EMPLOYMENT TRIBUNALS

Claimant: Ms C Muswere

Respondent: De Vere Group Limited

Heard at: London Central (in public) **On:** 19 March 2019

Before: Employment Judge Welch (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr M Sethi, Counsel

JUDGMENT

The Tribunal does not have jurisdiction to hear the Claimant's race discrimination complaints and they are therefore dismissed.

REASONS

Background to the Claim

1. The Claimant brought claims of race discrimination under the Equality Act 2010 ("EqA") relating to what she alleges to have been a discriminatory dismissal and also direct discrimination under Section 13 EqA. The Respondent defended the claims on the basis that the Tribunal did not have jurisdiction to adjudicate the claims as the Claimant is an individual who had been based wholly abroad. The Respondent denied the claims in any event.

2. Following a preliminary hearing for case management on 12 December 2018, Employment Judge Davidson listed the case for an open preliminary hearing to consider whether the complaints fell within the territorial jurisdiction of the Employment Tribunal.

3. The case was originally listed for a one day preliminary hearing on 21 January 2019. When the case came before Employment Judge Professor Neal, the case was unable to proceed. It was therefore listed for a preliminary hearing, this time for two days, and came before me on 20 March 2019.

Preliminary Hearing

4. I was provided with an agreed chronology, together with a bundle of documents that had been prepared by the Respondent. The Claimant had herself bought in documents, many of which were found to be within the Respondent's bundle. The additional documents brought by the Claimant had been left out by the Respondent as it believed that those documents were not relevant to the issue for the Tribunal to consider at the preliminary hearing, namely territorial jurisdiction. However, the Respondent did not object to those additional documents being inserted into the bundle, and the parties ultimately agreed where they should go.

5. The parties had prepared witness statements. The Claimant had originally submitted a witness statement dated 11 January 2019, which was prepared for the first preliminary hearing. However she had updated this and requested that I consider her latest statement dated 15 March 2019 as her evidence in chief. The Respondent's witnesses, namely Mr L McCorkindale and Mr M A Chalklin, gave evidence via video link.

6. The witness statements stood as the evidence in chief for the witnesses and were subject to cross examination (where appropriate) and questions from me (where appropriate).

Findings of Fact

7. The Respondent is a Dubai registered company. It is part of a global multinational group of companies with office locations all over the world, including the United Kingdom. The Claimant, a British Citizen, who graduated from Loughborough University lives permanently in Great Britain.

8. In July 2017, the Claimant applied for a place on the deVere Group graduate programme. When completing her application online, she did so from Great Britain.

9. The application that she made was to a training scheme for graduates across the world, who are interested in becoming qualified financial wealth advisors. DeVere Group's advisors provide advice to expatriates in locations all over the world in relation to wealth, growth and management. Applicants who are graduates from UK universities become wealth advisors of UK expatriates all over the world if they succeed in their application and initial training. However, they are not employed to work in the UK and the individual customers they advise would not be based there.

10. The recruitment process has a number of stages. The first stage is for the applicant to view a live presentation by Webinar. The presentation was by Mark Reed, head of the graduate training programme from his base in Malta. The Claimant watched this from Great Britain.

11. The next stage is for applicants to submit a short video and psychometric test. Again, the Claimant completed this from Great Britain. The individuals handling this on behalf of deVere Group Limited were employees of deVere Acuma Insurance Brokers (a Dubai registered entity) and were both based in Dubai. Following this, the applicants have an interview usually carried out by Skype, but, in the Claimant's case, this was carried out by phone with Mark Reed. This

telephone call, during which the interview took place, was carried out by the Claimant in Great Britain and by Mr Reed in Dubai.

12. Finally, there is a face to face assessment centre within the UK. The Claimant attended this in London on 10 November 2017. Mr Reed and William Billton travelled to the UK from Malta in order to conduct two assessment centres, including the one which the Claimant attended.

13. The evidence, which was accepted by both parties was that whilst the Claimant was in Great Britain during the recruitment process and the final interview took place in Great Britain, the people handling the recruitment process on behalf of the Respondent were not based in Great Britain nor were they employed by a British entity.

14. The Claimant gave evidence, which was accepted, that her recruitment took six months to come to fruition and throughout the whole time she was based in Manchester.

15. The Claimant was sent a letter by Nigel Green, Managing Director of deVere Group on 30 April 2018 [page 27]. This confirmed "*deVere Group Limited is pleased to offer you a secondment to the position of Trainee Wealth Advisor at the deVere & Partners Holding Limited office, situated at Centrepoint, Dun Carm Street, Birkirkara Bypass, Birkirkar BKR9037 Malta. This appointment will commence on 30 April 2018 on a full time basis, after which should your training period give successful results you will be offered a permanent role in one of deVere Group's offices worldwide. Your salary will be €,200 per month".*

16. I believe that this should have said that the salary will be €1,200 per month. This letter also confirmed that the company would provide accommodation for the duration of the training period in Malta. The Claimant was asked to sign the attached agreement to accept the offer and return this to the Human Resources Department. It was confirmed that the main Human Resources Department was not based in Great Britain; it was based in Malta.

17. The Claimant's contract (pages 28 to 37) identified that the Claimant was contracting as an independent contractor with deVere Group Limited, a company incorporated in Dubai, to provide services to that company.

18. The contract provided in paragraph 14 headed "Law and jurisdiction":

    14.1.This Agreement will be governed by and construed in accordance with the laws of England and Wales and will be subject to the jurisdiction of the English Courts."

19. I am therefore satisfied that the contract was formed with deVere Group Limited, the Dubai company although the Claimant's services were to deVere & Partners Holding Limited, a Malta registered company, for the period of the Claimant's five week training course.

20. The Claimant's permanent address at the time of her recruitment was Manchester. She therefore travelled from Manchester to Malta in order to undertake the training course with the Respondent. If she had been successful, it was agreed that the Claimant would have been given a permanent base in an overseas location in one of the Respondent's international offices. It was accepted that this would not have been within the UK.

21. During the five week training course, from 30 April 2018 until 1 June 2018, the Claimant worked in Malta having been seconded to the Respondent's Maltese group company, deVere & Partners Holding Limited. The timetable for the five week training programme appeared at pages 141 to 142 of the bundle.

22. The Claimant's evidence was that, during the majority of the five weeks, she was cold calling clients based in the UK. Mr McCorkindale gave evidence, which was not disputed by the Claimant, that during the first two weeks, the Trainee Wealth Advisers have classes on a range of financial topics. During the first two weeks, just over a quarter of the time is spent doing a task called "power hour". During these power hours, the consultants are required to contact people in the UK who are potential recruitment leads to persuade them to watch a webinar. The power hours in weeks 3, 4 and 5 require the Trainee Wealth Advisors to source and contact UK expatriates in a specific list of international locations (not the UK). The Claimant was asked to focus on the Far East, Middle East, Europe, excluding the UK, Africa, the Caribbean and Canada. I accept the Respondent's evidence that the Claimant was not contacting de Vere Group clients but was contacting potential applicants for recruitment from the UK.

23. Additionally, in the second week of the training, the Claimant and other Trainee Wealth Advisors were asked to persuade as many people as possible to download the deVere Group Limited's CryptoCurrency App. The Respondent accepted that given they were all UK graduates, it was likely that they contacted family and friends based in the UK. The Claimant persuaded nine people to download the app, four of whom were based in the UK.

24. It was clear that, should the Claimant have been successful, she would have been located to one of the Respondent's international offices, and would have been advising UK expatriates on their UK pensions. However, these individuals would not have been resident in the UK, and neither would the Claimant.

25. The training in Malta was provided by employees of deVere & Partners Holding Limited, the Respondent's group company registered in Malta.

26. In the bundle, there were records of telephone calls made by the Claimant during the power hours in the first weeks of the engagement [pages 152 to 162]. These did initially show calls were entirely made to the UK during the later stages of the training course, other countries were telephoned by the Claimant.

27. During the Claimant's training, she was managed by the individuals based in Malta, being employees of deVere & Partners Holdings Limited, the Maltese registered company. There appeared to be no management, control or involvement with the Respondent's UK group company during this period and I am satisfied that the work she did during this period was not for the benefit or otherwise, of the UK entity.

28. The Claimant was paid €1,200 into her bank account held within Great Britain for the work undertaken for the Respondent. No UK tax was deducted from this payment. This meant that she was paid ultimately in GB pounds. The Respondent stated that this was the Claimant's

preferred currency, however there was no evidence that the Claimant had made any such indication. Rather, it was the only place in which she had a bank account at that time.

29. During the recruitment process, the Claimant was required to provide a copy of her passport, a criminal records DBS check and references. Prior to the termination of the contract between the Claimant and the Respondent, the Claimant was asked by Mark Reed on Thursday 31 May, "*Out of interest, what passports do you hold?".* The Claimant had previously enquired about working in Zimbabwe, however, this was before her final interview in London however it was clear that the Claimant was happy to work in any deVere Group office location and in any jurisdiction.

