question as to the meaning or effect of new section 15C, regard is to be had to any principles laid down by the European Court in relation to the **Brussels Recast Regulation**, which – broadly – means that we are concerned here with "employer" and "employee" as European concepts. That is to say, the same approach should be taken to such questions as would have been taken to the **Brussels Recast Regulation** itself, as discussed by Tuckey LJ in **Samengo-Turner**, in particular at [35], being, to repeat, so as to protect the weaker party and achieve certainty and avoid multiplicity of proceedings.

72. It is certainly right that, as a matter of domestic law, a member of an LLP is not an employee of the LLP. But section 45 of the **2010 Act**, which forms part of the suite of causes of action under "Chapter I Employment Etc." of that Act, specifically prohibits discrimination by LLPs against members; and an LLP member can also be a "worker" for the purposes of employment protection rights: **Bates van Winkelhof v Clyde & Co LLP** [2014] UKSC 32; [2014] ICR 730. Mr Nicholls KC is also right that none of these appellants himself had a contract with the claimant. But section 110 of the **2010 Act** expressly provides for individual co-liability of employees and agents who do something that is treated as being done by their employer or principal.

73. Mr Nicholls KC submitted that both **Petter** and **Samengo-Turner** are distinguishable, and offer the claimant no assistance, because both cases involved individuals who were employees, and the issue was whether another company in the same group as the company which employed them,

which conferred benefits upon them pursuant to collateral contracts, fell to be treated as the employer for the purposes of section 5 of the **Brussels Recast Regulation**.

74. However, the judge properly saw the guidance in these authorities as informing the general approach to be taken by him. Section 5 of the **Brussels Recast Regulation** applied, as provided by Article 20(1), to "matters relating to contracts of employment". In **Petter** Moore-Bick LJ observed at [19] that the objective of section 5, to protect employees as the weaker parties, was "most likely to be achieved by looking at the substance of the relationship rather than the legal structure within which it sits". That properly informed the approach taken by the present employment judge. Moore-Bick LJ also observed at [20] that a dispute may relate to a contract of employment "even though the claim itself sounds in tort". I consider that the complaints against these appellants are properly viewed as raising "matters relating to" what is to be regarded as a contract of employment.

75. As to the status of section 15C I respectfully agree with Kerr J in **Bhatti**. But in any event, in light of the conclusions I have reached, the argument about whether the section 15C provisions should be viewed as mandatory or permissive is, in substance, sterile. To summarise, these are as follows.

76. Firstly, the purpose of section 5 of the **Brussels Recast Regulation** was protective of the rights of employees (in the broad European sense), in particular with a view to avoiding them being driven to bring a multiplicity of claims and to litigate in a foreign jurisdiction, including in cases involving non-UK-domiciled respondents; and to provide clear rules that were favourable to such litigants in place of the potentially less favourable, and uncertain, *forum non conveniens* doctrine.

77. Secondly, the purpose of the amendments to the **1982 Act** is the same, and to preserve the position in that regard, so that such employment tribunal claimants are no worse off as a result of the **Brussels Recast Regulation** ceasing to apply, and continue to have the benefit of a more favourable regime than under *forum non conveniens* principles, as well as there being no service requirements over and above the provisions of the employment tribunal's own rules of procedure.

78. Thirdly, given its clear purpose, and the inheritance of Community Law jurisprudence which applies to it, section 15C neither must be, nor should be, construed in a way which defeats that purpose, and results in an employment tribunal claimant being precluded from being able to pursue a complaint against an individual respondent that they would not, on the same facts, have been precluded from bringing before 31 December 2020.

79. In short, the purpose, and effect, of section 15C, is that it preserves the rights of such claimants, and does not reduce them, compared with how matters stood before it took effect. The tribunal judge accordingly did not err in his approach to its interpretation.

Outcome

80. For all of these reasons the tribunal's judgment is upheld and the appeal is dismissed.