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Joint Employers and Agency Workers

A Comparative Report Prepared for the Independent Workers'
Union of Great Britain

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
--------------------------	----------

JURISDICTIONAL REVIEWS

UNITED STATES	XX
----------------------	-----------

CANADA	XX
---------------	-----------

SOUTH AFRICA	XX
---------------------	-----------

NEW ZEALAND	XX
--------------------	-----------

IRELAND	XX
----------------	-----------

THE LEGAL POSITION IN ENGLAND AND WALES

THE ENGLISH LAW OF TORT	XX
--------------------------------	-----------

EUROPEAN UNION LAW	XX
---------------------------	-----------

THE EUROPEAN CONVENTION	XX
--------------------------------	-----------

EXECUTIVE SUMMARY

I. Introduction

1. OPBP has been asked by the Independent Workers Union of Great Britain (IWGB) to prepare a comparative report on the concept of joint employment. The request for this report arises from litigation which is currently pending before the Central Arbitration Committee against the University of London (UoL), in which the IWGB seeks statutory recognition of its right to collectively bargain with UoL on behalf of a group of receptionists, security officers, and porters.
2. Difficulties arise because the group in question are not employed by the University. They are instead employed by a facilities management company called Cordant Security. The University contracts with Cordant Security for the provision of their labour. Statutory recognition of IWGB's claim will only be possible if, for the purposes of statutory recognition, UoL are employers of the group. The UoL argues that the employer with whom IWGB should negotiate is Cordant Security, and not the UoL.
3. The IWGB are keen to argue that English law ought to recognise that, in certain situations such as this, an employee may be employed by two employers simultaneously, in relation to the same work: in other words, that English law ought to recognise the possibility of **joint employers**. In light of this, OPBP has undertaken a comparative review of relevant jurisdictions, in order to ascertain whether and how the concept of joint employment is recognised in those jurisdictions. We have also reviewed the legal position in England outside of English employment law in areas which might provide precedent for the recognition of a more flexible concept of the employer, by considering the law of the European Union, the European Convention on Human Rights, and English tort law.

II. The Research Questions

4. OPBP has undertaken research to establish the legal position in jurisdictions around the world. Our research breaks down the issue of joint employers in each jurisdiction into employment law and tort law. These are not intended to be exhaustive or even mutually exclusive categories, but rather, useful paradigms under which to review different ways in which two employer-like

entities can simultaneously bear duties. Specific policy questions might differ, yet the legal reasoning might in some instances be transferable. The questions are as follows.

- (1) Does employment law in your jurisdiction recognise the existence of joint employers?
If so:
 - a. Under what conditions will two or more legal persons be employers of the same person in relation to the same work?
 - b. How is liability divided between the two employers?
- (2) Under what circumstances will a duty of care be owed in tort to those who are for practical purposes working for legal person X, but do not do so pursuant to a contract of employment? How is liability divided between the two employers?

5. The following jurisdictions are considered in this report. They were selected after preliminary scoping research suggested that they might yield useful answers about the legal approaches adopted to joint employment.

- (1) The United States;
- (2) Canada;
- (3) South Africa;
- (4) New Zealand;
- (5) Ireland;
- (6) England (tort law, EU law, and the ECHR).

III. Summary Conclusions: Jurisdictional Reviews

(1) Does employment law in your jurisdiction recognise the existence of joint employers?

6. Joint employment is a recognised concept in the US, Canada and New Zealand. In Ireland, the matter is a little more complicated: there is no general recognition of joint employment outside of very special constitutional situations, which do not seem to have broader application to private relationships.
7. In the US, in relation to most federal employment statutes, an additional doctrine of ‘single’ or ‘integrated’ employer exists. This covers factual situations where, even though two entities are

legally distinct, their operations are so interrelated that they are, for all intents and purposes, one employer. Four relevant but non-exhaustive factors relevant to this analysis are: (1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labour relations. There is some uncertainty about whether this is the right test for every federal employment law statute.

a. If so, under what conditions will two or more legal persons be employers of the same person in relation to the same work?

8. Across the jurisdictions reviewed, where joint employers are recognised, there are a number of similar tests, which take into account, to a greater or lesser extent, the relationship between the putative joint employers and the control exercised over the employee. It is interesting to note that a common starting point is with the definition of employee as compared to an independent contractor – which explains the importation of the economic dependency test. There are arguments, put forward by the US Court of Appeals for the Fourth Circuit,¹ that the use of employee-centred tests of this nature are less useful in the context of joint employment than they are in the context of distinguishing a contractor from an employee within a single contractual relationship.
9. In the US, the test for joint employment varies depending on which statute is under consideration, and even within the context of individual statutes, there are discrepancies amongst the approaches of the Circuit Courts. Some tests focus on the relationship between the two putative joint employers, and others on the relationship between the worker and each of the employers. Within that second category there is then a spectrum of tests, with some focussing on control, some on economic dependency, and some a hybrid of the two. The National Labour Relations Board has recently propagated a wide version of the test under the National Labour Relations Act, which requires substantial control over the operations of the admitted employer by the alleged joint employer, but allows for that control to be ‘indirect.’ This standard is currently under appeal. The question is whether control is shared, and essential aspects of employment co-determined. Under the new standard, it is not necessary for the employer to actually exercise a reserved power in relation to the employees. Under the Fair Labour Standards Act (FLSA), a division is drawn between horizontal and vertical joint employment: it is the latter which of interest in the IWGB’s litigation. The touchstone of the

¹ *Salinas v Commercial Interiors* 2017 WL 360542 (4th Cir. Jan. 25, 2017)

analysis under the FLSA is economic dependency on the part of the worker, and this seems to be upheld by most Circuit Courts. The Third Circuit puts a gloss on the test adopted by most other courts as being tests which focus on control, and the Fourth Circuit favours a test which focusses far more on the relationship between the two putative joint employers. Under Title VII of the Civil Rights Act, the Circuit Courts sit on a spectrum between an ‘economic realities’ test, which is generous, and an agency-based control test, which is more restrictive. Under the Occupational Safety and Health Act, a complex system of division of responsibilities between different employers operating in the same workplace exists.

10. This spectrum is reflected in the approaches of other jurisdictions, which sit somewhere along it. In Canada, common employment arises where there is a sufficient degree of relationship between the two alleged joint employers, the essence of which is common control over the worker. A similar approach is adopted in New Zealand. There is a difference of emphasis between Canada and the US here, with Canadian law giving emphasis (akin to the *Salinas* position) to the relationship between the employers. This is reflective of the integrated employer doctrine in the US. However, in the context of agency outsourcing, rather than adopting this approach, the Canadian courts have held that the single employer is the user, and not the agency.
11. In South Africa, the test is again one of control over the worker. Courts will look past strict contractual arrangements, and consider who has the right of supervision and direction over the worker. In recent years, in the context of joint employers, the control test has been supplemented by the dominant impression test, which requires the realities of the relationship beyond control to be considered: a test which perhaps has resonance with the US economic realities test.

b. How is liability divided between the two employers?

12. In the US, Canada and New Zealand, liability is divided jointly and severally. On the basis of OPBP’s research, we could find no clear answer in South Africa, but joint and several liability seems to be a possibility.

(2) Under what circumstances will a duty of care be owed in tort to those who are for practical purposes working for legal person X, but do not do so pursuant to a contract of employment? How is liability divided between the two employers?

13. In the US, systems of workers' compensation and statutory administrative monitoring have limited the role of tort in workplace safety cases. However, a general duty on employers to provide a safe workplace does exist in tort, and it extends to those invited into the workplace, such as agency workers and independent contractors. In New Zealand, there also exists a statutory social insurance scheme, but criminal penalties exist for violations of workplace safety rules, and those penalties can be imposed jointly on joint employers.
14. In South Africa, delictual duties can circumvent privity of contract in contractual chains, where it is necessary to do so. In the employment context, this means that a delictual duty of care can exist even where no contract of employment does.
15. The concept of vicarious liability in tort is also instructive. Clearly, the purposes of vicarious liability law, tort law more generally, and employment law are not exactly the same. The possibility for tests arising from tort to inform joint employment tests is one which would require careful consideration of the underlying rationales for these two different branches of law in the jurisdictions surveyed, and consideration of whether there is sufficient alignment between those rationales to make analogous development of the standard possible. In the US cases reviewed, the vicarious liability cases rarely consider employment law tests from federal or state statutes: the branches of law do not seem to have informed each other to any great extent.
16. In any event, employers are, under certain conditions, responsible for the torts of their employees, and, the situation in England, discussed below, can be compared with the situation in the US: both recognise the possibility of joint 'employers' being simultaneously vicariously liable. In the US, vicarious liability exists for employees and not, usually, for independent contractors. However, under the borrowed servant doctrine, a company may be liable for workers sent by an employer to work under the company's direction, on facts analogous to the case at hand. In addition, on some occasions, courts have recognised that there can be jointly liable employers who are both simultaneously vicariously liable for the torts of a worker. This liability is joint and several. Courts have gone as far as to recognise that there can be a duty in tort to control a wholly separate organisation and prevent its tortious conduct, arising from the control which is exercised over that organisation. In Canada, this approach has led to a finding

that a company could be liable for a failure to control the human rights abuses of its subsidiaries.

17. We have not given consideration to contribution and indemnity proceedings between employers.

IV. Summary Conclusions: Analogous English Law

(1) Tort Law

18. There are three situations in which English tort law imposes employer-like duties in situations akin to joint employment. The first is where duties are owed by a parent company for the conduct of their subsidiary in relation to health and safety, where among other things the parent exercised control over the business of the subsidiary.² This is akin to the US jurisprudence on organisations being responsible for each other (although, unlike the US case discussed, this context concerns limited liability businesses). In such a case, liability is transferred to the parent entirely: there is no apportionment. As such cases tend to arise from the bankruptcy of the most likely defendant, this is perhaps not surprising.
19. The second situation is vicarious liability, as recognised by the Court of Appeal in *Viasystems*.³ The Court of Appeal was divided on the test to be used to determine joint vicarious liability. May LJ adopted an approach which asked who was in control of the worker; Rix LJ preferred to focus on structural and practical considerations in answering the question. Both approaches have echoes in the US law on vicarious liability. In such cases, courts must determine just and equitable contribution between the parties, and are highly likely to divide liability equally.
20. The third is where a contractor owes a duty of care to employees of a subcontractor, although such duties have only been recognised in occupier cases: there are strong parallels between this approach and the US approach to the duty to provide a safe working environment. As no case has affirmatively identified such a duty, the question of contribution and division of liability has not arisen.

² *Chandler v Cape* [2012] EWCA Civ 525

³ *Viasystems (Tyneside) Ltd v Thermal Transfer Northern* [2005] EWCA Civ 1151

(2) European Union Law

21. European Union law is binding on and directly applicable in the United Kingdom. There is, however, no jurisprudence directly considering the question of whether joint employers can exist under EU law. The Court of Justice of the European Union has recognised that an employment relationship might exist independently of a contract of employment, but the applicability of such a doctrine is open to debate: the CJEU has also held (in the context of collective consultation rights) that even if an undertaking controls employers of workers, it is not itself an employer of those workers.⁴

(3) The European Convention on Human Rights

22. There is no judgment of the European Court of Human Right that explicitly recognises the concept of joint employer. Two recent cases suggest tentative moves in that direction,⁵ but as the European Court of Human Rights hears only complaints against states, the question of whether the recognition of joint employment relationships is required by the Convention has come up only incidentally.

⁴ Case C-242/09 *Albron Catering BV v. FNV Bondgenoten and John Roest* [2010] ECR I-000

⁵ *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* App no 31045/10 (ECtHR, 8 April 2014); *Fernández Martínez v. Spain* App no 56030/07 (ECtHR, 12 June 2014).

THE UNITED STATES

I. Does employment law in your jurisdiction recognise the existence of joint employers? If so:

a. Under what conditions will two or more legal persons be employers of the same person in relation to the same work?

23. Federal labour law in the United States is spread over a number of statutes: the National Labour Relations Act (NLRA), the Family and Medical Leave Act (FMLA), the Fair Labour Standards Act (FLSA), the Migrant and Seasonal Worker Protection Act (MSWPA), the Occupational Safety and Health Act (OSHA) and Title VII of the Civil Rights Act. Federal law does recognise the possibility of joint employers, although the test varies depending on the statute under consideration.

Single/Integrated Employers

24. Before discussion of joint employers can commence, it is necessary to briefly comment upon the single employer doctrine. Under this doctrine, two nominally distinct legal entities can be taken to be one integrated employer (rather than two employers jointly employing a worker). This doctrine was recently considered in the context of the NLRA by the US Court of Appeals for the Fifth Circuit in *Alcoa v NLRB*, which was an appeal by Alcoa against a determination by the National Labor Relations Board (NLRB) that it and its subsidiary were one single employer. In *Alcoa* the Court reminded itself of the single employer doctrine in the following terms:

Alcoa first argues that the Board incorrectly determined that it and TRACO constitute a single employer within the meaning of the Act. "[I]n determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise." *S. Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, [425 U.S. 800](#), 802 n.3, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) (quoting *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile Inc.*, [380 U.S. 255](#), 256, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965) (per curiam)). To determine whether several entities are a single employer within the meaning of the Act, the Board looks to four factors: (1) common ownership; (2) interrelation of operations; (3) common management; and (4) centralized control of labor relations. *Radio & Television Broad.*, 380 U.S. at 256, 85 S.Ct. 876; *NLRB v. DMR Corp.*, [699 F.2d 788](#), 790-91 (5th Cir. 1983). "However, no one of these factors is controlling, nor need all criteria be present. Single employer status ultimately depends on 'all the circumstances of the case' and is characterized as an absence of an 'arm's length relationship found among unintegrated companies.'" *DMR*, 699 F.2d at 791 (quoting *Local 627, Int'l Union of Operating Eng'rs v.*

NLRB, [518 F.2d 1040](#), 1045-46 (D.C. Cir. 1975), *aff'd in part on this issue, rev'd in part sub nom. S. Prairie Constr.*, [425 U.S. 800](#), 96 S.Ct. 1842, 48 L.Ed.2d 382). But, "the factors of common control over labor relations, common management, and interrelation of operations are more critical than the factor of common ownership" and "centralized control of labor relations is of particular importance." *Oaktree Capital Mgmt., L.P. v. NLRB*, 452 Fed.Appx. 433, 438 (5th Cir. 2011) (per curiam) (quoting *Covanta Energy Corp.*, 356 N.L.R.B. 706, 726 (2011)).⁶

25. The FMLA also adopts this approach, when it comes to the question of determining how many employees a company has.⁷ A private employer is covered by the FMLA if they have over 50 employees, among other conditions, and so much litigation has turned on exactly how many employees an employer has.⁸

26. The Equal Employment Opportunity Commission (EEOC) endorses the adoption of this approach for Title VII claims,⁹ but it has been rejected by the US Court of Appeals for the Seventh Circuit in *Papa v. Katy Indus., Inc.*¹⁰ In that case, the Court was dealing with a claim that, in effect, a business which fell within an exemption from the anti-discrimination provisions of Title VII was a single integrated employer with its larger parent company. The Court was not impressed with the four-part test:

There is enough uncertainty about the standard to warrant a fresh look. This is especially appropriate because of the vagueness of three of the four factors (all but "common ownership" and it, as we shall see, is useless); because, being unweighted, the four factors do not yield a decision when, as in the two cases before us, they point in opposite directions; and because the test was not custom-designed for answering exemption questions under the antidiscrimination laws, but instead was copied verbatim from the test used by the National Labor Relations Board to resolve issues of affiliate liability under the laws administered by the Board.

27. The Court considered what the purposes of exempting small businesses from Title VII was:

The place to start in rethinking the proper standard is with the purpose, so far as it can be discerned, of exempting tiny employers from the antidiscrimination laws. The purpose is not to encourage or condone discrimination; and Congress must realize that

⁶ 849 F.3d 250 (2017) at 255-6

⁷ 29 C.F.R. § 825.104

⁸ 29 U.S.C. § 2611(4)(A)(i) and 29 C.F.R. § 825.104

⁹ <https://www.eeoc.gov/policy/docs/threshold.html#2-III-B-1-a-iii>

¹⁰ 166 F.3d 937, 940-42 (7th Cir. 1999).

the cumulative effect of discrimination by many small firms could be substantial. The purpose is to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail. See *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir.1995) (reviewing legislative history); *Miller v. Maxwell's International Inc.*, 991 F.2d 583, 587 (9th Cir.1993). This purpose or policy is unaffected by whether the tiny firm is owned by a rich person or a poor one, or by individuals or another corporation. If a firm is too small to be able economically to cope with the antidiscrimination laws, the owner will not keep it afloat merely because he is rich; rich people aren't famous for wanting to throw good money after bad. So an approach actually hinted at in the EEOC's brief of treating any affiliated group of corporations as a single employer of all the employees of all the corporations in the group would lead as rapidly to the destruction of tiny firms as the approach obviously rejected by Congress of applying the antidiscrimination laws to every employer, no matter how few employees he has.