30. I am satisfied that the Claimant could not have worked in the UK since to do so would have required regulation by the Financial Conduct Authority in order to have been a financial adviser in the UK.

Submissions

31. Both parties addressed me orally in respect of the salient points they wished me to take into account in respect of the issue before me. The Respondent provided me with copies of five cases which had been referred to in its response to the Tribunal case and which the Claimant had repeated in her witness statement in readiness for the preliminary hearing. I have outlined these as far as they are relevant below.

32. In brief, the Respondent contended that this was a case where the Claimant was engaged by a Dubai entity, was seconded and worked wholly and exclusively in Malta under a contract for services. Had she passed her initial training, she would have moved on to non-UK entity, being another deVere company, selling non-UK products to non-UK individuals (being UK expatriates).

33. The reality was that no element of the Claimant's work was performed, or expected to be performed, at any time in the UK. She was recruited to be trained overseas in the hope that she would be permanently based outside the UK.

34. The only point of any weight in the Claimant's favour was the fact that parties had contractually agreed that the law of England and Wales would be applicable, although the authorities make clear that choice of law or jurisdiction is only one of a number of determinative factors. The starting point, which the authorities make clear, is that where the work is wholly and exclusively performed outside of the UK, the overriding general principle is that the place of work has jurisdiction for any disputes and that there were no exceptional circumstances to take us away from the norm.

35. The Claimant contended that her contract stated that it was governed by, and would be construed in accordance with the laws of England and Wales and further was subject to the jurisdiction of the English courts.

36. This was not ambiguous and provided evidence to show a strong connection to the UK. In the case of Lawson v Serco she contended that she could be considered a 'travelling employee'.

As, her base was Manchester and she had no permanent base in Malta. Her travel began and ended in Manchester. The recruitment process had been carried out in the UK, including the webinar, the online application, tests, an interview with Adam Blower, all whilst she was permanently based in UK. In order to go to Malta it relied upon DBS checks and references carried out in the UK.

37. The Claimant was not really sure how her engagement could be linked to either of the other jurisdictions mentioned, namely Malta or Dubai.
38. Whilst working in Malta, she had been calling individuals back in the UK, whether or not these were clients. She had been paid in Currency British Pounds.

Law

39. The Equality Act 2010 ('EqA') is silent as to territorial jurisdiction. Earlier protection against discrimination provided that it was unlawful for an employer to discriminate against an individual in relation to employment by it at an establishment in Great Britain. However, this test was not replicated in the EqA'. There have been many cases which have stated that for territorial jurisdiction purposes, the EqA should be considered in the same way as the Employment Rights Act 1996 ('ERA').

40. I set out below what I consider to be the salient points from the cases referred to in respect of territorial jurisdiction, which relate to either the EqA and/or the ERA.

41. In *Lawson v Serco Limited [2006] UKHL3*, a case concerning territorial jurisdiction under the Employment Rights Act ("ERA") for unfair dismissal which is still of relevance, Lord Hoffmann said *"….what parliament must have intended as a standard, normal or paradigm case of the application of section 94(1) with the employee who was working in Great Britain….remains indicative of what the general intent is likely to have been*".

42. Lord Hoffmann went on to identify categories of employee, other than those working in Great Britain, who would potentially come within the scope of the ERA as follows:

    - Peripatetic employees, "such as airline pilots, international management consultants, salesmen and so on" i.e. those posted abroad to work for a business conducted in Great Britain;

    - Expatriate employees: Lord Hoffmann stated at paragraph 36, "*The circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. But I think that there are some who do. I hesitate to describe such cases as coming within an exception or exceptions to the general rule because that suggests a definition more precise than can be imposed upon the many possible combinations of factors, some of which may be unforeseen. …. I would also not wish to burden tribunals with inquiry into the systems of labour law of other countries. In my view one should go further and try, without drafting a definition, to identify the characteristics which such exceptional cases will ordinarily have";*

- Others who *"would have to have equally strong connections with Great Britain and British employment law".*

43. Lord Hoffmann stated that he thought *"that it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary".*

44. It therefore seemed that Lord Hoffmann considered that there would need to be exceptional circumstances in order for employees working abroad to fall within the scope of British labour legislation.

