Case Number: 2206435/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Johan Sebastian Lapinski		(1) Triton Investments Advisers LLP (2) Peder Påhl (3) Sten Thomas Hofvenstam (4) Beata Gawarecka-Green (5) Matthew Couch (6) Moana Moore (7) Per Agebäck

Heard at: London Central Employment Tribunal

On: 22, 23 May 2023 (24, 25 May in chambers)

Before: Employment Judge Adkin (sitting alone)

Representations

For the Claimant: Mr D Stilitz KC, Counsel
For the Respondent: Mr P Nicholls KC, Counsel

JUDGMENT

(1) The Employment Tribunal does have international and territorial jurisdiction in relation to claims against the Second, Third and Seventh Respondents.

REASONS

Preliminary issue

1. This Public Preliminary Hearing was listed to consider the following question: *does the Employment Tribunal have international and territorial jurisdiction in relation to claims against the Second, Third and Seventh Respondents*?

2. I will deal with the Respondents' application for anonymisation in a separate judgment.

Procedural matters

The hearing

3. Legal representatives attended on the two days of the hearing physically in the Victory House. This was an Public Preliminary Hearing, which was a hybrid hearing principally to allow the Second, Third and Seventh Respondents to give evidence remotely from Sweden. Permission for them to participate in this way was granted by the relevant Swedish authority.

Documents

4. I received an agreed bundle of 316 pages, a supplemental bundle of 93 pages and separate authority bundle from each side.

5. Mr Nicholls produced some authorities during the course of submissions.

Evidence

6. I received short witness statement from the Claimant and the Second, Third and Seventh Respondents.

7. Each witness was cross examined on the first day of the hearing.

Submissions

8. I am grateful to both Counsel for their skeleton arguments and submissions.

9. They each had two hours to develop their submissions orally on the second day of the hearing. Mr Stilitz went first.

10. They were each given a very brief right of reply. Mr Stilitz had less than 10 minutes at the conclusion of Mr Nicholls' submissions. Mr Nicholls was given the last word and made a couple of further points.

List of issues

11. I have been provided with a separate list of issues which has crystallised the substantive dispute between the parties and was agreed in January 2023. I

am only due to decide the first issue in that list, but the list itself is useful in understanding the nature of the substantive dispute.

Facts

Findings

12. After half a day of contested oral evidence, Mr Nicholls urged me not to make detailed findings of fact on the basis that the Claimant only had to show an arguable case for the purposes of the jurisdictional questions that I needed to decide, and by implication it might be for the full Tribunal at a substantive hearing to make more detailed findings based on fuller evidence. Mr Stilitz did not seek to dissuade me from this approach and adopted the concession that the Claimant only had to show an arguable case. (The authorities suggest that the threshold test is "good arguable case", but nothing turns on the distinction.)

13. The only definitive point that Mr Nicholls urges me to find is that there is no arguable case that the Claimant had a contract of employment with the First Respondent for the purposes of the jurisdictional questions I need to decide.

14. I have given in outline of what I understand to be an uncontentious chronology below in which I have made reference to evidence that goes to such questions as whether the Claimant had a line manager and second line manager and who and where these individuals were. It seems to me I do not need to make definitive decisions on these points, but merely need to record such evidence as might support the Claimant's [good] arguable case where these points are potentially in dispute.

First Respondent

15. The First Respondent Triton Investments Advisors LLP ("TIA") is a Limited Liability Partnership, based in London, which is part of the Triton Group of companies.

Triton Group

16. In these reasons I have used the term "Triton Group" to refer to various Triton corporate entities based in different jurisdictions collectively.

17. The Triton Group has its origins in Sweden in 1997 and has offices in Stockholm, China, Finland, Germany, Italy, Jersey, Luxembourg, the Netherlands, Norway, Sweden, the United Kingdom and the United States.

18. The Triton Group now has over 223 employees and partners. Since launch it has raised Eur16 billion from hundreds of investors, including public and private pension funds, endowments and sovereign wealth funds. Triton currently has investments in around 50 companies in Europe in four `sectors: Business Services, Industrial Tech, Healthcare and Consumer.

19. The Triton Group is described on its website as "one integrated team".

Second Respondent (Mr Pråhl)

20. The Second Respondent Mr Peder Pråhl ("R2") is the CEO, Managing Partner and founder of the Triton Group of which the First Respondent is a part.

21. Mr Pråhl was born in Sweden. He is a Swedish citizen. He is has been resident in Sweden since 5 April 2019, and this is where he currently spends the majority of his time, although he travels a significant amount. He says he was resident in Sweden at what he describes as "the point of attempted service of the Claimant's claim", which I take to be on or shortly after 7 September 2022 the date on which notices of claim were sent out by the Employment Tribunal.

22. Mr Pråhl also a British citizen and holds a British passport. He resided in the UK in the past, however, states in his witness statement that he ceased to be resident in the UK on 5th April 2019. Based on the evidence of his professional calendar and flight records he was a visitor to the UK in 2022 for 38 days of which 35 were "working" days, i.e. Monday-Friday. Mr Pråhl kept an office for his exclusive use at the First Respondent's London offices which was locked when he was not in the UK.

23. Mr Pråhl is described as the "ultimate controlling party" in various financial statements relating to the First Respondent, through various intermediaries businesses.

24. Companies House shows that Mr Pråhl was an LLP member of the First Respondent TIA between 13 June 2018 and 4 April 2019. The country of residence given in that document is England.

25. By an agreement made with effect from 5 April 2019 Mr Pråhl is said to be an employee of the First Respondent. In that agreement, described as an Employment Agreement on the front sheet, Mr Pråhl's home address in London is given. It is not necessary for present purposes to state that, since it is redacted, but it is a residential not a business address in London. Under clause 3.1 of that agreement his duties are said to be

> "general management, IR management, COO management and talent management of the Triton group, attend investor meetings, and attend Investment Advisory Committee meetings"

26. At clause 6.1 the agreement contains:

> The Employee will work in respect of the Employment at the London office of the Company. He may be required to travel and work outside of the United Kingdom from time to time.

27. The agreement is to be governed and interpreted in accordance with the laws of England and Wales and submit to the exclusive jurisdiction of the English Courts.

28. Mr Pråhl's internal system profile gives home addresses in Sweden, Jersey and United Kingdom, with effective dates from December 2019. His work contact address is the Stockholm address to which the Tribunal send the notice of claim.

29. A screenshot from Mr Pråhl's internal Outlook profile at 271 in the agreed bundle shows that he had 10 direct reports, some of whom were based in the UK and worked for the First Respondent TIA. The list of direct reports included Thomas Hofvenstam the Third Respondent. Mr Pråhl claimed not to know this document and said that it was not accurate.

30. According to an entry on the Finance Conduct Authority (FCA) register dated 9 February 2023 Mr Pråhl was certified and/or assessed by an authorised firm that is regulated for certain activities. The entry show his connection to the First Respondent specifically from 25 February 2021 "Manager of certification employee" and "Client dealing". The entry shows that historically in the period 1 October 2018 to 1 April 2019 he was CF4 Partner and in the period 1 October 2018 to 8 December 2019 he was CF30 Customer. Mr Pråhl suggested in answer to questions that he did not know whether he was registered with the FCA. Claimant's counsel submitted that Mr Pråhl was evasive in answering questions in relation to his registration with the FCA. I have not needed to make findings on this for present purposes.

Third Respondent (Mr Hofvenstam)

31. The Third Respondent Mr Sten Thomas Hofvenstam ("R3") was initially employed by Triton Advisers (Nordic) AB for three months, before becoming employed by Triton Advisers (Sweden) AB in November 2012. He has not been employed by or a member of any other entity within the Triton Group, including the First Respondent.

32. A screenshot from Mr Hofvenstam's internal Outlook profile at 271 in the agreed bundle shows that he reported to Mr Pråhl and had 9 direct reports, which included Per Agebäck the Seventh Respondent. Similarly to Mr Pråhl Mr Hofvenstam questioned whether this document was accurate.

Seventh Respondent (Mr Agebäck)

33. The Seventh Respondent Mr Per Agebäck ("R7") has worked within the Triton Group since May 2009. He was initially employed by Triton Advisers (Nordic) AB before becoming employed by Triton Advisers (Sweden) AB. Aside from this, he has never been employed by nor a member of any other entity within the Triton Group, including the First Respondent.

34. Mr Agebäck was described in the Claimant's performance review 2019/2020 as "Manager" of the Claimant. He did not recognise the term "line manager" and insisted that the Triton Group operate a non-hierarchical organisation. He did however take responsibility for the Claimant's annual review, communicated with him about adjustments in relation to his disability and in May 2022 and suspended him from financial activities.

35. A screenshot from Mr Agebäck's internal Outlook profile at 272 in the agreed bundle shows that he reported to Mr Hofvenstam. Similarly to Mr Pråhl and Mr Hofvenstam, Mr Agebäck questioned whether this document was accurate.

Claimant

36. The Claimant Mr Lapinski ("C") has worked within the Triton Group since May 2015. His title is Investment Advisory Professional.

37. The Claimant did not accept the characterisation the organisation as non-hierarchical. He said it was hierarchical. On his account he had a line manager, namely the Seventh Respondent whose line manager in turn was the Third Respondent. As to the role of the Second Respondent, the Claimant was adamant that he was the controlling hand, as Founder and CEO notwithstanding that decisions were technically made through the operation of various investment committees.

38. According to UK companies house the Claimant was appointed as an LLP member of the First Respondent on 1 September 2020 and resigned on 31 December 2022. His country of residence in that document is said to be England.

History of Claimant's work

39. The Claimant commenced working in the Triton Group in Sweden in May 2015 as Investment Advisory Professional.

40. In December 2017 the Claimant was made "Deal Captain" of a significant investment transaction called "Opti" and says that he reported directly to the Second Respondent Mr Pråhl in relation to that.

Move from Sweden to UK

41. In preparation for a move to the UK the Claimant drew up a document dated 16 June 2020 with Mr Agebäck entitled "Key principles for my London move" in which the new date was set to be August/September, the length of time anticipated to be 2 – 3 years. There was a commitment to visiting in Stockholm every two weeks, but in no event less than once a month. It contained the following:

> "Commitment to juniors in Stockholm: with every visit allow time for lunch / dinner / coaching sessions with one or more juniors to keep contacts. From time to time, provide opportunities for juniors to work on some projects from London. Aim to spend significant time in the Nordics during execution to ensure team works seamlessly and that junior team members get hands-on coaching
>
> Additional responsibilities in London: In addition to current roles and responsibilities, increased focus on consumer sourcing in the UK and Rest of Europe"

Documents

42. Shortly before the move to London the Claimant was given the opportunity to read various contractual documents, in an email dated 14 August 2020. In that email from Joe Farrant it said the following:

> "1. Partnership Agreement ("LLPA")
>
> The LLPA is the **equivalent of the usual Employment Agreement**'. All LLP members have the same one."
>
> [emphasis added]

43. As part of that move the Claimant signed a 'deed of adherence' dated 28 April 2021 but purportedly with effect from 1 September 2020 which required him to make a capital contribution of £92,800 on 30 April 2021, the majority of which was to be funded by a loan. That document showed a "voting percentage" of 1.78%.

44. In August 2020 the Claimant moved to London. He retained the same holiday entitlement of 30 days and some of his relocation costs were paid for.

IP completion day/Brexit

45. 31 December 2020 is described as "IP completion day" [IP stands for Implementation Period], following on from the Brexit referendum. The legal significance of that date is discussed below.

Disability

46. On 16 August 2021 the Claimant suffered from his first *Grand mal* seizure. Two days later on 18 August 2021 he received a diagnosis of epilepsy. This diagnosis and the Respondent's alleged treatment of the Claimant are the basis for the Claimant's claims of disability discrimination under the Equality Act 2010.

47. On 4 October 2021 the Claimant was advised by his doctor not to work more than 40 hours per week.

48. According to Mr Agebäck who provided instructions for the Grounds of Resistance following the Claimant's diagnosis and resulting medical restrictions, adjustments were made as to the Claimant's workload and travel commitments.

R3 in London

49. In March 2022 the Claimant says that he meet the Third Respondent Mr Hofventstam in person in London. He disputes the Third Respondent's allegation that he had not travelled outside Sweden.

R2's comments on C's bonus

50. On 22 March 2022 Mr Pråhl was copied in an email entitled "Compensation Review 2022" which was sent to a variety of people by Elissa Weston. Mr Pråhl wrote separately to the Fourth Respondent Beata Gawarecka-Green, (COO and former Head of HR of TIA) regarding the Claimant as follows:

> "Before we conclude on Sebastian L - we need to see what comes from this options issues ...
>
> If he keeps all that for sure no bonus ..."

51. In his oral evidence at the Tribunal hearing Mr Pråhl denied that he had the authority to deny the Claimant a bonus and explained that he had "miss written".

R2 in London

52. According to the Claimant, Mr Pråhl was in London on 31 March 2022 and had conversations with various people which included conversations about the Claimant. On that day the Claimant and Mr Pråhl had lunch together at 5 Hertford St, a private members club which Mr Pråhl was a member of.

R7 communicates C's annual compensation

53. Mr Agebäck discussed with the Claimant his annual compensation on 25 April 2022. He communicated to HR that the Claimant was disappointed with the figures discussed and raised the effect of inflation.

R7's comments on C's bonus

54. The following day, in an email dated 26 April 2022 Mr Agebäck responded to an email from the Fourth Respondent who had written that they were not ready to award him the regular bonus with the following suggestions:

> "If we want to hold back, then suggest ''corporate intervened" given latest insights and therefore payment held back. My honest view is that if we hold back bonus, then there is likely very hard to find a path back.
>
> He is a strong performer with high potential when healthy. I would like to work towards amicable solutions so have a chance to keep him"

Suspension of investment related activities

55. On 17 May 2022 the Claimant received a WhatsApp message from Mr Agebäck instructing him to "cease investment related activities" for compliance reasons. He had been given instructions in this respect by the compliance team in the First Respondent's compliance team.

56. He apparently clarified this did not constitute a suspension of employment generally.

Claim

57. The Claimant presented his claim on **24 August 2022**.

Service of the claim by the Tribunal

58. On 7 September 2022 Mr Owolabi of the London Central Employment Tribunal administrative team sent the claim form together with a Notice of Claim to the First Respondent on which the names of all seven of the Respondents is set out. The Seventh Respondent's name which should be "Mr Per Agebäck" has been rendered "Mr Per Ageback", i.e. without the umlaut).

59. This document was sent to the First Respondent's address 32 Duke Street, 3rd Floor, St James, Greater London SW1Y 6DF. Similar notices were sent to this address to the Fourth, Fifth and Sixth Respondents, all of whom are individuals who work in the UK and in respect of which no issue is taken in terms of service.

60. Similar notices was sent by post to the Second, Third and Seventh Respondent at their business office address in Sweden: Kungstadgardsgatan 20, Stockholm 111 47. The point has been made by the Respondents that this address not correctly written using the Swedish alphabet. The street name should be Kungsträdgårdsgatan. It has not been suggested however that this these notices of claim did not arrive at the address.

61. I have borrowed the terminology "Swedish Respondents" from Mr Nicholls as a convenient label for these three respondents to distinguish them from the other four respondents, but nothing in particular turns on their nationality, it is their country of domicile (Sweden) which is potentially of significance.

62. The position adopted by the Swedish Respondents is that the Notices of Claim should have been sent to their home addresses and as a result these documents were opened in the course of ordinary business post, which was the cause of some delay.

63. The deadline for response each of these notices was **5 October 2022**.

64. An ET3 (Response form) and a detailed Grounds of Resistance (i.e. a defence) was presented in time on the day of the deadline on behalf of the Second, Third and Seventh Respondents dated 5 October 2022.

Termination

65. On 31 December 2022 the Claimant's membership of the First Respondent LLP ended.

Arguments

66. I am grateful for skeleton arguments, oral arguments and the provision of authority bundles by representatives for both sides.

67. I have not sought to replicate the entirety of Counsel's written submissions. Those submissions stand for themselves and may be referred to if necessary. I have sought to capture headline submissions below.

Respondents' arguments

68. The Respondents concede that the claim as brought is rightly within the Employment Tribunal and further that the claim brought within the territorial scope of the legislation (that is sometimes called the *Lawson v Serco* point).

69. The arguments put forward by the Respondents relate to "international jurisdiction" only.

70. The Respondents argue first that assert that the Tribunal does not have jurisdiction in respect of the claims against the Second, Third and Seventh Respondents because the Claimant's claim was **not served** in the UK. The Respondents clarified in correspondence that this is the determinative point of law for the Tribunal to consider (Respondent letter 27 March 2023) [285].

71. Second, it is contended that following the Brexit IP completion day on 31 December 2020 it is necessary to identify the law that now applies. The Respondent specifically asserts that rule 8 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("the Rules") does not confer jurisdiction and is merely a provision for determining which domestic jurisdiction the claims should fall in (i.e. England and Wales on one hand or Scotland on the other).

72. As to the Claimant's alternative argument under section 15C of the Civil Jurisdiction and Judgments Act 1982 (below) it is argued first that the Claimant was not under a contract of employment and second the claim is not against his employer, since the Second, Third and Seventh Respondents are individuals but not alleged by the Claimant to be his employer.

73. It is argued that the Brussels Regulations are no longer in force and the common law rules must take their place

74. Mr Nicholls' ultimate oral submission was that the correct procedure which should now apply for the Swedish Respondents is to have a High Court Master give permission for service.

Claimant's arguments

75. The Claimant argues first, that the Respondents' argument about service is novel and unmeritorious and submits would be wrong to import the concept of service into established Employment Tribunal practice.

76. Alternatively the Claimant contends that international jurisdiction is conferred by section 15C(2)(b) of the **Civil Jurisdiction and Judgments Act 1982**, which was introduced by way of an amendment pursuant to the European Union (Withdrawal) Act 2018 and Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/419.

77. Finally it is argued that if the present application was well founded respondents could evade liability with impunity if not domiciled in England and Wales.

LAW

78. I am grateful to counsel for setting out much of the applicable law.

Basis for action against Swedish Respondents

79. The Equality Act 2010 contains the following provisions:

> 110 Liability of employees and agents
>
> (1)A person (A) contravenes this section if—
>
> (a)A is an employee or agent,
>
> (b)A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
>
> (c)the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

Jurisdiction

80. The Employment Tribunals Act 1996 contains the following provisions:

> 2 Enactments conferring jurisdiction on employment tribunals
>
> Employment tribunals shall exercise the jurisdiction conferred on them by or by virtue of this Act or any other Act, whether passed before or after this Act.
>
> 7 Employment tribunal procedure regulations
>
> (1) The Secretary of State may by regulations ("[employment tribunal] procedure regulations") make such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals.

(2) Proceedings before employment tribunals shall be instituted in accordance with employment tribunal procedure regulations.

(3) Employment tribunal procedure regulations may, in particular, include provision—

(a) for determining by which tribunal any proceedings are to be determined

Tribunal rules

81. Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 regulation 13 provides:

13.— Application of Schedules 1 to 3

(1) Subject to paragraph (2), **Schedule 1** applies to all proceedings before a Tribunal except where separate rules of procedure made under the provisions of any enactment are applicable.

82. The Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 ("**the Rules**") contain the following:

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) **avoiding unnecessary formality** and seeking flexibility in the proceedings;

(d) **avoiding delay**, so far as compatible with proper consideration of the issues; and

(e) **saving expense**.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Presenting the claim

8.—(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.

Sending claim form to respondents

15. Unless the claim is rejected, the Tribunal shall send a copy of the claim form, together with a prescribed response form, to each respondent with a notice which includes information on—

(a) whether any part of the claim has been rejected; and

(b) how to submit a response to the claim, the time limit for doing so and what will happen if a response is not received by the Tribunal within that time limit.

Delivery to parties

86.—(1) Documents may be delivered to a party (whether by the Tribunal or by another party)—

(a) by post;

(b) by direct delivery to that party's address (including delivery by a courier or messenger service);

(c) by electronic communication; or

(d) by being handed personally to that party, if an individual and if no representative has been named in the claim form or response; or to any individual representative named in the claim form or response; or, on the occasion of a hearing, to any person identified by the party as representing that party at that hearing.

(2) For the purposes of sub-paragraphs (a) to (c) of paragraph (1), the document shall be delivered to the address given in the claim form or response (which shall be the address of the party's representative, if one is named) or to a different address as notified in writing by the party in question.

(3) If a party has given both a postal address and one or more electronic addresses, any of them may be used unless the party has indicated in writing that a particular address should or should not be used.

Delivery to non-parties

87. Subject to the special cases which are the subject of rule 88, documents shall be sent to non-parties at any address for service which they may have notified and otherwise at any known address or place of business in the United Kingdom or, if the party is a corporate body, at its registered or principal office in the United Kingdom or, if permitted by the President, at an address outside the United Kingdom.

…

89 Substituted service

Where no address for service in accordance with the above rules is known or it appears that service at any such address is unlikely to come to the attention of the addressee, the President, Vice President or a Regional Employment Judge may order that there shall be substituted service in such manner as appears appropriate.

…

Irregular service

91. **A Tribunal may treat any document as delivered to a person**, notwithstanding any non-compliance with rules 86 to 88, **if satisfied that the document in question, or its substance, has in fact come to the attention of that person**.

[**emphasis** added]

83. It is something of an oddity that the rule 87 requires permission from the President for delivery to non-parties overseas but there is no equivalent rule dealing for parties overseas.

84. Professor Louise Merrett (Professor of International Commercial Law at the University of Cambridge) summarised the position in '*International employment cases post-Brexit: choice of law, territorial scope, jurisdiction and enforcement*' (ILJ,2021, 50(3), 343-354) as follows:

> "Employment tribunals are created by statute and as a result have no inherent jurisdiction. They are not governed by normal rules as to service (or the special rules introduced into section 15C CJJA 1982): their jurisdiction is governed by the Employment Tribunal Rules of Procedure 2013.
>
> The rules for starting a claim are set out in Rule 8(2) …
>
> In *Pervez v Macquarie Bank Ltd* an employee had been employed by a Hong Kong based company but had been seconded to an associated company based in London …
>
> Under the 2013 version of the rules which are currently in force, the claim would clearly be allowed as the employee was working in England."

85. In **Financial Times Ltd v Bishop** [2003] 11 WLUK 702, a case about the territorial scope of the ERA 1996), Judge Burke QC sitting in the EAT referred to the prevailing practice of ET pleadings (and other documents) being served without territorial or jurisdictional limitation and without the need for permission:

> " 29….. Rule 23(4) of Schedule 1 to the 2001 Regulations contains no limitation on the geographical extent to which Tribunal proceedings may be sent to Respondents as is required by Rule 2(1); and **in practice Tribunals, we are told, regularly send Originating Applications and other documents to Respondents based abroad**, although we understand that there has been a Tribunal decision that overseas service should only be effected with the permission of a Regional Chairman (see E.L.A Briefing Volume 10 No 3 April 2003 page 47). **Service is not the central consideration; the central consideration is whether, in each case, the employee has the benefit of the statutory right upon which he bases his claim; if he does have such a right, then prima facie the Tribunal has jurisdiction to entertain his claim; if he does not, the position is otherwise**."

86. As to the significance of established practice, Carnwath LJ stated in **Isle of Anglesey CC v Welsh Ministers** [2009] QB 163 at [43]:

> "Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach. That applies particular in a relatively esoteric area of the law such as the present, in relation to which cases may rarely come before the courts, and the established practice is the only guide for operators and their advisers."

87. In **Pervez v Macquarie Bank Ltd** [2011] ICR 266 (UKEAT/246/10) Underhill J (then President) held that an employment judge had been right to find that the Claimant was entitled to the protection of the statutes and regulations on which his claims were based, and, on the face of it, the wording of regulation 19(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 meant that Pervez could not in fact enforce those rights in the employment tribunal. However, the EAT decided that it was wrong in principle that a group of employees should notionally enjoy protection for which there was no forum for enforcement and, to avoid that result, it was necessary to hold that in the context of regulation 19a ET Rules of Procedure 2004, a company could carry on business in England by seconding an employee to work at an establishment there even if the supply of workers to third parties was not part of its ordinary business.

88. The EAT held that, accordingly, while accepting that it could not be said in the ordinary sense that the Hong Kong company carries on business in England, it should nevertheless be joined as a respondent to the claims.

89. Underhill J gave the following guidance in on regulation 19(1), which was the predecessor provision to rule 8. It is in slightly different terms. Rule 8 for example has no reference to the county court. Nevertheless the guidance is useful:

> "15.
>
> …… 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**"

90. At paragraph [22] of the judgment, Underhill J said,

> " In my view, therefore, the judge was wrong to hold that regulation 19 had the effect of depriving the tribunal of jurisdiction to entertain a claim against MCSL. Since that is the only basis of objection to the joinder application, I substitute a

> finding that MCSL be joined as a respondent. It will be necessary for the details of claim to be amended in order accurately to formulate the claim against MCSL. **I direct that the amended details of claim be served on MCSL by no later than 23 December 2010, with liberty to MCSL to serve an amended response by no later than 14 January 2011**."
>
> [emphasis added]

91. There is no suggestion in Underhill J's direction that the amended claim required any special procedure to be served on MCSL.

92. Lewis J sitting in the EAT in **Embassy of Brazil v Mr D A De Castro Cerqueira** [2014] ICR 7031 specifically stated in both paragraphs [18] and [21] of its judgment that the CPR provisions on service, including service outside the jurisdiction, are not directly applicable to proceedings in the employment tribunal. Lewis J held as follows:

> 18. For completeness, reference was made to the provisions of the CPR . They only apply to proceedings in the county court, the High Court and the Civil Division of the Court of Appeal: see CPR rule 2.1 . **They do not apply to proceedings in the employment tribunal**. There is provision for requiring the permission of the court to serve proceedings out of the jurisdiction in specified cases: see rule 6.36 .
>
> 21. …. Furthermore, it would not be permissible for a court to seek to restrict the words of the Act by reference to provisions of other subordinate legislation, such as the CPR provisions, **which are not applicable to proceedings in employment tribunals**.

Brexit & CCJA 1982

93. This section is of relevance to the Claimant's alternative case that in light of the Brussels Regulation (Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast)) ("**Recast Brussels Reguation**"), read together the relevant domestic legislation, international jurisdiction is conferred upon the Employment Tribunal and to the Respondent's counter-argument that following IP completion day that is no longer the position.

94. The Civil Jurisdiction and Judgments Act 1982, contains the following provisions inserted by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/479) ("the 2019 regulations") with effect from 31 December 2020:

> 15C Jurisdiction in relation to individual contracts of employment

(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

…

(5) Subsections (2) and (3) do not affect—

…

(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.

[emphasis added]

15E Interpretation

(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

SCHEDULE 4

Paragraph 5

A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, also be sued—

(a) **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**;

95. The following commentary is offered by the learned editors of **Harvey** on Industrial Relations and Employment Law/Division PIII/ 1. (3) The Civil Jurisdiction and Judgments Act 1982 and the Brussels Regime/(a), who submit that:

> For proceedings commenced in the UK on or after 31 December 2020, the Brussels Regime which had previously determined the appropriate forum as between the UK and a competing EU jurisdiction no longer applies. However, **the approach of the Brussels Regime has been re-enacted through domestic legislation**: the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982). The result of CJJA 1982 s 15C(2) is that **the approach to competing forums (whether the competing forum is an EU member state or any other foreign jurisdiction) remains largely unchanged** and a claimant continues to have the choice to bring employment litigation in the UK pursuant to a contract of employment:

96. In **Soleymani v Nifty Gateway LLC** [2023] 1 WLR 436 Popplewell LJ stated at [55]:

> "The Explanatory Memorandum [to the 2019 Regulations] says in no fewer than six places that the instrument is intended to 'adopt', 'retain' or 'restate' the protections afforded to consumers (and employees) in the Recast Regulation .. It is clear beyond dispute that the intention expressed in the Explanatory Memorandum was one of restatement and retention in domestic law …"

Brussels Regulation

97. Regulation (EU) No 1215/2012 of The European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("**the Recast Brussels Regulation**") contains the following :

> SECTION 2
>
> Special jurisdiction
>
> Article 8
>
> A person domiciled in a Member State may also be sued:
>
> (1) **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;

[emphasis added]

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.

Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Principles to be applied to interpretation of the Brussels Regulation

98. In **Petter v EMC Europe Ltd** [2015] IRLR 847 the Court of Appeal considered the threshold test, the autonomous definition of employment and emphasised the importance of taking a broad view of the scope of the specialist employment jurisdiction provisions within the Regulation. The following extracts from the decision of Moore-Bick LJ are of assistance:

> [12]
>
> The proper approach to the judge's decision
>
> It was common ground before the judge and before us that a claimant will establish that the court has jurisdiction if he can show '**a good arguable case**' to that effect. In the present case that means a good arguable case that the court has jurisdiction under Section 5 of the Regulation. For these purposes it is accepted that 'a good arguable case' means 'having much the better of the argument' or 'a much better argument than the defendant' on the basis of the material before the court. In the present case the facts were not significantly in issue and the question therefore ultimately turned on the meaning of the words 'employee', 'employer' and 'contract of employment' in Section 5 of the Regulation.
>
> …
>
> [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 [for EMC] 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] 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**."
>
> [Emphasis added]

99. In **Holterman Ferho Exploitatie BV v Spies von Buellesheim** C-47/14 [2016] ICR 90, the issue was whether the defendant, a manager, director and shareholder in various group companies, could avail himself of the special jurisdictional provisions applying to employment. The CJEU held at [39]-[46]:

> "[39] … contracts of employment have certain particularities: they create a lasting bond which brings the worker to some extent within the organisational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements …
>
> … in relation to the independent concept of 'contract of employment', it may be considered that it presupposes a **relationship of subordination** of the employee to the employer.
>
> … the essential feature of an employment relationship is that for a certain period of time one person performs services for an under the direction of another in return for which he receives remuneration …

> [43] With regard to the purpose of Chapter II, Section 5 of Regulation No 44/2001, suffice it to note that, as is clear from recital (13) in the Preamble, the Regulation aims to provide the weaker parties to contracts, including contracts of employment, with enhanced protection by derogating from the general rules of jurisdiction …
>
> [46] … **with regard to the relationship of subordination, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties** …"
>
> [emphasis added]

100. In **Samengo Turner v J&H Marsh & McLennan (Services) Ltd** [2008] ICR 18 the Court of Appeal adopted a broad interpretation of the concept of "employer" within the Regulation, holding that companies which were not in fact the individuals' employers should be treated as such.

101. In that case the employee claimants were domiciled in the UK. MSL was the employer and MMC was a holding company not the employer. The defendants brought an action in New York. At first instance the judge found that MMC as holding company was not the employer and it followed that the individual claimant employees could not be granted an anti-suit injunction to restrain New York proceedings brought by MMC.

102. Tuckey LJ said at [35]:

> "A construction … in the way I have indicated gives effect to the objectives of the Regulation. **It achieves certainty and avoids multiplicity of proceedings** … 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. "
>
> [Emphasis added]

<u>Threshold test – 'good arguable case'</u>

103. Further guidance on 'good arguable case' has been provided in the case of **Brownlie v Four Seasons Holdings International** [2017] UKSC 80 approved in **Goldman Sachs International v Novo Banco** [2018] UKSC 34. In Brownlie, at para. 7 Lord Sumption explained the test in three limbs:

> (i)'that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway;
>
> (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but

> (iii) the nature of the issue and the limitations of the material available at the interlocutory stage **may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it**.'
>
> [emphasis added]

CONCLUSIONS

The dispute

104. There are three questions identified in relation to cases with an international element in **Simpson v Intralinks** [2012] ICR 1343: (i) does the tribunal have international jurisdiction; (ii) should the case be in the tribunal or in some other court; and (iii) does the claim fall within the territorial scope of the legislation? It is only (i) that the Respondent disputes, based on the argument that service has not been effected.

Lack of service

105. The Respondents have failed to identify any clear authority for the proposition that High Court or Civil Procedure Rules ("CPR") relating to service should apply to Employment Tribunal claims.

106. "Service" within the context of the Employment Tribunal rules means that the Employment Tribunal sends a notice of claim together with the claim form and any particulars of the claim to the address given for a relevant respondent.

107. That is what has happened in this case.

108. I see no reason to import the High Court or CPR rules in this case, nor all of the authorities discussing service in the High Court (e.g. Chellaram v Chellaram [2002] EWHC 632, HRH Maharanee of Baroda v Wildenstein [1972] QB 283). This is so particularly following the decisions in the cases of **Bishop**, **Pervez** and **De Castro Cerqueira** set out above.

109. **Rule 8** (which was drafted by Underhill P) clearly envisages that there may be cases with a foreign element. There is no special requirement in the Rules for service on overseas parties.

110. The Claimant argues there is some weight to be attached to settled practice (**Isle of Anglesey**). I would not necessarily conclude that the question of serving employment tribunal claims overseas is as esoteric as the Isle of Anglesey case, which related to oyster and mussel fishing. Nevertheless overseas service of employment tribunal claims is a point on which there is limited authority. A practice is described in the decision in the case of Bishop, which acknowledged that "originating applications" were regularly sent to respondents overseas. I should acknowledge that Bishop does describe a

employment tribunal, now approximately 20 years ago, deciding that it needed to involve the Regional Employment Judge. Caution should be exercised before determining that settled practice must be legally correct. I accept the submission however that clear authority is required to demonstrate that what appears to be the settled practice is not correct.

111. I am not satisfied that there has been a failure of service, even a technical one. I do not regard the difference between Kungsträdgårdsgatan and Kungstradgardsgatan (the street address) as amounting to a failure of service in circumstances in which there is no suggestion that this did not come to the attention of the Swedish Respondents.

112. It follows that I find that the Second, Third and Seventh Respondents have been served an that the Tribunal has the jurisdiction to hear these claims.

Rule 91 – irregular service

113. *Alternatively*, if I am wrong about that and there is some technical defect, I consider that **Rule 91** comes into play. I am satisfied that the notice of claim and the claim form have in fact come to the attention of the Second, Third and Seventh Respondents and in the circumstances those documents should be treated as delivered to them.

114. The whole purpose of service is to inform the respondent of the contents of the claim form and the nature of the claimant's case.

115. I cannot ignore the reality that in this case the Second, Third and Seventh Respondents are aware of the claim. They received the notices of claim and claim forms at their usual business address in Stockholm. The notice of claim and claim forms were also sent the First Respondent's business address in the UK. Given that the Second Respondent is the "ultimate controlling party" of the First Respondent, that is another route by which he at least would become aware of this claim.

116. The notices of claim received enabled the Second, Third and Seventh Respondents to instruct solicitors, present a response within the time allowed for doing so, provide disclosure of documents relevant to the question of jurisdiction, produce witness statements, instruct leading counsel via the solicitors, attend a video hearing and give oral evidence. I cannot see any sense in which they are not aware of the claim or prejudiced in their ability to deal with it.

117. In assessment this is a case which clearly falls within the scope Rule 91. My finding is that the notice of claim and claim form has come to the attention of the Second, Third and Seventh Respondents and therefore it should be treated as having been delivered.

118. In short the Respondents argument about service such that there is no jurisdiction in the claims against the Second, Third and Seventh Respondents fails.

International jurisdiction

119. Dealing with the Claimant's *alternative case*, as to the question of international jurisdiction and the appropriate forum, at this stage the Claimant merely needs to show a good arguable case.

120. It is cannot be in dispute that the First Respondent was based in the UK and the Claimant was working for that entity in London.

121. I do not accept Mr Nicholls' submission that there was a fundamental change on 31 December 2020 which necessitates a completely new way of looking at the matter. I find, supported by the commentary of the learned editors of Harvey set out above, that the intention of Parliament through the amended **CJJA 1982** is to provide continuity and that similar principles to the Recast Brussels Regulation should apply.

122. As to the Respondents' argument that this was not litigation brought pursuant to a contract of employment, Mr Nicholls suggests that they cannot be an arguable case that this was a contract of employment. There are a number of arguments which it seemed to me suggest that there is such a good arguable case:

122.1. the appropriate approach is to consider the substance of the relationship rather than the legal structure in which it sits (per **Petter**);

122.2. the Claimant was told in writing that the agreement he entered into when he moved to the UK was "equivalent to an Employment Agreement";

122.3. there was significant continuity from his employment in Sweden, e.g. his title, his annual leave and a number of his responsibilities;

122.4. based on the Claimant's evidence, following the move to the UK, he was subject to continued management by Mr Agebäck, and second line management from Mr Hofvenstam, which is supported by the Respondents' own contemporaneous documents e.g. the outlook profiles;

122.5. the Claimant's evidence about the role and degree of control of Mr Pråhl is supported by contemporaneous evidence.

123. There is a good arguable case with plausible evidence based on the Claimant's version the necessary degree of subordination (per **Holterman**). It does not matter for present purposes that this is disputed.

124. As to the Respondents' other argument that the Second, Third and Seventh Respondents were not the Claimant's employer, I accept that, following **Samengo-Turner**, and by analogy with the present situation there should be a degree of elasticity in the definition of employer for the purposes of the Brussels Regulation in particular where that leads to the litigation taken place in one jurisdiction. In that case as this the English forum (employment tribunal rather than court) does have the closest connection with the dispute.

It is desirable for certainty and to avoid multiplicity of proceedings that the litigation takes place in the Employment Tribunal of England and Wales.

125. There is an employment agreement showing that the Second Respondent was an employee of the First Respondent employer. There is a good arguable case that he exercised control over the First Respondent, not least because of the financial statements describing him as the "ultimate controlling party", such that he was an agent of the First Respondent as well as being an employee.

126. The Seventh Respondent as the Claimant's manager it seems better than a good arguable case that he was the First Respondent's agent. There is a good arguable case that the Third Respondent was the Seventh Respondent's manager and again the First Respondent's agent.

127. Had I been required to determine this point I would have found that that the Employment Tribunal of England & Wales has international jurisdiction conferred on it to determine the claims against the Second, Third and Seventh Respondents as employees or agents of/for the employer First Respondent. The Employment Tribunal of England & Wales is seised of the matter by virtue of the claim of the First Respondent. The Employment Tribunal has the closest connection with the dispute and it would achieve certainty and avoid the multiplicity of proceedings should the Claimant have to sue the Second, Third and Seventh Respondents separately in Sweden.

128. I should reiterate that this is a conclusion I have considered in the alternative. It follows from my decision in respect of service and/or the operation of rule 91 that the Second, Third and Seventh Respondents have been served and no issue of jurisdiction arises.

Employment Judge Adkin

Date 10 July 2023

WRITTEN REASONS SENT TO THE PARTIES ON

.11/07/2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.