28. On that basis, the Court held that, in the context of Title VII claims, the integrated employer analysis would apply in three situations. The first is where the traditional doctrine of piercing the corporate veil would apply. The second is where an enterprise deliberately splits itself up into a number of component units in order to avoid anti-discrimination law. The third is where the parent company directs or induces the breach of anti-discrimination law.

29. In the context of the FLSA, the question of integrated employment has arisen because that statute applies only where a certain revenue threshold is met. In *Chao v A-One Medical Services*, the issue arose whether a parent and a subsidiary were to be considered a single integrated employer for the purposes of calculating the whether the revenue threshold is met. The Court held that:

[I]f A-One and Alternative constitute for purposes of the FLSA a single "enterprise," it is irrelevant whether Alternative alone satisfied the revenue requirement. Instead, the proper inquiry would be whether the single enterprise comprised of A-One and Alternative satisfied the requirement. "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." 29 U.S.C. § 203(r)(1). If these three elements—related activities, unified operation or common control and common business purpose—are present, different organizational units are grouped together for the purpose of determining FLSA coverage. *Id.*; *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 518, 93 S.Ct. 1138, 35 L.Ed.2d 463 (1973). Despite the Appellants' argument to the contrary, there is no material factual dispute as to any of these elements, and the district court's conclusion that A-One and Alternative constituted a single enterprise for the purpose of coverage under § 207 was correct. We consider the three elements in order.

The activities of two companies are "related" if they are "the same or similar." *Arnheim & Neely*, 410 U.S. at 518, 93 S.Ct. 1138 (quoting S.Rep. No. 145, at 41 (1961)). The district court held that the fact that both A-One and Alternative provide home health services "is more than sufficient to establish that the two companies' activities are `related.'" District Ct. Order at 6 (citing *Brennan v. Plaza Shoe Store, Inc.*, [522 F.2d 843](#), 848 (8th Cir.1975), which held that a shoe store and a dress store engaged in related activities because they both sold "articles of wearing apparel ... to the general public entering the premises which housed both stores"). The Appellants in their reply brief assert that A-One only provided "private duty home health services" while Alternative and A-One's sister corporation, A-One Home Health, provided Medicare services. Even if, however, we accept the Appellants' assertion that A-One and Alternative were servicing different types of patients, under different levels of care and eligibility requirements, the fact that they were both providing home health services is sufficient for our conclusion that the two companies were clearly engaged in "related activities." *See also Brock v. Hamad*, [867 F.2d 804](#), 806 (4th Cir.1989) (holding that management of single family homes and management of an apartment building were related activities under the FLSA).

"`Common' control ... exists where the performance of the described activities [is] controlled by one person or by a number of persons, corporations, or other organizational units acting together." 29 C.F.R. § 779.221. "[C]ontrol' ... includes the power to direct, restrict, regulate, govern, or administer the performance of the activities." *Id.* The district court held that A-One and Alternative were under common control because both were controlled by Black. The Appellants argue that "although Ms. Black did oversee the clinical operations of Alternative, the owner of Alternative, Hanahn Korman, had the ultimate authority over financial operations of the company." Appellants' Br. at 13-14. The Appellants' argument relies on a definition of "control" based on formal corporate structure rather than practical operation. "We must look beyond formalistic corporate separation to the actual or pragmatic operation and control, whether unified or, instead, separate as to each unit." *Donovan v. Grim Hotel Co.*, [747 F.2d 966](#), 970 (5th Cir.1984). Despite Korman's formal corporate authority, there is no doubt here, from the deposition testimony of Black and Korman, that Black had effectively undisputed control over Alternative's operations. Indeed, by the time of Black's deposition, she had assumed all financial responsibility for, and claimed the benefits and burdens of, the profits and losses of Alternative. A-One and Alternative were clearly under common control.⁴

"Common business purpose" is perhaps the most opaque part of the three-part test. The district court held that "[i]t is clear that Black managed the two companies for a common business purpose: to service home health patients, who were clients of either company, utilizing the same pool of nurses, the same scheduler, and the same phone service." We agree with the Eighth Circuit that a common business purpose is generally found where there are related activities and common control. *See Plaza Shoe Store*, 522 F.2d at 848 (citing with approval a Wage-Hour Administrator's opinion that courts have considered the satisfaction of the first two elements to suggest the satisfaction of the third, and collecting cases). With undisputed evidence that the activities of A-One and Alternative

were related and that A-One and Alternative were under common control, there is no reason to doubt that A-One and Alternative shared a common business purpose.

Because A-One and Alternative performed related activities under common control for a common business purpose, the district court properly identified A-One and Alternative as a single enterprise for purposes of the FLSA's jurisdictional requirement. Since A-One by itself meets the revenue requirement for FLSA enterprise coverage, the single enterprise comprised of A-One and Alternative also satisfies the requirement.¹¹

30. It is only if the two entities are not one single integrated employer that the question of whether they might be joint employers arises. The single/integrated employer issue tends to arise because of threshold applicability requirements in statutes – it is strictly speaking a different question to who is liable, which is the question answered by the joint employer analysis.¹²

Joint Employers

The National Labour Relations Act

31. The NLRA guarantees the right of workers to collectively organise and bargain. It is enforced by the National Labour Relations Board (NLRB).
32. For most of the past 30 years, the NLRB required the party advocating for joint-employer status to provide evidence of the following: (1) that the alleged employer had direct and immediate control over the workforce, (2) that the alleged employer exercised that control in practice, and (3) that the employer's exercise of that control was/is substantial and not "limited and routine."¹³
33. This test has recently been expanded by the NLRB in *NLRB v. Browning-Ferris Industries (BFI)*.¹⁴ In *BFI*, the Board had to decide whether to adopt a broader understanding of the notion of joint employer, in order to meet the realities of the modern workplace. The facts were as follows. Since 2009, BFI had used a temporary staffing agency, Leadpoint Business Services (or Leadpoint for short) to provide up to 240 employees. The BFI plant consisted of these 240

¹¹ 346 F.3d 908 (9th Cir. 2003), [12]-[16]

¹² *Patel v. Wargo*, 803 F.2d 632, 637 (11th Cir.1986)

¹³ *TLL, Inc.*, 271 NLRB 798 (1984), and *Laervo Transportation*, 269 NLRB 324 (1984)

¹⁴ 691 F.2d 1117, 1122 (3d Cir. 1982)

additional workers in addition to 60 of BFI's own employees; however, both groups of workers did different tasks in slightly different areas.

34. In June 2013, Sanitary Truck Drivers & Helpers, Teamsters Local 350 filed a petition with Region 32 of the NLRB in Oakland, California, seeking to represent a unit of all sorters, housekeepers, and screen cleaners at the BFI facility. At the NLRB's pre-election hearing, the major issue was whether or not Leadpoint was the "sole employer" of the 240 employees. The union claimed that the 240 employees were "joint employees". However, within the BFI-Leadpoint agreement, Leadpoint was expressly stated to be the "sole employer"¹⁵ of the people concerned, stating in plain language that "nothing in this agreement shall be construed as creating an employment relationship (between Leadpoint employed workers and BFI)". In reality, while Leadpoint held sole discretion over the power to hire, fire, review and discipline workers, BFI could, even within the contract, decide to reject or discontinue the use of personnel. In other words, BFI could not terminate a worker's employment *with* Leadpoint, but could in practice affect Leadpoint's continued need for labour. Further, while the wages of the 240 people were controlled solely by Leadpoint, Leadpoint still had to seek BFI's consent when adjusting wages, especially if it were seeking to adjust wages *above* the standard set with BFI's own directly employed workers. Other than that, both BFI and Leadpoint had their own completely separate wage systems, recruitment and interviewing processes, human resource departments and physical offices. During the hearing, BFI supervisors testified that they never issued direct orders towards Leadpoint employees, nor did they interfere with their tasks, however BFI did set production standards and general expectations which Leadpoint followed closely when setting production goals and scheduling shifts.

35. In its reasoning, the Board departed from its earlier case law as to what amounted to joint employment, holding that the previous standard had been too restrictive. The Board held that:

The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the

¹⁵ Decision & Direction of Election at 1–2, BFI, No. 32-RC-109684 (N.L.R.B. Aug. 16, 2013), <http://apps.nlr.gov/link/document.aspx/09031d45813ac6d0>.

various ways in which joint employers may “share” control over terms and conditions of employment or “codetermine” them, as the Board and the courts have done in the past. We adhere to the Board’s inclusive approach in defining “essential terms and conditions of employment.” The Board’s current joint-employer standard refers to “matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction” a non-exhaustive list of bargaining subjects. Essential terms indisputably include wages and hours, as reflected in the Act itself. Other examples of control over mandatory terms and conditions of employment found probative by the Board include dictating the number of workers to be supplied; controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance. This approach has generally been endorsed by the Federal courts of appeals. Also consistent with the Board’s traditional approach, we reaffirm that the common-law concept of control informs the Board’s joint-employer standard. But we will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a “limited and routine” manner. Accordingly, we overrule *Laerco*, *TLI*, *A&M Property*, and *Airborne Express*, *supra*, and other Board decisions, to the extent that they are inconsistent with our decision today. The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect. The existence, extent, and object of a putative joint employer’s control, of course, all may present material issues. For example, it is certainly possible that in a particular case, a putative joint employer’s control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining. Moreover, as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.

36. The Board dealt with the issue of rights to control workers which have been specifically reserved in the following way:

Where a user employer reserves a contractual right (emphasis added) to set a specific term or condition of employment for a supplier employer’s workers, it retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences. Even where it appears that the user, in practice, has ceded administration of a term to the supplier, the user can still compel the supplier to conform to its expectations. In such a case, a supplier’s apparently independent control over hiring, discipline, and work direction is actually exercised subject to the user’s control. If the supplier does not exercise its discretion in conformance with the user’s requirements, the user may at any time exercise its contractual right and intervene. Where a user has reserved authority, we assume that it has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice.

37. On this basis, the Board found that BFI was a joint employer with Leadpoint. Two members of the Board dissented on the basis that the new standard was too uncertain and disapproved of the indirect control standard as lacking in sensible boundaries. The majority defended their decision on the basis that diversity and workplace circumstances had changed enormously in the last 30 years; that there was a stronger need to create a better and clearer analytical structure when determining joint employment; and to acknowledge the deep relationships within firms that exist when determining employment structures (and the fact that these are often not visible within contracts alone).¹⁶
38. The standard used in *BFI* was also confirmed in *Green JobWorks LLC*, but in that case the board required the union to show specific, and not simply anecdotal, evidence of a joint relationship. Insufficient evidence consisted of the union producing text messages and witness accounts of supervisors in the primary employer directing employees of the secondary. However, the board acknowledged the difficulty that a union might face in trying to obtain documented evidence of a joint relationship before the proceedings of a legal hearing.¹⁷ The standard was also applied in *NLRB v CNN*, reversed on appeal because the case applied the new standard without discussing conflicting previous precedent.¹⁸
39. *BFI* is currently on appeal. Oral argument was heard on March 9th 2017.¹⁹

The Fair Labour Standards Act and Migrant and Seasonal Worker Protection Act

40. The FLSA has a broad definition of employment. It defines as an employee any individual employed by an employer,²⁰ and “employer” as including any person acting directly or indirectly in the interest of an employer in relation to an employee. The FLSA’s definition of “employ” “includes to suffer or permit to work²¹.” The “suffer or permit” test is “the broadest definition that has ever been included in any one act”.²² The FLSA regulations explicitly state that a single

¹⁶ BFI, 362 N.L.R.B. No. 186, slip. op at 2 (Aug. 27, 2015).

¹⁷ Decision & Direction of Election, *Green JobWorks, LLC*, No. 5-RC-154596 (N.L.R.B. Oct. 21, 2015), <http://apps.nlr.gov/link/document.aspx/09031d4581d84cf6>

¹⁸ *NLRB v. CNN Am., Inc.*, 2017 WL 3318834, at *3-5 (D.C. Cir. Aug. 4, 2017).

¹⁹ <https://cei.org/blog/takeaways-browning-ferris-joint-employer-hearing>

²⁰ U.S.C. 203(e)(1)

²¹ U.S.C. 203(g)

²² *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting statement of Sen. Hugo Black, 81 Cong. Rec. 7657 (1938))

worker may be an employee to two or more employers at the same time. (“The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act²³.”), and the Supreme Court has confirmed this.²⁴ The MSWPA and FLSA share the same definition of employment.

41. Joint employment is likely to exist under the FLSA or the MSWPA where: 1) the employee has two (or more) technically separate but related or associated employers, or 2) one employer provides labour to another employer and the workers are economically dependent on both employers²⁵. The first situation is referred to as horizontal employment. The second situation is referred to as vertical employment.

Horizontal Employment

42. *Horizontal employment* cases will generally feature an employee who is employed by two employers to do different tasks at different times. In such cases, the focus is on the relationship between the two employers, as, for example, where separate restaurants employ the same staff and share economic ties and management.²⁶ An FLSA Regulation sets out guidance on when the situation will be one of horizontal employment. The analysis is a context-sensitive one. The regulation provides that:

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

- (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
- (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
- (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

²³ C.F.R. 791.2(a); see also *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998)

²⁴ *Falk v Brennan* 414 U.S. 190

²⁵ Department of Labor Wage and Hour Division Report, Jan 2016

²⁶ *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 917-18 (9th Cir. 2003)

43. The focus is therefore clearly on the relationship between the employers. The Ninth Circuit has held that it is primarily the guidance, and not the *Torres-Lopez* 8-stage economic realities test (discussed below) which should guide the resolution of issues of horizontal joint employment.²⁷

Vertical Employment

44. It is vertical joint employment which is most likely to be relevant to the subcontracting context. There are two questions which must be addressed. The first is a preliminary question – namely whether the subcontractor is in fact themselves an employee. If they are, then all those that they employ will also be employees, and there will be no need to undertake the vertical employment analysis.²⁸ The second question is then whether there is in fact a vertical joint employment relationship.
45. An MSPA Regulation sets out guidance on when a joint employment relationship will be found to exist. The touchstone of this analysis is economic dependency.²⁹ The guidance sets out a non-exhaustive list of relevant factors:
- (A) Whether the agricultural employer/association has the power, either alone or through control of the farm labor contractor to direct, control, or supervise the worker(s) or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties);
 - (B) Whether the agricultural employer/association has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker(s);
 - (C) The degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue;
 - (D) The extent to which the services rendered by the worker(s) are repetitive, rote tasks requiring skills which are acquired with relatively little training;
 - (E) Whether the activities performed by the worker(s) are an integral part of the overall business operation of the agricultural employer/association;

²⁷ *Ibid.*, [21]

²⁸ Administrator's Interpretation No. 2016-1, US Wage and Hour Division, 9-10 [now repealed, but this does not change the legal responsibilities of employers: <https://www.dol.gov/newsroom/releases/opa/opa20170607>]

²⁹ 29 CFR 500.20(h)(5)

(F) Whether the work is performed on the agricultural employer/association's premises, rather than on premises owned or controlled by another business entity; and

(G) Whether the agricultural employer/association undertakes responsibilities in relation to the worker(s) which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).

46. Looking at the economic realities therefore includes looking at controlling employment conditions, the nature of the relationship, the type of supervision, the nature of the work (of note is that repetitive, unskilled and rote work often indicates a direct relationship and dependency on the potential joint employer), whether the work is integral to the business, if the work is done on premises and the degree to which work is intertwined (doing the same functions and using the same equipment).
47. There is divergence between the circuit courts as to the exact test to apply to determine whether a joint employer relationship exists under the FLSA. The First³⁰ and Ninth Circuits adopt the test set out in *Bonnette v. California Health and Welfare Agency*.³¹ The Court held:

The district court, while acknowledging that its determination must be based on "a consideration of the total employment situation and the economic realities of the work relationship," looked in particular to four factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." In varying combinations, these factors have been considered by other courts for the same purpose. See, e.g., *Real*, 603 F.2d at 756; *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d at 237-38. More important, these four factors are relevant to this particular situation.

Appellants argue that these factors were developed in cases involving profit-seeking employers and should not be blindly applied here, where the alleged employers are public social service agencies. We agree that this is not a mechanical determination. The four factors considered by the district court provide a useful framework for analysis in this case, but they are not etched in stone and will not be blindly applied. The ultimate determination must be based "upon the circumstances of the whole activity." *Rutherford*, 331 U.S. at 730, 67 S.Ct. at 1477.

³⁰ *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675-76 (1st Cir. 1998)

³¹ 704 F.2d 1465

48. The Second Circuit Court of Appeals has also developed an economic realities test, based on six factors. In *Zheng v. Liberty Apparel Co.*,³² the Court held that:

On remand, the District Court must determine whether the Liberty Defendants should be deemed to have been the plaintiffs' joint employer. This determination is to be based on "the circumstances of the whole activity," *Rutherford*, 331 U.S. at 730, 67 S.Ct. 1473, viewed in light of "economic reality," *Goldberg*, 366 U.S. at 33, 81 S.Ct. 933. We discuss below factors, drawn from *Rutherford*, which we think the court will find illuminating in these circumstances. The court is also free to consider any other factors it deems relevant to its assessment of the economic realities.

The factors we find pertinent in these circumstances, listed in no particular order, are (1) whether Liberty's premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the Liberty Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the Liberty Defendants. *See Rutherford*, 331 U.S. at 724-25, 730, 67 S.Ct. 1473; *see also Lopez*, 14 F.Supp.2d at 416-18 (summarizing the factors considered in *Rutherford*).

These particular factors are relevant because, when they weigh in plaintiffs' favor, they indicate that an entity has functional control over workers even in the absence of the formal control measured by the *Carter* factors.

49. *Zheng* was affirmed in *Barfield v. New York City Health and Hospital Corporation* with emphasis on the need for context dependency.³³ This test is very similar to the *Bonnette* test, which inspired it.³⁴

50. The Third Circuit has adopted an approach which focusses on the degree of control exercised over the employees at issue. In *Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*,³⁵ the Court held that the *Bonnette* test was really a question of control. The relevant question was therefore:

[D]oes the alleged employer have: (1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (3) day-to-day supervision, including employee

³² 355 F.3d 61, at 71

³³ 537 F.3d 132, 141-42 (2d. Cir. 2008)

³⁴ *Zheng*, at p 67

³⁵ 683 F.3d 462

discipline; and (4) control of employee records, including payroll, insurance, taxes, and the like. These factors are not materially different than those used by our sister circuits, and reflect the facts that will generally be most relevant in a joint employment context.

51. This focus on control has been criticised by the Department of Labor in its (now revoked) Administrator's Interpretation No. 2016-1.³⁶
52. The Fifth and Eleventh Circuits also apply economic realities tests. In *Gray v. Powers*,³⁷ the Fifth circuit held:

The Fifth Circuit uses the "economic reality" test to evaluate whether there is an employer/employee relationship. *See, e.g., Williams v. Henagan*, [595 F.3d 610](#), 620 (5th Cir.2010); *Watson v. Graves*, [909 F.2d 1549](#), 1553 (5th Cir.1990). The test originates in the Supreme Court's holding that "economic reality" should govern the determination of employer status under the FLSA. *Goldberg v. Whitaker House Coop.*, [366 U.S. 28](#), 33, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961). To determine whether an individual or entity is an employer, the court considers whether the alleged employer: "(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Williams*, 595 F.3d at 620. In cases where there may be more than one employer, this court "must apply the economic realities test to each individual or entity alleged to be an employer and each must satisfy the four part test." *Graves*, 909 F.2d at 1556.

53. Likewise, in *Layton v. DHL Express*, the Eleventh Circuit applied an economic realities test, holding that the relevant factors were (1) the nature and degree of control of the workers; (2) degree of supervision; (3) power to determine pay; (4) right to fire or modify employment conditions; (5) payroll control; (6) ownership of workplace; (7) performance of a speciality job integral to the business; and (8) investment in equipment and facilities.³⁸
54. The Fourth Circuit has recently rejected the *Bonnette* test. In *Salinas v Commercial Interiors*,³⁹ the Court reviewed the genesis of the *Bonnette* test:

Notwithstanding the joint employment doctrine's venerable and entrenched position, courts have had difficulty developing a coherent test distinguishing "separate

³⁶ Administrator's Interpretation No. 2016-1

³⁷ 673 F.3d 352, 354 (5th Cir. 2012)

³⁸ 686 F.3d 1172, 1178 (11th Cir. 2012)

³⁹ 2017 WL 360542 (4th Cir. Jan. 25, 2017)

employment" from "joint employment." As explained below, courts' attempts to distinguish separate employment from joint employment have spawned numerous multifactor balancing tests, none of which has achieved consensus support.

The genesis of the confusion over the joint employment doctrine's application appears to be the Ninth Circuit's decision in *Bonnette v. California Health and Welfare Agency*, [704 F.2d 1465](#) (9th Cir. 1983). Emphasizing that courts must consider "the circumstances of the whole activity" and that no set of factors was "etched in stone," the *Bonnette* Court concluded that four, nonexclusive factors "provide a useful framework" for determining whether an entity constitutes a joint employer: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." 704 F.2d at 1469-70 (internal quotation marks omitted).

Bonnette's four-factor joint employment test derived from the test the Ninth and Fifth Circuits used to distinguish employees from independent contractors for purposes of the FLSA.

...

Accordingly, courts should not rely on the *Bonnette* factors in determining whether a worker constitutes *an employee or independent contractor* for purposes of the FLSA and analogous labor statutes.² But focusing on *Bonnette's* errant reliance on common-law agency principles diverts attention from two more fundamental problems with the use of the *Bonnette* factors — and tests built upon those factors — in the joint employment context: that the factors (1) improperly focus on the relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers, and (2) incorrectly frame the joint employment inquiry as a question of an employee's "economic dependence" on a putative joint employer.

...

Tests focusing on the relationship between a worker and a putative joint employer — like the *Bonnette* test — do not address, much less solve, the problem of whether two entities are "entirely independent" or "not completely disassociated" with regard to the essential terms and conditions that govern a worker's employment, 29 C.F.R. § 791.2(a), and thus whether the worker's employment with the two entities should be treated as "one employment" for purposes of determining compliance with the FLSA, *Schultz*, 466 F.3d at 307.

...

Although economic dependency is the prism through which courts should distinguish employees from independent contractors, as *Rutherford Food* and *Goldberg* demonstrate, it does not capture key ways in which putative joint employers may be "not completely disassociated" with respect to establishing the terms and conditions of a worker's

employment — the relevant question in determining whether entities constitute joint employers. 29 C.F.R. § 791.2(a).

...

In sum, courts have failed to develop a coherent test for determining whether entities constitute joint employers. The myriad existing tests — most of which derive from *Bonnette* — improperly (1) rely on common-law agency principles; (2) focus on the relationship between a putative joint employer and a worker, rather than the relationship between putative joint employers; and (3) view joint employment as a question of economic dependency. Accordingly, district courts should not follow *Bonnette* and its progeny in determining whether two or more persons or entities constitute joint employers for purposes of the FLSA.

55. The Court therefore adopted a different test. It stated that first, a court must decide whether entities are separate or joint employers under the DOL regulations, and then must consider whether the putative joint employers' influence combines to render the worker an employee. This test focusses on the relationship between the putative joint employers:

Although the regulations identify three distinct scenarios, all three speak to one fundamental question: whether two or more persons or entities are "not completely disassociated" with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine — formally or informally, directly or indirectly — the essential terms and conditions of the worker's employment. *Cf. Enterprise Rent-A-Car*, 683 F.3d at 468 ("[W]here two or more employers ... share or co-determine those matters governing essential terms and conditions of employment — they constitute 'joint employers' under the FLSA." (internal quotation marks omitted)).

In answering this question courts should consider six factors:

- (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;
- (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to — directly or indirectly — hire or fire the worker or modify the terms or conditions of the worker's employment;
- (3) The degree of permanency and duration of the relationship between the putative joint employers;
- (4) Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
- (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
- (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

We emphasize that these six factors do not constitute an exhaustive list of all potentially relevant considerations. To the extent that facts not captured by these factors speak to the fundamental threshold question that must be resolved in every joint employment case — whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment — courts must consider those facts as well.

We also emphasize that "[t]he ultimate determination of joint employment must be based upon the circumstances of the whole activity."

The FLSA and MSWPA in Context

56. The concepts of employment and joint employment under the FLSA and MSPA are notably broader than the correlative common law concepts, which are based on the law of agency and look to the amount of control that an employer exercises over an employee (the Fourth Circuit *Salinas* standard notwithstanding). Under the common law control test, the question of whether a worker is an employee is determined by reference to the employer's control over the worker and not the broader economic realities of the working relationship. The "suffer or permit" standard, on the other hand, goes beyond control, and takes into account all the circumstances, including the following factors, according to the MSWPA guidance:

- (i) The nature and degree of the putative employer's control as to the manner in which the work is performed;
- (ii) The putative employee's opportunity for profit or loss depending upon his/her managerial skill;
- (iii) The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers;
- (iv) Whether the services rendered by the putative employee require special skill;
- (v) The degree of permanency and duration of the working relationship;
- (vi) The extent to which the services rendered by the putative employee are an integral part of the putative employer's business.⁴⁰

57. Indeed, in FLSA and MSPA cases, "courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees".⁴¹

⁴⁰ 29 CFR 500.20(h)(5)

⁴¹ *Antenor*, 88 F.3d at 933 n.10

58. The test for joint employment under the FLSA and MSPA is thus different from the tests under other labour statutes, such as the National Labor Relations Act⁴², and the Occupational Safety and Health Act.⁴³

Title VII

59. The EEOC has issued guidance about when employers will be joint for the purposes of Title VII.⁴⁴ According to this guidance:

Factors that indicate that the worker is a covered employee include:

- a) the firm or the client has the right to control when, where, and how the worker performs the job;
- b) the work does not require a high level of skill or expertise;
- c) the firm or the client rather than the worker furnishes the tools, materials, and equipment;
- d) the work is performed on the premises of the firm or the client;
- e) there is a continuing relationship between the worker and the firm or the client;
- f) the firm or the client has the right to assign additional projects to the worker;
- g) the firm or the client sets the hours of work and the duration of the job;
- h) the worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;
- i) the worker has no role in hiring and paying assistants;
- j) the work performed by the worker is part of the regular business of the firm or the client;
- k) the firm or the client is itself in business;
- l) the worker is not engaged in his or her own distinct occupation or business;
- m) the firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;
- n) the worker is considered an employee of the firm or the client for tax purposes (i.e., the entity withholds federal, state, and Social Security taxes);
- o) the firm or the client can discharge the worker; and
- p) the worker and the firm or client believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the fact-finder must make an assessment based on all of the circumstances in the relationship between the parties.

⁴² U.S.C. 151 et seq

⁴³ U.S.C. 651 et seq

⁴⁴ EEOC Guidance, <https://www.eeoc.gov/policy/docs/conting.html>

60. There is, as with FLSA, some variation between the circuit courts in their approach to the question of whether to employers will be joint employers for the purposes of Title VII.
61. The Third Circuit addressed the question in *Fausb v. Tuesday Morning*,⁴⁵ where it held that the sole question before it was one of agency.

“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished.” *Darden*, 503 U.S. at 323 (quoting *Reid*, 490 U.S. at 751). *Darden* provides a non-exhaustive list of relevant factors, including “the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”

Id. at 323–24 (quoting *Reid*, 490 U.S. at 751–52).

Our Court has generally focused on “ ‘which entity paid [the employees'] salaries, hired and fired them, and had control over their daily employment activities.’ ” *Covington*, 710 F.3d at 119 (alteration in original) (quoting *Covington v. Int'l Ass'n of Approved Basketball Officials*, No. 08–3639, 2010 WL 3404977, at *2 (D.N.J. Aug. 26, 2010)). However, “[s]ince the common-law test contains ‘no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’ ” *Darden*, 503 U.S. at 324 (second alteration in original) (quoting *N.L.R.B. v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).⁶

The *Darden* factors assist in “drawing a line between independent contractors and employees” hired by a given entity. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 n.5 (2003). Significantly, the inquiry under *Darden* is not which of two entities should be considered the employer of the person in question. Two entities may be “co-employers” or “joint employers” of one employee for purposes of Title VII. *Graves v. Lowery*, 117 F.3d 723, 727 (3d Cir.1997). Indeed, at common law, one could be a “dual servant acting for two masters simultaneously” or a “borrowed servant” who by virtue of being “ ‘directed or permitted by his master to perform services for another may become the servant of such other.’ ” *Williamson v. Consol. Rail Corp.*, 926 F.2d 1344, 1349 (3d Cir.1991) (quoting *Restatement (Second) of Agency* § 227 (1958)).

⁴⁵ 808 F.3d 208, 214(3rd Cir. 2015)

62. The Fourth Circuit, after review of the approaches taken in various US courts to Title VII joint employer status, has adopted a 'hybrid' test, which sits somewhere between the economic realities test, and a test based on common law agency. The Court held:

The object of the joint employment doctrine is to determine whether a putative employer "exercise[s] significant control over the same employees." *Bristol*, 312 F.3d at 1218 (quoting *Graves*, 117 F.3d at 727). The question then is how to determine the extent to which an employer "controls" an employee.

Courts have formulated at least three tests that could be used in the joint employment context: the economic realities test, the control test, and the hybrid test. All three tests aim to determine, in a highly fact-specific way, whether an entity exercises control over an employee to the extent that it should be liable under Title VII.

...

Guided by these decisions, we conclude that the hybrid test best captures the fact-specific nature of Title VII cases, such as the one before us. *Cf. Haavistola*, 6 F.3d at 222 ("Title VII claims involved fact-intensive determinations for which the district court was not equipped to rule on the basis of a summary judgment record alone."); *Hunt v. State of Mo., Dep't of Corr.*, [297 F.3d 735](#), 741 (8th Cir.2002) (finding that an employer-employee relationship is a "fact-intensive consideration of all aspects of the working relationship between the parties" (citation and internal quotation marks omitted)). The hybrid test also allows for the broadest possible set of considerations in making a determination of which entity is an employer. Moreover, it best captures the reality of modern employment in which "control" of an employee may be shared by two or more entities. The hybrid test correctly bridges the control test and the economic realities test.

Accordingly, we adopt the hybrid test. We find, however, that our previous statements of the hybrid test, involving the analogous but legally distinct independent contractor context, do not adequately capture the unique circumstances of joint employment. The factors used in *Spirides* and *Cilecek* include considerations that are irrelevant to the joint employment context. Drawing on our existing precedent and joint employment cases in other circuits, we now articulate a new set of factors for courts in this Circuit to use in assessing whether an individual is jointly employed by two or more entities:

(1) authority to hire and fire the individual;(2) day-to-day supervision of the individual, including employee discipline;(3) whether the putative employer furnishes the equipment used and the place of work;(4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes;(5) the length of time during which the individual has worked for the putative employer;(6) whether the putative employer provides the individual with formal or informal training;(7) whether the individual's duties are akin to a regular employee's duties;(8) whether the individual is assigned solely to the putative employer; and(9) whether the individual and putative employer intended to enter into an employment relationship.

We note that none of these factors are dispositive and that the common-law element of control remains the "principal guidepost" in the analysis. Indeed, consistent with our

opinion in *Cilecek*, courts can modify the factors to the specific industry context. *See id.* at 261 (refashioning factors for a controversy arising in a hospital setting); *Darden*, 503 U.S. at 323-324, 112 S.Ct. 1344 (prefacing its list of factors with "[a]mong the other factors relevant to this inquiry are").

Three factors are the most important. The first factor, which entity or entities have the power to hire and fire the putative employee, is important to determining ultimate control. The second factor, to what extent the employee is supervised, is useful for determining the day-to-day, practical control of the employee. The third factor, where and how the work takes place, is valuable for determining how similar the work functions are compared to those of an ordinary employee. When applying the joint employment factors, however, "no one factor is determinative, and the consideration of factors must relate to the particular relationship under consideration." *Cilecek*, 115 F.3d at 260. Courts should be mindful that control remains the principal guidepost for determining whether multiple entities can be a plaintiff's joint employers.

63. The Tenth Circuit addressed the question in *Knitter v. Corvias Military Living*:⁴⁶

Under the joint employer test, two entities are considered joint employers if they "share or co-determine those matters governing the essential terms and conditions of employment." *Id.* (quotations omitted). Both entities are employers if they both "exercise significant control over the same employees." *Id.* (quotations omitted). "An independent entity with sufficient control over the terms and conditions of employment of a worker formally employed by another is a joint employer within the scope of Title VII." *Sizova*, 282 F.3d at 1330 (quotations omitted).

"Most important to control over the terms and conditions of an employment relationship is the right to terminate it under certain circumstances." *Bristol*, 312 F.3d at 1219. Additional factors courts consider for determining control under the joint employer test include the ability to "promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; . day-to-day supervision of employees, including employee discipline; and control of employee records, including payroll, insurance, taxes and the like." *Butterbaugh v. Chertoff*, 479 F.Supp.2d 485, 491 (W.D.Pa.2007) (quotations omitted).

OSHA

64. No joint employment OSHA cases could be found.⁴⁷ The Occupational Safety and Health Administration does however have a multi-employer enforcement policy, which sets out the obligations on employers depending on their relationship to a source of danger:

⁴⁶ 758 F.3d 1214, 1225-27 (10th Cir. 2014)

Multi-employer Worksites. On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited.

Step One. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (B) - (E) below explain and give examples of each. Remember that an employer may have multiple roles (see paragraph H). Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate (NOTE: only exposing employers can be cited for General Duty Clause violations).

Step Two. If the employer falls into one of these categories, it has obligations with respect to OSHA requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies. Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

65. Creating employers are those that create a hazard, exposing employers are those whose employees are exposed to the hazard, correcting employers are those who are responsible for correcting hazards, and a controlling employer is one who has general supervisory authority over the worksite.
66. The multi-employer policy sets out the various obligations the Administration interprets these four categories of employers as having. The Administration has made it clear that it considers that these duties apply to both the outsourcer and user of temporary workers.⁴⁸

b. How is liability divided between the two employers?

67. This question arises most acutely in the case of the FLSA and MSPA. Under MSPA and FLSA, “when joint employment exists, all of the joint employers are jointly and severally liable for compliance with the FLSA and MSPA”⁴⁹.
68. If the FLSA or the MSPA is applicable, and it is proven that “two or more employers jointly employ an employee, the employee’s hours worked for all of the joint employers during the workweek are aggregated and considered as one employment, including for purposes of

⁴⁷ Smith, Miller and Morrison, ‘Is Your Company a Joint Employer under OSHA?’

<https://shermanboward.com/publications/is-your-company-a-joint-employer-under-osha/>

⁴⁸ https://www.osha.gov/temp_workers/Policy_Background_on_the_Temporary_Worker_Initiative.html

⁴⁹ Department of Labor Wage and Hour Division Report, Jan 2016

calculating whether overtime pay is due. Additionally, when joint employment exists, all of the joint employers are jointly and severally liable for compliance with the FLSA and MSPA:

If the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek.⁵⁰ In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.⁵⁰

69. In *Salinas*, addressing the question of the division of liability between employers under the FLSA, the Fourth Circuit Court of Appeals held:

"[J]oint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek." *Id.* Accordingly, the hours an individual works for each joint employer in a single workweek must be aggregated to determine whether and to what extent the individual must be paid overtime to comply with the FLSA.⁵ See *Chao v. A-One Med. Servs., Inc.*, [346 F.3d 908](#), 916-18 (9th Cir. 2003) (aggregating an employee's hours for each joint employer to determine whether the joint employers complied with the FLSA overtime provision); *Karr v. Strong Detective Agency, Inc.*, [787 F.2d 1205](#), 1207-08 (7th Cir. 1986) (aggregating the hours worked for each joint employer separately to determine the total overtime pay owed). Therefore, the joint employment doctrine: (1) treats a worker's employment by joint employers as "one employment" for purposes of determining compliance with the FLSA's wage and hour requirements and (2) holds joint employers jointly and severally liable for any violations of the FLSA. *Schultz v. Capital Int'l Sec., Inc.*, [466 F.3d 298](#), 305, 307, 310 (4th Cir. 2006).

70. Under the FMLA, responsibility for compliance with the FMLA may be shared between two employers. The Department of Labor Guidance states:

When an individual is employed by two employers in a joint employment relationship under the FMLA, in most cases one employer will be the primary employer while the other will be the secondary employer. Determining whether an employer is a primary or

⁵⁰ C.F.R. 791.2(a)

secondary employer depends upon the particular facts of the situation. Factors to consider include:

- who has authority to hire and fire, and to place or assign work to the employee;
- who decides how, when, and the amount that the employee is paid; and,
- who provides the employee's leave or other employment benefits.

In the case of a temporary placement or staffing agency, the agency is most commonly the primary employer.

...

Responsibilities of Primary Employers

Under the FMLA, the primary employer is responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same job or an equivalent job upon return from leave. The primary employer is prohibited from interfering with a jointly-employed employee's exercise of or attempt to exercise his or her FMLA rights, or from firing or discriminating against an employee for opposing a practice that is unlawful under the FMLA. Primary employers must keep all records required by the FMLA with respect to primary employees.

A primary employer must meet all of its obligations under the FMLA even when a secondary employer is not in compliance with the law or does not provide support to the primary employer in meeting these responsibilities.

Responsibilities of Secondary Employers

The secondary employer, whether an FMLA-covered employer or not, is prohibited from interfering with a jointly-employed employee's exercise of or attempt to exercise his or her FMLA rights, or from firing or discriminating against an employee for opposing a practice that is unlawful under the FMLA. The secondary employer is responsible in certain circumstances for restoring the employee to the same or equivalent job upon return from FMLA leave, such as when the secondary employer is a client of a placement agency and continues to use the services of the agency and the agency places the employee with that client employer. Secondary employers must keep basic payroll and identifying employee data with respect to any jointly-employed employees.

A covered secondary employer is also responsible for compliance with all the provisions of the FMLA for its regular, permanent workforce.⁵¹

71. Under the NLRA, joint liability for unfair labour practices could arise, save for in special isolated circumstances.⁵²

⁵¹ <https://www.dol.gov/wbd/regs/compliance/wbdjs28n.htm>

II. Under what circumstances will a duty of care be owed in tort to those who are for practical purposes working for legal person X, but do not do so pursuant to a contract of employment? How is liability divided between the two employers?

72. In all 50 US states, a system of workers' compensation exists which means that tortious claims against employers arising out of personal injury are barred.⁵³ However, where workers are not covered by workers' compensation, then employers owe a duty of care to employees.⁵⁴ The duty of care is owed even by independent contractors operating within a workplace, under the normal principles of tort law⁵⁵
73. Employers are under a duty, *both to their employees and to lawful invitees who may be employees of a third party*, to furnish a safe place of work. In *Olivo v Owens-Illinois*, it was held that a duty of care was owed by the owner of land on which work was taking place to independent contractors and their employees invited onto the land.⁵⁶
74. Employers can also be liable for negligently hiring, retaining or supervising an employee who is likely to cause harm.⁵⁷ Critically for the purposes of joint employment, this duty to supervise may extend to one organisation's relationship with another, where a sufficient relationship of control exists between them. In *Grand Aerie Fraternal Order v Carneyhan*, the Court assess the position as follows:

There is indeed a current running through the relevant Restatement sections [and the judicial opinions evaluating miscellaneous claims of special relationships] that in order for

⁵² Galiatsos, "Beyond Joint Employer Status: A New Analysis for Employers' Unfair Labor Practice Liability under the NLRA" (2015) Boston University Law Review 95 2083, 2096

⁵³ Jasper, *Workers Compensation Law* (Oceana 2008) 3

⁵⁴ Cheit, *Injury and Recovery in the Course of Employment* (John Wiley and Sons 1961) 10

⁵⁵ Jasper, *Workers Compensation Law* (Oceana 2008) 14

⁵⁶ 186 NJ 394 (2006)

⁵⁷ Dobbs, Hayden and Bublick, *Hornbook on Torts* (West Academic 2016) 657

a special relation to exist between the defendant and the third person, the defendant must have the ability to control the third person's conduct. Moreover, the cases from which these sections derive indicate that the ability to control is not the fictitious control which provides the basis for vicarious liability. Instead, "control" is "used in a very real sense."

Estates of Morgan, 673 N.E.2d at 1322-23 (quoting Fowler v. Harper & Posey M. Kime, The Duty to Control the Conduct of Another, 43 Yale L.J. 886, 891 (1934)). A "real" ability to control necessarily includes some sort of leverage, such as the threat of involuntary commitment, Estates of Morgan, 673 N.E.2d at 1324, parole revocation, Neakok, 721 P.2d at 1126, or loss of the livelihood provided by an employment relationship, Hills v. Bridgeview Little League Ass'n, 195 Ill.2d 210, 253 Ill.Dec. 632, 745 N.E.2d 1166, 1185 (2000). Not only must the control be "real," but it also must be related in some manner to the harm caused by the person under control, such that its exercise would restrict the person's ability to cause harm. Absent such control, there is no special relationship giving rise to a duty of reasonable care.⁵⁸

75. An instructive context in which to review the concept of joint employment is vicarious liability. US courts have had to deal with the question of joint employers in that context. Vicarious liability for the torts of employees arises under the doctrine of *respondeat superior*. It does not arise in respect of independent contractors, absent special exceptions. The distinction between an employee and an independent contractor for these purposes is one based on general agency principles of control.⁵⁹
76. One exception to this rule is the 'borrowed employee' rule. This rule applies in cases where employer A directs an employee to do work for entity B. Under certain circumstances, it will be B rather than A which is vicariously liable for torts committed by the employee. Which employer is to be liable is answered by the control test: if the lending employer retains control, then it will be that employer which bears vicarious liability.
77. Courts are willing to find that one employer retains control for some tasks, while another does for other tasks.⁶⁰ In *New York Central Railroad*, the Court of Appeals of Indiana had to deal with a case where a labourer died through the negligence of a third-party crane operator employed by the third party. The question was whether the third party or the company contracting with it was employer under the borrowed servant doctrine. The Court held:

⁵⁸ 169 S.W.3d 840 (Ky. 2005)

⁵⁹ Dobbs, Hayden and Bublick, *Hornbook on Torts* (West Academic 2016) 764

⁶⁰ Dobbs, Hayden and Bublick, *Hornbook on Torts* (West Academic 2016) 773

Both the appellant and the appellee seem to agree that the determining question placed before this court involves the borrowed servant doctrine which states that an employee, while generally employed by one party, may be loaned to another in such a manner that the special employer may be responsible for the acts of the employee under the doctrine of respondeat superior. Indiana has recognized this doctrine. *Standard Oil Company v. Soderling* *85 (1942), 112 Ind. App. 437, 446-448, 42 N.E.2d 373; *Sargent Paint Co. v. Petrovitzky* (1919), 71 Ind. App. 353, 124 N.E. 881. If the operator were the borrowed servant of the appellant, then under the terms of the contract the "claim" was "caused by the sole negligence of" the appellant, "its agents or employees." Therefore, it would not be within the indemnification provision. In the converse if the operator remained the servant of the Vic Kirsh Trucking Company or Daniel Varday, Inc., and if the operator were negligent the claim arose not out of the sole negligence of the appellant. Consequently, the indemnification provision would be fulfilled and the indemnitee would be bound by such (assuming the operator to have been negligent).

In their argument and briefs both the appellee and the appellant overlooked that there was a third possibility: to-wit: that the operator could have been the employee of both employers. The Restatement of Agency, Second, acknowledges this concept in § 226 where it is stated:

"A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other."

78. The Court went on to hold:

Certainly we have present a case where reasonable men might differ as to which employer had the right to control the operator in the movements and operation of the crane and as to whether the operator was within the scope of business of the special employer. We as a matter of law might say that some elements should be determinative in deciding which employer had the right to control, thereby changing the result from that found by the lower court. However, we believe that all of the facts outlined above were properly considered and the findings and conclusions of law are supported by sufficient evidence.

We might add that we would prefer another view in face of the facts at bar as that both employers had the right to control the operator in line with § 227 of the Restatement of Torts, *supra*. In reviewing this question we have found that many of the borderline cases are attempting to find a single legal relationship within the doctrine of respondeat superior which in reality does not exist, i.e., between the two employers it is not necessary and rarely does it exist in these borderline cases that only one employer had the right to control as to the very act in question. However, we are dealing with a question of fact in which we as an appeals court cannot weigh the evidence.⁶¹

⁶¹ 140 Ind. App. 79, 221 N.E.2d 442

79. In other cases, Courts have been prepared to find, as the Indiana Court of Appeals would have liked to, that both the lender and the borrower could be simultaneously employers for the purposes of *respondeat superior*. In *Kastner v Toombs*, a drilling company leased a backhoe and operator from another company. The operator, in accordance with the instructions of the drilling company's director and in spite of the operator's express reservations, negligently dug a ditch which injured Kastner.⁶² The Supreme Court of Alaska, faced with the question of which company was vicariously liable, held:

In our opinion the borrowed servant rule as an exception to the doctrine of respondeat superior has imparted unnecessary complexity to the law of agency. We see no reason for a rule of exclusive liability in situations in which a servant acting within the scope of his employment for two masters negligently causes injury to another. The question of how the loss so caused should be distributed should be determined in accordance with principles of contribution^[4] and indemnity.^[5] These principles have been devised to answer questions concerning the allocation of losses among potentially responsible parties. These principles may not be easy to apply in every case, but they are at least directly responsive to the problem, while the various approaches taken under the borrowed servant rule are not.

There is considerable authority supporting the position which we have taken. For example, Professor Mechem has argued that dual liability is the simplest and most practical solution to the borrowed servant problem. F. Mechem, *Outline of the Law of Agency*, § 458 (4th ed. 1952). In *Harper & James, The Law of Torts*, dual liability is *66 referred to as a "sensible result."^[6] Among the cases which have rejected exclusive liability in the borrowed servant context are *Vance Trucking Co. v. Canal Insurance Co.*, [249 F. Supp. 33](#) (D.S.C. 1966), *aff'd* 395 F.2d 391 (4th Cir.1968); *Colorado & S. Ry. v. Duffy Storage & Moving Co.*, 145 Colo. 344, [361 P.2d 144](#) (1961); *Gordon v. S.M. Byers Motor Car Co.*, 309 Pa. 453, 164 A. 334 (1932); *Strait v. Hale Construction Co.*, [26 Cal. App. 3d 941](#), 103 Cal. Rptr. 487 (1972); *Keitz v. National Paving Contracting Co.*, 214 Md. 479, 136 A.2d 229 (1957).

80. The judgment in *Kastner* makes it clear that, where employers must both answer for an employee under *respondeat superior*, their liability is joint and several.

⁶² 611 P.2d 62 (Alaska 1980)

CANADA

I. Does employment law in your jurisdiction recognise the existence of joint employers?

81. Canadian law recognises a doctrine known as the common employer doctrine.

a. Under what conditions will two or more legal persons be employers of the same person in relation to the same work?

82. The common employer doctrine arises in the common law and under a number of statutes in Canada. Under the common law doctrine two or more persons can be employers of a person in relation to the same work where there is a sufficient degree of relationship between the different entities that act as common employers.⁶³ What counts as a sufficient degree of relationship is determined on a case by case basis but includes “factors such as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control”.⁶⁴

83. The idea of common employers was first recognised in *Bagby v Gustavson Int'l Drilling Co Ltd*⁶⁵ but the test was not clearly stated until *Sinclair v Dover Engineering Services Ltd*.⁶⁶ In *Sinclair* the plaintiff was a professional engineer who wanted to bring a wrongful dismissal claim against two companies. One company, Dover Engineering Services Ltd (Dover), held itself out as his employer. Another company, Cyril Management Limited (Cyril), was responsible for paying the plaintiff. Cyril also deducted all payments from the plaintiff's salary for income tax, unemployment insurance and his pension plan. Dover was owned by Vernon Gould and Donald Keenan. Cyril was effectively a management company that paid everyone who worked for Dover and the other companies owned by the Gould partnership. In *Sinclair* Wood J held both companies were the common employers of the plaintiff and it did not matter that the companies were in this complex business relationship with one another. Wood J stated, “I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the

⁶³ *Sinclair*, (1988) 49 D.L.R. (4th) 297, [18].

⁶⁴ *Ibid.*

⁶⁵ (1980), 24 A.R. 18.

⁶⁶ *Sinclair*, (1988) 49 D.L.R. (4th) 297

realities of modern-day business, accounting and tax considerations.”⁶⁷ He continued that, “As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract.”⁶⁸

84. *Downtown Eatery (1993) Ltd v Ontario*⁶⁹ affirmed that the focus of the common employer doctrine was the relationship between the employers and not on the relationship between the employers and the employee. In *Downtown* the plaintiff was a manager of a night club. He had been awarded damages for wrongful dismissal against his employer. However, his employer was insolvent. He sought judgement against all the companies involved in the nightclub enterprise, which he claimed belonged to the same corporate group. The court held that all the companies were the plaintiff's joint employer. MacPherson JA stated, “although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law.” The companies were all said to belong to one integrated unit.
85. In a triangular employment relationship the doctrine of common employers has not been used. Instead in the Supreme Court held that in a triangular employment relationship for the purposes of collective bargaining the end user was the employer, and not the agency. The employee hired through the agency had to be included in the bargaining unit and covered by the same collective agreement as other employees working for the end user.⁷⁰ In *Point-Claire (City) v Quebec (Labour Court)* the City had hired the employee to be a receptionist through an employment agency. The contractual arrangements were between the City and the agency. The employee's wages were set and paid by the agency who then billed the City. The issue of collective bargaining was covered by the Quebec Labour Code. The Labour Code did not cover the question of who the employer was in a triangular employment relationship: it used only the words employer and employee. The court had to determine the meaning given to the term employee by the Labour Commissioner. The majority drew three elements from the

⁶⁷ *Sinclair*, (1988) 49 D.L.R. (4th) 297, [16].

⁶⁸ *Sinclair*, (1988) 49 D.L.R. (4th) 297, [18].

⁶⁹ (2001), 8 C.C.E.L.(3d) 186 (Ont. C.A.), [36].

⁷⁰ G Trudeau, “Temporary Employees Hired through a Personal Agency: Who is the Real Employer?” (1997) C.L.E.L.J. 359.

definition of employer.⁷¹ These were legal subordination of the employee to the employer, performance of work and remuneration. The majority of the court held that there was legal subordination because the City had actual day to day control over the employee.⁷² The majority also found that the City was effectively responsible for the remuneration and discipline of the employee because the agency was fully reimbursed for paying the employee based on the number of hours the employee worked and the City could trigger the agency to take disciplinary action against the employee.⁷³ It was therefore reasonable for the Labour Commissioner to consider the employee to be an employee of the City for the purposes of collective bargaining.

b. How is liability divided between the two employers?

86. Where the court finds there are joint or common employers they are held jointly and severally liable.⁷⁴

II. Under what circumstances will a duty of care be owed in tort to those who are for practical purposes working for legal person X, but do not do so pursuant to a contract of employment? How is liability divided between the two employers?

87. There have been very recent developments in Canadian tort law concerning the question of when a company will be liable for workplace injury caused by a subcontractor to that subcontractor's employees. These cases are instructive as to the approach to Canadian tort law to piercing the corporate veil in the relationship between workers, their employers, and the contractors of their employers. In this regard, there are two important cases to consider.
88. In *Choc v Hudbay*,⁷⁵ an indigenous community from Guatemala sued Hudbay, a mining company, alleging that employees of its subcontractors had committed various human rights abuses in relation to a mining operation in Guatemala. Hudbay applied to strike out the action as disclosing no reasonable cause of action in negligence, arguing that:

⁷¹ *Ibid.* p364

⁷² *Pointe-Claire (City) v. Quebec* (Labour Court), [1997] 1 S.C.R. 1015, [48].

⁷³ *Ibid.* [56].

⁷⁴ *Sinclair*, (1988) 49 D.L.R. (4th) 297

⁷⁵ 2013 ONSC 1414

...the law is clear that one corporation cannot be responsible for the actions of another and, particularly, that a parent corporation cannot be responsible for the actions of its subsidiary. They submit that the narrow exceptions under which the corporate veil may be pierced have not been met. They argue that the plaintiffs are implicitly requesting that the Court ignore the separate corporate identity of Hudbay's subsidiary, CGN, and impose absolute supervisory liability on the parent company.

89. Hudbay also argued that they had no duty to control their subsidiaries. It was primarily this direct liability (and not, save for in one claimant's case, the vicarious liability of Hudbay for its subsidiary's employees) which the claimants relied upon. The case was allowed to proceed to trial on both points. On the vicarious liability point, the court held:

The fact that Hudbay allegedly engaged in wrongdoing through its subsidiary is not enough to pierce the corporate veil. The plaintiffs would have to allege that Hudbay had used CGN "as a shield for fraudulent or improper conduct", that the very use of CGN was to avoid liability for wrongful conduct that it carried out through CGN. The plaintiffs do not plead this. [49] However, the plaintiffs do plead in the Choc action that CGN "is an agent of Hudbay Minerals." By doing so, the plaintiffs have pleaded the second exception to the rule of separate legal personality. Whether or not this agency relationship is ultimately found to have existed at the relevant time, the allegation is not patently ridiculous or incapable of proof, and therefore must be taken to be true for the purposes of this motion. If the plaintiffs can prove at trial that CGN was Hudbay's agent at the relevant time, they may be able to lift the corporate veil and hold Hudbay liable. Therefore, the claim based on piercing the corporate veil in the Choc action should be allowed to proceed to trial.

90. On the direct negligence point, the court analysed the potential for a new duty through the *Anns* test, considering the facts closely to hold that the foreseeability requirement was met. Regarding the proximity requirement, the court held:

Proximity is determined by examining various factors, rather than a single unifying characteristic or test. Factors considered in defining the proximity of a relationship include, as set forth above, the "expectations, representations, reliance, and the property or other interests involved": Cooper, supra, at para. 34. In Odhavji, supra, at para. 55, Iacobucci J. outlined factors that could give rise to proximity as including (a) a close causal connection, (b) the parties' expectations and (c) any assumed or imposed obligations. Based on the plaintiffs' pleadings, there were numerous expectations and representations on the part of Hudbay/Skye and the plaintiffs. In particular, Hudbay/Skye made public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to

expectations on the part of the plaintiffs. There were also a number of interests engaged, such as Hudbay/Skye's interest in developing the Fenix project, which required a "relationship with the broader community, whose efficient functioning and support are critical to the long-term success of the company in Guatemala", according to Hudbay's President and CEO. The plaintiffs' interests were clearly engaged when, according to the pleadings, the defendants initiated a mining project near the plaintiffs and requested that they be forcibly evicted. [70] It is possible that, based on the foregoing, the defendants have brought themselves into proximity with the plaintiffs. The pleadings disclose a sufficient basis to suggest that a relationship of proximity between the plaintiffs and defendants exists, such that it would not be unjust or unfair to impose a duty of care on the defendants. Based on the foregoing, I find that it is not plain and obvious that no duty of care can be recognized. A prima facie duty of care may be found to exist for the purposes of this motion.

91. The court then turned to consider policy considerations, holding that:

There are clearly competing policy considerations in recognizing a duty of care in the circumstances of this case. This alone would prevent it from being plain and obvious that this step of the Anns test will fail. In addition, "[a] court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments": Haskett at para. 52. Based on the foregoing, I find that it is not plain and obvious that policy reasons would negative or otherwise restrict a prima facie duty of care.

92. In *Das v George Weston*,⁷⁶ litigation arose in Ontario against a clothes retailer which had bought clothes from a supplier, who in turn bought the clothes from a supplier based in the Rana Plaza in Bangladesh. After the tragedy which befell that factory, a number of Bangladeshi citizens sued the retailer in tort, alleging both a direct breach of duty to control the defendant, and vicarious liability. The court rejected the imposition of a duty of care both directly on the defendant to control those further down the supply chain. The case was distinguished from *Choc* on the basis that:

...to gain control of the mining site, the security personnel assaulted, torched, gang rapped, and killed the locals, who were indigenous Mayan Q'eqchi' asserting an ownership claim to the mining site. There was a strong case to be made for piercing the corporate veil and for treating Hudbay Minerals and its subsidiaries as one entity. Indeed, the plaintiffs who were the victims of the atrocities did sue to pierce the corporate veil. They also sued Hudbay Minerals for vicarious liability and for negligence in not

⁷⁶ 2017 ONSC 4129

supervising and controlling its subsidiaries. Hudbay Minerals brought a motion to have the action against it dismissed for failing to disclose a reasonable cause of action, and, not surprisingly, Justice Brown dismissed the motion. [540] In the case at bar, there is no basis for piercing the corporate veil and treating Loblaws, Pearl Global and New Wave as one enterprise. In the case at bar, analogizing a Canadian retailer having a duty of care to ensure that the employees of a foreign sub-supplier, over whom the retailer has no management or administrative control, be protected from working in dangerous premises to the circumstances of a Canadian mining company having a duty to care to ensure that the security forces of its subsidiaries, over whom the parent company had direction and management control, not rape and kill the indigenous population makes no sense.

93. The court therefore concluded that, under Ontario tort law, the claims were doomed to failure.

SOUTH AFRICA

I. Does employment law in your jurisdiction recognise the existence of joint employers?

94. In South Africa, labour law recognises that a single employee may have multiple employers in relation to the same work. Section 213 of the Labour Relations Act 1995 defines an employee as:

- a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee";

95. The legislation which preceded this, namely the Labour Relations Act 1956, contained a substantially similar definition of employees under section 1, although independent contractors were not specifically excluded.

96. The term 'employer' is not defined under the 1995 Act, but section 1 of the 1956 Act defined employer as "any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who ... permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business; and 'employ' and 'employment' have corresponding meanings."

a. Under what conditions will two or more legal persons be employers of the same person in relation to the same work?

97. Courts have developed tests to determine the true nature of a relationship between employees and their purported employers. Initially, the South African courts favoured the use of the control test in determining the nature of the relationship between master and servant. Control and supervision were held to be the most important indicia.

98. In *Boumat v. Vaughan*,⁷⁷ the court had to examine whether there was an employer-employee relationship between a holding company and the managing director of a subsidiary company. The appellant, namely the holding company, argued that the corporate separateness of the subsidiary company from the holding company should not be ignored. It was contended that the definitions of an employee and an employer under section 1 of the 1956 Act should not be so widely interpreted as to allow an employee to have more than one employer, because this outcome could not have been contemplated by the legislature.
99. The Labour Appeal Court rejected this argument, holding that the aforementioned definitions in the 1956 legislation had to be ascribed their ordinary meaning. Therefore, as long as the conditions envisaged in the definitions were satisfied, an employee having more than one employer would not lead to absurdity or defeat the purposes of the Act.
100. The court relied on the control test to establish an employer-employee relationship. The court observed that the holding company was driven by the goal to generate profits through its control of the subsidiary companies. It followed therefore, that control was exercised over the managing directors of these subsidiaries. This created an employer-employee relationship.
101. In *Camdons Realty (Pty) Ltd & Another v. Hart*,⁷⁸ the respondent had been offered a three-year contract by the first appellant to help set up a franchise division and had been accordingly employed under it. The first appellant bought a dormant company, Network, to operate the franchise business. Thereafter, the respondent signed a service agreement with Network. After about ten months the respondent was dismissed by the first appellant. The Industrial Court found that the respondent had been unfairly dismissed and awarded him four months' compensation.
102. On appeal, the first appellant contended that it was not the employer of the respondent and that the Industrial Court was therefore not entitled to grant relief against it. It was argued that the moment the respondent had entered into a service agreement with another party, his employment with the appellant had terminated. The court, on the other hand, held that the proper enquiry was not whether a contractual relationship existed between Network and the respondent, but whether the appellant could properly be said to be an 'employer' of the

⁷⁷ (1992) 13 ILJ 934 (LAC).

⁷⁸ (1993) 141 LJ 1008 (LAC)

respondent as defined in the Act. After noting that the definition had wide connotation, the court concluded that there may be more than one employer of an employee at any particular time.

103. In *Board of Executors Ltd v. McCafferty* the respondent worked with the Board of Executors Merchant Bank (BOE-MB), which was a wholly owned subsidiary of the Board of Executors Ltd (BOE Ltd). The latter shut down a unit of BOE-MB, which resulted in the retrenchment of the respondent. Consequently, the respondent launched proceedings at the Industrial Court in which he claimed that BOE-MB was his employer and cited them as respondents in those proceedings. At the hearing of certain points *in limine* in the Industrial Court, the presiding officer, acting *mero motu* and without any request by either party, substituted the BOE Ltd as the respondent in place of BOE-MB.

104. The Industrial Court held that *BOE* Ltd was the employer of the respondent, finding as follows:

“Although in strict law it could be argued that BOE-MB as an independent legal entity, was the employer of the applicant because it appointed him, paid him and controlled his day to day activities, this entity was wholly owned and controlled by BOE Ltd. The former had to adhere to directions from the executive committee of the BOE Group of Companies, which caused the FIU of the Merchant Bank to be closed. This again resulted in the retrenchment of the applicant which leaves the predominant impression that he was, albeit indirectly, dismissed by the respondent. An employee cannot be dismissed by anyone but his employer.”

105. On appeal by BOE-Ltd, it was argued that a finding that the appellant was the employer of the respondent was contrary to the fact that BOE-MB had been admitted to be the respondent's employer in previous proceedings.

106. The Labour Court held that the mere fact that BOE-MB had been previously admitted in different litigation to be the employer of the respondent did not preclude the respondent from alleging and proving ‘additional and concurrent employers.’ This possibility of having a multiplicity of employers in certain circumstances and on appropriate and objective facts was confirmed by the Supreme Court in 1999.⁷⁹

⁷⁹ *Board of Executors Ltd v McCafferty* 2000 (1) SA 848 (SCA).

107. The court observed that definition of 'employer' clearly envisaged the right to terminate employment and the exercise of such power. As elaborated by the court, "the most significant moments in the life of a contract of employment are those of creation and of dissolution.
108. The first milestone provides the potential employee with the opportunity to submit his productive capacity to the will of the potential employer and it is the potential employer's acceptance of that submission which creates the relationship of employment.
109. The second milestone is the withdrawal of the productive capacity - either the employee reclaims it for himself or for use by another, or the employer rejects the capacity formerly tendered and removes that opportunity. That moment of withdrawal or termination of the employment relationship is a decisive exercise of power in the employment relationship. It must be amongst the most definitive indicia of participation in a contract of employment.
110. When the afore-mentioned case came up for adjudication before the Supreme Court in 2000, this 'power of termination' was used to establish that the appellant had ultimate direct control over the respondents.
111. In *Mandla v. Lad Brokers (PTY) Ltd*,⁸⁰ the applicant, Mr R J Mandla claimed that he had been employed by the respondent, LAD Brokers (Pty) Ltd and had been unfairly dismissed for operational reasons by the termination of his contract. The respondent denied that it had employed the applicant and alleged that the contract which it had concluded with the applicant created an independent contractor relationship.
112. The respondent admitted that it had terminated the contract with the applicant based upon the operational requirements of its client, for whom the applicant worked, but denied that this had constituted an unfair dismissal in terms of the Labour Relations Act 1995. The question to be decided was whether the contractual relationship between the applicant and the respondent constituted an employment contract or whether it was that of an independent contractor relationship.

⁸⁰ (2000) 21 ILJ 1807(LC).

113. The Labour Court held that the right to supervision and control was one of the most important *indicia* that a particular contract is in all probability a contract of service (employment contract). Justice Basson observed as follows:

“The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service.”

114. On appeal to the Labour Appeal Court,⁸¹ although the court disagreed with the way the Labour Court had assessed control, the importance of the test was reaffirmed.

115. However, solely relying on the control test led to problems being encountered by South African courts. As a result, the test was supplemented with other tests, like that of dominant impression.

116. In *August Läßle v. Jarrett*,⁸² the applicant, namely Läßle South Africa (LASA) was a wholly owned local subsidiary of the German parent company, August Läßle GmbH Co KG, Läßle Germany (LAG). David Jarrett, the first Respondent, who had been an employee of LAG since 1993, in terms of a written contract entered into between the parties in Germany. During or about March 1998, he was appointed by LAG as its employee, to carry out services as managing director of LASA. His contract of employment was eventually suspended and the terminated by LAG.

117. In order to establish jurisdiction of the Bargaining Council in South Africa, Jarrett argued that he was an employee of LASA under the Labour Relations Act of 1995. This claim was upheld in the Dispute Resolution Council, but challenged by LASA in the Labour Court, on the grounds that the mere fact that Jarrett was a director of LASA did not make him an employee. It was argued that a person could be an employee of the parent company but not an employee of the subsidiary of which he or she was a director.

118. LASA also argued that Jarrett did not have any written contract with them. A determination of the true relationship, according to them, had to take into account the structure and content of

⁸¹ [2001] 9 BLLR 993 (LAC).

⁸² [2003] ZALC 113 (LC).

the contract between the contracting parties. It was pointed out that several cases⁸³ including *Pearson*⁸⁴ required that the nature of an employment relationship be primarily determined by reference to the contract concluded between parties, which in this case was between LAG and Jarrett.

119. It was also contended that all that LASA did was to terminate Jarrett's appointment as managing director (and not his employment), consequent upon the termination of his employment by LAG. *In casu*, Jarrett was bound to LAG as employee, and to no one else.

120. The Labour Court looked past these arguments, and held that that an employment relationship need not necessarily depend on the existence of a contract of employment between the parties, given the wide language of section 213(b) of the Labour Relations Act 1995. In fact, the court specifically declined to follow the *ratio decidendi* of the *Pearson* judgment.

121. Likewise, in *Linda Erasmus Properties Enterprise (Pty) Ltd v. Lucky Mblongo*,⁸⁵ the court was concerned with the true nature of the relationship between the applicant and the first respondent. The applicant contended that the contract concluded with the respondent clearly identified the latter as an independent contractor.

122. However, the court, after scrutinising the various clauses in the contract, concluded that these provisions did not tilt the scale in favour of the respondent being an independent contractor. It held that, whilst deciding whether a person is an employee or not, it was enjoined to determine the true and real position between the parties. The issue was not to be exclusively decided on what the parties decided to call their relationship. The designation of the position was not conclusive of the nature of relationship. Rather, what was important was the dominant impression that was gathered from the relationship. In support of this proposition, the court cited the case of *Stein Rising Tide Productions*,⁸⁶ where it had been observed as follows:

⁸³ *Niselow v Liberty Life Association of Africa Ltd*, (1998) 191 LJ 752 (SCA); *CMS Support v. Briggs*, (1998) 191LJ 274 (LAC).

⁸⁴ *Pearson v Sheerbonnet SA (Pty) Ltd* [1999] 7 BLLR 703

⁸⁵ [2007] 6 BLLR 530 (LC).

⁸⁶ (2002) 23 ILJ 2017 (C).

“Although the control test is an important factor in the inquiry, the crucial test, particularly in marginal cases is whether or not the dominant impression of the relationship is that of a contract of employment.

123. A reference was also made to *Goldberg v. Durban City G Council*,⁸⁷ where in seeking to discover the true relationship between parties, the court paid due regard to the realities of the relationship as opposed to being bound by what the said relationship had been called.

124. Yet another case that was cited in *Linda* was that of *Denel (PTY) LTD v. Geber*.⁸⁸ Particular reference was made to the dictum that “ignoring the realities of the relationship between parties makes it possible to avoid the scope of protective legislations such as the Labour Relations Act.”

125. Therefore, the only conditions and tests that need to be satisfied by two or more legal persons to be employers of the same person are those that are generally prescribed to establish an employment relationship.

b. How is liability divided between the two employers?

126. Although case law in South Africa have perfunctorily referred to the possibility of having joint employers on an interpretation of Section 213 of the 1995 Act or section 1 of the 1956 Act, there has been no further explanation of how liability would be divided between the employers in such cases.

127. However, there seems to be an indication of how division of liability might be approached in the debate surrounding the interpretation of amended Article 198 in the Labour Relations Act.

128. Prior to amendment, the first four sub-sections of section 198 of the Labour Relations act read as follows:

1. In this section, “temporary employment services” (TES) means any person who, for reward, procures for or provides to a client, other persons –

⁸⁷ 1970 (3) SA 325.

⁸⁸ (2005) 26 ILJ 1256 (LAC).

- (a) who render services to, or perform work for, the client; and
 - (b) who are remunerated by the temporary employment service.
2. For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.
 3. Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.
 4. The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes
 - a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment; [0861 IMPLEX]
 - b) a binding arbitration award that regulates terms and conditions of employment; c) the Basic Conditions of Employment Act; or
 - d) a determination made in terms of the Wage Act.

129. In 2014, section 198A was inserted by way of an amendment. Of particular import was the deeming provision contained in section 198A(3)(b) whereby an employee rendering service to a client for more than three months would be deemed to be an employee of the client, no longer providing temporary service.⁸⁹

130. Furthermore, subsection 4A was inserted in section 198, whereby the employee was vested with the right to institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client.⁹⁰

131. In the aftermath of this amendment, the interpretation of the Deeming Provision led to two main approaches regarding employees who perform work for a period exceeding three months, namely the Sole Employer Approach and the Dual Employer Approach.

⁸⁹ Labour Relations Amendment Act, 2014, sec. 38

⁹⁰ Labour Relations Amendment Act, 2014, sec. 37.

132. In terms of the Sole Employer Approach, TES employees who are performing for more than three months become the employees of the client and the client becomes the only employer of the TES employees. This approach suggests that the employees are transferred to the client from the TES and that the latter is removed from the employment relationship.
133. In terms of the Dual Employment Approach, the Deeming Provision, read together with s198(4) and 198(4A) of the LRA, creates a dual employment relationship. In other words, when employees work for the client for more than three months, they are not transferred from the TES to the client, but rather have both of them as their dual employers. Such dual employers attract joint and several liability.
134. However, in a ruling handed down by the Commission for Conciliation, Mediation and Arbitration on 29 June 2015, in the matter between *Assign Service (Pty) Ltd and Krost Services and Racking (Pty) Ltd*, the sole employer rule was adopted. It was held that merely because a joint and several liability provision existed under section 198(4), that was not suggestive of a dual employment relationship between the client and TES. Rather, the joint and several liability was merely restricted to the four conditions stipulated in section 198(4). This position was upheld by the Labour Appeal Court in July 2017.⁹¹
135. Therefore, in cases where dual employment is established, the courts have not rejected the possibility of joint and several liability.

⁹¹ *NUMSA v Assign Services and Others*, (2017) 38 ILJ 1978 (LAC).

- II. Under what circumstances will a duty of care be owed in tort to those who are for practical purposes working for legal person X, but do not do so pursuant to a contract of employment? If that person is employed under a contract of employment with another in relation to that work, how will liability be divided the legal employer and X?**

Delictual Duties in Tri-Partite Chain of Contracts

136. A duty in delict can arise in a tri-partite relationship between parties with no privity of contract, if there has been a breach of duty that is not covered by the chain of contracts. In *Concor Holdings v. Minister of Water Affairs & Forestry and Another*⁹² (which was not a case pertaining to employment contracts, but dealt with a similar chain of tripartite contracts regarding the construction of the Injaka Dam bridge), there existed a chain of contracts where not every party was in privity of contract with every other one. The plaintiff was Concor Holdings Ltd, a company carrying on business as construction and engineering contractors. The first defendant was the Minister of the Department of Water Affairs and Forestry. The second defendant was VKE Consulting Engineers, a company carrying on the business of consulting engineers.
137. The first defendant had entered into a consulting contract with the second defendant for the design of an alternative route to Road P57 -2, over or around the Injaka dam basin. Subsequently, the plaintiff concluded a building contract with the first defendant to construct a bridge over the said basin, based on the design and under the general administration of the second defendant. On 6th July 1998, there was a collapse of certain components of the work in progress and the plaintiffs attributed the fault to the designs of the second defendant.
138. The plaintiffs alleged that the two defendants were jointly and severally liable to the plaintiffs in delict for damages if, or to the extent that, the said amount was not recoverable from the first defendant in contract.

⁹² *Concor Holdings v. Minister of Water Affairs & Forestry and Another*, (2006) ZAGPHC 138.

139. The second defendants were alleged to have been the wrongdoers, and the claims in delict against the first defendant were based upon the alleged vicarious liability of the first defendant for the wrongdoing of the second defendants.

140. The defendants contended that the claims were solely contractual claims, and that there was no room for concurrent or alternative claims in delict.

141. While deciding the issue, the High Court referred to the observations that had been made in the case of *Lillicrap, Wassenaar and Partners v Pilkington Brothers*,⁹³ by Judge Grosskopf –

“The relationship between the three parties is still one which has its origin in contract. One must assume that their respective rights and obligations were regulated to accord with their wishes, and that the contractual remedies which would be available were those which the parties desired to have at their disposal. The same arguments which militate against a delictual duty where the parties are in a direct contractual relationship, apply in my view, to the situation where the relationship is tripartite, namely that a delictual remedy is unnecessary and that the parties should not be denied their reasonable expectation that their reciprocal rights and obligations would be regulated by their contractual arrangements and would not be circumvented by the application of the law of delict.”

142. However, the High Court, after having carefully studied the principle laid down in *Lillicrap*, concluded that the decision did not necessarily exclude all possibility of delictual liability arising between two or more of the parties to a chain of contracts. It observed:

“If, in a chain of contracts between three (and sometimes more) parties, the wrongful conduct of one of them, acting intentionally or negligently, should cause patrimonial loss to another of them, in a manner that is not regulated expressly or by implication by contract, it seems to me that there must remain room for the application of Aquilian principles, or other principles of the law of delict, to the extent that this can be done consistently with the parties' contracts.”

“In particular, the present plaintiffs, for relief in respect of such conduct of the second defendants as is regulated by the building contract, are limited to their contractual remedies against the first defendant. It is the first defendant alone who has contractual remedies against the second defendants for any harmful conduct on their part that is regulated by the terms of the consultancy agreement. The only possibility that the plaintiffs may have a remedy against the second defendants based upon Aquilian

⁹³ 1985 1 SA 475 (A).

principles is if the plaintiffs' allegations reveal that the second defendants owed the plaintiffs a non-contractual legal duty that is independent of the parties' two contracts and not inconsistent with either contract, and that the second defendants have conducted themselves in a manner that, without being regulated at all by the contracts, is wrongful in that it breached the independent legal duty owed by the second defendants to the plaintiffs.”

143. At the same time, the court cautioned that the plaintiffs were precluded from enjoying a right to a remedy against the second defendants based on Aquilian principles, for any conduct on the part of the second defendants in respect of which the plaintiffs had a contractual remedy against the first defendant. It was clarified that it would be fanciful to suggest that the plaintiffs' contractual remedies against the first defendant, based on the alleged conduct of the second defendants, constituted a collateral source, wholly independent of the wrongdoer.

144. Thus, it appears that a duty in delict can arise in a tri-partite relationship between parties with no privity of contract, only if there has been a breach of duty that is not covered by the chain of contracts in such a relationship.

Duty of Care in Relation to Employment

145. It seems that a duty of care in delict can exist in the employment context, even in the absence of a contract of employment. In *Peri- Urban Areas Health Board v Munarin*,⁹⁴ the court devised a common law principle whereby a duty of care was not owed by employers to workers employed by a contractor unless the terms of a contract or other factors created such a duty. However, this common law principle was altered by the court in *Joubert v Buscor Proprietary Limited*.⁹⁵ The case pertained to the death of an apprentice who had worked with a close corporation. The said close corporation had been contracted by the defendant to carry out electrical, mechanical repairs and maintenance of equipment owned by the defendant, situated at the defendant's premises and depot. It was during the course of the same that apprentice died. The question was whether the defendant owed a duty of care to the deceased.

⁹⁴ 1965 (3) SA 367 (A).

⁹⁵ (2013/13116) [2016] ZAGPJHC 340.

146. The court held that in light of the broad wordings contained in the Occupational Health and Safety Act, 1993, the employer owed a duty of care to those affected by his activities, particularly in relation to health hazards and other safety issues arising out of or in connection with work. Thus, the court sought to alter the common law principle laid down in the Peri-Urban Areas Health Board case, by relying on other factors like statutory duties of care.

147. It appears therefore, that a duty of care in delict can exist, even in the absence of a contract of employment, under certain circumstances.

NEW ZEALAND

I. Does employment law in your jurisdiction recognise the existence of joint employers?

148. When two legal persons have a close legal relationship they can be considered to be joint employers of an employee. In *Inspector of Awards v Pacific Helmets (NZ) Ltd*⁹⁶ Chief Judge Horn stated, “I see nothing in principle to prevent two people or firms joining together to employ one man for their respective purposes.”⁹⁷ The acceptance of the concept of joint employers was confirmed by Judge C M Shaw in *Orakei Group (2007) Limited v Doherty*.⁹⁸

a. Under what conditions will two or more legal persons be employers of the same person in relation to the same work?

149. The conditions for finding two or more legal persons to be employers of the same person in relation to the same work were set out by Judge Shaw, drawing on Canadian case law,⁹⁹ in *Orakei Group (2007) Limited v Doherty*.¹⁰⁰ Two or more legal persons will be employers of the same person in relation to the same work where there is a sufficient degree of a relationship between the two employers.¹⁰¹ The court will take elements of common control as evidence of a relationship between two employers. The element of common control is usually that the employer is the same person operating through different companies.¹⁰² Both companies are held to be jointly employing the employee.

150. The first acknowledgement of the concept of having two employers was in *Inspector of Awards v Pacific Helmets (NZ) Ltd*.¹⁰³ Mr Foster was taken to be jointly employed by Wholesale Cycles (South Pacific) Ltd and Pacific Helmets (NZ) Ltd. Mr Foster responded to an advertisement of a job to be a sales representative for Wholesale Cycles (South Pacific) Ltd. Mr Bennet, the director of both Wholesale Cycles (South Pacific) Ltd and Pacific Helmets (NZ) Ltd, claimed to have explained to Mr Foster that he was self-employed. Mr Foster regarded himself as an

⁹⁶ [1988] NZILR 411.

⁹⁷ *Ibid.* 417.

⁹⁸ [2008] NZEmpC 65, [48]-[58].

⁹⁹ *Sinclair v Dover Engineering Services Ltd* (1988), 49 D.L.R. (4th) 297 (Canada).

¹⁰⁰ [2008] NZEmpC 65

¹⁰¹ *Orakei* [2008] NZEmpC 65, [56].

¹⁰² *Ibid.*, and *Inspector of Awards* [1988] NZILR 411

¹⁰³ [1988] NZILR 411.

employee. Judge Horn ruled he was in fact an employee. The relevant question was who was his employer. Mr Bennet claimed Pacific Helmets (NZ) Ltd was the parent company of Wholesale Cycles (South Pacific) Ltd. Judge Horn decided that both companies employed Mr Foster. Mr Foster's direct responsibility was to one person who was the director of both companies. The element of common control was, therefore, that the same person was director of both companies.

151. In *Orakei Group (2007) Limited v Doherty* the concept of joint employers was explicitly recognised. Mr Doherty and another grievant raised an employment relationship problem against the plaintiff, then named PRP Auckland Limited, and an associated company, 54 Cuba Street (2007) Limited. Mr Doherty claimed he was owed redundancy money as well as other allowances. 54 Cuba Street (2007) Limited accepted liability for redundancy payments. Mr Doherty wanted to bring a claim against PRP Auckland Limited for the outstanding payment owed by 54 Cuba Street (2007) Limited. Mr Kidd was the director of both PRP Auckland Limited and 54 Cuba Street (2007) Limited. Mr Kidd was held to be the source of common control over each company at least insofar as it affected Mr Doherty's employment. The element of common control was again that the same person was a director of both companies.¹⁰⁴

152. Research found no cases where the concept of joint employers was used in the context of a triangular employment relationship. In the first case to consider a triangular employment relationship the focus was instead on the existence of a separate contract of service that could be implied between the employee and the end user deriving the direct benefit of the employee's services.¹⁰⁵ This has been the focus of the subsequent case law and the concept of joint employer's has not been used.

153. In 2008 the Employment Relations Amendment Bill (No 3) proposed increased protection for employees in triangular employment relationships by introducing a section in the Employment Relations Act that would allow a "controlling third party" to be joined along with the employer to a grievance procedure, for example an unfair dismissal or harassment claim.¹⁰⁶ This would have introduced a statutory concept that would have effectively made a controlling third party a

¹⁰⁴ [2008] NZEmpC 65

¹⁰⁵ *McDonald v Ontrack Infrastructure Ltd And Anor* [2010] NZEmpC 132, [52].

¹⁰⁶ Employment Relations Amendment Bill (No 3), Clause 6.

joint employer. However, following a general election and a subsequent change of government, the Bill was discharged on the 6 March 2009.¹⁰⁷

b. How is liability divided between the two employers?

154. Where the court finds there are joint employers they are held jointly and severally liable.¹⁰⁸

II. Under what circumstances will a duty of care be owed in tort to those who are for practical purposes working for legal person X, but do not do so pursuant to a contract of employment? If that person is employed under a contract of employment with another in relation to that work, how will liability be divided between the legal employer and X?

155. Compensation for personal injuries in New Zealand is covered by statute and not tort law. Employers pay insurance levies to the Accident Compensation Corporation and are not liable for paying compensation for injuries that occur at work. The scheme is not fault based. Employers pay insurance levies to the Accident Compensation Corporation and are not liable for paying compensation for injuries that occur at work. They can, however, be prosecuted under the *Health and Safety at Work Act 2015*.

156. An employer will owe a duty to ensure, as far as is reasonably practical, the health and safety of a person who for all practical purposes is working for the legal person X whilst the person is at work.¹⁰⁹ The duty of care that employers owe their workers and those who are for practical purposes working for them is governed by statute under the *Health and Safety at Work Act 2015*. An employer can be prosecuted under this act for failing to carry out the duty they owe to employees.

157. A worker is defined broadly and in section 19(1)(d) includes, “an employee of a labour hire company who has been assigned to work in the business or undertaking”. The Act is designed to cover all modern working relationships and moves away from the employer-employee relationship. Workers in a triangular employment relationship are counted as workers under the Act.

¹⁰⁷ <http://www.legislation.govt.nz/bill/government/2008/0289/latest/versions.aspx>, last accessed 26 November 2017

¹⁰⁸ *Inspector of Awards* (n 1), 417.

¹⁰⁹ *Health and Safety at Work Act 2015*, s36(1)(a).

158. Under the Act more than one person can have the same duty imposed by or under the Act at the same time.¹¹⁰ Section 34(1) states that, “If more than 1 PCBU [a person undertaking a conducting a business or undertaking] has a duty in relation to the same matter imposed by or under this Act, each PCBU with the duty must, so far as is reasonably practicable, consult, co-operate with, and co-ordinate activities with all other PCBUs who have a duty in relation to the same matter.” It is an offence not to consult with other PCBUs that have the same duty under the Act.¹¹¹
159. There have not been many judgements interpreting the Act. The first judgement relating to a prosecution under the Act was only handed down on the 22 August 2017.¹¹²
160. Research found no cases outside of personal injury in tort where an employer will owe a duty of care to those who are for practical purposes working for the employer.

¹¹⁰ *Ibid.*, s33(1).

¹¹¹ *Ibid.*, s34(2).

¹¹² *WorkSafe New Zealand v Budget Plastics (New Zealand) Limited* [2017] NZDC 17395.

IRELAND

Does employment law in your jurisdiction recognise the existence of joint employers?

Introduction

161. Irish law recognises a limited and context specific form of joint employment. So far, it has been impliedly rejected as a *general* concept in employment law, although no case *directly* attempting to establish a general rule of joint employment has been brought in Irish courts. The concept appears to exist only in so far as, in the context of employment by school boards but payroll management/payment by the government a teacher is employed by both the government and the school board respectively *for the purpose of different rights* depending on the context (see below for more detail).
162. The issue of joint employment has rarely been explicitly raised in Ireland. A number of cases have hinted at the possibility that a person may have more than one employer, but these cases have almost (with two notable exceptions) always been resolved without having to address this issue directly. The issue has been avoided (and so seems to be an unlikely source of information about joint employment) in the following situations:
- a. **Secondment:** in one case employment by ‘more than one employer’ was raised by a seconded teacher, but the case was not decided on this point (*Raifery v Frobel College of Education*¹¹³);
 - b. **Agency workers:** various agency working cases have considered the tripartite relationship, but this has not tended to any analysis of joint employment as, where the finding is that the third party employs the agency worker, this is *instead of* (rather than as well as) the agency (as in *Diageo Global Supply v Rooney*¹¹⁴).
163. Two situations exist where the court has directly examined whether an employee may have more than one employer with respect to the same work. Both of these involve government and the employment of (semi-) public servants. The first is joint employment of teachers by school boards and the Department of Education, and the second is the employment of a secretary by a Teachta Dála but paid by the Oireachtas.¹¹⁵ In both situations, the employee works for one party but the other provides payment.

¹¹³ [2014] 25 E.L.R 190, 193; 198

¹¹⁴ [2004] 15 E.L.R 133, 141

¹¹⁵ The Oireachtas is the Irish Parliament, and a Teachta Dála is a member of its lower house.

Joint Employment of Teachers: *Minister of Education v Boyle*

164. *The Minister for Education and Skills v Anne Boyle*:¹¹⁶ B was a part time primary school teacher. She had not been included in a superannuation scheme, and sued the Minister for Education in the Labour Court on the basis of discrimination due to her part time status under the Protection of Employees (Part Time Work) Act 2001. On judicial review of the Labour Court's decision, the Minister argued that he was not an employer for the purposes of the 2001 Act. The two possible employers were the school's board of management and the Department of Education. The latter provided the former with a grant covering 98% of B's salary until 2009, but from 2009 onwards B was paid directly by the Department. The terms and conditions of B's employment were set by the Department. On the other hand, the management committee had day-to-day control of the performance of B's duties, and the usual position in Irish law is that the contract of employment is between the school and the teacher, despite pay coming from the Department.¹¹⁷

165. The Labour Court said that 'in a tripartite employment relationship, where a worker is engaged by and works under the direction and control of one party, and his or her terms and conditions of employment are determined solely by another party and funded by that party, the party who determines and funds the wages is to be regarded as the employer for the purposes of the 2001 Act'.¹¹⁸ On appeal to the High Court, the Labour Court's decision was upheld, the High Court noting that the payment arrangements with the Department were 'consistent with the legal responsibility of an employer for pay related issues'.¹¹⁹

166. In the Court of Appeal, a distinction was drawn between on the one hand situations where the question is whether the State is vicariously liable for a teacher's torts (as in *O'Keefe v Hickey*¹²⁰) or the State's constitutional obligations when teachers strike (in *Crowley v Ireland*¹²¹), and on the other hand 'whether the Minister the is employer for the purposes of contemporary employment legislation'.¹²² In this situation, there is an 'underlying reality which transcends the

¹¹⁶ CA, 24th Feb 2017

¹¹⁷ *Ibid.*, [63] – [65]

¹¹⁸ *Ibid.*, [42]

¹¹⁹ *Ibid.*, [50]

¹²⁰ [2008] IESC 72

¹²¹ [1980] I.R. 102

¹²² CA, 24th Feb 2017, [66]

formal contract of employment,¹²³ and because of the situation regarding payment ‘there was an implied contract of service between Ms. Boyle and the Minister’. Concluding, the Court of Appeal recognised that in the ‘unique tripartite relationship’¹²⁴ between schoolteachers, schools and the Department of Education established originally because of Art. 42.4 of the Irish Constitution, a teacher will be employed by both the Department and the school, though each employer is only an employer for some purposes not others.¹²⁵

167. In summary, it is possible in Irish Law for a teacher to be jointly employed because of the unusual situation whereby one party is responsible for all the usual aspects of employment except payment, and a second is fully responsible for payment, more than simply providing the money with which the teacher is paid. It is not clear to what extent this precedent could ground a more comprehensive doctrine of joint employment.

‘Co-employment’ of a secretary to a Teachta Dála: *Blackbyrne v Pringle*

168. *Joan Blackbyrne v Thomas Pringle and the House of Oireachtas*:¹²⁶ the claimant had worked for ten years as the secretary to the first defendant, Pringle (a politician in the Oireachtas), from whom she took day to day instruction, but was paid by the second defendant (the Oireachtas), who kept her on their payroll.¹²⁷ Although the traditional understanding of her position was that she was employed by Pringle only, she argued that the Oireachtas was a ‘co-employer’.¹²⁸

169. Blackbyrne sought to establish that she was ‘co-employed’ by the Oireachtas because Pringle was retiring from politics. If she could establish that O was also her employer, then her employment would ‘revert’ to O and she could, if dismissed, claim unfair dismissal.

170. The Employment Tribunal decided against B, holding that she was employed only by P and not O. Counsel for the second respondent had argued that ‘no such concept is recognised in law’ and whilst not explicitly rejecting the notion of ‘co-employment’, the Tribunal said that ‘no interpretation of the law and case law could allow the Tribunal to make such a finding’.¹²⁹ However, it is worth noting that the Tribunal relied on case law that specifically discussed the

¹²³ *Ibid.*, [81]

¹²⁴ *Ibid.*, [86]

¹²⁵ *Ibid.*, [104]; [66]

¹²⁶ [2014] 25 E.L.R 153

¹²⁷ *Ibid.*, 154

¹²⁸ *Ibid.*, 155

¹²⁹ *Ibid.*

employment status of Teachta Dála employees, so the statement quoted above cannot be taken as completely rejecting in all circumstances the existence of joint employment.

Conclusion

171. Although a finding of the Labour Tribunal has rejected the notion of joint employment (or ‘co-employment’ as it was referred to in that case), the Court of Appeal in *Minister of Education v Boyle* was happy to accept that B could be employed by different parties for different purposes, although the factual scenario that lead to this finding came about only because of quirks of the Irish constitution.

ENGLISH LAW OF TORT

I. Under what circumstances will a duty of care be owed in tort to those who are for practical purposes working for legal person X, but do not do so pursuant to a contract of employment?

Overview

172. In the context of employment, English law currently allows tort liability to be found against legal person X, despite the absence of a contract of employment between X and the claimant, in the following circumstances: (i) when there is a duty owed by a parent company to the employee of its subsidiary; (ii) by applying and extending the approach to joint employers in *Viasystems (Tyneside) Ltd v Thermal Transfer Northern*,¹³⁰ and (iii) in certain cases, where there is a duty of care owed by an independent contractor to employees of its sub-contractor.

173. It is noted that there is no *prima facie* obstacle preventing tort liability from being recognised independent of an existing contractual relationship. This is recognised, *inter alia*, in *Lennon v Commissioner of Police of the Metropolis*.¹³¹ The claimant was unable to sue the defendant employer for breach of contract; he was a member of the police force, which does not utilize contracts of employment. Instead, the court recognised that, independent of a contract between the parties, a tortious duty arose due to the assumption of responsibility by the defendant.

Duties owed by parent companies

174. The court in *Chandler v Cape*¹³² recognised that a duty of care exists between a parent company and employees of a subsidiary company, despite the absence of a contractual relationship between the parties. In *Chandler*, the claimant had been employed by Cape Products, a wholly owned subsidiary of Cape. He contracted asbestosis, and brought a claim in negligence against Cape; there could be no claim against Cape Products as the company no longer existed.

175. The court ruled that there was a duty owed in relation to the health and safety of the employees of a subsidiary company, where the following conditions were met: (i) the business of the two companies were in relevant aspects the same; (ii) the parent had, or ought to have had, superior

¹³⁰ [2005] EWCA Civ 1151

¹³¹ [2004] EWCA Civ 130

¹³² [2012] EWCA Civ 525

knowledge on some relevant aspect of health and safety in the particular industry, (iii) the parent knew, or ought to have known, that that subsidiary's system of work was unsafe; and (iv) the parent knew, or ought to have foreseen, that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection. The facts of the case satisfied these criteria. The critical question outlined by Arden LJ was 'simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees'.¹³³

176. Of particular importance is the insistence that the court is not piercing the corporate veil. Instead, the court has highlighted that '[a] subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company'.¹³⁴

177. The principle in *Chandler v Cape* has been employed in subsequent cases.¹³⁵ Notably, *Thompson v The Renwick Group*,¹³⁶ although distinguished on the facts, clarifies that the criteria outlined by Arden LJ above was not 'exhaustive of the circumstances in which a duty may be imposed... the case merely illustrates the way in which the requirements of *Caparo v Dickman* may be satisfied between the parent company, and the employee of a subsidiary'.¹³⁷

The concept of 'joint employers' in *Viasystems*

178. *Viasystems* adopts a notion of 'join employers' which allows for a defendant to be held liable in tort, despite the absence of a contractual relationship between the employee and the defendant. However, the case concerned vicarious liability of the employer and X for the negligence of the employee, and not liability of X for negligence injuring the employee.

179. Specifically, the claimant in *Viasystems* had employed contractors (the first defendant) to install air conditioning in their factory. These contractors sub-contracted ducting work to the second defendant. The second defendant contracted with the third defendant for the provision of fitters on a labour-only basis. The accident was caused by the negligence of a fitter's mate loaned under this arrangement, flooding the claimant's factory. The Court of held that both the second and third defendants could be held jointly vicariously liable for the fitter's mate's

¹³³ *Chandler v Cape* [2012] EWCA Civ 525, [70]

¹³⁴ *Chandler v Cape* [2012] EWCA Civ 525, [69]

¹³⁵ E.g. *AAA v Unilever Plc* [2017] EWHC 371 (QB)

¹³⁶ [2014] EWCA Civ 635

¹³⁷ *Ibid.*, [33]

negligence, with just and equitable division of contribution section 1 of the Civil Liability (Contribution) Act 1978.

180. The notion of ‘joint employers’ may still be applicable to the question, even though the facts are quite different to the case IWGB seeks to bring. The court in *Viasystems* identify various tests for determining when there is a requisite relationship between X and the employee, in order for the general tortious liability of X to be found. Specifically, May LJ and Rix LJ provide different tests for determining the liability of X.

181. May LJ states that: ‘To look for a transfer of a contract of employment is, in a case such as this, no more than a distracting device... The inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it. Who was entitled, and perhaps theoretically obliged, to give orders as to how the work should or should not be done? In my view, “entire and absolute control” is not, at least since the *Mersey Docks* case, a necessary precondition of vicarious liability’.¹³⁸

182. Rix LJ states that: ‘Liability is imposed by a policy of the law upon an employer, even though he is not personally at fault, on the basis, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently... Over the years, the tests which have been adopted to answer these issues have developed in a way which has gradually given precedence to function over form’.¹³⁹ He further elaborates: ‘What has to be recalled is that the vicarious liability in question is one which involves no fault on the part of the employer. It is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefit. One is looking therefore for practical and structural considerations. Is the employee, in context, still recognisable as the employee of his general employer and, in addition, to be treated as though he was the employee of the temporary employer as well?’¹⁴⁰

183. It remains to be seen if this definition of an ‘employer-employee’ relationship will extend beyond vicarious liability, in order to create a duty of care owed by X to the employee. This is

¹³⁸ *Viasystems* [2005] EWCA Civ 1151, [16]

¹³⁹ *Viasystems* [2005] EWCA Civ 1151, [55]

¹⁴⁰ *Viasystems* [2005] EWCA Civ 1151, [79]-[80]

because vicarious liability serves a discrete function in tort law. It is often explained as a matter of loss distribution, as employers are generally better able to distribute loss than employees. Courts have also cited the maxim of *qui facit per alium facit per se* (he who acts through another does the act himself) in describing vicarious liability.¹⁴¹ This rationale for vicarious liability may be inapplicable in finding a duty of care owed by X to the employee.

184. Hallett LJ expressed preference for the May LJ test of ‘control’ over Rix LJ’s ‘broader or more flexible’ test. She stated that the question of control ‘may not be wholly determinative’, but nonetheless ‘remains at the heart of the test to be applied’.¹⁴²

Duty of care owed by a contractor to employees of a sub-contractor

185. The court has recognised the possible existence of a duty of care between a contractor and employees of a sub-contractor, despite the absence of a contractual relationship between them. This was established in *Gray v Fire Alarm Fabrication Services Ltd*.¹⁴³

186. In that case, a hotel had hired a contractor to rewire their hotel. The contractor subsequently contracted the installation of a fire alarm system to a sub-contractor. An employee of the sub-contractor fell through a window and died. The sub-contractor had admitted liability, but sought contributions from the main contractors and the hotel, with whom the employee had no contractual relationship. The court held that, in appropriate circumstances, a duty of care could exist. However, on the facts of the case, no duty of care arose as the contractor and the hotel did not know of the decisions made by the sub-contractor which led to the employee’s death.

187. Gage LJ explicitly approved of a duty of care owed by the contractor, stating that ‘In my judgment there can be no doubt that in certain circumstances both an independent contractor and an occupier of a building can owe a duty of care to the employee of a subcontractor’.¹⁴⁴ However, he declined to express a specific test for when such a duty to arise, preferring to apply a ‘range of tests... which the House of Lords has developed in the years following *Ferguson v Welsb*’.¹⁴⁵

¹⁴¹ *Launchbury v Morgans* [1973] AC 127, 140, 142.

¹⁴² *Hawley v Lumina Leisure Ltd* [2006] EWCA Civ 18, [82]

¹⁴³ [2006] EWCA Civ 1496

¹⁴⁴ *Ibid.*, [34]

¹⁴⁵ *Ibid.*, [36]

188. In particular, Gage LJ refers to obiter dicta in *Ferguson v Welsh* accepting the possibility of liability of a contractor for injury to the employee of a sub-contractor: 'It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work. In special circumstances, on the other hand, where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for the occupier to take steps to see that the system was made safe'.¹⁴⁶

189. However, it is noted that these dicta have thus far only been applied in cases where X is an occupier of the premises in which the employee worked in. This was seen in *Makepeace v Evans Bros (Reading)*¹⁴⁷ and *Bottemley v Todmorden Cricket Club*.¹⁴⁸ It is therefore uncertain if a duty of care will be found independently of X's status as an occupier.

190. There are, however, some obiter dicta that the duty of care is to be predicated on X's status as a joint tortfeasor and not an occupier. Lord Oliver in *Ferguson v Welsh* states that 'I incline to think that his [the occupier's] liability in such a case would be rather that of joint tortfeasor than of occupier'.¹⁴⁹

II. If that person is employed under a contract of employment with another in relation to that work, how will liability be divided the legal employer and X?

Duties owed by parent companies

¹⁴⁶ *Ferguson v Welsh* [1987] 1 WLR 1553, 1560

¹⁴⁷ [2001] ICR 241

¹⁴⁸ [2003] EWCA Civ 1575

¹⁴⁹ *Ferguson v Welsh* [1987] 1 WLR 1553, 1562

191. Under the rule established in *Chandler v Cape*, it is the parent company's tort which is complained of, and so the parent company will be wholly liable.

The concept of 'joint employers' in *Viasystems*

192. The contribution that X is liable to pay was a salient issue in *Viasystems*. There, the court ruled that the legal employer and X were liable to contribute equally (50%). This was because equal contribution was considered to be 'just and equitable' under section 1 and 2 of the Civil Liability (Contribution) Act 1978.

193. It is highly likely that joint liability under the principle in *Viasystems* will always be equally divided. In particular, May LJ states that 'For dual vicarious liability, equal contribution may, depending on the facts, be close to a logical necessity'. Rix LJ further states that 'Where, therefore, there is dual vicarious liability arising out of the negligence of a single employee, it follows that the responsibility of each employer for the purposes of contribution must be equal'.

Duty of care owed by a contractor to employees of a sub-contractor

194. The three cases supporting this rule (*Gray v Fire Alarm Fabrication Services Ltd*, *Ferguson v Welsh*, and *Bottemley v Todmorden Cricket Club*) do not find the contractor liable on the facts of each case. Instead, the rule has been developed through dicta which explicitly accepts the possibility of such a duty arising on certain facts. Therefore, no indication as to division of liability between X and the legal employer has been made.

EUROPEAN UNION LAW

Is there any jurisprudence from the Court of Justice of the European Union which endorses, recognises, or might be helpful for the concept of “joint employer”?

195. There is no jurisprudence from the Court of Justice of the European Union (CJEU), which directly refers to the concept of ‘joint employer’.
196. However, in *Albron Catering BV v FNV Bondgenoten*,¹⁵⁰ a case from the year 2010, the CJEU upheld the idea of multi-employer-ship as a legal possibility, using the term ‘non-contractual-employer’.¹⁵¹ Generally speaking, the Court interpreted the concept of the employer in complex group scenarios very widely, by seeing it as independent of direct contractual arrangements.
197. The case was brought before the CJEU through a reference for a preliminary ruling under Article 267 TFEU (former Article 234 EC) from the *Gerichtshof te Amsterdam* (Netherlands).
198. It was concerned with questions related to the transfer of undertakings. The national court asked the CJEU for a preliminary ruling on the interpretation of ‘transferor’ within the meaning of Art. 2 (1) (a) of Directive 2001/23¹⁵² on a transfer of employees within a group of companies to a company outside the group.
199. The Directive’s purpose is essentially the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
200. The factual circumstances of the case were as follows: within the Heineken group, all personnel were in the employ of Heineken Nederlands Beheer BV (*HNB*). HNB has accordingly functioned as the central employer and seconded personnel to the various operating companies of the Heineken group in the Netherlands. From 17 July 1985 to 1 March 2005, Mr Roest (the claimant) was in the employ of HNB as a member of the catering staff. Together with some 70 other catering staff, he was seconded by HNB to Heineken Nederland BV which, until 1 March 2005, provided catering for workers in the Heineken group on various sites. The

¹⁵⁰ Case C-242/09 *Albron Catering BV v. FNV Bondgenoten and John Roest* [2010] ECR I-000

¹⁵¹ *Ibid.*, paras 20, 26, 29

¹⁵² Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or part of undertakings or businesses (Transfer of Undertakings Directive) [2001] OJ L82/16

HNB-based collective labour agreement applied in the context of that secondment. The claimant did not have a contractual relationship to Heineken Nederlands BV.

201. The claimant was a member of FNV Bondgenoten (FNV), a trade union whose objectives include protecting the interests of its members in the context of terms and conditions of employment and remuneration, in particular by concluding collective labour agreements. Heineken Nederland took the decision to outsource its catering operations from Heineken Nederlands BV to Albron Catering BV (Albron), a catering service company, from 1 March 2005. The claimant entered the service of Albron as a member of the catering staff in a restaurant from 1 March 2005.
202. FNV and the claimant brought legal proceedings against Albron before a national court for a judgment that the transfer of the catering operations on 1 March 2005 between Heineken Nederland and Albron was a transfer of an undertaking within the meaning of Directive 2001/23 and that employees in the employ of HNB who were seconded to Heineken Nederland BV automatically entered the service of Albron as from that date.
203. FNV and the claimant also claimed that Albron should therefore be ordered to apply to the employment contract concluded between Albron and the claimant, the terms and conditions that were in force between HNB and the claimant until that date.¹⁵³
204. Hence, the specific question the CJEU had to answer was whether in the event of a transfer within the meaning of Directive 2001/23, of an undertaking belonging to a group (*Heineken Nederlands BV*) to an undertaking outside that group (*Albron*), it was possible to regard as a "transferor", within the meaning of Art. 2 (1) (a) of that Directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment (*Heineken Nederlands BV*), even though there existed within that group an undertaking with which the employees concerned were linked by such a contract of employment (*HNB*).
205. The CJEU, following the Advocate-General's opinion,¹⁵⁴ concluded that

¹⁵³ Overview taken from Case C-242/09 *Albron Catering BV v. FNV Bondgenoten and John Roest* [2010] ECR I-000, Opinion of Advocate General Bot, para 55

- ‘within a group of companies, there are two employers, one having contractual relations with the employees of that group and the other non-contractual relations with them’¹⁵⁵,
- and, in this perspective it was possible to regard a ‘transferor’ within the meaning of Directive 2001/23, ‘the employer responsible for the economic activity of the entity transferred which, in that capacity, establishes working relations with the staff of that entity, despite the absence of contractual relations with those staff.’¹⁵⁶
- Furthermore, the CJEU stated that in complex group situations with a ‘plurality of employers’, there was nothing to suggest that ‘the contractual employer must systematically be given greater weight’.¹⁵⁷

206. Indeed, as the transfer regime was designed to ‘protect employees in the event of a change of “employer”’, ‘a change in the legal or natural person ... responsible for the economic activity’ could be a relevant transfer despite the absence of direct contractual relationships, ‘even [where] there exists within [the corporate] group an undertaking with which the employees concerned were linked by ... a contract of employment’.¹⁵⁸

207. The acknowledgement of a ‘non-contractual’ employer has not been used in cases related to employment questions prior to *Albron*. Quite on the contrary, in the *Fujitsu Siemens Case* from 2008¹⁵⁹, the CJEU suggested that the notion ‘employer’, referring to its meaning in Directive 98/59¹⁶⁰ dealing with collective redundancies, is ought to be construed as ‘a natural or legal person who stands in an employment relationship with the workers who may be made redundant. An undertaking which controls the employer, even if it can take decisions which are binding on the latter, does not have the status of employer.’¹⁶¹

¹⁵⁴ Case C-242/09 *Albron Catering BV v. FNV Bondgenoten and John Roest* [2010] ECR I-000, Opinion of Advocate General Bot

¹⁵⁵ Case C-242/09 *Albron Catering BV v. FNV Bondgenoten and John Roest* [2010] ECR I-000, para 31

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*, para 25

¹⁵⁸ *Ibid.*, paras 30, 28, 32 respectively

¹⁵⁹ Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy* [2009] ECR I-8163

¹⁶⁰ Council Directive (EC) 1998/59 on the approximation of the laws of the Member States relating to collective redundancies (Collective Redundancies Directive) [1998] OJ L225/15

¹⁶¹ Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy* [2009] ECR I-8163, paras 57, 58

208. Also, taking into account all CJEU decisions related to the transfer of undertakings,¹⁶² this decision has been the first to deal with and acknowledge the existence of a non-contractual employer.

209. Nevertheless, the decision dealt specifically with the transfer of undertakings. Whether this decision has an impact on the notion of the ‘joint employer’ in general, cannot be clearly foreseen. In *Albron*, the CJEU had to deal with a situation where the temporary employment has been conducted between subsidiary companies of one parent company. It is not clear whether the principle can also be applied to ‘normal’ temporary employment situations.

210. The Advocate General, whose opinion the CJEU had followed in its judgement, left the answer to this question to the Court, as he stated:

‘In this case, assessing that stability does not pose a problem, since the employee at issue was assigned upon recruitment and on a permanent basis to the transferred company. It will be for the Court, where appropriate, to state subsequently whether and under which circumstances that solution must be extended to other cases of secondment. Interpretation of European Union law on the transfer of an undertaking has consisted, inter alia, in defining the scope of the law in the light of the broad diversity of situations which the national courts have to address.’¹⁶³

211. To date, the CJEU has not made a subsequent decision dealing with the notion of ‘non-contractual’ employers in cases of secondment.

¹⁶² See for instance Case C-392/92 *Schmidt v Spar – und Leibkasse der früheren Ämter Bordesholm, Kiel und Cronshagen* [1994] ECR I-01311; Case C-13/95 *Ayşe Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] ECR I-01259; Case C-466/07 *Dietmar Klarenberg v Ferrotorn Technologies GmbH* [2009] ECR I-00803

¹⁶³ Case C-242/09 *Albron Catering BV v. FNV Bondgenoten and John Roest* [2010] ECR I-000, Opinion of Advocate General Bot, para 55

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Is there any jurisprudence from the European Court of Human Rights which endorses, recognises, or might be helpful for the concept of “joint employer”?

212. There is no judgment of the European Court of Human Rights that explicitly recognises the concept of joint employer. There are two recent cases that show the Court’s tentative movement towards accepting the concept of joint employers under the ECHR.¹⁶⁴
213. The first case of potential relevance to this question is *Fernández Martínez v Spain*.¹⁶⁵ The domestic law dispute was between a public secondary school and a priest, who had been employed on fixed-term contracts to teach religion and ethics at the school. Under an agreement between the Spanish State and the Vatican, no religious school teacher would be appointed without the prior approval of the school’s diocese. After an article was published in which Mr Fernández Martínez’ status as a ‘married priest’ was mentioned, the diocese informed the school that they would not authorise the applicant’s contractual renewal. The applicant’s contract was not renewed and he commenced domestic proceedings against the Education Ministry.
214. Upon his claim to the ECtHR, the non-renewal of the applicant’s contract was found to interfere with his Article 8 right to private life as it was affected by events in his private life (his marriage). This non-renewal was based on an agreement between the Vatican and the Spanish education authorities and thus in accordance with law. The legitimate aim claimed was protecting the autonomy of the Church in choosing the personnel that teach its religious doctrine. A majority of the court found that the interference was proportionate to that aim.
215. Of interest to the question of joint employers is the fact that the interference was committed by the school authorities, but on the command of the local diocese. Further, the legitimate aim related to the latter, and not to the former. Whilst the dissenters were keen to separate the secular and the clerical role of the applicant, the majority went some way to treating the party giving authority to hire the applicant and the party who exercised control over the applicant in their job as one entity.

¹⁶⁴ *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* App no 31045/10 (ECtHR, 8 April 2014). *Fernández Martínez v. Spain* App no 56030/07 (ECtHR, 12 June 2014).

¹⁶⁵ *Fernández Martínez v. Spain* App no 56030/07 (ECtHR, 12 June 2014).

216. The most relevant statement of the majority is that:

The Court is thus of the opinion that the crux of the issue lies in the action of the state authority, which, as the applicant's employer, and being directly involved in the decision-making process, enforced the Bishop's non-renewal decision. Whilst the Court recognises that the state had limited possibilities of action in the present case, it is noteworthy that if the Bishop's decision had not been enforced by the Ministry of Education, the applicant's contract would certainly have been renewed.¹⁶⁶

217. The joint dissenting judgment (Spielmann, Sajò, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz) discussed the interference in the following terms:

We agree with the majority that the Ministry's decision not to reappoint the applicant should be characterised as an interference by the state with the applicant's human rights, not as an alleged failure by the state to take positive measures to protect the applicant against an interference by the Church. It is that interference by the state that is the direct object of the Court's scrutiny.

We would like to add that the foregoing does not necessarily prevent the Court from examining whether the Bishop's decision not to propose the applicant for appointment violated his human rights. This was indeed the approach adopted by the Constitutional Court, which stated that if the decision of the Diocese were to be found to violate the applicant's fundamental rights, the ensuing act of the Ministry would as a consequence have to be annulled. However, the attention should not be diverted from what is the main question in this case: did the state's reaction to the Church's decision respect the applicant's fundamental rights? It is state action that our Court has to review.¹⁶⁷

218. Interlocking decision-making processes are thus recognised as capable of interfering the human rights of an individual under the ECHR. The main reason that this was relevant to the Court was emphasising the state's direct involvement, and therefore a higher standard of scrutiny of their actions. Although the Court was divided on the issue of justification, both sides agreed on the existence of an interference as a result of the school authority *and* diocesan authority's decision not to renew the applicant's contract.

¹⁶⁶ Paragraph 115 of the majority decision.

¹⁶⁷ Paragraph 12 and 13 of the joint dissent.

219. Of more marginal relevance is the case *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*.¹⁶⁸ RMT argued that the UK had violated its right to freedom of association under Article 11 ECHR.¹⁶⁹ The core issue at the centre of the case was the UK's prohibition on secondary strike action – 'sympathy strikes' – alongside some points about strike ballot notices.

220. The European Court of Human Rights has found no violation of Article 11 ECHR. Nonetheless, the Court recognised that restrictions on industrial action fall within the scope of the Article.¹⁷⁰

The foregoing considerations lead the Court to conclude that the fact of the specific situation challenged in the present case do not disclose an unjustified interference with the applicant union's right to freedom of association, the essential elements of which it was able to exercise, in representing its members, in negotiating with the employer on behalf of its members who were in dispute with the employer and in organising a strike of those members at their place of work. In this legislative policy area of recognised sensitivity, the respondent State enjoy a margin of appreciation broad enough to encompass the existing statutory ban on secondary action, there being no basis in the circumstances of this case to consider the operation of that ban in relation to the impugned fact at Hydrex as entailing a disproportionate restriction on the applicant union's right under Article 11.

221. The European Court of Human Rights emphasised in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*¹⁷¹ that its jurisdiction is limited to the European Convention of Human Rights.¹⁷² Nonetheless, the judges Ziemele, Hirvelä, and Bianku were critical of the majority's deference to member states' legislation. They recommended that softer, reflexive practices should be used to deal with issues:

'At this juncture we should say, however, that we are not impressed with the argument that, merely because Parliament has adopted a particular general measure, the Court may not overrule it, as it were. The Court has to adjudicate upon the individual facts and

¹⁶⁸ *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* App no 31045/10 (ECtHR, 8 April 2014).

¹⁶⁹ *Ibid.*, 4, 7, and 42.

¹⁷⁰ John Hendy QC and Michael Ford QC, 'RMT v United Kingdom: Sympathy Strikes and the European Court of Human Rights' (OxHRH Blog, 10 April 2014) <<http://ohrh.law.ox.ac.uk/rmt-v-united-kingdom-sympathy-strikes-and-the-european-court-of-human-rights/>> [26 November 2017].

¹⁷¹ RMT (n 8).

¹⁷² *Ibid.*, 106.

those facts may stem from a general measure. The Court may well conclude that the measure is contrary to the Convention in view of its effects on the facts of the case.¹⁷³

¹⁷³ Paragraph 2 of their concurring opinion.