45. In *Ravat v Halliburton Manufacturing and Services Limited[2012 UK SC1]* where the Claimant lived in Preston but worked in Libya, providing his services to a German company in the Halliburton group which was charged by his employer for the cost of employing him. The Claimant job shared with another employee. He would work 28 days in Libya followed by 28 days at home in Preston. He was described as an "international commuter" in his employment contract. Mr Ravat, prior to accepting work in Libya, was given assurances that his contract would continue to be governed by UK employment law. "*The question of law is whether s94(1) applies to this particular employee. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain".*

46. Lord Hope provided the following principles:

    - There must be a stronger connection with Great Britain than with the foreign country where the employee works in respect of the employment relationship. Place of employment may be decisive but that is not an absolute rule.
    - There must be an especially strong connection with Great Britain and with British employment law where an employee lives and works outside of Great Britain for the exception to be made.
    - The proper law of the parties' contract and the reassurance given by the employer about the availability of UK employment law was not determinative but was nonetheless relevant.

47. *Bates Van Winkelhof v Clyde & Co LLP 2012 EWCA CIV 1207* was a case involving whistleblowing and discrimination. One of the matters for the Court of Appeal to consider was whether the Tribunal had territorial jurisdiction to consider the Claimant's complaints since she was seconded to a Tanzanian law firm. Lord Justice Elias stated at paragraph 98, *"The*

comparative exercise will be appropriate where the appellant is employed wholly abroad. There is then a strong connection with that other jurisdiction and Parliament can be assumed to have intended that in the usual case that jurisdiction, rather than Great Britain, should provide the appropriate system of law. In those circumstances it is necessary to identify factors which are sufficiently powerful to displace the territorial pull of the place of work, and some comparison and evaluation of the connections between the two systems will typically be required to demonstrate why the displacing factors set up a sufficiently strong counter-force. However, as paragraph 29 of Lord Hope's judgment makes plain, that is not necessary where the applicant lives and/or works for at least part of the time in Great Britain, as is the case here. The territorial attraction is then far from being all one way and the circumstances need not be truly exceptional before the connection with the system of law in Great Britain can be identified. All that is required is that the tribunal should satisfy itself that the connection is, to use Lord Hope's words: "sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim.".".

48. *Creditsights Limited v Dhunna [2014] EWCA CIV 1238* - in this case, the Claimant originally lived and worked in the UK, but became keen to sell products to the Middle East and to live in Dubai. The Court of Appeal in this case held that the position remains that the employee must be able to show sufficiently strong and exceptional circumstances, in order to enable the Tribunal to have jurisdiction from the general rule that an employee working or based abroad will not be within the territorial scope of the ERA. It held that there was no requirement for a Tribunal to carry out a comparison of a competing systems of law to ensure that if a Claimant is denied a remedy in the UK he/she is guaranteed one in that other jurisdiction.

49. The final case provided by the Respondent was *R (on the application of Hottak and another) v Secretary of State for Foreign and Commonwealth Affairs and another) [2016] EWCA CIV 438].* This case concerned interpreters who were Afghan nationals providing services to the British Military in Afghanistan. The Court of Appeal held that the Tribunal did not have jurisdiction to consider their claims of discrimination under the Equality Act 2010, Sir Colin Rimer stated: *"…the present appellants were and are subject to the heaviest burden. They are not British citizens: they are Afghan nationals. They lived in Afghanistan. They were recruited in Afghanistan. Their employment contracts were governed by Afghan law. They worked exclusively in Afghanistan and there was no UK, international or peripatetic element to their employment. There was no provision either in their contracts or in any inter-state agreement that they were to be treated as resident in the UK for any purpose. Their contracts provided that, at least initially, their pay was to be exempt from local taxes, the result of a concession by the Afghan government. Their contracts did not provide for their pay to be subject to UK taxation. Their contracts included express statements of undivided loyalty to their employer, but there is nothing materially special about that for present purposes: employees ordinarily owe duties of fidelity to their employers. Whilst they worked at what may be regarded as British enclaves in Afghanistan, they were also part of an indigenous Afghan community, where*

Afghan law applied; and they could and would return to their Afghan homes when on leave. They were not employed on the same footing as British staff."

50. I had reference to one further Court of Appeal decision in respect of two cases *Jeffrey v the British Council and Green v Sig Trading Limited [2018 EWCA CIV 2253]*. In the Jeffrey case, Mr Jeffrey worked for the British Council in Bangladesh. He was a UK citizen, recruited in the UK but, almost always, worked abroad in teaching centres. He did not live in the UK, but did own properties in the UK, which he rented out. He also visited his parents in the UK and intended to retire there. His contract expressly provided that it was governed by the laws of England and Wales. The EAT and Court of Appeal concluded that there was jurisdiction to consider Mr Jeffrey's complaints of unfair dismissal, whistleblowing detriment and discrimination. They considered that the decisive elements were the civil service pension, the tax equalisation adjustment and the nature of the Respondent (being one departmental public body) "*which while not directly part of government are recognised as playing such a part in the life of the nation that it is right to afford a civil service pension to their employees*".

51. Mr Green however failed in his application for territorial jurisdiction for his unfair dismissal and whistle-blower detriment complaints. Mr Green lived in Lebanon, but worked in Saudi Arabia and was treated as exempt from UK tax and national insurance. He occasionally attended the UK for training or meetings, but did not perform any work for the benefit of the UK business. He owned no property in the UK. His contract was also expressly governed by English law and contained a mobility clause under which he could be required to work in the UK and Ireland. His line manager, IT, HR and payroll support were all based in the UK and he was paid in sterling. However, the Court of Appeal concluded that it did not have jurisdiction to consider his complaints since his employment did not have sufficiently strong connection with Great Britain.

Conclusion

52. The work undertaken by the Claimant in this case was carried out solely in Malta. This was not for the benefit of a British company, rather it was done by virtue of a secondment to the Respondent's Maltese group company, deVere & Partners Holding Limited.

53. The Claimant was not a peripatetic employee, nor was she an expatriate. Therefore, she would need to fall within the third exception of showing a sufficiently strong connection to Great Britain in order for the Tribunal to have jurisdiction to consider her race discrimination complaints, the allegations of which occurred in Malta.

54. The work carried out by the Claimant, whilst on training in Malta, included telephoning potential recruits in the UK. However, I do not consider this to have been a decisive factor in coming to my conclusion on whether the Tribunal has jurisdiction to hear the Claimant's race discrimination complaints.

55. The Claimant was recruited in the UK by the Respondent, a Dubai registered company. She worked entirely outside of Great Britain for the entirety of her contractual relationship with the Respondent. Some of her work involved speaking with individuals back in the UK, however, this was to recruit potential new applicants to the trainee wealth advisory programme and was

used as a training exercise to ascertain the Claimant's ability to persuade/ sell to others. The Claimant was not dealing with clients of the Respondent based in the UK.

56. I am satisfied that, whilst the contract specified that the laws of England and Wales were to apply to the contract for services entered into by the Claimant, this was a factor to be taken into account but was not necessarily decisive. There were no further assurances given to the Claimant regarding the applicability of the laws of England and Wales. I took this from the documentation before me and from the evidence provided by the witnesses.

57. Whilst the Claimant was living in the UK at the time of her recruitment and is a UK citizen, this in itself is again not determinative of where any discrimination complaints should be brought.

58. The Claimant was paid into her UK bank account in sterling although the contract provides that she will be paid the equivalent of euros. This appeared to me to be an administrative process due to the fact that the Claimant had not been in a position to obtain bank accounts abroad in the short space of time in which he was contracted with the Respondent. Again, this was not, in my view, determinative either way.

59. I am satisfied that had the contractual relationship continued between the parties, the Claimant would have moved to another international jurisdiction, not the UK. Therefore, whilst the Claimant travelled from the UK to Malta and back again at the end of her five week contractual relationship, this could not be considered to be the same as Mr Ravat's circumstances where he was effectively an 'international commuter'.

60. It was clear that all of the individuals the Claimant worked with, and, in fact, those who recruited her, were not employed by or a part of a British company; they were all employed by either the Dubai registered Respondent or its Maltese group company. Therefore, the contractual relationship was managed from outside of Great Britain.

61. The Claimant did not have UK tax deducted from her earnings from the Respondent, although was paid in GP Pounds for her assignment.

62. In light of the facts found, and in consideration of the authorities, there has to be a sufficiently strong connection with Great Britain in order for there to be jurisdiction for the race discrimination complaints. I am not satisfied that the Claimant has shown such a strong connection with Great Britain to be able to displace the fact that she worked wholly outside of Great Britain in respect of the work that she carried out in Malta for the Respondent company. I consider that there is a stronger connection with Malta than with Great Britain in this case.

63. The Claimant in this case was not engaged by a UK entity, nor was she working for the benefit of a UK entity overseas. She was regulated, line managed, controlled and paid from an overseas entity. The operational structure of her engagement originated from abroad, with only part of the recruitment process carried out in Great Britain.

64. For the reasons set out above, I do not consider this to be a case where I should accept jurisdiction to consider the Claimant's race discrimination complaints and, therefore, the Claimant's claims are dismissed for want of jurisdiction.

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Employment Judge Welch

23 April 2019

Sent to the parties on:

24 April 2019

For the Tribunal: