THE INDUSTRIAL TRIBUNALS

CASE REFS: 8552/17IT
8551/17IT

CLAIMANTS:
1. **Stewart Anderson**
2. **Brian Anderson**

RESPONDENTS:
1. **BC Plant JCB Limited**
2. **R Kennedy & Co (NI) Limited**
3. **BC Plant Ltd (In Administration)**

DECISION

The unanimous decision of the tribunal is:-

(i) The claimants were employed by the third respondent.

(ii) Their employment transferred to the second respondent under a service provision change.

(iii) The second respondent terminated the claimants' contracts of employment without notice on 9 October 2017. The first claimant was unfairly dismissed.

(iv) The second respondent is ordered to pay an award of £26,210.17 to the first claimant in respect of unfair dismissal.

(v) The second respondent is ordered to pay an award of £598.88 to the second claimant in respect of notice pay.

(vi) The third respondent is ordered to pay appropriate compensation as follows for breach of regulation 13 of the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006.

To the first claimant £4,493.52.

To the second claimant £3,593.28.

It is declared that the second respondent is jointly and severally liable for these sums ordered to be paid by the third respondent.

Constitution of Tribunal:

Employment Judge: **Employment Judge Travers**

Members: **Mrs D Adams**
Mr I Atcheson

Appearances:

The claimants were represented by Neil Phillips, Barrister-at-Law, instructed by Worthingtons, Solicitors.

The first and third respondents were unrepresented.

The second respondent was represented by Barry Mulqueen, Barrister-at-Law, instructed by Miller McCall Wylie, Solicitors.

REASONS

Issues

1. The claimants are salesmen who say that they were employed by a company which had a dealer agreement with JCB Sales Limited ['JCB'] to sell JCB agricultural machinery. When JCB terminated the dealer agreement and subsequently entered a dealer agreement on similar terms with the second respondent, the claimants assert that, insofar as their activities as salesmen were concerned, it was a service provision change which fell within the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006.

2. In broad terms, the issues which the tribunal has to determine are as follows:-

   (a) Was the second claimant employed by the first or the third respondent?

   (b) The parties to the Agricultural Dealer Agreement ['ADA'] which was terminated, are stated to be JCB Sales Limited and the first respondent. The claimants' case is that it was the third respondent which in fact carried out the obligations under the ADA either as sub-contractor or an implied contract between the third respondent and JCB Sales Limited. In all the circumstances, if the claimants were employed by the third respondent, was their employment capable of being subject to a service provision change when JCB Sales Limited appointed the second respondent as their dealer?

   (c) If the answer to (b) above is yes, when the second respondent became the JCB dealer was there a service provision change to which the claimants were subject within the terms of the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006?

   (d) If so, are the claimants entitled to any remedy?

   (e) Has there been a breach of the duty to inform and consult under the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006?

Sources of evidence and submissions

3. At the conclusion of the evidence, the case adjourned for written submissions. The parties' respective counsel have filed and exchanged lengthy closing submissions and subsequent written comments on each other's submissions.

4. The tribunal is grateful to both counsel for their helpful written submissions. It is not proposed to recite the submissions extensively in this decision, but the tribunal has weighed them and taken them fully into account in reaching its conclusions of fact, law, and generally.

5. The findings of fact set out below have been reached on the balance of probabilities. They have been informed by the oral and written evidence which the tribunal has heard, together with the parties' written submissions, and by the documents to which the tribunal was referred within the 598 page trial bundle.

6. The tribunal heard oral evidence from the following witnesses:-

    - Stewart Anderson, the first claimant;
    - Brian Anderson, the second claimant;
    - Mr Philip Chick, former managing director of the third respondent;
    - Mr Jon Nixon, General Manager, Dealer Development JCB; and
    - Mr Alex McCloy, managing director of the second respondent

Facts

Commencement of Proceedings and Parties

7. By claim forms dated 1 December 2017, the claimants commenced tribunal proceedings against the first and second respondents. By order dated 6 August 2018, the claims were consolidated.

8. Their claims sought relief under the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 and/or the Transfer of Undertakings (Protection of Employment) Regulations (Northern Ireland) 2006. The first claimant made a claim for notice pay, unfair dismissal and a redundancy payment. The second claimant made a claim for notice pay but did not have the qualifying service for an unfair dismissal claim.

9. The first respondent filed a response dated 5 January 2018, signed by Mr Philip Chick.

10. The first respondent denied liability to the claimants and asserted that their employment had been transferred to the second respondent under the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 and/or the Transfer of Undertakings (Protection of Employment) Regulations (Northern Ireland) 2006.

11. The second respondent filed a response dated 8 January 2018, signed by its solicitors.

12. The second respondent denied liability to the claimants and asserted that neither the Service Provision Change (Protection of Employment) Regulations (Northern

Ireland) 2006 and or the Transfer of Undertakings (Protection of Employment) Regulations (Northern Ireland) 2006 ['TUPE'] applied to make the second respondent liable to them.

13. At a case management discussion on 6 June 2018 the third respondent was joined to the proceedings. The record of proceedings recorded that:

> *'1. The claimants applied to join BC Plant Limited as an additional respondent in this matter. They explained that they had been advised that the first named respondent was merely a shelf company. There was doubt as to which was the correct employer.*
>
> *2. The* ***second named respondent did not object to the joinder*** [emphasis added].'

14. By replies to notices for additional information dated 14 and 19 December 2018 respectively, each claimant accepted that TUPE did not apply in their case and that the relevant regulations were the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006.

15. In the same replies the claimants asserted that they were each, '*…an employee of the First or Third Named Respondent …*'

16. On the second day of the hearing, following the evidence of Mr Chick, the claimants through counsel made an oral application to amend their pleadings to assert unambiguously that the third respondent was their employer.

17. Counsel acting for the second respondent responded to the application: 'I am not objecting nor am I consenting. Have to leave it to the tribunal, I remain neutral on this one.' The employment judge asked for confirmation that: 'You are not suggesting that there is any injustice to you by this amendment?' To which counsel replied: 'No I am not. Obviously judge, I may be referring to this issue in the course of submissions and how the case has been pleaded'.

18. The second respondent's counsel made further comment about this amendment at paragraph 5 of the second respondent's 24 May 2019 reply to the claimants' written submissions:

> *'Further, such fundamental changes to the case presented at hearing has prevented an opportunity to raise discovery and additional information requests regarding the employment status of each Claimant, the trading position of the First Named Respondent and/or with regard to any financial or other documentation passing between JCB Sales Limited and the Third Named Respondent.'*

19. The content of paragraph 5 of the submissions cited above, is inconsistent with the lack of objection raised on behalf of the second respondent at the time when the application for amendment was made during the hearing.

20. At the point that the application for amendment was made, the second respondent could have objected and sought, on the grounds set out at paragraph 5 of the written submissions, to persuade the tribunal to refuse permission for the amendment. Alternatively, the second respondent could have sought to persuade the tribunal that if the amendment was granted, so too should an adjournment to

permit the additional requests to be raised, with potential costs consequences for the claimants.

21. Making such applications at the time would have complied with the obligations contained within the overriding objective at Regulation 3 of the Industrial Tribunals (Rules of Procedure) Regulations (Northern Ireland) 2005.

22. The objections were not made and it is unnecessary for the tribunal to speculate now as to whether such objections would have succeeded.

23. The claimants' solicitor and the second respondent's solicitor on 29 May 2019 each sent an email to the tribunal office concerning the content of paragraph 5 of the second respondent's written submissions which had been submitted in reply to the claimant's submissions. The claimants' solicitors invited the tribunal not to attach weight to the content of paragraph 5, while the second respondent's solicitors stated that, '…The tribunal is entitled to consider such consequences [the inability to raise notices for additional information and discovery] for the Second Named Respondent in relation to any findings of fact they may feel it appropriate to make.'

24. As noted above, when the application for amendment was made the second respondent did not object but reserved the right to refer to, '…this issue in the course of submissions and how this case has been pleaded'.

25. The tribunal confirms that the history of uncertain pleading as to the claimants' employer is a matter which the tribunal has considered and taken into account when determining the identity of the claimants' legal employer(s).

26. The second respondent's complaint that the timing of the amendment prevented the raising of additional requests for information and discovery is made too late for the tribunal to attach any weight to it.

First claimant's employer

27. It is not in dispute that the first claimant, Stewart Anderson ['SA'], was employed by the third respondent, BC Plant Limited.

28. The third respondent entered administration on 8 March 2018 and its title in these proceedings reflects that fact. All references in this decision to the third respondent which concern events prior to 8 March 2018 should be read as referring to BC Plant Limited.

29. SA commenced employment with BC Plant Limited on 5 May 2010. He was employed as an agricultural sales representative.

Second claimant's employer

30. The second claimant, Brian Anderson ['BA'], asserts that he was employed by BC Plant Limited. Despite sharing a surname, he is unrelated to the first claimant, SA.

31. The second respondent, R Kennedy & Co (NI) Limited, challenges this assertion and submits that the evidence leads to the conclusion that BA was employed by the first respondent, BC Plant (JCB) Limited.

32. Whichever legal entity employed BA it is not in dispute that his employment commenced on 9 January 2017.

33. During the summer of 2016 BA's attention was drawn to a job advertisement in Farming Life which was headed: 'Agricultural Sales Representative'. The advertisement stated:

> *'As JCB Distributors for Northern Ireland and Co Donegal BC Plant Ltd has an Exciting Opportunity for an Experienced Sales Representative to join a Market Leading Global Brand.*
>
> *We are looking for an experienced, self motivated and Enthusiastic Agricultural Technical Sales Representative to join our successful Sales Team.*
>
> *Experience in the agricultural machinery industry is essential and proven sales experience is preferred.*
>
> *Applications should be made in writing enclosing a current CV to:-*
>
> *Agricultural Applications*
> *BC Plant JCB Ltd*
> *Old Coach Road*
> *Hillsborough*
> *Co Down, BT26 6PB*
>
> *Email: recruitment@bcplantjcb.co.uk'.*

34. The message, 'BC Plant Ltd is an Equal Opportunities Employer', was highlighted at the bottom of the advertisement. The advertisement also bore a large JCB corporate logo which beneath it had the message, 'A Product of Hard Work'.

35. The advertisement refers to the third respondent, BC Plant Limited, in two places.

The words at the top of the advertisement suggest that the prospective employer is BC Plant Limited:

> *'As JCB Distributors for Northern Ireland and Co Donegal* ***BC Plant Ltd has an Exciting Opportunity*** *for an Experienced Sales Representative to join a Market Leading Global Brand'* [emphasis added].

36. This is consistent with the words at the bottom of the advertisement:

> *'****BC Plant Ltd is*** *an Equal Opportunities* ***Employer****'* [emphasis added].

37. BC Plant JCB Ltd is referred to just once in the advertisement, in the address line to which job applications should be sent.

38. The email address given is, 'recruitment@bcplantjcb.co.uk'. This email address does not refer to a limited company and offers no information as to which legal entity is offering the job.

39. In contrast to SA's contract of employment which described his employer as BC Plant Ltd, the statement of main terms and conditions of employment of BA

described his employer as BC Plant (JCB) Ltd. The second respondent relies upon this in support of its contention that BC Plant (JCB) Ltd was BA's employer.

40. The tribunal heard evidence from Mr Philip Chick, who was managing director and dealer principal for BC Plant Ltd at the date when JCB Sales Limited appointed the second respondent as their dealer. Mr Chick had taken over BC Plant Ltd from his father who was the person who originally had secured the JCB dealership.

41. Mr Chick told the tribunal that BC Plant (JCB) Ltd was what he described as a 'shelf' company which never actually traded. He said that it had been incorporated many years earlier at the behest of JCB. The reasoning appears to have been JCB's desire to have a consistent branding across its dealerships, hence the reference to JCB in the company title.

42. Mr Chick was clear that it was an error that BA's written statement of main terms and conditions of employment referred to his employer as BC Plant (JCB) Ltd. The document should have named his employer as BC Plant Ltd.

43. Mr Chick withstood firm but entirely fair cross-examination by Mr Mulqueen. Having listened carefully to the substance of his evidence and having observed his demeanour while he gave evidence, the tribunal is satisfied that his evidence was fundamentally honest.

44. It is an unhappy state of affairs that Mr Chick signed off on a response to the tribunal claims which accepted on the face of it that BC Plant (JCB) Ltd was the claimants' employer. It is clear from his evidence and all the circumstances however, that at the time that he signed the response form, Mr Chick had not properly appreciated the significance of this.

45. While the terms of the pleadings are a matter which the tribunal must weigh in its consideration, ultimately the tribunal has to determine the identity of BA's employer on the basis of all the evidence and information presented to it.

46. No evidence was adduced to the tribunal that BC Plant (JCB) Ltd ever actually traded. There is ample evidence that BC Plant Ltd did trade.

47. On his payslips, BA's employer was stated to be BC Plant Ltd. Similarly his P45 names BC Plant Ltd as his employer. SA's statement of main terms and conditions of employment names his employer as BC Plant Ltd. No justification has been suggested as to why SA and BA would have different employers. The job advertisement which BA answered refers to an employment opportunity with BC Plant Limited.

48. All of this is consistent with Mr Chick's evidence that the naming of BC Plant (JCB) Ltd as BA's employer was a mistake.

49. It is for the tribunal to determine the identity of BA's employer on the basis of all the evidence and information which it has received. In all the circumstances, the tribunal finds as a fact that the third respondent was BA's employer.

Franchise

50. In his statement, Mr Chick stated that, *'BC Plant Ltd had the franchise with JCB for 49 years'*.

51. The use of the term 'franchise' has proved controversial in these proceedings. The second respondent is adamant that it is a misnomer to characterise the relationship between BC Plant JCB Ltd/BC Plant Ltd and JCB Sales Ltd as that of franchisee and franchisor.

52. When Mr Chick was cross-examined about his use of the word 'franchise' he readily volunteered that he did not use it in any technical sense.

53. Ironically, given the concern expressed by the second respondent about the use of the term 'franchise', the annual report and financial statements for the second respondent for the year ended 31 December 2017 includes the statement:

> *'On 9 October 2017 R Kennedy & Co. (NI) Ltd* ***took over the JCB franchise*** *…'* [emphasis added].

54. In his oral evidence Mr McCloy, managing director and majority shareholder in the second respondent, described the inclusion of the word 'franchise' in the annual report as 'poorly used'.

55. In the context of this case the tribunal attaches no legal significance to the use of the word 'franchise'. No legal authority was presented to the tribunal to demonstrate that the use of the word describes a clear and well-defined legal arrangement or set of legal consequences which are relevant in this case.

56. Where the word 'franchise' has been used by any witness the tribunal finds that it has been used in a non-technical sense. Where a witness has described a business relationship as a franchise, no witness has by the use of that word alone sought to define the underlying legal relationship.

BC Plant Limited and the Agricultural Dealer Agreement

57. In about 1971 Mr Chick's father and a colleague established BC Plant Ltd. The company sold plant and machinery. In 2002 Mr Chick took over as managing director when his father was seeking to retire.

58. Mr Chick's father and BC Plant Ltd had a long history in selling products manufactured by JCB. This included JCB agricultural machinery. The company went into administration on 8 March 2018, around six months after JCB Sales Limited appointed the second respondent as its local dealer in agricultural machinery.

59. In around 1978 BC Plant JCB Ltd was incorporated. It never traded and is now dissolved. The company was incorporated to satisfy a demand from JCB that a dealer in its products should have the letters 'JCB' incorporated in its company title. It is unclear why the then directors of BC Plant Ltd did not simply change the name of that company rather than incorporate a new one, but that is the course they took.

60. Over the years a series of time limited dealer agreements were concluded and subsequently renewed between JCB and Mr Chick's organisation.

61. On 17 May 2016 the managing director of JCB Sales Ltd (Guy Robinson) wrote to Mr Chick. The letter was addressed to, *'Mr P Chick, Managing Director,*

***BC Plant JCB Ltd**, Old Coach Road, Hillsborough, Co Down BT26 6PB'* [emphasis added].

62. The letter began: *'Dear Philip, Further to our recent conversations, JCB is willing to offer a renewal of your Agricultural Dealer Agreement for a three year term from 1 January 2017, upon expiry of your existing agreement, subject to the following conditions …'*

63. Among the conditions set out by Mr Robinson for the renewal of the Agricultural Dealer Agreement was the following:

> *'Sales Team: Increase sales team to 3 full-time and dedicated JCB Agricultural specialists, with the additional salesperson clearly focussed on Fastrac Sales. Recruitment is to start immediately and the person is to be in place within 3 months. JCB Landpower to be involved in the selection and appointment'.*

64. Subsequently an 'Agricultural Dealer Agreement' dated 18 November 2016 was made between JCB Sales Ltd and a party described as, 'BC Plant JCB Limited whose registered office is at Main Depot, Old Coach Road, Hillsborough, County Down, BT26 6PB (the "Dealer")'.

65. The agreement was signed on behalf of JCB Sales Ltd by its managing director, Mr Robinson. It was signed, 'for and on behalf of Dealer' by Mr Chick who gave his job title as 'Managing Director'.

66. The claimants submit that it was BC Plant Ltd and not BC Plant JCB Ltd which in fact discharged the obligations of the Dealer under the Agricultural Dealer Agreement dated 18 November 2016.

67. The tribunal finds that this was the case.

68. No evidence was presented to the tribunal to substantiate any suggestion that BC Plant JCB Ltd performed the Dealer's obligations under the Agricultural Dealer Agreement. Mr Chick was clear that BC Plant JCB Ltd never traded and the evidence overwhelmingly indicates that BC Plant Ltd, not BC Plant JCB Ltd, performed the Dealer's obligations under the Agreement.

69. There is no evidence that BC Plant JCB Ltd had any employees (save in respect of BA as addressed earlier in this decision). Employees would have been essential if the company was to perform the Dealer obligations under the Agricultural Dealer Agreement. The pre-agreement letter from Mr Robinson dated 17 May 2016 clearly contemplated the employment of a sales team as a condition of concluding the Agreement. The sales team which worked under the Agricultural Dealer Agreement was employed by BC Plant Ltd.

70. JCB Finance Ltd is an asset finance business which BC Plant Ltd used to assist customers in the purchase of JCB products. The company itself is FCA regulated, it is majority owned by the Royal Bank of Scotland and is entirely separate from JCB Sales Limited. JCB is a minority shareholder. JCB Finance Ltd also provided BC Plant Ltd with wholesale finance facilities to enable them to purchase JCB machines from JCB for stocking purposes.

71. Significantly, sales invoices for machines, whether sold via JCB Finance Ltd or to the end user direct, were issued in the name of BC Plant Ltd. The accompanying printed terms of sale began with the words, *'Conditions of Sale for BC PLANT LIMITED a company incorporated in Northern Ireland under company number NI008439 and having its registered office at Old Coach Road, Hillsborough, County Down, Northern Ireland, BT26 6PB'.*

72. The terms of sale go on to set out BC Plant Ltd's undertaking to provide a one year warranty in respect of JCB machines and 90 days in respect of JCB parts. Under paragraph 8.1 of the Agricultural Dealer Agreement an obligation was imposed on 'the Dealer' (defined as BC Plant JCB Ltd) to provide a warranty on sales which was, *'in at least like terms to the Manufacturer's Warranty but not further or otherwise'*.

73. At the bottom of the BC Plant Ltd sales invoice was printed: 'Reg. Office as above BT26 6PB. Reg No. NI8439 VAT No. GB 252 6386 53'.

74. The tribunal was shown a number of purchase orders for machines. These were filled in by hand on forms which were headed, 'BC Plant JCB Ltd'. Below this was printed 'VAT Registration: GN 252 6386 53, SOLE DISTRIBUTOR FOR JCB MACHINERY IN N.IRELAND AND CO. DONEGAL (hereinafter described as "the seller"). At the bottom of the purchase order form was printed, 'Reg. office as above BT26 6PB Reg. No. NI8439'.

75. It is significant that, although the purchase orders are headed BC Plant JCB Limited, it is BC Plant Ltd's vat and company registration numbers which are printed on the purchase order pro forma.

76. It is clear that not only was BC Plant Ltd providing the sales warranty on any JCB agricultural machinery sale, it was also receiving payment for the machines and accounting to HMRC for any vat payable.

77. In reality, although the Agricultural Dealer Agreement was nominally entered into by BC Plant JCB Ltd, it was BC Plant Ltd which discharged their obligations under it.

78. Importantly, this fact was known or ought to have been known by JCB, but no objection was taken. On the contrary JCB actively worked with BC Plant Ltd.

79. The tribunal was shown a screenshot of the JCB 'Deal Hunter' App. This is an app which allows salespeople direct access to the JCB Finance system and highlights hire agreements which are close to completion so that the salespeople can contact the customer with a view to securing new business. The top of the screenshot read 'Deal Hunter (BC Plant Ltd)'. The Deal Hunter app was accessed by BC Plant Ltd's sales team.

80. Through one BC Plant entity or another, JCB's relationship with the Chick family was a long one. On the evidence, the tribunal finds that in reality JCB was not concerned about which particular BC Plant entity performed the dealer's duties under the Agricultural Dealer Agreement. JCB was more concerned about the fact that the duties would be performed.

81. The tribunal heard from Jon Nixon who is JCB's 'General Manager: Dealer Development'. It is notable that throughout his witness statement he refers to 'BC Plant' save where he recites the parties to the Agricultural Dealer Agreement.

82. The Agricultural Dealer Agreement was terminated by JCB Sales Limited with effect from 8 October 2017. Echoing Mr Nixon's references to BC Plant, the September 2017 press release which announced the appointment of R Kennedy & Co Ltd as JCB's agricultural dealer included the following:

> *'… The changes follow the termination of JCB's contract with existing Northern Ireland dealer* ***BC Plant****…we would like to place on record our thanks to* ***BC Plant*** *for its contribution to JCB's business over the years …'* [emphasis added].

83. In cross-examination Mr Nixon agreed that in real terms it was BC Plant Ltd, not BC Plant JCB Ltd, which was making machinery sales on a day to day basis. He said that his interpretation is that BC Plant Ltd was carrying out the duties of BC Plant JCB Ltd under the Agricultural Dealer Agreement.

84. At no point during the currency of the Agricultural Dealer Agreement did Mr Nixon or any other representative of JCB express any objection to BC Plant Ltd performing the duties ascribed in the Agreement to BC Plant JCB Ltd.

The activities performed by the claimants

85. Under the Agricultural Dealer Agreement, BC Plant was the only dealer of agricultural machinery appointed by JCB in Northern Ireland and Donegal. The Agreement imposed sales, service and warranty obligations on the dealer.

86. The claimants worked exclusively on the sales side of the Agreement. They were assigned exclusively to the sale of JCB vehicles. Their involvement with other manufacturers' products was limited to dealing with second hand vehicles which had been traded in against a JCB product which they had sold.

87. The Agricultural Dealer Agreement covered Northern Ireland and Donegal. At that time JCB had no other appointed dealer in agricultural machinery in the designated sales territory. BC Plant represented JCB's sales force for the area.

88. On occasions JCB as an organisation sells directly, other than through dealers, to larger clients. No evidence was given of any sale of agricultural machinery made by JCB directly in the designated sales territory during the term of the Agricultural Dealer Agreement.

89. Similarly, although a JCB dealer covering a different territory may theoretically have been entitled to sell into BC Plant's territory of Northern Ireland and Donegal and may in fact have done so, no evidence was presented to the tribunal that this had happened to any significant extent.

90. JCB retained the right to exercise a high degree of control over BC Plant in respect of the sales team and how they operated.

91. It is significant that, as set out above, the managing director of JCB Sales Limited in his letter to Mr Chick dated 17 May 2016 demanded as a <u>condition</u> of renewing the dealer agreement that the sales team must be <u>increased,</u> *'… to 3 full-time and dedicated JCB Agricultural Specialists'.*

92. In the letter, not only did Mr Robinson of JCB dictate the number of, 'JCB Agricultural Specialists' on the BC Plant sales team, he also sought to dictate that the additional salesperson would be, *'… clearly focussed on Fastrac sales'.*

93. The Agricultural Dealer Agreement was not signed until 18 November 2016, yet in his letter of 17 May 2016 Mr Robinson was demanding that, *'Recruitment* [of the additional salesperson] *is to start immediately and the person be in place within 3 months'*. In a further mark of the control which JCB reserved to itself, whether ultimately it was exercised or not, Mr Robinson specified that, 'JCB Landpower to be involved in selection and appointment'.

94. Mr Nixon told the tribunal that JCB Landpower was not in fact, as events turned out, involved in the recruitment of a third salesperson.

95. JCB retained considerable control over BC Plant's ability to sell any piece of machinery at a commercially profitable level. This control was exercised through a system of dealer trade support which provided financial support for BC Plant's agricultural machinery sales on a deal by deal basis.

96. Mr Chick told the tribunal that at times he would sell a vehicle without knowing what dealer support JCB was going to offer, but he, *'had no ability to sell a machine without dealer support, unless at a loss or a microscopic margin'.*

97. BA described how, in addition to dealer trade support, JCB also incentivised BC Plant's sales team by the provision of 'conquest' payments to win over customers who were using machines under 10 years old which were manufactured by JCB's market rivals.

98. The Agricultural Dealer Agreement of 18 November 2018 itself placed a number of onerous obligations and restrictions on BC Plant as conditions of selling JCB machinery.

99. BC Plant sold only JCB machinery. Under the Agreement BC Plant was not permitted to sell new any other manufacturer's competing products, *'except in separate premises, under separate management, and in the form of a distinct legal entity'* [clause 5.1.2]. Even then JCB would be 'entitled' to terminate the agreement on 3 months' notice, should it choose to do so, in the event that the dealer, or any affiliate (whether in separate premises and/or under separate management and/or in the form of a distinct legal entity) sold new machines, *'which in the reasonable opinion of JCB are competitive with JCB machines'* [clause 15.4.1].

100. Under the Agricultural Dealer Agreement, BC Plant was required, *'to comply with JCB's Corporate Identity Policy with regard to premises, vehicles, paperwork systems, signs, parts reception layout, displays etc, as may be reasonably required by JCB'* [clause 10.1.8]. BC Plant maintained JCB branded premises. The sales team regularly wore JCB branded clothing. Their business cards bore the JCB brand.

101. JCB maintained the Deal Hunter app, as referred to above. The BC Plant sales team was given access to it in order to maximise the prospects of JCB retaining a customer on expiry of the customer's vehicle finance deal.

102. The sales team had access through JCB information technology systems to confidential customer information. Financial incentives were offered to the sales

team to encourage customers to finance machines using JCB Finance Ltd rather than a competing product.

103. BA accompanied customers on a marketing trip to visit JCB headquarters in England.

104. The claimants' employment by BC Plant had one dominating purpose: to sell JCB agricultural products within the sales territory of Northern Ireland and Donegal.

105. The JCB territory manager worked closely with the BC Plant team. BA told the tribunal that on occasions the territory manager attended agricultural shows with the BC Plant sales team to support their efforts to sell and promote JCB products. In his statement, BA said that the territory manager, *'was available to come out to meet customers with us'.*

106. BC Plant was paid a fee by JCB when the sales team arranged to take a demonstrator vehicle to a potential customer's premises and demonstrating the machine.

The termination of the Agricultural Dealer Agreement

107. On 8 September 2017 JCB served BC Plant with a 30 day notice of termination of the Agricultural Dealer Agreement which was effective on 8 October 2017.

108. The evidence of Mr Nixon for JCB and Mr Chick for BC Plant conflicted as to whether or not this notice of termination was fair in all the circumstances.

109. JCB justified the termination on the basis that BC Plant had not complied with the established wholesale finance arrangements in respect of the supply of machinery to end customers. This resulted in an unacceptable financing debt.

110. Mr Chick places the financing difficulties in the context of what he says was a delay in JCB delivering machines which BC Plant had sold between March and July 2017. By 11 July 2017 JCB had not despatched any of the machines which BC Plant had sold during the period. On 17 July, when BC Plant was closed for the holidays, JCB invoiced BC Plant for around £3,500,000 in respect of 29 machines which it was ready to despatch. Under the dealer agreement JCB was to be paid in full before the shipment of any machine. Mr Chick said that BC Plant did not have the financial means to meet the cost of what he described as a, *'sudden, massive influx of machines'*. He said it is this which led to the termination of the dealer agreement.

111. It is not the function of the tribunal in these proceedings to adjudicate on the merits or fairness of the termination of the Agricultural Dealer Agreement. The tribunal is only concerned as to whether the claimants are entitled to the remedies they seek.

Termination of the claimants' employment

112. All staff were directed to attend a meeting on 14 September 2017 at BC Plant's premises. The meeting was chaired by Mr Chick. He informed the staff that JCB had served a 30 day notice of termination of the Agricultural Dealer Agreement. Mr Chick said that redundancy of some staff was a possibility and he also said that some employees might be eligible to transfer to the new contractor.

113. A further meeting took place on 20 September 2017 when the employees were told that the second respondent had been approached to provide the services which had previously been provided by BC Plant under the Agricultural Dealer Agreement. At the meeting the employees were told that only those employed as agricultural sales representatives would be transferring to the new service provider. SA said that those in attendance at the meeting were invited to elect representatives. SA was elected an employee representative. The date of his election is not entirely clear.

114. By letter dated 20 September 2017 which was delivered by hand to SA, Mr Chick wrote [emphasis added]:

> *'As discussed at our meeting with all employees earlier today, JCB recently served notice to terminate their JCB Dealer Agreements with BC Plant, with effect from 8 October 2017. As a result, regretfully, the* ***Company considers that it is probable that a number of redundancies will be necessary*** *across the Company.*
>
> ***Before any decision is made as to how the redundancies will be carried out****, we wish to* ***give you an opportunity to express your views through employee representatives who will be elected for this purpose****.*
>
> *We are therefore giving you the opportunity to elect employee representatives with whom* ***we will consult on matters including whether there is any way of avoiding redundancies, reducing the number affected or lessening the impact of redundancies, which employees will be in a 'pool' for selection and what criteria will be used to select for redundancy****. Any comments which you have on these matters should be made through your employee representatives, once they are in place.*
>
> *For the purposes of consultation four elected employee representatives are required for the workforce.*
>
> *We are therefore inviting employees to nominate representatives. If you wish to nominate anyone for such a post you should first ensure your nominee is willing to stand for election. Please be advised that you may nominate yourself.*
>
> *Nominations should be submitted to Diane Gilmore by no later than 1.00 pm on Friday 22 September 2017 using the attached form. If the nomination is returned later than the notified time and date your nomination will not be valid.*
>
> *For those elected as employee representatives consultation is likely to revolve around a number of meetings with management, which we expect to hold within the Company's premises during working hours, although this process may change. We will give representatives more information about their role following their election …'*

115. A meeting was held with the elected employee representatives on 29 September 2017. Among the attendees were Mr Chick and SA. The minutes of the meeting included the following [emphasis added]:

> *'The possibility of a TUPE situation was discussed. Philip explained that he had raised this with the solicitors who were in turn raising it with JCB.* ***He***

was of the view that the Agricultural Sales reps posts *and possibly Stephen's* ***could <u>arguably</u> be in a TUPE situation****. Susan [HR Consultant] explained that if an employee was in a TUPE situation they would transfer to another employer. Their terms and conditions of employment would be protected and their length of service with BC Plant would carry over with them. The only thing that did not TUPE was pension.* ***They would not be made redundant by BC Plant and if they did not want to transfer they would be seen as resigning****. If they did transfer and the new employer felt that they had too many staff then it would be up to the new employer to go through a redundancy selection procedure.'*

116. On 29 September 2017 Mr Chick wrote to the second respondent:

> *'We have been given notice by JCB that they intend to terminate the JCB Agricultural Dealer Agreement ("the Agreement") with us on 8 October 2017. We are now aware that your company will take over responsibility for the contract on 9 October 2017.*
>
> *We wish to advise you that we have 3 employees who are assigned to service the Agreement and who work exclusively on work arising under the Agreement. The employees' job titles are Agricultural Sales Representative.*
>
> *In accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 and/or The Service Provision Change (Protection of Employment) Regulations (NI) 2006 ("the Regulations")* ***these employees will transfer to your employment on 9 October 2017****.*
>
> *We wish to provide you with Employer Liability Information as required by the Regulations as soon as possible and would be grateful if you would advise to who we should send the information in order that the information can be provided confidentially and in accordance with the Data Protection Act 1998.*
>
> ***We are willing to discuss with you facilitating any consultation you may wish to hold with the employees prior to transfer****.'*

117. In the 29 September letter Mr Chick asserted that the sales team would transfer to the second respondent's employment but he did not ask what measures, if any, which the second respondent proposed to take in respect of the transferring employees.

118. On 3 October 2017 Mr Chick wrote to SA in the following terms [emphasis added]:

> *'I am writing to you in accordance with Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and/or the Service Provision Change (Protection of Employment) Regulations (NI) 2006 ("TUPE") to* ***provide you with the following information as the elected representative of the Agricultural Sales Representatives****.*
>
> *1. JCB have terminated the JCB Agricultural Dealer Agreement with our company with effect from the 8 October 2017. We understand that R. Kennedy & Co NI Limited, 168b Larne Road, Ballymena will take on the Agricultural Dealer Agreement with JCB from 9 October 2017.*

2. *In accordance with TUPE we believe the 3 Agricultural Sales Representatives' employment will transfer to Kennedys on their existing terms and conditions of employment. Apart from this it is not envisaged that there will be any economic or social implications of the transfer for employees.*

3. *We do not intend to take any measures in relation to the transferring employees' employment.*

4. *We will ask Kennedys whether they do/do not intend to take any measures in relation to the transferring employees' employment and will inform you as soon as we receive a response.*

5. *There are no agency workers working temporarily for and under the supervision and direction of the company.*

As we do not envisage any measures will be taken in relation to the transfer, it seems that there are no consultations legally required by the company but we will continue to consult with you and keep you informed as matters develop.

Please let me know if you have any queries arising out of this letter.'

119. A further consultation meeting was held with employee representatives at BC Plant on 5 October 2017. Both Philip Chick and SA were among the attendees. In contrast to the 29 September consultation meeting, the minutes contain no record of discussion about the sales representatives transferring to the second respondent.

120. On 5 October 2017 Mr Chick wrote to BA a letter which included the following [emphasis added]:

'…It is our view that in accordance with TUPE Regulations you and the other 2 Agricultural Sales Representatives employment will transfer to Kennedys on your existing terms and conditions of employment.

We have written to Kennedys at the beginning of this week advising them of your transfer, but unfortunately we have not received a response. We have also instructed our solicitor to write to Kennedys. We have provided to Kennedys the Employer Liability Information required under TUPE.

***On Monday 9 October 2017 you should present yourself for work to Kennedys at the above address**.*

We sincerely apologise for the late notice and uncertainty that you now find yourself in. We have acted as soon as we became aware of the transfer of the JCB Agricultural Dealer Agreement to Kennedys. We hope that Kennedys will respond to our correspondence and we will keep you updated with any contact we receive.

Please let me know if you have any queries arising out of this letter.'

121. On 5 October 2017 BC Plant's solicitors wrote to the second respondent. They referenced a letter dated 2 October 2017 which had been sent by BC Plant to the

second respondent. The solicitors said that there had been no response by the second respondent to correspondence from BC Plant.

122. The solicitors asserted that the Agricultural Sales Representatives would transfer to the second respondent [emphasis added]:

> *'In accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 and/or the Service Provision Change (Protection of Employment) Regulations (NI) 2006 ("the Regulations") these employees will transfer to your employment on 9 October 2017 …* ***Our client will also be advising the three employees to present themselves to you for continued employment on Monday 9 October 2017****'.*

123. On the same day, 5 October 2017, the second respondent's solicitors replied to the letter. The letter denied that either the TUPE or Service Provision Change regulations applied. The second respondent's solicitors sought to explore the basis for BC Plant's assertion that they did apply and went on to state that:

> *'…* ***your client should on no account be advising the employees that they should present themselves at [the second respondent's] premises on Monday 9 October 2017****. Rather the employees should present at your client's premises. If your client does not have sufficient work to provide to those employees then it will have to give consideration to making redundancies or making other cost saving measures'* [emphasis added].

124. Mr Chick wrote a further letter to BA on 6 October 2017. He reiterated his view that BA's employment would transfer to the second respondent. He also wrote that:

> *'Our solicitors received a response this morning from Kennedy's [the second respondent] solicitors disputing the transfer. Our solicitors are continuing to correspond with Kennedy's lawyers.*
>
> *On Monday 9 October 2017 you should present yourself for work to Kennedys at the above address…We hope that Kennedys will accept the transfer and employ you from Monday'.*

125. When Mr Chick wrote this letter which repeated the instruction that BA should attend the second respondent's premises on 9 October he already knew, or ought to have known, that his solicitors had been told by the second respondent's solicitors that BC Plant, *'should* ***<u>on no account</u>*** [emphasis added] *be advising the employees that they should present themselves'* at the second respondent's premises on 9 October.

126. No evidence was presented to the tribunal that SA and BA were anything other than diligent and loyal employees. No party has suggested that either man was in any way responsible for the decision of JCB to terminate the dealer agreement. In all the circumstances it was far from satisfactory that BC Plant did not inform them in writing that the second respondent had made clear that they should not attend its premises on 9 October.

127. On 6 October 2017 SA contacted the second respondent's managing director, Mr McCloy, by telephone. He told him of the respect he had for Mr McCloy's father who had assisted SA to get a sales job early in his career. He told Mr McCloy that he had been advised that his employment would transfer to the second respondent

and that he should attend the second respondent's premises on 9 October. Mr McCloy disputed the basis for this but told him he was free to do as he wished. SA told Mr McCloy that he and BA would see him on 9 October. SA told the tribunal that until he met Mr McCloy on 9 October, he thought that he would be carrying on doing the same job.

128. When the claimants arrived at the second respondent's premises on 9 October 2017 they had a conversation with Mr McCloy. There is some disagreement about the detail of what was said during the conversation. It is not necessary to resolve that disagreement for these proceedings. The key point is that Mr McCloy made it clear to both men that the second respondent did not regard their employment as having transferred to the second respondent.

129. The second respondent had advertised for staff, including sales personnel. The closing date was 9 October. During the meeting with the claimants Mr McCloy invited them to apply if they wished. SA did so that day. He did not receive a response.

130. The claimants found themselves caught between BC Plant and the second respondent. Each of the companies refused to accept responsibility for them or the termination of their employment.

131. It is a measure of SA's desperation that he contacted the JCB territory manager and JCB Landpower's sales director. He even tried to contact the JCB UK area manager but without success. None of SA's efforts bore positive fruit. It was an utterly miserable time for both claimants.

JCB and the second respondent

132. A written Agricultural Dealer Agreement dated 16 October 2017 was concluded between JCB Sales Limited and the second respondent. It includes sales and service functions. Its terms are similar to the dealer agreement which BC Plant JCB Ltd had previously concluded with JCB Sales Limited. This includes those as to premises and branding.

133. The second respondent's agreement contains the same obligations and restrictions in respect of selling competing products and staffing its premises *'with well-trained sales, service and other personnel* ***devoted solely*** *to promoting the service of JCB Machines and* ***sale of JCB Products*** [emphasis added]*'* [agreement, para 10.1.2].

134. Despite this contractual obligation, at present the second respondent has not been required by JCB Sales Limited to comply. Mr McCloy told the tribunal that he did not have any sales staff who are designated solely to the sale of JCB products. In his premises he also sells products from other manufacturers. In cross-examination Mr McCloy said that it was a two way conversation with JCB and that, *'It is a process and it may well be in the future that we comply with things under the agricultural dealer agreement that we are not currently complying with'.*

135. The second respondent is bound by contractual obligations in respect of sales and marketing of JCB products, obligations which are identical to those which bound BC Plant in its Agricultural Dealer Agreement. This is so, whether or not JCB is currently choosing to enforce these obligations against the second respondent.

136. The second respondent has assumed the sales function on behalf of JCB which was previously carried out by BC Plant. It has taken on the territory of Donegal and Northern Ireland. JCB Sales Ltd now relies on the second respondent to perform the vital sales and marketing function for JCB agricultural machinery within that territory. Until the termination of the BC Plant Agricultural Dealer Agreement, it was BC Plant which JCB relied on to perform the same vital sales function.

The first claimant's employment

137. SA commenced employment with the third respondent on 4 May 2010 and his P45 indicates that his employment with the third respondent terminated on 8 October 2017.

138. Apart from the unsuccessful application to the second respondent on 9 October 2017, SA applied for three jobs.

- 21 November 2017 – Teemore Engineering
- 01 December 2017 – Irish Agricultural Machinery
- 22 January 2018 – Johnston Gilpin

139. SA secured employment with Johnston Gilpin in Agri-Sales. He commenced employment with the company on 1 March 2018.

140. In his statement SA complains that his basic salary with his new employer is only £24,000 gross in comparison to his BC Plant salary which, *'had reached approximately £45k'.* Despite this, SA has not applied for any better paid job since he commenced work at Johnston Gilpin.

141. By letter dated 20 February 2017 SA was promoted by BC Plant to Senior Agricultural Salesman on a salary of £24,000 gross plus commission and bonus, effective from 6 March 2017.

142. SA's P60 for the tax year to 5 April 2017, SA's last complete year of work with BC Plant, shows a total gross for the year of £35,961.75.

143. The copy of SA's P11D for 2016-2017 contained in the bundle is blank, save for his name, his PAYE reference, his national insurance number and his employer's name. No details at all are filled in at paragraph F of the P11D which deals with cars.

144. The second page of the P11D has not been included in the bundle. On the second page of a P11D at paragraph G there are boxes which cover vans and van fuel. The tribunal has not been provided with this in respect of SA's P11D. The first page of SA's P11D is at page 241 of the bundle and at page 242 is SA's P60 for the year ended 5 April 2017. It is noted that SA's schedule of loss refers to *'Loss of car benefits as per P11D 16/17'* and it sets out two figures which are described as *'cash equivalent of van'* and *'cash equivalent of fuel'* respectively. The relevant page from SA's P11D in support of those figures was not presented to the tribunal.

145. SA's P45 is dated 8 October 2017 which is almost precisely 6 months into the tax year. It shows total gross pay in the tax year to date of £19,472.57. This equates to £748.92 gross per week.

146. The claim form at paragraph 6.2 states that SA's, 'Normal take-home pay (including overtime, commission, bonuses etc.)' was £3,245 pm 'based on an average of final 6 months'. This figure appears to have been reached by dividing by 6 the 'total pay to date £19,472.57' on the P45. SA's calculation of net monthly income does not however take account of the fact that the P45 also shows 'total tax to date £3795.40'. When this is factored into the calculation, SA's average net monthly income was £2,612.86 [£19,472.57-£3,795.40 = £15,677.17 ÷ 6] not £3,245. This is the equivalent of £602.96 net per week.

147. No evidence was presented to the tribunal to substantiate SA's claim that his salary with BC Plant had reached around £45,000 prior to the termination of his employment.

148. On his schedule of loss SA states that he, *'received a bonus of £6,000 from his new employer* [Johnston Gilpin] *in December 2018, but could have expected to receive between £8,000 and £10,000 from his previous employer* [BC Plant]*'.*

149. BA's schedule of loss is based on a pay of £598.88 per week. It was not challenged by the second respondent. In the schedule this figure has been applied to both notice pay and the calculation of any potential award in respect of the third respondent's failure to inform and consult as required by The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 as set out below.

Law

150. The claimants assert that there was a 'service provision change' when the Agricultural Dealer Agreement with BC Plant was terminated and the second respondent was appointed as JCB dealer in its place.

Service Provision Change

151. Regulation 3 of The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 ['the Regulations'] includes the following [emphasis added]:

> **"3**— (1) These Regulations apply to **a service provision change, that is a situation in which**—
>
> (a) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
>
> (b) **activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf**; or
>
> (c) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

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

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

(a) **immediately before the service provision change**—

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

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

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

[…] (6) In this regulation "**contractor" includes a sub-contractor**."

152. The issue of whether a service provision change has occurred is a question of fact. In ***Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation) and Ors [2009] IRLR 700*** the Employment Appeal Tribunal ['EAT'] (HHJ Burke QC) commented at paragraphs 25-28 [emphasis added]:

'27. "Service provision change" is a wholly new statutory concept. It is not defined in terms of economic entity or of other concepts which have developed under TUPE 1981 or by community decisions upon the Acquired Rights Directive prior to April 2006 when the new Regulations took effect. ***The circumstances in which service provision change is established are, in my judgment, comprehensively and clearly set out in Regulation 3(1)(b) itself and Regulation 3(3)****; if there was, immediately before the change relied upon, an organised grouping of employees which had as its principal purpose the carrying out of the activities in question, the client intends that those activities will be carried out by the alleged transferee, other than in connection with a single specific event or a task of short term duration, and the activities do not consist totally or mainly of the supply of goods for the client's use, and if those activities cease to be carried out by the alleged transferor and are carried out instead by the alleged transferee, a relevant transfer exists. In contrast to the words used to define transfer in TUPE 1981 the new* ***provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact****.*

28. In this context there is, as I see it, no need for an Employment Tribunal to adopt a purposive construction as suggested by Mr Cooper, as opposed to ***a straightforward and common sense application of the relevant statutory words to the individual circumstances before them****; but equally and for the same reasons there is no need for a judicially prescribed multi-factorial approach, as advanced by Mr Bourne, such as that which has necessarily arisen in order to enable the Tribunal to adjudge whether there*

was a stable economic entity which retained its identity after what was said to be a transfer falling within what is now Regulation 3(1)(a).

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

30. The ***statutory words require the Employment Tribunal to concentrate upon the relevant activities****; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor.* ***A common sense and pragmatic approach is required*** *to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the Tribunal in the present case.* ***The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it****.'*

153. In approving the dicta of HHJ Burke QC in ***Metropolitan Resources***, Elias LJ in ***McCarrick v Hunter [2013] IRLR 26*** at paragraph 22 commented:

> *'… I agree with HH Judge Burke QC that there is no room for a purposive construction with respect to the scope of reg. 3(1)(b) itself. So far as that is concerned, there is in my view no conflict between a straightforward construction and a purposive one: the natural construction gives effect to the draftsman's purpose. There are no underlying EU provisions against which the statute has to be measured.* ***The concept of a change of service provision is not complex and there is no reason to think that the language does not accurately define the range of situations which the draftsman intended to fall within the scope of this purely domestic protection****.'*

154. On the meaning of 'activities', in ***SNR Denton LLP v Kirwan and Anor [2012] IRLR*** 966 EAT, at paragraph 22 Langstaff P observed [emphasis added]:

> *'As to* ***'activities',*** *the common use of the word is to* ***describe what is being done****.'*

155. The activities carried out under the Agricultural Dealer Agreement related to both sales and servicing of agricultural machinery. The claimants worked only on the sales side. In these circumstances, can there be a service provision change?

156. The judgement of Simler P in ***Arch Intitiatives v Greater Manchester West Mental Health NHS Foundation Trust and Ors [2016] IRLR 406 EAT***, robustly confirms that there can be a service provision in these circumstances [emphasis added]:

> ***'17***
>
> *… the starting point must be the Regulations themselves. These are domestic provisions that do not depend on any finding that there was a discrete economic entity in the hands of the transferor with or without functional autonomy…reg. 3(1)(b)(ii) identifies an SPC as a situation in which 'activities' cease to be carried out by the outgoing provider and are carried out instead by another person.* ***The word 'activities' is not defined, and nor is it qualified in any way by words that could have been used to qualify it.*** *For example, the provision could have said 'the activities', 'all of the activities' or 'the principal activities'.* ***There is nothing in the Regulations that expressly requires that the relevant activities should constitute 'all of the activities' carried out by the outgoing contractor****.*
>
> ***18***
>
> ***Nor, in my judgment, is there any justification for substituting or equating the word 'activities' with the word 'service'. That could have been done, but it was not****. It seems to me that the fact that the service that is subject to an SPC can comprise 'activities' connotes that the relevant activates in a particular case may be a subset of the whole of the activities carried out by the transferor, as Ms Tether submits. Mr Gorton's reliance on the absence of any express reference to 'part of an activity' in contrast to the reference to 'part of an undertaking' does not support his argument in light of the wording of the Regulations. Given that* ***this Regulation is framed by reference to 'activities' rather than 'the service'****, it was unnecessary to provide expressly that there can be an SPC in relation to part only. Since 'activities' is undefined, there is nothing in principle to prevent some only of the activities that form part of service from being considered in the context of an SPC.*
>
> ***19***
>
> *As the Regulations and the authorities to which I have been referred and some of which I have referred to above make clear,* ***the first question for a tribunal in every SPC case is whether the activities that cease to be carried out by the outgoing person and are carried out instead by the incoming person after the relevant date are fundamentally or essentially the same, and that question is a question of fact for the fact-finding tribunal****…limiting conditions are expressly provided by the SPC regime itself. The limiting conditions are those identified at reg. 3(3). Of particular relevance in this case and in most cases is the requirement that immediately before the relevant date there must be an organised grouping of employees that has as its principal purpose the carrying out of the activities concerned on behalf of the client. In other words,* ***not only must the activities be fundamentally the same both before and after the putative transfer date, but there must be an organised grouping of employees, and that organised grouping of employees must have as its principal purpose the carrying out of the activities that cease and are carried out instead***

***by the incoming person**. The **words of reg. 3(1)(b) and (3) have their ordinary straightforward meaning, and their application to an individual case is one of fact and degree for the assessment of the fact-finding tribunal**.*

20

*In Kimberley Langstaff J rejected the argument that reg. 3(1)(b) can only apply when there is one transferee to whom the activities transfer, invoking s.6 of the Interpretation Act 1978 to the effect that words in the singular include the plural. He held that the tribunal in that case was entitled to conclude that there was an SPC where two overlapping contracts awarded to two transferees provided for activities previously provided by one provider. Although in that case the division of activities involved a quantitative split, **I can see no reason why the SPC provisions should not in principle apply in a case involving a division on functional lines. The ways in which the activities of a service may be organised are infinitely variable. They may be organised geographically, in teams, in departments or by reference to particular functions or processes**.*

21

Equally, it is commonplace for contract awarding bodies to split a service into different components or functions when re-tendering, each of which is assigned to a different incoming contractor. Whether or not the SPC provisions in fact apply in any of these circumstances will depend on the application of the particular conditions within the SPC regime to the facts of the particular case. A split or change in activities is plainly a relevant consideration in assessing whether the activities cease in relation to the outgoing contractor and whether fundamentally the same activities are carried on by the incoming contractor for the same client, but at the end of the day in each case the question is one of fact and degree.

22

*Moreover, **once a tribunal has decided that there is a sufficient degree of similarity between the activities of the service in the hands of the putative transferee as compared with those in the hands of the transferor before the putative transfer, then the question will be whether before the change there existed an organised grouping of employees whose principal purpose was the carrying out of the activities for the client. That, again, will be a question of fact and degree**, and there is no reason in principle to limit the number of organised groupings of employees to one in any SPC case.*

23

*I reach those conclusions without regard to the purpose of the SPC regime but by **adopting a straightforward and natural reading of the words used within the Regulations.** To the extent that the aim or purpose is relevant, in my judgment this construction is consistent with the aim of the regime, which is to remove or reduce the uncertainties and difficulties created by the need under the old style transfer provisions to establish a transfer of a stable economic entity that retained its identity in the hands of the putative*

transferee by introducing a new definition of relevant transfer that covers three situations: outsourcing, insourcing and a change in contractors – all of which caused problems under TUPE. ***If, as Mr Gorton contends, the SPC regime applies only where the whole of the activities carried out by the outgoing person are replicated in the hands of the incoming person, the range of situations in which the SPC provisions are capable of applying would be substantially restricted and it would be easy for the provisions to be circumvented so as to frustrate the purpose of the SPC regime****.'*

157. Jackson LJ in ***Rynda (UK) Ltd v Rhijinsburger [2015] EWCA Civ 75, [2015] IRLR 394*** at paragraph 34 summarised the authorities as identifying a four stage process to be adopted in ascertaining whether there is an organised grouping of employees for the purposes of a service provision change:

> *'I would summarise the principles which emerge from the authorities as follows. If company A takes over from company B the provision of services to a client, it is necessary to consider whether there has been a service provision change within reg. 3 of TUPE. The first stage of this exercise is to identify the service which company B was providing to the client. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a 'grouping' for the principal purpose of carrying out the listed activities.'*

158. The Regulations at 4(1) provide that, save where an employee objects to being employed by the transferee [emphasis added]:

> *'… a service provision change* ***shall not operate so as to terminate the contract of employment of any person*** *employed by the transferor and* ***assigned to the organised grouping of resources or employees that is subject to the service provision change*** *which would otherwise be terminated by the transfer but any* ***such contract shall have effect*** *after the transfer* ***as if originally made between the person so employed and the transferee****.'*

Service Provision Change and Unfair Dismissal

159. Regulation 7(1) states that:

> *'****7.****—(1) Where either before or after a service provision change, any employee of the transferor or transferee is dismissed, that* ***employee shall be treated for the purposes of Part XI of the 1996 Order (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—***
>
> *(a) the transfer itself; or*
>
> *(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.'*

160. Under Part XI of The Employment Rights (Northern Ireland) Order 1996, including articles 126, 130 and 130A, an employee has a right not to be unfairly dismissed.

Duty to inform and consult affected employees

161. Where there is a service provision change the regulations at 13-16 impose duties to inform and consult elected representatives of affected employees. Breach of these duties can result in an order for payment of 'appropriate compensation' to the employees, as defined by regulation 16.

162. Regulation 13 provides [emphasis added]:

> ***"Duty to inform and consult representatives***
>
> ***13.—*** *(1) In this regulation and regulations 14 and 15* ***references to affected employees, in relation to a service provision change****,* ***are to any employees*** *of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a service provision change)* ***who may be affected by the change or may be affected by measures taken in connection with it****; and references to the employer shall be construed accordingly.*
>
> *(2) Long enough* ***before a service provision change*** *to enable the employer of any affected employees to consult the appropriate representatives of any affected employees,* ***the employer shall inform those representatives of—***
>
> *(a) the fact that the change is to take place, the date or proposed date of the change and the reasons for it;*
>
> *(b) the legal, economic and social implications of the change for any affected employees;*
>
> *(c) the measures which he envisages he will, in connection with the change, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and*
>
> *(d) if the employer is the transferor, the measures, in connection with the change, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the change by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.*
>
> *(3) For the purposes of this regulation the appropriate representatives of any affected employees are—*
>
> *[…](b) in any other case, whichever of the following employee representatives the employer chooses—*
>
> *(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive*

information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) ***The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them****, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.*

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the service provision change, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

[…](9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

(10) Where—

(a) the employer has invited any of the affected employee to elect employee representatives; and

(b) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time, the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the service provision change is taken by the employer or a person controlling the employer.'

163. Regulation 14 sets out the circumstances for election of employee representatives [emphasis added]:

> *`**Election of employee representatives***
>
> ***14.—** (1) The requirements for the election of employee representatives under regulation 13(3) are that—*
>
> *(a) the employer shall make such arrangements as are reasonably practicable to ensure that the election is fair;*
>
> *(b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all affected employees having regard to the number and classes of those employees;*
>
> *(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;*
>
> *(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under regulation 13 to be completed;*
>
> *(e) the candidates for election as employee representatives are affected employees on the date of the election;*
>
> *(f) no affected employee is unreasonably excluded from standing for election;*
>
> *(g) all affected employees on the date of the election are entitled to vote for employee representatives;*
>
> *(h) the employees entitled to vote may vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;*
>
> *(i) he election is conducted so as to secure that—*
>
> *(ii) so far as is reasonably practicable, those voting do so in secret; and*
>
> *(iii) the votes given at the election are accurately counted.*

(2) Where, after an election of employee representatives satisfying the requirements of paragraph (1) has been held, one of those elected ceases to act as an employee representative and as a result any affected employees are no longer represented, those employees shall elect another representative by an election satisfying the requirements of paragraph (1)(a), (e), (f) and (i).'

164. Regulation 15 sets out the consequences of failure to comply with regulations 13 or 14 [emphasis added]:

*'**Failure to inform or consult***

***15.**— (1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an industrial tribunal on that ground—*

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

[…] and

(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

(3) If on a complaint under paragraph (1) a question arises as to whether or not an employee representative was an appropriate representative for the purposes of regulation 13, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees.

(4) On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it

was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

(6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) ***Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—***

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award*; or*

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) ***The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11)****.*

(10) An employee may present a complaint to an industrial tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that—

(a) in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;

(b) in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.

(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.

(12) An industrial tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with—

(a) in respect of a complaint under paragraph (1), the date on which the service provision change in question is completed; or

(b) in respect of a complaint under paragraph (10), the date of the tribunal's order under paragraph (7) or (8), or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months'.

165. The calculation of 'appropriate compensation' for breach of regulations 13 or 14 is set out in regulation 16 [emphasis added]:

*'**Failure to inform or consult: supplemental***

***16** […]*

*(3) "**Appropriate compensation**" in regulation 15 **means such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty**.*

(4) Articles 16 to 24 of the 1996 Order shall apply for calculating the amount of a week's pay for any employee for the purposes of paragraph (3) and, for the purposes of that calculation, the calculation date shall be—

[…]

(b) in the case of an employee who is dismissed for any other reason, the effective date of termination (within the meaning of Articles 127(1) and (2) and 129 of the 1996 Order) of his contract of employment;

(c) in any other case, the date of the service provision change.'

166. The EAT in ***Todd v Strain [2011] IRLR 11*** reviewed the proper approach to assessing 'appropriate compensation' under Regulations 15(8) and 16(3). Underhill P approved the approach to the issue taken by the EAT in ***Sweetin v Coral Racing [2006] IRLR 252***.

167. In ***Sweetin*** it was held that the guidance given by the Court of Appeal in ***Susie Radin Ltd v GMB [2004] IRLR 400*** concerning an employer's breach of obligations under s188 of the Trade Union and Labour Relations (Consolidation) Act 1992 is applicable to the assessment of appropriate compensation under Regulation 15(8).

168. At paragraph 24 of ***Todd*** Underhill P cited the following from the judgement of Gibson LJ in ***Susie Radin*** [emphasis added]:

'I suggest that ETs, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind:

*(1) The **purpose of the award is to provide a sanction for breach by the employer** of the obligations in s.188: it is **not to compensate the employees for loss** which they have **suffered in consequence of the breach**.*

*(2) The **ET have a wide discretion** to do what is just and equitable in all the circumstances, **but the focus should be on the seriousness of the employer's default**.*

(3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.

*(4) The **deliberateness of the failure may be relevant**, as may the availability to the employer of legal advice about his obligations under s.188.*

(5) How the ET assesses the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate.'

169. In ***Todd*** the EAT found that although there had, *'been a complete failure to observe regs. 13 and 14 according to their terms, this was not a case where no information had been given to the workforce at all'* (Todd para 28). In all the circumstances the EAT found that it was appropriate to reduce the appropriate compensation from the maximum 13 weeks ordered by the employment tribunal to 7 weeks.

170. Underhill P contrasted this situation with that in ***Sweetin***, *'… where the first that the employees knew about the transfer was when the representative of the new owners announced himself at the premises on the day that it took place: in that case unsurprisingly, a maximum award was held to be appropriate'* (Todd para 28).

171. In ***Todd*** Underhill P went on to note that the terms of Regulation 15(9) concerning joint and several liability, *'are unequivocal'* (Todd para 33).

Conclusion

Second claimant's employer

172. As is set out above, the tribunal finds that BA was employed by the third respondent.

What was the relationship between JCB and BC Plant Ltd?

173. The written Agricultural Dealer Agreement dated 18 November 2016 was stated to be between the first respondent, BC Plant JCB Ltd, and JCB Sales Ltd.

174. The claimants were employed by the third respondent, BC Plant Ltd. An essential foundation of their claim is that there was a relationship between BC Plant Ltd and JCB Sales Ltd. They say that it operated on the same terms as the Agricultural Dealer Agreement between JCB and the first respondent.

175. The claimants invite the tribunal to find either: that there was, 'an implied contract between BC Plant Ltd and JCB'; or that BC Plant Ltd was acting as a sub-contractor for the first respondent within the terms of Regulation 3(6) which provides that, 'In this regulation 'contractor' includes a sub-contractor'.

176. The second respondent relies on the fact that the written Agricultural Dealer Agreement records that it was between the first respondent and JCB. Consequently, it is said, the claimants as employees of the third respondent cannot rely on an agreement to which the third respondent was not a party.

177. It is further submitted by the second respondent that:

- It was not pleaded that the Agricultural Dealer Agreement operated between JCB and the third respondent.

- This point was not made in the claimants' witness statements which are supposed to be a complete account of their evidence as to liability and quantum.

- No documentation was presented to the tribunal in support of this position.

- No such scenario was put to the second respondent's witnesses in cross-examination.

178. The tribunal has carefully considered the submissions of the second respondent on this point. Nonetheless the tribunal finds that the course of dealings between the third respondent and JCB Sales Ltd clearly support a finding of a contractual relationship between them.

179. Witness statements are intended to be statements of facts which are within the knowledge of that witness. They are not intended to be a surrogate skeleton argument or evidential/legal analysis of the case generally. The claimants' evidence is what it is. It is a matter for the tribunal to draw such conclusions as appear to it to be appropriate on the basis of all the evidence and information which is presented at the hearing.

180. The first respondent has never been anything other than a company of straw. Described by Mr Chick as a 'shelf company' which never traded, the reality is that the first respondent's role in JCB's business affairs was limited to being named as a party to the Agricultural Dealer Agreement.

181. On an overview of the evidence it is clear that the reality was that the trading relationship was between the third respondent and JCB. This overview includes, but is not limited to, the evidence of Mr Chick and Mr Nixon, together with the invoices bearing the vat and company registration numbers of the third respondent.

182. The business of selling JCB agricultural machinery regularly involved the sale of vehicles worth many tens of thousands of pounds. All of these transactions were

conducted between the third respondent and JCB. All of these transactions ran through the bank account of the third respondent.

183. Mr Nixon of JCB, a witness called by the second respondent, agreed in cross-examination that in real terms the third respondent was carrying out deals on a day to day basis. His interpretation of the facts is that the third respondent was carrying out the duties of the first respondent under the Agricultural Dealer Agreement.

184. The tribunal agrees with Mr Nixon's interpretation. There is absolutely no evidence that the first respondent either did anything to perform the dealer obligations under the Agreement, or had the wherewithal to do so.

185. It is clear from all the evidence that JCB knew that it was dealing with the third respondent. A minor illustration of this is the screenshot from the JCB 'Deal Hunter' App. This is an important tool for sales representatives selling JCB products. The top of the screenshot reads 'Deal Hunter (BC Plant Ltd)'.

186. JCB in its dealings sought to hold the third respondent to the terms of the Agricultural Dealer Agreement and the third respondent regarded itself as bound by the terms of the Agreement.

187. The reality is that JCB was dealing with Mr Chick following a longstanding business relationship with the Chick family. It is clear that the identity of the particular entity through which Mr Chick operated was unimportant to JCB, providing that the relationship was governed by the terms of the Agricultural Dealer Agreement.

188. JCB is a large international business. It is inconceivable that it would have sought to conduct a day to day business relationship with a non-trading company. It did not do so. All the evidence indicates that its ongoing business relationship was with the third respondent. When the Agreement was terminated it was as a result of concerns about the financial conduct of the third respondent. JCB didn't raise a complaint, either then or now through Mr Nixon, about the fact that it was dealing with the third respondent or that the third respondent was discharging the dealer obligations under the Agreement.

189. Ultimately, as addressed later in this decision, the claimants' case turns on whether the relationship between JCB and the third respondent falls within the terms of Regulation 3 rather than any other legal analysis of the nature of their relationship.

190. Nonetheless, the tribunal finds that it is clear from the course of dealing between JCB and the third respondent that both parties understood and intended a contractual relationship to exist between them.

191. Both parties acted on the basis that a contract existed and that the terms were defined by the Agricultural Dealer Agreement.

192. It was BC Plant Ltd which employed the, *'3 full-time and dedicated JCB Agricultural specialists'*, as demanded by JCB in Guy Robinsons' 17 May 2016 letter to Mr Chick as a condition of entering the Agreement. JCB supplied agricultural machinery on the terms of Agreement, and the third respondent in turn promoted and marketed JCB products in accordance with the terms of the Agreement.

193. At the heart of the sale and supply of expensive items of machinery is a financial transaction. Consistent with JCB's understanding that a contractual relationship

existed with the third respondent, not once did JCB query why it was the third respondent which was transacting business with it. JCB never complained to, or contacted, the first respondent to query why it was entirely failing to perform its contractual obligations. The JCB territory manager never refused to deal with the third respondent or to ask why the first respondent was failing to meet its obligations under the Agreement.

194. The claimants' counsel simply states that it is open to the tribunal to find that a contract between JCB and the third respondent arose by implication. Whether the existence of the contract is best analysed as arising by implication, novation or otherwise, the tribunal finds that a contract existed. By their respective conduct it is clear that JCB and the third respondent had a contractual relationship whereby the third respondent acted as JCB's dealer for Donegal and Northern Ireland on identical terms to the Agricultural Dealer Agreement.

195. If the tribunal is wrong to conclude that there was a direct contractual relationship between JCB and the third respondent, the tribunal would find on the basis of the conduct of the parties that the third respondent was acting as sub-contractor for the first respondent. Mr Chick was the common controlling mind behind the first and third respondents. In the event that, by the Agricultural Dealer Agreement, the first respondent was the only Chick controlled company to be in a direct legal relationship with JCB, the tribunal would find that the third respondent's performance of the dealer obligations was as sub-contractor for the first respondent. There is no standard form for a sub-contract of this nature. It may be made orally or in writing. JCB raised no complaint about the third respondent's performance of any dealer obligations. Insofar as JCB may have been entitled to object to the appointment of a sub-contractor and/or the first respondent may have been in breach of contract by its appointment of a sub-contractor in this way, JCB waived its right to object.

Did BC Plant Ltd and JCB Sales Ltd have a client/contractor relationship within the terms of the Regulations?

196. The second respondent submits through counsel's written submissions that:

> *'… there was no client/contractor relationship between JCB and the First and/or Third named Respondent. Applying the rationale for the introduction of the Service Provision regulations and the literal interpretation that must be given to the same, a service agreement or arrangement represents a situation whereby a client enters into agreement with a contractor for the provision of services, in return for payment.*
>
> *The ADA made between JCB Sales Limited and the First Named Respondent is not a service agreement, it does not refer to or imply a client/contractor relationship and it does not specify the payment of any fees in return for the provision of services …'*

197. The second respondent goes on to highlight that:

- *'JCB operates a long established business model to sell its products through an independent dealer network.*
- *'A dealer buys and sells JCB products at its own risk.*

- *'Dealers do not provide any services for JCB nor do JCB pay the dealers for any services'.*

- *'JCB does not run a franchise, it is a pure distribution model'.*

198. The tribunal disagrees with the second respondent's submissions about this issue.

199. In this case the tribunal must apply the terms of Regulation 3 of The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 to the facts which it has found.

200. The circumstances in which a service provision change is established are set out comprehensively in Regulation 3(1)(b) and Regulation 3(3). The tribunal must ask itself whether, on the facts, one of the three situations set out in Regulation 3(1)(b) existed and whether the conditions set out in regulation 3(3) are satisfied. As noted above:

- Elias LJ in ***McCarrick*** was emphatic that, *'… the concept of a change of service provision is not complex and there is no reason to think that the language does not accurately define the range of situations which the draftsman intended to fall within the scope of this purely domestic protection'*.

- Judge Burke QC in ***Metropolitan Resources Ltd*** thought that a purposive construction of the Regulation was unnecessary and he recommended, *'…a straightforward and common sense application of the relevant statutory words in the individual circumstances before [the tribunal]…The statutory words require the tribunal to concentrate upon the relevant activities…A common sense and pragmatic approach is required…The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it'.*

- Simler P in ***Arch Initiatives*** observed. *'The word 'activities' is not defined, and nor is it qualified in any way by words that could have been used to qualify it…There is nothing in the Regulations that expressly requires that the relevant activities should constitute 'all of the activities' carried out by the outgoing contractor. Nor, in my judgment is there any justification for substituting or equating the word 'activities' with the word 'service'. That could have been done, but it was not…this Regulation is framed by reference to 'activities' rather than 'the service''.*

201. Regulation 3(1)(a) introduces the concept of 'client' and 'contractor' in the context of the Regulation. The words are defined simply by reference to one person carrying out 'activities' on behalf of another. There is no greater element of prescription. There are no formalities prescribed for the existence or evidencing of a client/contractor relationship. The only requirement is compliance with Regulation 3.

202. There is no requirement that the client and contractor should either be bound by a 'service agreement' or that the client should enter into an, 'agreement with a contractor for the provision of services, in return for payment'. Neither is it a requirement of a client/contractor relationship that it should, 'specify the payment of any fees in return for the provision of services'. The second respondent submits

that all of the foregoing in quotation marks are features of a client/contractor relationship under the Regulation. They are not.

203. The claimants rely on Regulation 3(1)(b). It states that a service provision change is a situation in which:

> *'… **activities** cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ('a subsequent contractor') on the client's behalf…and in which the conditions set out in paragraph (2) are satisfied'.*

204. The client is JCB Sales Limited. The contractor is the third respondent. The subsequent contractor is the second respondent.

205. A combination of sales and service activity was carried out by the third respondent on behalf of JCB. The activity which is the subject of these claims is the sales and marketing of JCB agricultural machinery within the Donegal and Northern Ireland sales territory. JCB maintained no sales and marketing team based within the sales territory other than that provided by the third respondent. It now maintains no sales and marketing team based within the sales territory other than that provided by the second respondent.

206. It was not the case that JCB simply appointed the third respondent as a dealer and then left the company to get on with buying and selling the products with the benefit of a tariff of commercially profitable margins and/or sales incentives set in advance. The evidence indicates that JCB maintained a high level of control not only over the branding and marketing but also over the profitability of each individual sale. Mr Chick's evidence in this regard was striking. He, *'had no ability to sell a machine without dealer support, unless at a loss or a microscopic margin'*.

207. JCB dictated the number of sales staff to be employed as dedicated JCB specialists. In his letter to Mr Chick dated 17 May 2016, the managing director of JCB Sales Ltd also reserved the right for JCB to be involved in the selection and appointment of the additional sales person which JCB demanded should be appointed as a condition of entering the Agricultural Dealer Agreement.

208. Details of the sales and marketing activities which the third respondent carried out on behalf of JCB, and the activities performed by the claimants, are set out in the findings of fact earlier in this Decision.

209. The claimants were employed exclusively in sales and marketing activity related to JCB agricultural machinery. They were part of an organised grouping of employees which had the principal purpose of selling and marketing JCB agricultural machinery in Donegal and Northern Ireland.

210. Under the terms of the Agricultural Dealer Agreement the third respondent had to employ sales personnel dedicated to JCB agricultural machinery. 'JCB Agricultural Specialists' as such personnel were described in the 17 May 2016 letter to Mr Chick from the managing director of JCB Sales Limited.

211. The tribunal finds that the condition at Regulation 3(2)(a)(i) that immediately before the service provision change, *'there is an organised grouping of employees situated in Northern Ireland which has as its principal purpose the carrying out of the*

activities concerned on behalf of the client', is satisfied. The claimants belonged to that organised grouping.

Are the activities formerly carried out by the third respondent of behalf of JCB now carried out by the second respondent on behalf of JCB?

212. Regulation 3(2)(a)(ii) makes it a condition of a service provision change that immediately before the service provision change, *'the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration'.*

213. The claimants' case is that the activities formerly carried out by the organised grouping of employees of which they were part, are now carried out by the second respondent on behalf of JCB.

214. In determining this issue the tribunal, as noted earlier in this Decision, must:

- Consider whether, *'… there is a sufficient degree of similarity between the activities of the service in the hands of the putative transferee as compared with those in the hands of the transferor before the putative transfer …'* per Simler P in ***Arch Initiatives***.

- *'… ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it'* per HHJ Burke QC in ***Metropolitan Resources Ltd***.

215. The tribunal finds that the condition in Regulation 2(a)(ii) is satisfied. The Agricultural Dealer Agreement between JCB and the second respondent is, in all significant respects, identical to that agreed with BC Plant.

216. At present JCB is not requiring rigorous compliance by the second respondent with the terms of their dealer agreement and an accompanying dealer standards document. The second respondent does not employ sales staff who are allocated only to the sales and marketing of JCB products and it also sells JCB products from premises where it also sells and markets agricultural equipment which is produced by another manufacturer.

217. Nonetheless, the second respondent's activities in sales and marketing are fundamentally the same as those carried out by the third respondent on behalf of JCB within Donegal and Northern Ireland.

218. The terms of the second respondent's agricultural agreement and accompanying dealer agreement effectively reserve to JCB the right to seek to enforce compliance against the second respondent if it wishes to do so. Mr McCloy acknowledged that, *'… it may well be in the future that we comply with things under Agricultural Dealer Agreement that we are not currently complying with'.*

219. Whether or not all of the contractual provisions are in fact enforced by JCB against the second respondent does not alter the fact that there is sufficient similarity between the sales and marketing activity carried out by the second respondent and

that previously carried out by the third respondent to satisfy the requirements of a Regulation 3 service provision change.

Unfair Dismissal

220. In all the circumstances the tribunal finds that the claimants' employment was the subject of a service provision change, whereby their employment transferred to the second respondent under Regulation 4(1).

221. The second respondent's erroneous belief that there had been no service provision change led to it to refuse to accept the claimants as employees on 9 October 2017. In respect of the first claimant this represented a dismissal which was unfair within the terms of Regulation 7(1). In respect of the second claimant this represented a termination of his contract of employment without notice.

Dealership agreements generally

222. The second respondent at paragraph 31 of its written submissions, *'… asserts that it is highly significant, given the widespread use of dealership arrangements and agreements within the European Union, that there is no legal authority to suggest a dealership agreement can result in a service provision change'.*

223. The decision of this tribunal has been made by applying the terms of the Regulation to the particular facts of this case. This decision is highly fact specific.

224. The Regulation does not use the terminology of 'dealership agreement' and the tribunal has not been directed to any standard legal definition as to what, if any, provisions it is universally recognised should be contained within a 'dealership agreement'.

225. In reaching its conclusions as to the legal effect of the facts found, the tribunal has applied the words of the Regulation. The tribunal has been assisted in this task by a number of UK cases where the terms and practical implications of the Regulation have been considered.

Duty to Inform and Consult

226. The claimants seek an award of appropriate compensation under Regulation 15(8) in respect of what they say was a failure to inform and consult.

227. The details concerning the timing of election of SA as an employee representative are not entirely clear. Nonetheless, on the balance of probabilities the tribunal accepts that SA was elected as an employee representative pursuant to the terms of Regulation 14. Minutes of consultation meetings note his attendance as an employee representative and BA raises no objection to the fact or propriety of SA's election as an employee representative.

228. Regulation 13(2)(a)-(d) required the third respondent to notify SA of four matters.

229. Initially there appeared to be some confusion on Mr Chick's part as to what precisely was to happen following the termination of the Agricultural Dealer Agreement. At the 14 September meeting he informed the staff that some may be made redundant and that some may be eligible to transfer to the new contractor. At the 20 September meeting Mr Chick suggested that only those employed as

agricultural sales representatives would transfer. He followed this up with a letter to SA of the same date which referred only to prospective redundancies.

230. At the meeting on 29 September he told SA that the sales team, *'could arguably be in a TUPE situation'* and went on to tell SA that *'if the sales team did not want to transfer they would be seen as resigning'.* On the face it, the message being delivered by Mr Chick at this time was confused.

231. Mr Chick's letter dated 29 September 2017 to the second respondent was unambiguous in its assertion that the sales team's employment would transfer to the second respondent.

232. His letter to SA dated 3 October, just six days before the transfer, purported to provide the information required by Regulation 13(2).

233. Mr Chick's letter dated 5 October 2017 to BA was emphatic that BA, *'On Monday 9 October 2017 you should present yourself for work to Kennedys at the above address'.*

234. An unsatisfactory aspect of the second respondent's compliance with Regulation 13(2) is that when Mr Chick was informed by the second respondent's solicitors that, *'on no account'* should he be advising the sales team to present themselves at the second respondent's premises on 9 October, he failed to convey the strength of this objection to SA as employee representative. Mr Chick's letter to BA dated 6 October did refer to the second respondent *'disputing the transfer'*, but it did not convey the strength of the, 'on no account' emphatic message which the second respondent's solicitors had conveyed about the sales team attending the second respondent's premises.

235. The tribunal is satisfied that the third respondent endeavoured to comply with its Regulation 13(2) obligations. It fell short however in respect of Regulation 13(d) concerning the information about the measures which were to be taken by the second respondent. The third respondent should have conveyed explicitly to SA the emphatic terms of the, *'on no account'*, language used by the second respondent's solicitors in their letter dated 5 October 2017. Even if this had been done, the tribunal takes into account the watering down of the message which occurred when Mr Chick wrote directly to BA, who was one of the affected employees, where he continued to advise BA to attend the second respondent's premises without any reference to the *'on no account'* message.

236. The tribunal has considered the efforts made by the third respondent to comply with Regulation 13(2) and the seriousness of its failure to comply with its duty under the Regulation. Regulation 16(3) defines the maximum 'appropriate compensation' as thirteen weeks pay. This is what the claimants' seek.

237. The tribunal bears in mind that the purpose of the award is to provide a sanction for breach of the Regulation by the employer and not to compensate the employees for loss which they have suffered in consequence of the breach. The tribunal has focussed on the seriousness of the third respondent's default and considered the deliberateness of the default. In all the circumstances, the tribunal assesses the appropriate level of compensation as 6 weeks' pay.

238. The second respondent is jointly and severally liable pursuant to Regulation 13(9).

Remedy

239. In respect of the breach of Regulation 13(2) the tribunal makes the following award:

First Claimant

Weeks' pay = £748.92 x 6 = £4493.52

Second Claimant

Weeks' pay = £598.88 x 6 = £3593.28

240. The second claimant had been employed for more than one month but less than 2 years. He did not receive the one weeks' notice to which he was entitled under article 118 of the Employment Rights (Northern Ireland) Order 1996 ['the ERO']. Consequently the tribunal allows his claim against the second respondent for one weeks' notice pay which is £598.88.

241. The first claimant was unfairly dismissed by the second respondent. The tribunal has considered the schedule of loss attached to the first claimant's witness statement. The relevant remedies for unfair dismissal are set out in articles 152 to 157 of the ERO. Article 157 states as follows:

> *"(1) … the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*
>
> *(2) The loss referred to in paragraph (1) shall be taken to include:-*
>
> *(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
>
> *(b) subject to paragraph (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal."*

242. The first claimant had 7 full years of service with the third respondent. He was 55 years old at the effective date of termination which was the 9 October 2017. Consequently an age multiplier of 1.5 weeks' pay applies under article 153(2) of the ERO. The first claimant's basic gross weekly wage was £461.54. (£24,000 gross p.a.). The tribunal makes a basic award of £4,846.17.

243. The tribunal awards £500 in respect of the first claimant's loss of statutory rights.

244. The first claimant was dismissed without notice and seeks loss of earnings (including 7 weeks' notice pay) from the effective date of termination (9 October 2017) until the date of the hearing (8 May 2019). It is a total of 82 weeks. The first claimant also seeks future loss of earnings post-hearing for a period of 52 weeks. In all, the first claimant seeks to be compensated for loss of earnings for 134 weeks post-termination. This is a period of more than 2½ years.

245. Following his unfair dismissal the first claimant had a duty to mitigate his loss. He has made a total of 3 job applications since his dismissal. His last job application

was made on 22 January 2018 and it led to his current employment which he began on 1 March 2018.

246. The first claimant earns less in his current employment than he did with the third respondent and he seeks compensation for that. Despite his lower earnings in his current employment he has not made any further job applications since 22 January 2018. In his witness statement he has not explained this omission to any substantial extent. The first claimant impressed the tribunal as a man who is loyal to his employer. This is a creditable quality. The tribunal must however consider whether he has adequately mitigated his loss. The second respondent says that he has not and the tribunal agrees.

247. The first claimant has made a conscious choice not to seek other, better paid jobs than his current employment. In the 14 months between commencing his current employment and the hearing of this claim, he has made no job applications. It does not appear that he proposes to do so in the foreseeable future. No substantial evidence was given by SA of any feature of the job market to explain this failure to make any further job applications. In the circumstances the tribunal finds that he has not adequately mitigated his loss which he should have endeavoured to do by at least actively exploring whether better paid employment might be available to him in the job market.

248. The tribunal calculates the loss of earnings claim on the basis of 64 weeks which represents the period from 9 October 2017 until 31 December 2018. This equates to:-

9 October 2017 – 28 February 2018 = 20.5 weeks @ £602.96 = £12,360.68

1 March 2018 – 31 December 2018 = 43.5 weeks @ £602.96 = £26,228.76 then deduct earnings received of £17,725.01 = £8,503.75

The total loss of earnings awarded by the tribunal is therefore £20,864.

249. The first claimant also seeks payments on his schedule of loss in respect of loss of car benefits, loss of mobile phone and iPad, loss of lunch allowance, loss of pension, and loss of annual bonus. None of these items were addressed substantively in his witness statement and the evidence which has been adduced is inadequate for the tribunal to make awards in respect of any of these claims.

250. The tribunal's total award in respect of the first claimant's unfair dismissal is £26,210.17.

251. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 8, 9, 10 May 2019, Belfast.

Date decision recorded in register and issued to parties: