EMPLOYMENT TRIBUNALS

Claimant: Mr G Marsden

Respondent: Bucher Municipal Ltd

Heard at: Croydon (remote public hearing via CVP)

On: 11 May 2021

Before: Judge Brian Doyle

Representation
Claimant: In person
Respondent: Mr Huw P Davies, counsel

RESERVED JUDGMENT

The Tribunal does not have territorial jurisdiction to determine the claim and accordingly the claim is dismissed.

REASONS

Introduction

1. This is a preliminary hearing conducted remotely by video conference (CVP), but otherwise held in public, with the agreement of the parties. The preliminary issue to be decided is whether the Employment Tribunal in England and Wales (this Tribunal) has territorial jurisdiction to consider the merits of the claimant's complaints of unfair dismissal and disability discrimination arising from his dismissal by the respondent company at a time when the claimant was living and working in Germany.

2. The Tribunal heard evidence and submissions, but had insufficient time to deliver a considered judgment. It reserved its judgment, which has been considered and written up in chambers in the interim period between the hearing and the judgment being signed today.

The evidence

3. The Tribunal had before the witness statement of Ms Samantha Taylor, the respondent company's Human Resources Manager. The claimant accepted that Ms Taylor's account of the history and chronology of his employment was an accurate one. He agreed that he did not wish to ask her questions about her witness statement (that is, cross-examine her). Her evidence is thus not contested and the Tribunal accepts it without need of further formality (although it does not follow that her *interpretation* of events is accepted).

4. The respondent's counsel also set out the history and chronology of Mr Marsden's employment in his written skeleton or submission. That summary of events is also not contested by Mr Marsden (although again it does not follow that counsel's *interpretation* of events is accepted).

5. The Tribunal also had before it a file of relevant documentary evidence.

Findings of fact

6. The Tribunal has made the following, largely uncontested, findings of fact for the purposes of determining the preliminary issue of territorial jurisdiction.

7. The respondent company "Bucher Municipal Ltd" manufactures specialist vehicles. It is registered under the company law of England & Wales with registration number 00199841. Its previous name was "Johnson Sweepers Ltd". Its name changed with effect from 22 September 2020. It is a member of the international Bucher Group of companies. The group includes Bucher Municipal SIA in Latvia ("Bucher Latvia") and Bucher Municipal AG in Switzerland ("Bucher Switzerland"). All are separate companies domiciled in different jurisdictions.

8. The claimant commenced employment with the respondent company on 2 December 2013 in Great Britain. He had responsibility for the daily operations of the respondent company's warehouse.

9. On 11 April 2016 the claimant informed the then Managing Director of the respondent company, Mr Peter Rhodes, that he would be relocating to Germany with his family. He expressed an interest in any jobs within the Bucher group in Germany.

10. At this time the respondent company was involved in "Project Spirit". This involved the Bucher Group seeking to co-ordinate functions across various different Bucher Group companies. Under Project Spirit, Mr David Bishop, the respondent company's then Operations Director, also took responsibility for the operations of Bucher Latvia and Bucher Switzerland. Each remained a separate company with its own accounts, HR function and payroll.

11. There was a need to co-ordinate between the group companies. Accordingly, a role was offered to the claimant. This was on the basis that he would leave his Great Britain-based job to take up a job as a Warehouse Systems Manager with responsibility for the warehouse systems of two companies, the

respondent company and Bucher Latvia. He commenced this role in or around November 2016.

12. From the time that the claimant took up this role he worked from his home in Germany as well as in Great Britain and Latvia. He spent a significant portion of his time in Latvia performing duties for Bucher Latvia. Due to this, on 1 February 2017 he commenced paying Latvian tax.

13. By November 2017 the claimant was permanently resident in Germany. The respondent company then offered him a contract governed by German law. He signed this contract on 14 February 2018.

14. On or around 31 January 2018 the claimant's British tax liability changed. He commenced paying British income tax on only 37% of his salary. This position continued until March 2020. During this period he actually spent less than 37% of his time in the Great Britain. The respondent company is currently assisting him with seeking a tax refund on this basis. The claimant's British national insurance contributions ceased on 1 April 2018. At this time he began paying tax and social security in Germany. This continued for the remainder of his employment.

15. By this time, the majority of work he undertook was not in Great Britain but in Germany and Latvia. Ms Taylor estimated that the claimant spent less than 37% of his working time in Great Britain. This would seem to the Tribunal to be an overestimate. The claimant's own spreadsheet evidence indicates that in 2019, out of 233 working days, he spent 101 days in Latvia, 18 days in Great Britain, 107 days in Germany and 7 days in other countries. That is, less than 8% of working time was spent in Great Britain. Of 144 weekends and holiday days, 122 days were spent in Germany while only 12 days were elsewhere.

16. In the summer of 2019 a new project ("Project Camino") was introduced which would reverse key aspects of Project Spirit. Cross-country responsibility ceased. Management reverted to having responsibility only for activities in the company employing them. Mr Bishop became Managing Director for the Truck Mounted Sweepers Competence Centre. This is the respondent company's operation based in Great Britain. Mr Bishop's responsibilities associated with Bucher Latvia and Bucher Switzerland ceased. Although Bucher Group's municipal products began to be marketed under a single "Bucher" brand, the separate corporate entities would, and do, remain in place with separate management teams and separate operations.

17. By the end of 2019 the claimant's project work had been completed. The need for a co-ordination function ceased. His role as Warehouse Systems Manager, involving duties for both the respondent accompany and Bucher Latvia, ceased to exist. As the respondent company did not operate in or from Germany (that is, it has no base or establishment there), it had no alternative work there to offer him. There had been previous discussion about other possible work. However, this work had been deferred for a period of 3 to 5 years. As a consequence, the claimant's role was identified as redundant.

18. There was a meeting with the claimant at the respondent company's Dorking office in Surry, England on 27 February 2020. He was given notice of termination. He was advised that his employment would end on 30 April 2020.

19. It is the respondent company's case that the claimant's dismissal was conducted in accordance with German law. That has not been contested. See counsel's specific highlighting (below) of the effects of the contract being subject to German law (which the Tribunal accepts)

20. The respondent company provided the period of notice to which the claimant was entitled under his contract and under German law. He was not entitled to a redundancy payment under German law. As the respondent company wanted to offer the claimant a sum of money equivalent to the redundancy payment he would receive in Great Britain, despite having no legal obligation to do so, it offered him a settlement agreement using a German legal process. This included a provision rendering the agreement void in the event of the claimant commencing legal proceedings, which he subsequently did in the German courts.

21. The claimant's employment terminated on 30 April 2020. Prior to the claimant's employment terminating on 30 April 2020, he commenced legal proceedings against the respondent company in Germany to challenge his dismissal.

22. On 22 July 2020 an oral hearing took place at the Heidelk Labour Court. Judgment was issued in the Braunschweig Labour Court on 31 August 2020. The claims brought by the claimant disputing his dismissal were dismissed. The termination of his employment was found not to be unlawful under German law. The judgment held the claimant responsible for 75% of the costs of the dispute. He has appealed the judgment and the appeal remains underway. Since learning of the present Employment Tribunal proceedings, the German Labour Court has requested clarification from the parties about the claims commenced.

23. The claimant had commenced formal proceedings challenging his dismissal in Germany prior to commencing Early Conciliation with Acas (the British Advisory, Conciliation & Arbitration Service) and these Employment Tribunal proceedings.

24. The respondent company's position is that German law had been selected by the parties in the employment contract. The claimant was working and residing permanently in Germany. The respondent company is a Great Britain-domiciled company. Since 2016 the claimant only spent a limited proportion of time working in Great Britain. He worked predominantly in Germany and Latvia. He was resident in Germany at the time of his dismissal and for a substantial period prior to that. He was also subject to a German contract of employment.

25. The claimant's claim in Germany was dismissed, pending a current appeal, on 31 August 2020.

26. On 4 September 2020 he initiated proceedings in the Employment Tribunal here. His claims differ between the two jurisdictions. In the British proceedings the claimant has now made claims of unfair dismissal and disability discrimination in his ET1 claim form. He did not raise the disability

discrimination claims in the German proceedings. He also did not raise a grievance making allegations of this nature during his employment.

Submissions on behalf of the respondent company

27. Mr Huw Davies, of counsel, presented written submissions on behalf of the respondent company as follows.

28. The claimant commenced employment with the respondent company (formerly Johnston Sweepers Ltd) on 22 December 2012. In April 2016 the claimant informed the respondent company that he would be relocating to Germany with his family. In October 2017 he moved with his family on a permanent basis to Germany. This was not a work deployment or requirement of the respondent company. The respondent company offered the claimant the opportunity to take up a new job as Warehouse Systems Manager, with responsibility for the warehouse systems of two companies, the respondent company and Bucher Latvia. This new role commenced in or around November 2016.

29. In November 2017, owing to the claimant's permanent residence in Germany, the respondent company offered him a contract governed by German law, which was signed in February 2018. Pursuant to this contract the claimant worked in Germany, Latvia, and for limited periods, in England.

30. On 27 February 2020 the claimant was given notice of termination. The effective date of termination 30 April 2020. The claimant has already brought a claim against the respondent in the German Labour Court in relation to the termination of his employment. That claim was dismissed. Since the dismissal of that claim the claimant has brought a claim for unfair dismissal and disability discrimination in this Employment Tribunal. The respondent company disputes that the Employment Tribunal has jurisdiction to hear any of these claims. The Employment Tribunal has listed this matter for a preliminary hearing on the issue of jurisdiction.

31. Counsel then summarised the relevant legal principles as follows.

32. The burden of proof in establishing that the Employment Tribunal has jurisdiction to hear his claims rests with the claimant. No witness evidence has been provided by the claimant in relation to the question of jurisdiction. The following submissions give specific consideration to the territorial application of the Employment Rights Act 1996 ("ERA 1996").

33. The following propositions are established by case law.

34. Section 94(1) ERA 1996 contains no geographic limitation. Territorial limitations are therefore to be implied.

35. Ordinarily the question should simply be whether a claimant is working in Great Britain at the time when he is dismissed. The place of work is normally decisive:[1] "… ordinarily the question should simply be whether he is working in

[1] *Lawson v Serco Ltd* [2006] ICR 250 at 260 para 25 and at 261 para 27B; and *Ravat v Halliburton* [2012] ICR 389.

Great Britain at the time when he is dismissed" (*per* Lord Hoffman in *Serco* at para 27B).

36. When a claimant works and lives abroad as an expatriate worker, it is only in exceptional circumstances that such an employee would come within the scope of British labour legislation.[2] In the generality of cases, Parliament can be taken to have intended that an expatriate worker does not come within such scope.

37. An exceptional case is one where there are exceptional (i.e. extraordinary) factors connecting the employment to Great Britain which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work (and residence) and to justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation: "despite the workplace being abroad there are other relevant factors so powerful that the employment relationship has a closer connection with Great Britain than the foreign country where the employee works" – *per* Lord Hoffman in *Serco* at para 36.

38. In determining whether any of these exceptional circumstances are present, the proper focus is upon the time when the dismissal occurred, and not at any time earlier in the employment relationship: see the EAT in *Walker v Church Mission Society* at paras 11 and 14.

39. In the case of a peripatetic employee, the most helpful test is to decide where the employee was based at the time of dismissal: if it was not Great Britain, then the connection between the employment and Great Britain and with British employment law will not be sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal/ discrimination in Great Britain - Lord Hoffman in *Serco* at para 29; and see also Lord Hope in *Ravat* at para 29.

40. The quality of employment protection in the country of the place of work is irrelevant in considering the substantial connection question: see Rimer LJ in *Dhuna* at 961 para 40 and Lord Hoffman in *Serco* at 264 para 36C.

41. In *Serco*, Lord Hoffman sought to identify the characteristics that an exceptional case would ordinarily have if the Act was to apply. Lord Hoffman was only able to identify a very limited number: (1) That the employee would be working abroad for an employer based in Great Britain. However, without something more, this would not be enough; (2) That the employee was posted abroad for the purpose of a business carried on in Britain – for example as a foreign correspondent; or (3) That the employee might be working within what amounts for practical purposes to an extra-territorial social or political enclave in a foreign country [para 39] – or in something closely analogous thereto – see *Ministry of Defence v Wallis and Grocott* [2011] EWCA Civ 231.

42. Lord Hoffman stressed that neither the base of the employer, the nationality of the employee nor the place of recruitment was decisive: "Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account

[2] *Serco* at para 36 and *Ravat* at paras 28-29.

of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary" (para 37).

43. In *Duncombe (No. 2)*,[3] a case concerning a teacher employed by the Secretary of State for Children Schools and Families to work in European Schools set up abroad by the government, the Supreme Court identified a combination of factors which indicated: "an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal".

44. That very special combination of facts was: (1) The employer was the UK government; (2) The employee was based abroad specifically because of commitments undertaken by the British Government; (3) The employee was employed under contracts governed by English law; (4) The employee was employed in an international enclave having no particular connection with the country in which the claimant happened to be situated; (5) The claimant did not pay local taxes; (6) It would be anomalous if teachers working in the European School in England enjoyed different protection from the teachers who happened to be employed in the same sorts of schools aboard.

45. Applying the legal principles to the facts, and cross-referencing Ms Taylor's witness statement, counsel submitted that at the time of dismissal the claimant was not a peripatetic employee with a base in England. He had moved to and was living in Germany with his family. He was not "posted" to Germany pursuant to his employment contract. He was based in Germany. The claimant clearly considered himself based in Germany. This is evidenced in the starkest terms by the fact that he brought his initial employment claim in the German Courts.

46. Counsel submitted that it is apparent that the majority of work he undertook was not in England but in Germany and Latvia. Ms Taylor has estimated that the claimant spent less than 37% of his working time in England. This would seem an overestimate. The claimant's own spreadsheet [84] indicates that in 2019, out of 233 working days, he spent 101 days in Latvia, 18 days in the UK, 107 days in Germany and 7 days in other countries. That is, less than 8% of working time was spent in the UK. Of 144 weekends and holiday days, 122 days were spent in Germany while only 12 days were elsewhere.

47. Save for this modest time spent working in the UK, counsel submitted, the claimant was effectively an expatriate. The claimant's employment with the respondent was not one which had an overwhelmingly closer connection with Britain and with British employment law such that a claim can be brought before the Employment Tribunal. The connection between Great Britain and the employment relationship was not sufficiently strong.

[3] [2011] ICR 1312.

48. In counsel's submission, the following matters indicate that there is no sufficient territorial pull to Great Britain: (1) The claimant was living in Germany; (2) The claimant's "base" was not the UK; (3) The claimant spent the majority of his working time not in England but in Latvia and Germany; (4) The claimant's employment contract provided for: (i) the choice of law as German law with the court of jurisdiction being Hannover; (ii) payment of his salary in Euros; (iii) payment through a local payroll bureau in Germany; (iv) an expectation that the claimant would pay his own personal tax to the German authorities; (v) the provision of German statutory minimum vacation of 20 days and the Federal Holiday Act (*Bundesurlaubsgesetz*); (vi) exclusion of section 616 of the *BGB* (the German Civil Code) in relation to company leave; and (vii) application of contractual non-competition agreement pursuant to section 60 of the *HGB* (the German Commercial Code) (para 52); (5) The claimant was paying only limited tax in the UK: (i) the claimant's national insurance contributions ceased on 1 April 2018; (ii) only UK income tax was paid on 37% of his salary from 31 January 2018 and there are attempts to assist the claimant in seeking a tax refund on the basis that he spent less than 37% of his time in the UK.

49. Neither party has behaved in a way that indicated they considered themselves to be bound to obey UK law and statutes made in the UK: (i) the respondent through the contract has provided for the application of German Law. References to legal rights are to the German Civil and Commercial Codes and not to UK Acts, statutes or regulations; (ii) the claimant's dismissal was conducted in accordance with German law; and (iii) the claimant originally commenced a claim against the respondent in a German court.

50. Counsel submitted that the claimant has adduced no evidence to allow the Employment Tribunal to conclude that this is "an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal". Rather, for the reasons set out above, it is quite clear that the employment has an overwhelmingly closer connection with Germany and German employment law. The claimant was correct to commence his original claim in Germany and this Employment Tribunal should dismiss the claims on the basis of lack of jurisdiction.

51. Turning to the claimant's claims under the Equality Act 2010 (EqA 2010), counsel submitted that, like the ERA 1996, the EqA 2010 contains no express provision about the territorial reach of the rights and obligations which it enacts. It is submitted that the *Serco* principles apply equally to the territorial application of the EqA 2010.[4]

52. Counsel referred to two recent cases in which the Court of Appeal has determined that the *Serco* principles as to jurisdiction apply to the EqA 2010: see *Jeffrey v British Council* (where a claim was brought under the 2010 Act for discrimination on the ground of religion or belief) and *Regina (Hottak and another) v Secretary of State for Foreign and Commonwealth Affairs*,[5] where the Court of Appeal commented at para 48: "I would, therefore, reject the

[4] *Jeffery v British Council* [2019] IRLR 123 at para 2.
[5] [2016] EWCA Civ 438.

submission that, because these are discrimination claims, the court should look upon the territoriality problems with greater sympathy than if they were unfair dismissal claims. I would uphold the Divisional Court's decision on this part of the claimants' case. In my view, the principles applicable to claims for unfair dismissal by employees engaged abroad, as explained in the authorities I have referred to, provide the relevant guidance. I turn to whether it enables the claimants to overcome the jurisdictional difficulties in which their overseas employment prima facie lands them".

53. Counsel anticipated that the Employment Tribunal may wish to consider whether the *Bleuse* principle would require a modification to the ordinary principles of interpretation of the implied territorial limits. The following extract from *Harvey on Industrial Relations and Employment Law* summarises the *Bleuse* principle [101.02].

54. "Subject to the hesitation expressed in the previous paragraph, the effect of the *Bleuse* principle appears to be that: (a) where the proper law of the contract is English law (*Bleuse v MBT Transport Ltd* [2008] IRLR 264 EAT; *Ministry of Defence v Wallis* [2011] EWCA Civ 231, [2011] ICR 617); (b) and the claimant has a sufficient connection with the EU (most obviously, living and working in the EU); (c) then a modification is required to the ordinary principles of interpretation of the implied (*Bleuse*) or express (*Wallis*) territorial limits on jurisdiction both in respect of British legislation enacted to implement EU directives but also legislation with an entirely domestic genesis, where that legislation is the vehicle by which an EU right is vindicated in Great Britain (*Duncombe* in the Court of Appeal: [2009] EWCA Civ 1355, [2010] IRLR 331); (d) to ensure that the claimant has an effective remedy for potential breach of an EU law (now retained EU law) right (*Bleuse*)."

55. "[101.03] The first case in which an adjustment to the domestic approach to territorial jurisdiction was held to be required was *Bleuse*, and the need to modify the implied territorial jurisdiction test that would otherwise be applied has become known as the *Bleuse* principle. The principle is limited to work conducted inside the EU (*Wittenberg v Sunset Personnel Services Ltd* UKEATS/0019/13, [2017] ICR 1012). And the *Bleuse* principle does not allow employees working in the EU to forum shop when they wish to bring a claim against their employer: the proper forum for a claim within the EU being dependent on the rules set out in the Civil Jurisdiction and Judgments Act 1982, formerly the Brussels Regime, considered below at para [241]. The *Bleuse* principle still requires some connection with Great Britain – English law being the proper law of the contract as a minimum."

56. Counsel submitted that in the light of *Jeffrey* and *Hottak* finding jurisdiction on a *Bleuse* principle (modifying the implied jurisdiction test) should be rejected. The Court of Appeal indicated that no modification was needed (albeit in neither case was the claimant working in an EU state). In any event, the fact that the contract is clearly governed by German law rather than English law means that no modification is required pursuant to *Bleuse* and therefore the submissions raised as to the lack of jurisdiction in relation to the unfair dismissal claim apply equally to the EqA claims of discrimination and the Tribunal should reject these claims for want of jurisdiction on the same basis.

Submissions by the claimant

57. The claimant appeared as a litigant in person without legal or professional representation. The Tribunal took account of the "inequality of arms" and it did its best to ensure that the claimant's case could be understood. How his case might have been put if he had been professionally represented, the Tribunal cannot speculate.

58. In his opening statement the claimant recognised that the question of whether the Tribunal had jurisdiction to determine his claim was key. He accepted the account of the history and chronology of his employment given by Ms Taylor and by the respondent's counsel. He stated that the missing element in the puzzle was that he was originally employed by the respondent company in 2013 under an employment contract in which the UK courts had jurisdiction. He moved to Germany in 2017 and he was afforded a new employment contract. In his view, the German Labour Court declined jurisdiction in his claim against the respondent. His interpretation of the Labour Court decision is that it tool a view of its territorial jurisdiction based upon the respondent company being UK-based.

59. He stated further that he had been told by the respondent that his employment contract should be governed by German law. He thought that that seemed a sensible idea. It might have made life easier if he had a problem with labour law. However, now based on the information he has, that contract is only worth "toilet paper". It provides him with no security, whereas he would have had security in UK law.

60. The claimant accepted that the German Labour Court had accepted that it had jurisdiction and that it applied local labour law. Normally German labour law would provide stringent employment protection, but not for employees employed in a company with less than 10 employees.

61. He agreed that he had no wish or need to give evidence, except to say that he was disappointed with the way in which he was treated after 6 years' service with the respondent. He also agreed that there was no need to call Ms Taylor or to question her.

62. In his closing submissions the claimant referred to EU Regulation 1215/2010 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). He relied upon Section 5, article 20(1), which provides that 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. Article 20(2) further provides that 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.

63. He also referred to the Rome Convention. Where an agreement on contract has been made, an employee is in the weaker position and employment

protection afforded to an employee cannot be removed by a change in the law of the contract. In the claimant's submission, had he not signed an employment contract subject to German law, he would have had UK employment protection. Derogation from UK protection is not possible.

64. The claimant asserted that he was not an expatriate worker. He was employed for the benefit of a UK employer. He had a substantial connection with the UK. He was on the relevant UK payroll. He was part of the UK pension scheme. He had access to UK HR. He was subject to UK management. He worked with a UK computer system. The UK employee handbook was his source of policy and procedure. In his submission, the change in contract permitted an "either/or" approach to German or English law – whichever was the more favourable. He pointed to the bundle and to a letter of 10 November 2017 ("In the event of any differences …" and also the first sentence).

65. He submitted that he had no say in the matter (of the ending of the project). He would have returned to the UK and he would have been assigned to another project or contract. He spent 50 per cent of his time in the UK and 50 per cent in Latvia. His employment was weighted more towards the UK than towards Germany. All the direction and support came from the UK and from nowhere else.

66. In reply to questions from the Tribunal, the claimant said that it suited the respondent to retain him when he moved to Germany. It was to their mutual advantage until the respondent wanted to part company with him.

67. The claimant confirmed that an appeal had been filed. It is in progress. He accepted that he had not pursued a disability discrimination complaint in the German courts. He suggested that this was because of the fragmented system there and his need to find a way to protect his rights.

Respondent in reply

68. The respondent's counsel confirmed that the German court was awaiting a decision of the Employment Tribunal.

69. Counsel said that "Rome 2" had been raised. See article 6(1). The choice of law made shall not deprive an employee of employment rights under EU law. See Elias LJ at para 55 of *Bleuse*. See also article 6(2), which is not applicable.

70. It is not enough for the claimant to show links with the UK. He must demonstrate exceptional circumstances. The balance is clear – there is no jurisdiction.

The claimant's further points

71. The claimant asked whether it was possible to join the German and the UK proceedings together. While the Tribunal could not advise the claimant, it indicated that that was not procedurally possible or appropriate. It confirmed that the Employment Tribunal would need to decide both applicable law and jurisdiction.

Relevant legal principles

72. Independently of the respondent's counsel's exposition of the relevant law, this Tribunal has also taken account of the pertinent commentaries in *Harvey on Industrial Relations and Employment Law* Division PIII and IDS Employment Law Handbook, Volume 5, *Employment Tribunal Practice and Procedure*, Chapter 2. The legal issues are: (1) the appropriate place for the matter to be decided (the forum); (2) the applicable law of the contract (the law); and (3) the territorial reach or scope of the Great Britain statutes (the jurisdiction).

73. This is a case that commenced in the Employment Tribunal during the transitional period for the UK's withdrawal from the EU. The EU rules on jurisdiction and on recognition and enforcement of judgments continue to apply. The Recast Brussels Regulation continues to apply in respect of where a case should be heard, as the respondent company is domiciled in the UK and, at the very least, does business in an EU state. However, this does not determine which law applies to the case: see *Bleuse*.

74. Nevertheless, the Recast Brussels Regulation affords an employee a choice of forum: whether in the state where the employer is domiciled or in the state where the employee is domiciled or habitually worked. Although the respondent company is registered in Great Britain, which is also its principal place of business and location of its central administration, it trades in more than one EU state and appears to have an agency there. The employee retains a choice as to the forum in which to litigate his employment rights.

75. That brings us to the question of the jurisdiction of the Employment Tribunal in England and Wales – this forum. Rule 8(2) of the Employment Tribunals Rules of Procedure 2013 is the starting point. Our jurisdiction is limited to cases where the respondent resides or carries on business in England and Wales; one or more of the acts or omissions complained of took place in England and Wales; the claim relates to a contract under which the work is or has been performed partly in England and Wales; or the tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain, which is at least partly a connection with England and Wales. This Tribunal takes particular care here to note that the purpose of rule 8 is to indicate whether tribunals in Great Britain have jurisdiction to hear particular proceedings, and whether these should be dealt with in England and Wales or in Scotland. This is a different issue to that of the territorial scope of an employment right. These two matters are not to be confused.

76. Next it is necessary to consider the applicable law. As the IDS commentary neatly explains, the question of which country's domestic law is the applicable law to resolve an employment dispute is governed by international conventions. Here that is the Rome I Regulation. The basic rule is that an employment contract is governed by the law chosen by the parties – here German law. As the parties here have made such a choice, regard is not to be had to the default provisions as to what might be the applicable law in the absence of a choice of law having been made.

77. Nevertheless, even if the parties have agreed a choice of law, an employee may not be deprived of the protection of provisions that cannot be derogated

from by agreement under the law that would have been applicable in the absence of a choice of law. In Great Britain, this would constitute most statutory employment rights. To borrow from the IDS commentary again, in other words, if an employment contract states that German law is to apply to it, but the employee habitually carries out his work in England, he will be able to rely on non-derogable rights of English law, such as unfair dismissal, in addition to rights under German law. However, that does not appear to be the position in the present case.

78. That leads us to the final question: that of territorial reach. The decision in *Lawson v Serco Ltd* (above) establishes that there are territorial boundaries to British employment rights. Neither the Employment Rights Act 1996 nor the Equality Act 2010 deal with territorial reach (although they or their legacy legislation once did: see, for example, section 196 ERA 1996, now repealed). The matter is left to implied control by courts and tribunals here.

79. The basic position is that the ERA 1996 rights (here, unfair dismissal) only apply to employment in Great Britain. Where an employee works partly in Great Britain and partly abroad, the question is whether the connection with Great Britain and British employment law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim (*Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389 SC). Where an employee works and lives wholly abroad, it will be more appropriate to ask whether his employment relationship has much stronger connections both with Great Britain and with British employment law than with any other system of law (*Duncombe v Secretary of State for Children, Schools and Families (No.2)* [2011] ICR 1312 SC).

80. As *Lawson v Serco Ltd* establishes, the general principle is that unfair dismissal protection applies to employees working in Great Britain. *Serco* recognised three categories for the purpose of establishing whether a UK employment tribunal has territorial jurisdiction to hear a claim of unfair dismissal.

81. The first and standard case depends upon whether the employee was working in Great Britain at the time of dismissal. What was contemplated when the contract was entered into is not the question. The terms of the contract and any prior contractual relationship between the parties may be of relevance in determining whether the employee was actually working in Great Britain or simply on a casual visit.

82. The second case of a peripatetic employee addresses those who, owing to the nature of their work, do not perform services in one territory. Here the employee's base (that is, the place at which he started and ended assignments) should be treated as his place of employment. The question then is whether the base was in Great Britain at the time of dismissal. Determining where an employee's base is requires more than just looking at the terms of the contract. It is necessary to look at the conduct of the parties and the way they had been operating the contract in practice.

83. The third case concerns expatriate employees working and based abroad. Here there might be exceptional circumstances entitling them to claim unfair dismissal. Such circumstances might include an employee posted abroad by a

British employer for the purposes of a business carried on in Great Britain or an expatriate employee of a British employer who is operating within what amounts for practical purposes to an extraterritorial British enclave in a foreign country. There may be other qualifying situations. However, the employee would need to show equally strong connections with Great Britain and British employment law.

84. It is not to be assumed that every case has to be fitted into these broad categories. See *Ministry of Defence v Wallis [2011] ICR 617 CA*; *Duncombe v Secretary of State for Children, Schools and Families (No.2) [2011] ICR 1312 SC; Ravat v Halliburton Manufacturing and Services Ltd* [2012] ICR 389 SC. To be covered by the ERA 1996 the employment must have much stronger connections with Great Britain and with British employment law than with any other system of law. Although the general rule is that the place of employment is decisive, it is not an absolute rule. For an expatriate employee to fall within the ERA 1996 it will be necessary to show that he is exceptional because there would ordinarily be a greater connection to the country where the employee lives and works. In considering whether an employee was actually working in Great Britain or was merely on a casual visit, the terms of the contract of employment and the history of the contractual relationship may be relevant, but they are not determinative.

85. Note that section 204(1) ERA 1996 provides that, for the purposes of the Act, it is immaterial whether the law which (apart from that Act) governs any person's employment is the law of Great Britain, or of a part of Great Britain, or not. Nevertheless, a choice of law clause in an employment contract is clearly a relevant actor (although not a determinative one) in deciding whether there is a sufficient connection with British employment law.' The test is the existence of a choice of national law clause within the terms of the relevant contract. In *British Council v Jeffery [2019] ICR 929 CA*, the Court of Appeal rejected two arguments against the relevance of such clauses. First, that they are concerned only with contractual obligations and that the parties cannot contract into statutory employment law where the statutes themselves do not provide for it to apply. Second, section 204 ERA 1996 renders the law of contract immaterial when considering the reach of statutory rights. See: *Duncombe v Secretary of State for Children, Schools and Families (No.2) [2011] ICR 1312 SC*.

86. The relevant case law establishes that the circumstances would have to be unusual for an employee who works abroad and who is based abroad to come within the scope of the ERA 1996. It would be very unlikely that someone working abroad would be covered unless he was working for an employer based in Great Britain, but that by itself would not be enough. Many companies based in Great Britain also carry on business in other countries. Employment in those businesses will not attract jurisdiction. The fact that the employee is British or was recruited in Britain is not of itself sufficient to distinguish the case from the general rule that the place of employment is decisive.

87. It is not necessary for the Tribunal to compare the merits of the competing national jurisdictions. The decision is not which legal system would be more favourable to the claimant. Whether German employment law is less favourable to the claimant than British employment law is not the question.

88. The claimant's case is a hybrid case. At the relevant time he did not live and work wholly in Great Britain. Neither did he live and work wholly in Germany. Instead, for at least part of his time he worked in the UK, while living and working in Germany, and worked at least part of the time in Latvia.

89. The case law in relation to the territorial reach of the Employment Rights Act 2010 is generally assumed or accepted as also applying to that question when it arises under the Equality Act 2010. But what if the right in question is an EU law-derived right, as a complaint of disability discrimination would be (as EU law has expanded and developed what was originally Great Britain-derived law in the Disability Discrimination Act 1995), but which a complaint of unfair dismissal would not be?

90. In *Bleuse v MBT Transport Ltd [2008] ICR 488 the EAT* considered it highly relevant that British regulations that existed to give effect to the EU rights must, if at all possible, be construed so as to give effect to those rights in cases where English law is the proper law of the contract or where English mandatory rules apply under the Rome I Regulation. Such statutory provisions should be construed so as to ensure that directly effective EU rights can be enforced by the British courts, otherwise the EU principle of effectiveness would not be satisfied as there would be no effective remedy for a breach of an EU right.

91. *Bleuse* is authority for the proposition that limitations on territorial scope have to be modified where necessary to give effect to a claimant's directly effective rights under EU law. That is confirmed by *Duncombe (No.2)* and by *Wallis* (above), at least at the Court of Appeal level.

92. Finally, this Tribunal must note that it has not be argued before it that the claimant is seeking to re-litigate matters which have already been decided by the German Labour Court or which could have been so litigated had the claimant raised them in his German legal proceedings. We have heard no argument as to whether the claimant's proceedings in this Tribunal are *res judicata* or an abuse of process, such as arises from cause of action estoppel or issue estoppel or the rule in *Henderson v Henderson* (1843) 3 Hare 100 (which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier ones).

93. The Tribunal is not aware of such arguments arising in circumstances such as this where proceedings are commenced in a UK Employment Tribunal raising similar questions about the termination of a claimant's employment that have already been litigated and decided in the German Labour Court.

94. In the course of writing up its reserved judgment and reasons, the Tribunal became aware of the Employment Appeal Tribunal's decision in *Partners Group (UK) Ltd v Mulumba* (Eady J 25 May 2021). This contains a useful summary of the relevant law on territorial jurisdiction, but it does not alter the principles set out in submissions or in this Tribunal's summary above. Nor does it offer an obviously analogous factual case from which the Tribunal might draw some assistance.

Discussion and conclusion

95. Having set out the parties' submissions and the relevant legal principles in some detail, the Tribunal is able to set out its decision and reasoning for it relatively more briefly, as follows.

96. First, we address the applicable law of the contract.

97. By November 2017 the claimant was permanently resident in Germany. The respondent company then offered him a contract governed by German law. That contract contains a choice of law clause to that effect. He signed this contract on 14 February 2018. There is no suggestion that the contract was imposed upon him or that there are any vitiating factors present to suggest that choice of law is the result, for example, of duress, mistake or misrepresentation. It is also not suggested that the purpose was to deprive him of British employment rights. The contract was seen as mutually beneficial.

98. The basic rule is that an employment contract is governed by the law chosen by the parties – here German law. The default provisions – that arise in the absence of a choice of law having been made – do not arise here.

99. Nevertheless, as noted above, even if the parties have agreed a choice of law, an employee may not be deprived of the protection of provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of a choice of law. In Great Britain, this would constitute most statutory employment rights. In other words, if an employment contract states that German law is to apply to it, but the employee habitually carries out his work in England, he will be able to rely on non-derogable rights of English law, such as unfair dismissal, in addition to rights under German law. However, that does not appear to be the position in the present case. The claimant lived and worked in Germany and so the choice of a contract governed by German law was appropriate.

100. Second, we turn to the question of forum.

101. The Recast Brussels Regulation affords the claimant a choice of forum. All other things being equal, he may litigate in Great Britain where the respondent employer is domiciled or he may litigate in Germany where he is domiciled and habitually worked. He may litigate in either Germany or Great Britain. He appears to have reflected that choice in proceedings that he has already brought in the German Labour Court. There appears to be nothing otherwise that would prevent a claim being brought either in Great Britain or in Germany.

102. Third, however, that leads to the crucial question here: that of territorial jurisdiction or territorial reach of the British Employment Rights Act 1996 and the Equality Act 1996.

103. The general approach to the question of territorial jurisdiction is a multifactorial one.

104. The factors that point towards a strong connection with the Great Britain and British employment law, although not necessarily at the time of dismissal, include the following.

105. The respondent company is a British-registered company established and based in Great Britain. The claimant is a British national recruited by the respondent company in Great Britain. At the time of recruitment, and between 2013 and 2016, he lived and worked in Great Britain, and paid British income tax and national insurance. At that time his employment was implicitly subject to British employment law. He has been line managed from Great Britain and subject to British-based HR and payroll procedures. His pension rights were also British-based.

106. The factors that point away from a strong connection with the Great Britain and British employment law, especially by the time of dismissal, include the following.

107. In 2016, wholly independently of the company, he decided to permanently relocate his family from Great Britain to Germany. In order to retain his services, the company offered him a newly created role in Germany co-ordinating warehouse services between group companies in Europe. This was not a secondment nor was he a peripatetic employee with a British base. He left his Great Britain-based job to take up this role with responsibility for the warehouse systems of the respondent company and Bucher Latvia. From that time forward he worked from his home in Germany as well as spending working time also in Great Britain and Latvia. He spent a significant portion of time in Latvia. By February 2017 he was paying Latvian tax. By November 2017 he was permanently resident in Germany. In February 2018 he then entered into a new employment contract expressly governed by German law. By this time his British tax liability reduced to 37% of his salary. This position continued until March 2020. During this period he spent less than 37% of his time in Great Britain. The claimant's British national insurance contributions ceased by April 2018. He began paying tax and social security in Germany for the remainder of his employment. The majority of work he undertook was not in Great Britain, but in Germany and Latvia. In 2019 he spent 101 working days in Latvia, 18 days in the UK, 107 days in Germany and 7 days in other countries. Less than 8% of working time was spent in Great Britain. Of 144 weekends and holiday days, 122 days were spent in Germany while only 12 days were elsewhere.

108. By the end of 2019 the claimant's project work had been completed. The need for a co-ordination function ceased. His role as Warehouse Systems Manager ceased to exist. The respondent company had no alternative work to offer him in (or based from) Germany. His role was identified as redundant. After a meeting in England he was given notice of redundancy. His dismissal was conducted in accordance with German law. The respondent company provided the period of notice to which the claimant was entitled under his contract and under German law. He was not entitled to a redundancy payment under German law. The respondent company offered the claimant a sum of money equivalent to a British redundancy payment, but payable under a settlement agreement using a German legal process. The claimant then brought (ultimately unsuccessful) legal proceedings in the German courts,

which he is presently appealing in Germany. Subsequently, he commenced legal proceedings in Great Britain using British legal processes.

109. Those are the relevant factors, in one direction or in the other, as it appears to this Tribunal.

110. The decision in *Lawson v Serco Ltd* (above) establishes that there are territorial boundaries to British employment rights. Neither the Employment Rights Act 1996 nor the Equality Act 2010 deal with territorial reach. The matter is left to implied control by the British courts and tribunals.

111. The basic position is that the ERA 1996 rights (here, unfair dismissal) only apply to employment in Great Britain. Where an employee works partly in Great Britain and partly abroad, the question is whether the connection with Great Britain and British employment law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim. Where an employee works and lives wholly abroad, it will be more appropriate to ask whether his employment relationship has much stronger connections both with Great Britain and with British employment law than with any other system of law.

112. Although it is not strictly necessary to categorise the claimant's employment in line with the *Lawson v Serco Ltd* analysis, it is clear that the claimant does not fit into the standard case of an employee working in Great Britain at the time of dismissal. What was contemplated when the contract was entered into is not the question. The terms of the contract and any prior contractual relationship between the parties may be of relevance in determining whether the employee was actually working in Great Britain or simply on a casual visit.

113. To a degree, the claimant might be regarded as a peripatetic employee. He performed services in more than one territory. Here the employee's base (that is, the place at which he started and ended assignments) should be treated as his place of employment. On the facts of this case, this claimant's base was Germany, not Great Britain, at the time of dismissal. That conclusion is reached by looking at the terms of the contract, but also the conduct of the parties and how the contract operated in practice.

114. It appears that the claimant fits more closely the case of an expatriate employee working broad and based abroad. But are there any exceptional circumstances entitling the claimant to claim unfair dismissal? On the facts, he was not an employee posted abroad by a British employer for the purposes of a business carried on in the Great Britain. Nor was he an expatriate employee of a British employer who is operating within a British enclave in a foreign country. He must be able to show equally strong connections with Great Britain and with British employment law.

115. The *Serco* categories are not conclusive or determinative. To be covered by the ERA 1996 the employment must have much stronger connections with Great Britain and with British employment law than with (here) the German legal system (or, for that matter, the Latvian system of law). The general rule is that the place of employment is decisive, but not absolute. The claimant must show

that he is exceptional because there would ordinarily be a greater connection to the country where the employee lives and works – Germany.

116. Despite section 204(1) ERA 1996, a choice of law clause in an employment contract is clearly a relevant factor (although not a determinative one).

117. The relevant case law establishes that the circumstances would have to be unusual for an employee who works abroad and who is based abroad to come within the scope of the ERA 1996. It would be very unlikely that someone working abroad would be covered unless he was working for an employer based in Great Britain, but that by itself would not be enough. Many companies based in Great Britain also carry on business in other countries. Employment in those businesses will not attract jurisdiction. The fact that the employee is a British national or was recruited in Great Britain is not of itself sufficient to distinguish the case from the general rule that the place of employment is decisive.

118. It is apparent that, subject to his appeal, the claimant did not fare well in attracting the protection of German employment law in the German Labour Court. However, it not for this Tribunal to compare the merits of the competing national jurisdictions. The decision is not which legal system would be more favourable to the claimant. Whether German employment law is less favourable to the claimant than British employment law is not the question.

119. The claimant's case appears to be a hybrid case. At the relevant time he did not live and work wholly in Great Britain. He lived and worked largely in Germany. For at least part of his time he worked in Great Britain, while living and working in Germany, and worked at least part of the time in Latvia.

120. So far as the Employment Rights Act 1996 is concerned, having considered the multifactorial test and applying it to the findings of fact above, this Tribunal is not persuaded that the claimant's case is an exceptional case or that the connection with Great Britain and with British employment law is sufficiently strong to enable it to be said that it is appropriate for this Tribunal to deal with the claim. The claimant was an employee who worked and lived largely abroad. The Tribunal concludes that his employment relationship did not have much stronger connections both with Great Britain and with British employment law than with any other system of law.

121. That conclusion is also applicable to his claim under the Equality Act 2010. However, the Tribunal hesitates in order to consider that his complaint of disability discrimination is an EU law-derived right. However, the modification in approach potentially required by *Bleuse v MBT Transport Ltd [2008] ICR 488 applies only* in cases where English law is the proper law of the contract or where English mandatory rules apply under the Rome I Regulation. This is not such a case. There is thus no reason to take a different view of the claimant's disability discrimination complaint from that which has just been taken in relation to his unfair dismissal complaint.

122. If it is necessary to go further to explain its decision, the Tribunal would adopt the further reasoning of the respondent's counsel, with which it agrees.

123. In conclusion, therefore, the Employment Tribunal in England and Wales (this Tribunal) does not have territorial jurisdiction to entertain and determine the claimant's present claim. For that reason alone, the claim cannot proceed further and it is dismissed.

Judge Brian Doyle
Date: 26 May 2021