Case Number: 2206503/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms M Heal	**v**	Mr P Kite (1)
		Mr W Peake (2)
		Mr A R Munro (3)
		Mr R Willings (4)
		Harney Westwood and Riegels (5)

PRELIMINARY HEARING

Heard at: Central London Employment Tribunal

On: 14-15 February, 18 March & in Chambers on 8 April 2019

Before: Employment Judge Norris sitting alone

Appearances
For the Claimant: In person
For the Respondents: Mr M Sethi QC

RESERVED JUDGMENT

The Tribunal does not have jurisdiction to hear the Claimant's claim, which is accordingly struck out.

REASONS

The Claims/Background

1. The Claimant is a barrister of more than 20 years' call, specialising in tax law.

2. On 11 September 2018, the Claimant lodged a claim with the Employment Tribunal in which she had ticked only "I am making another type of claim which the Tribunal can deal with", and in answer to the question "Please state the nature of the claim" she wrote "Breach of Contract".

3. The Claimant stated in the claim form that her employment had started on 1 May 2017 and ended on 10 September 2018. She stated her job was "Partner". In

respect of each of the five Respondents, she had indicated that she did not have an ACAS Early Conciliation (EC) certificate number and in response to the question asking why not, she had ticked the answer "ACAS doesn't have the power to conciliate on some or all of my claims".

4. The Particulars of Claim ran to eleven pages. In brief summary, the Claimant contended that the first four Respondents are partners of the Fifth Respondent, which she describes as an "unlimited partnership". She contended that as partners of the Fifth Respondent, the first four Respondents were, with the firm itself, her employer, and as such jointly and severally liable to her. She set out the circumstances of her recruitment in London through an agency and her arrival in the Cayman Islands via Hong Kong.

5. The Claimant stated that on 29 January 2018, she was told by the Human Resources Manager of the Cayman office (Ms Trisha McElroy) that the Respondents were terminating her employment with immediate effect. This was confirmed by letter of the same date. The Claimant contended that this letter was ineffective/invalid to terminate her contract, as was the payment into her bank account of a sum of money purporting to be her notice.

6. The Claimant contended further or in the alternative that the Respondents were in breach of their "promises" to her before her employment contract was signed to be responsible for and to pay the Claimant's UK tax as well as her contractual salary. Further or in the alternative, she argued that the Respondents were in repudiatory breach of contract, which she purported to accept by service of her claim form.

7. The Claimant asserted that she had met the Second Respondent on 30 January 2018 and that he had promised on behalf of the Respondents that they would pay the UK tax on her employment income. He said he would revert in writing following advice from the Respondents' London accountants. The Claimant returned from the Cayman Islands to her home in London on 31 January 2018, arriving the following day.

8. On 2 February 2018, the Claimant received an amount equivalent to three months' salary and one quarter's PRP into her UK bank account. The Claimant asserted that this was a "significant underpayment of salary and/or a significant and unlawful deduction from her salary" contrary to her contract and to Cayman Islands labour law.

9. In July 2018, the Claimant stated, the Respondents wrote to her refusing to pay her UK tax. She did not receive a response to her subsequent emails setting out her position in relation to her contract and asking for a P45 and/or a list of partners.

10. The Claimant asserted that her primary case is that the Respondents are liable to pay her outstanding UK income tax and national insurance; she acknowledged the Tribunal's jurisdictional limit of £25,000 and indicated that she would seek to transfer the case to another court if that was exceeded.

11. Under a heading “Extension of Time”, the Claimant stated that the 25 July email “raised for the first time the Employer’s refusal to pay the UK tax”. She continued, “Further or alternatively if it is needed, the Claimant seeks an extension of time for bringing this complaint and filing the Claim Form pursuant to Rule 5 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013”. She was seeking: damages for breach of contract; an assessment of sums due and an order for payment of these; interest; and costs.

12. On 17 September 2018, the Claimant contacted ACAS and received a certificate for each of the five Respondents, which she forwarded to the Employment Tribunal stating that ACAS agreed with her view that it did not have the power to conciliate in her claim.

13. On 17 January 2019, the Claimant obtained further EC certificates for each of the same five Respondents and on 22 January 2019 she lodged a second claim against them all, comprising complaints of notice pay, holiday pay, arrears of pay, other payments and breach of contract.

Service of the Claims

14. The first claim form was served on the Respondents on 1 November 2018, accompanied by standard directions and the listing of a Preliminary Hearing (Case Management) (PHCM) on 16 January with a full merits hearing scheduled provisionally for 25-28 March 2019.

15. On 22 November 2018, the Claimant served amended Particulars of Claim on the Respondents. She forwarded a copy to the Employment Tribunal under cover of an email dated 28 November.

16. The second claim form was not served on the Respondents, or any of them, while the preliminary issues as to jurisdiction were yet to be determined. I do not deal with the second claim directly in this decision, though it appears to me likely, in light of my findings and conclusions below, that the jurisdictional issues will be the same for that claim as they were for this one.

The Response

17. Also on 28 November 2018, the Respondents lodged their defence to the claim and served an application to strike out the claim and/or seek a deposit order.

18. The Response stated that the Claimant’s employment had terminated on 29 January 2018. It denied that the Claimant had ever been employed by any of the Respondents and instead asserted that she was employed by "Harneys Gil” [sic], a Cayman Islands law firm. It suggested the correct name of the Fifth Respondent is Harneys Westwood & Riegels LLP, that being the name of a registered law firm in London.

19. The Respondents set out their understanding of the terms and effect of the Claimant’s contract. They asserted that the Claimant was employed until 29 January 2018, whereupon she was dismissed with contractual pay in lieu of notice and holiday pay, in accordance with her contract. They noted that the sole

complaint being advanced was one of breach of contract. They contended that the EC procedure had not been complied with as the Claimant had not approached ACAS prior to presenting her claim form and that none of the named Respondents had been her employer.

20. Further, the Respondents contended that the claim was out of time (and time should not be extended) and that the Cayman Islands was "clearly" the proper forum in which to hear the claim in any event; therefore, the Tribunal did not have territorial jurisdiction. They asserted that the claim stood no reasonable prospect of success and sought strike out/deposit orders.

21. On 29 November, the Claimant emailed the Tribunal asserting that the response was wholly defective and should be struck out.

The PHCM

22. The case came before Employment Judge Segal QC on 16 January 2019. He noted that there were disputes as to the correct parties, the termination date of the Claimant's employment, whether there was any requirement for the Claimant to comply with the EC procedures before lodging her claim, the Claimant's amendment application and the Respondent's strike out/deposit order applications.

23. Employment Judge Segal was unable to resolve any of those issues at the PHCM (though he made some observations based on what was before him) and instead listed the matter for an open PH for two days on 14 to 15 February 2019.

The PH

24. The PH was listed before me, starting at 11.30 on 14 February, although I took additional time (until 14.00) to read the extensive witness statements, skeleton arguments and documents referred to therein. I had two lever arch bundles of evidence (around 1400 pages in total) and a lever arch bundle of authorities running to 32 tabs. Additional authorities were handed up by both sides. The Claimant indicated that she would require 30-40 minutes in cross examination of each of the Respondent's two witnesses.

25. We had first to deal with some preliminary points and by agreement, redacted, for the purposes of the PH only, parts of the Respondents' witnesses' statements. It was immediately apparent that regardless of anything else, I would not have time, in two days, to deal with the question of strike out or deposit in relation to the claim, or strike out of the response. Also, so far as deposit orders were concerned, that would require me to consider liability issues and the parties were agreed that I would not do that.

26. I considered it was essential to determine the correct identity of the Claimant's employer as a starting point, and to deal with the question of whether the Respondents or any of them should be removed as parties; then I would consider the issue of Early Conciliation and whether it was required/had been complied with; next I would consider whether the Tribunal has territorial jurisdiction to hear the breach of contract claim; and finally, I would look at the question of time limits. If there was time, and if the claim was still on foot at that stage, I would consider the

Claimant's application to amend the claim and make further case management directions.

27. I indicated that in order to retain the provisional March full Hearing date, I would need to hear the evidence on day one of the PH and submissions the following morning; however, that timetable appeared highly unlikely and I therefore noted that we would probably have to re-list the Hearing. I explained to the Claimant in answer to her question that the proceedings in the Employment Tribunal are not recorded and that she was welcome to take her own notes or could have somebody accompany her who was able to do so (at the reconvened hearing, she did indeed bring a companion for that purpose). I did not, given the time constraints, permit an opening speech from the Claimant, although I did allow her to make an opening point about the correct employer, to which the Respondent replied. I explained it was not of particular importance who went first; technically it is the party with the burden of proof but that can be flexible. In the event, we were constrained by the times when the Respondents' witnesses could be available and I return to this below.

28. I heard evidence from the Second Respondent via video link from the Cayman Islands on the afternoon of 14 February. I rejected the Claimant's application to have Ms McElroy removed from the room in which the Second Respondent was giving evidence during his cross examination, as this was an open hearing and it would have been exceptional to have had her excluded if they were present in the UK, even though she was to give evidence herself. The Claimant also contended that their evidence was not relevant to the issues before me; however, I considered that this was something that we would not know until they had been cross examined. If they had little of relevance to say, I suggested that their cross examination would be limited.

29. However, the Claimant cross examined the Second Respondent from 14.44 until 16.15. I reminded her at intervals during her cross examination of Mr Peake that she had said she would require only 30-40 minutes, but did not curtail her, though the relevance of some of the questions she asked was not obvious to me. I then had a small number of questions for the Second Respondent, and he was finally re-examined by Mr Sethi until 16.40.

30. We then heard evidence from Ms McElroy, as I was mindful of the fact that she would not be available via video link the following morning, and noted that the Claimant had said she would similarly require 30-40 minutes for her. The Claimant had not concluded her cross examination of Ms McElroy by 17.05; I had some questions for her and there would have to be an opportunity for re-examination, so with reluctance I decided that we would adjourn overnight and take the Claimant's evidence first on day two, concluding Ms McElroy's cross examination later that day at a suitable time for someone in the Cayman Islands, with oral submissions to follow. I had already had extensive written submissions handed up by the parties. I indicated that I would reserve my decision and have a day in Chambers in March to deliberate and draft my judgment.

31. We started early on day two, and the Claimant handed up some further authorities/academic texts on which she wished to rely. Following some further discussions, the Claimant was sworn at 10.20. She was cross examined for an hour; then again following a short break, with the addition of some further discussion with me as to the way in which she put her case, until lunch at 13.25.

32. We re-started at 14.00 and recommenced Ms McElroy's cross examination at 14.10 once the video link had been re-established. The Claimant finished her cross examination of Ms McElroy at 14.45 and following a small number of questions from me, there was re-examination, during the course of which, Ms McElroy was asked questions about a document which the Claimant asserted was privileged, and she asked me to rule on this point. My decision on that issue (that the document was not privileged) gives rise to a reconsideration application, to which I return below. Ms McElroy was eventually released shortly after 15.50.

33. Cross examination of the Claimant was then concluded; I asked her some questions and there was no re-examination. By now it was 16.20. We had not begun submissions and it was clear further time would be required. I therefore decided to list the matter for a full Hearing on 2, 3, 4 and 7 October 2019, and vacate the provisional March listing; I also listed it before me on 18 March for a 09.30 start to hear oral submissions in the morning (I indicated that time would have to be restricted) and carry out my deliberations in the afternoon.

34. On 22 February the Claimant submitted an emailed application for reconsideration of the decision not to attach privilege to the document(s) on which I had ruled on day two and purported to serve a witness statement (in truth, written submissions) and another ten authorities in this connection.

35. Regrettably, on 18 March the Tribunal staff were unable to locate the Claimant in the building until 10.00 or so, and we did not start until 10.10. Notwithstanding my indication that submissions should be confined to the morning so that I could have the afternoon to deliberate, the Claimant spent three hours in oral submissions, we adjourned for half an hour to take lunch and then the Claimant continued for a further hour. This left us in some difficulty because the Claimant had had four hours in total, and there was therefore only an hour and 45 minutes remaining for the Respondents if I had risen as usual at 16.30. In the event, I heard Mr Sethi for the Respondents until just before 17.30, though he had still had considerably less time than the Claimant. The Claimant then wished to reply. In view of the lateness of the hour, I said I would allow her to email a reply. I did not, as Mr Sethi requested, restrict the Claimant only to points arising in his submissions, because although she is a lawyer, she is still a litigant in person and I was mindful of the Tribunal's inherent flexibility, but I did restrict her to a further five pages in a specified font size.

36. The Claimant emailed her submissions and a further Supreme Court authority to me on 25 March. She emailed me corrections to her skeleton bundle references on 26 March and a correction to a typo on 27 March. She made a further minor correction on 28 March. On 1 April 2019, in accordance with my order, the

Respondents submitted a short letter indicating that they relied on Mr Sethi's oral closing argument. Given their length, I do not set out either party's submissions in great detail, but I have read them in full (and the authorities to which they refer) and summarise them where applicable below.

Findings

37. I make the following findings of fact necessary to the determination of the preliminary issues, noting that much of the Claimant's evidence in relation to her recruitment was unchallenged. Where evidence is disputed, I make clear which version I prefer:

    a. On 2 March 2017, the Claimant was in London when she received an unsolicited email from a Mr Strickland. He introduced himself as a former Cayman Islands attorney who now assists "leading firms offshore" when they are looking to hire senior lawyers. He stated he had been instructed "by one of the elite law firms in Cayman" and invited the Claimant to let him know whether or not she wished to hear more. She said that she did; and they met the following afternoon. I accept her evidence that throughout their discussion, Mr Strickland referred to his client as being the firm of Harney Westwood & Riegels (HWR), and that he specifically told her it was an "old-fashioned equity partnership based in the British Virgin Islands" (BVI). The Claimant was familiar with HWR's name but had not been instructed by them herself or, to her recollection, met any of its lawyers.

    b. Further discussions took place in the next few weeks with Mr Kish, Mr Mann, Ms Verbiesen and Mr Noble, who were variously described as partners or heads of department. Mr Strickland sent the Claimant a link to the "Harneys" website (www.harneys.com) with contact details, and another to Mr Kish's profile.

    c. The Claimant went in to the HWR London office, where she met Mr Kish, described as the Head of Litigation in Cayman, on 13 March 2017. She had researched HWR on the internet and discovered they were involved in a number of reported cases and had produced a text book on commercial law in the BVI, then in its third edition. The Claimant heard from Mr Kish about the underlying reasons for the firm seeking to appoint someone from the London bar, working in-house. The First Respondent, introduced as the Global Head of Litigation, then joined the Claimant and Mr Kish. The Claimant contends the First Respondent expressly confirmed that her salary would be free of UK tax and that this was highly material to her in the ensuing discussions.

    d. As a result of those discussions and following an email simulation exercise, the Claimant negotiated, via Mr Strickland, an offer that was mutually acceptable to the parties. An offer letter/contract was sent by email to the Claimant. The email cover was headed "Harneys" in the top left-hand corner, and in the top right-hand corner, above an address in the Cayman Islands, it said "Harney Westwood & Riegels". It was sent by Mr Martins,

described at the end of the offer letter as "Managing Partner Harney Westwood & Riegels, Cayman Islands". It had the following items of significance:

i. It said that it was offering the Claimant a position in the Cayman Islands office of HWR, starting no later than a specified date (which I understand was amended by the Claimant) or within two weeks from the Claimant obtaining a relevant work permit, for an initial two-year period with an option to renew and subject to a background check and continuing relevant immigration and regulatory approvals;
ii. The Claimant was to be employed by the Firm (defined as "Harney Westwood & Riegels") as a Local Partner, reporting to Mr Kish, Senior Litigation Partner, and to Mr Martins himself;
iii. The place of work clause stated, "Our office is located at Harbour Place, South Church Street", although the Claimant could be required to travel internationally in the performance of her duties;
iv. The Claimant was entitled to remuneration comprising base salary and profit-related pay, the latter guaranteed for the first 12 months and payable in four equal quarterly payments. In the subsequent year, the Claimant would receive a payment based on a percentage of the "Harney Westwood & Riegels global partnership"; she was given a factor as a "Local Partner";
v. She was entitled to join the Firm's health insurance scheme, administered by Britcay Health Insurance in the Cayman Islands, and its death in service scheme with Zurich;
vi. The Claimant was required to join the Firm's designated pension scheme after completing nine months' employment "in accordance with the Cayman Islands Pension Law" and deductions would be made from her salary and paid into the pension scheme, held with Silver Thatch Pension;
vii. The Firm would pay for her work permit, her practising certificate and membership of the Cayman Bar Association. The Claimant was required to become admitted to practice as a Cayman Islands lawyer;
viii. The offer letter (referred to as "this Agreement"), together with the Firm's staff handbook, governed the terms of the Claimant's employment, and if there was a conflict, the terms of the Agreement were said to take precedence;
ix. The Agreement was to be governed by and construed in accordance with the laws of the Cayman Islands and the parties submitted to the exclusive jurisdiction of the Cayman Islands courts;
x. It was signed by Mr Martins.
xi. The offer letter did not mention anything about the position in relation to UK tax. It concluded: "This Agreement supersedes any previous agreement whether written or oral".

e. I set out the "Termination" clause of the letter (19) in detail because of its significance before me; both sides seek to rely on its content in support of their positions. it said:

"Either party may terminate this contract of employment on giving the other three months' notice in writing…

The Firm may, at its sole discretion, provide payment in lieu of notice (less applicable deductions). In the event that either party provides notice, the Firm reserves the right to require that you not attend work or undertake your duties, provide that the Firm shall continue to pay your base salary and contractual benefits for the said period. …

At the termination of your employment you will be paid in lieu of days accrued but untaken, subject to pro rating. During a notice period, including gardening leave, the Firm may require you to take any accrued vacation leave. …

You may also be terminated without notice for gross misconduct…."

There was no suggestion before me that the latter clause relating to termination for gross misconduct was being exercised at the time when the Claimant's employment was terminated.

f. The staff handbook (version April 2014) was in the bundle. It is an HWR handbook, according to the front cover. The first section, Company Information, welcomes the reader to "Harney Westwood & Riegels, Harneys Corporate Services Limited and Harneys Insurance Management Services Limited, which in the rest of this handbook we simply call "Harneys"". It confirms in the second section, Disclaimer, that the handbook is not contractual. In section three, A Brief History, it states that Harney Westwood & Riegels is the "oldest and largest law firm in the British Virgin Islands", established by a Mr Harney who was subsequently joined by Mr Westwood and then by Mr Riegels. The "London office" was established in 2002 and "a Cayman office" in 2008. Whilst purporting to be a staff handbook for the global HWR firm, it has a clear bias towards those employed in the BVI (e.g. the references to kitchen, drinks and parking facilities appear only to refer to buildings in the BVI; it sets out time off for voting for those registered in Tortola, Virgin Gorda/Anegada and Salt Island. It makes no mention of facilities or time off for elections in any other part of the world).

g. I note there was a new version of the handbook issued in September 2017, i.e. the month after the Claimant started working in the Cayman Islands. The front cover refers only to Harneys. The first Schedule contains defined terms, among which is the following: "**Harneys**, the **Firm**, or the **Group** all refer to both the law firm and Harneys Fiduciary collectively. By **law firm** we mean Harney Westwood & Riegels, Harneys Gill, Harney Westwood & Riegels LLP, Harney Westwood & Riegels Singapore LLP, Aristodemou Loizides LLC (practising as Harneys) and Zuill & Co and/or Zuill & Co Limited (practising as Harneys)." This version of the handbook removes the local references and has a more global reach. It is unclear whether the

Claimant was ever shown or saw this version, but it was not disputed by her that it appeared on the HWR intranet from the date of issue.

h. Following a visit to the Cayman Islands, the Claimant accepted the offer by signing and dating the Agreement, hand-delivering it for Mr Kite's attention in the London office. She received an email the following day attaching the Agreement signed by Mr Mann *per pro* for Mr Martins. On 28 April 2017, the Claimant completed the "Employee" sections of otherwise blank work permit applications and returned them to Ms McElroy.

i. Unbeknown to the Claimant, on 23 May 2017, Ms McElroy completed the "Employer" sections of the same work permit applications, naming the employer as Harneys Gill, and it was in that name that a Temporary Work Permit was issued on 1 June 2017, valid until 30 August 2017. The permit stated that the permit holder was not to be employed by any other employer without prior approval. In Ms McElroy's evidence, which was not challenged, she confirmed that the legal entity registered in the Cayman Islands with the Department of Immigration is Harneys Gill and that that is why all the work permits are issued in that name. Ms McElroy also said in answer to my question that she believes under Cayman Islands law any company must have at least 60% Caymanian ownership. Hence the law firm Harneys Gill is registered as a partnership and Mr Gill, who is Caymanian, is part of that partnership. Harneys Gill is, however, known as HWR locally, as it is part of the HWR global company. She said "in a way it is a subsidiary, I guess. It is my employer as well".

j. Having resigned from her London Chambers, the Claimant flew to and spent nearly three months in the HWR Hong Kong office, where she was given business cards giving her name and details as a partner of Harney Westwood & Riegels. She worked with Mr Mann and other litigation lawyers in preparation for her arrival in the Cayman Islands. She then took up her role in the Cayman Islands from 1 August 2017. Again, she was issued with business cards as a partner of Harney Westwood & Riegels. The Claimant was paid throughout her period in Hong Kong and the Cayman Islands from a Cayman Islands bank account in the name of Harney Westwood & Riegels with an address given of a PO Box in South Church Street, Grand Cayman.

k. On 3 August 2017, again unbeknown to the Claimant, an agency called Baraud International wrote "on behalf of [its] client Harneys Gill" to the Chief Immigration Officer of the Cayman Islands, asking for a work permit to be granted for the Claimant. Baraud International stated that their client (to whom they referred interchangeably as "Harneys") was "60% Caymanian and Residency holders". They emphasised that their client is dedicated to the employment and development of Caymanians as well as the local community, both within the legal environment and through its corporate social responsibility initiatives. Both the temporary and full work permits were issued by the Cayman Islands authorities naming the employer as Harneys Gill.

l. There was a potential conflict of evidence in relation to the work permit. The Claimant did not recall having seen it, notwithstanding that she had sworn an affidavit on 9 August 2017 in support of her application to practice as an attorney and to which it was exhibited. The body of the affidavit did however say "I am the holder of a valid temporary Work Permit … issued by the Cayman Islands Immigration Department … authorising my retention by Harney Westwood & Riegels, Attorneys at Law ("Harneys")". The full work permit was issued on 8 November 2017 until 31 August 2020, and as I have said above, it again named the employer as Harneys Gill. Standard conditions appended to it confirm among other points that the holder's authority to remain in the Islands ceases if the permit is revoked, expires or if the employment is terminated.

m. I find that the Claimant did not see the work permit applications or the accompanying letters until these proceedings. Nor did she see the work permits themselves, although she had the opportunity to do so. I accept her evidence that she was familiar with the other documents exhibited to her affidavit and could easily have made an assumption in relation to her work permit that it was in the name of HWR as the affidavit suggested. However, it is not asserted by her that these documents are anything other than what they appear to be. Therefore, notwithstanding that she had not seen them, I consider them to be germane to the correct identity of her employer.

n. On 29 January 2018, the Claimant was on her way out but was intercepted in the office by Ms McElroy, who asked to speak to her in the conference room. Ms McElroy told the Claimant that the partners had decided to terminate her contract. The Claimant asked why, to which Ms McElroy replied that they did not have to give notice or have a reason. She said that that was the Claimant's last day in the office and that her work permit would be cancelled in the next few days and she would have to leave the island. She said however that they would be paying the Claimant for three months instead of giving notice, and handed her a letter.

o. The letter was on Harney Westwood & Riegels notepaper in the same manner as the covering email of the offer letter, i.e. with the Cayman Islands address in the top right corner and the Harneys logo in the top left. It was headed "Termination Notice and Final Compensation Letter", signed by Ms McElroy for Harney Westwood & Riegels, and dated 29 January 2018. It stated, so far as is relevant:

"This letter serves to advise that your employment with Harney Westwood & Riegels (collectively "Harneys") will terminate with immediate effect. This letter therefore constitutes as [sic] formal notice of the termination of your employment with the Harneys [sic].

Under clause 19 of your offer of employment dated 11 April 2017, you are entitled to three months' notice from Harneys. Your final day of employment

with Harneys will be 29 January 2018. You will be paid in lieu of notice for the remaining period up to 30 April 2018.

We will provide you with a separation agreement that should be read in parallel to this letter. This agreement will highlight both the Firm and your obligations post your termination. Your salary and benefits amount is inclusive of any payments, statutory of otherwise [sic] that may be owed to you under the Cayman Islands Labour Law."

p. The letter set out a figure for three months' salary and ten days' accrued vacation. It confirmed that the Claimant could remain in the healthcare plan for up to three months at her own cost, otherwise it would end on 28 February; and she would no longer be in the death in service insurance policy after 29 January. It also stated that the work permit would be cancelled on 7 February 2018 and that if the Claimant intended to remain on the island after that date, she would need to regularise her immigration status directly with the authorities.

q. The Claimant's unchallenged evidence as set out in her witness statement was that she read the letter through quickly and did not think that the figure given as payment in lieu of notice was sufficient. She handed it back to Ms McElroy and said it was not enough and she was not accepting it. In her witness statement the Claimant said that Ms McElroy agreed that she had not calculated the three months' pay properly and asked for the letter back to be re-done, saying said she would email the final version to the Claimant. The Claimant told Ms McElroy that her concern lay in the fact that it did not mention the payment of UK tax; Ms McElroy replied that she did not know anything about this, but said she would speak to the partners and revert.

r. In cross examination, the Claimant said that Ms McElroy said words to the effect of "I am sorry to have to tell you this, but the equity partners have decided to terminate your contract. It will come as a shock to you but don't worry, we're going to be paying you for three months and I've got a letter here", and she handed the Claimant a letter. The Claimant said she told Ms McElroy "but this is not enough and it doesn't terminate the contract", to which Ms McElroy, looking over her shoulder, said "You are quite right, give the letter back to me". The Claimant accepted (at its highest) that she could not be certain whether Ms McElroy was agreeing to both parts of her sentence (that the figure set out was not enough **and** that the letter did not serve to terminate the contract) or only one, and if one, which part. She did not remember if the letter said her employment was terminated "with immediate effect". She asked Ms McElroy why and the response was that they did not have to have a reason, then the Claimant says she said, "but this is not enough and it's not a termination of the contract".

s. Ms McElroy's evidence in cross examination was that the Claimant may well have said that the figure was not enough and that she may have replied that the Claimant was right. She based this on the fact that the letter was

redrafted, although she did not recall the specific discussion. She did not recall the Claimant saying, "this isn't a termination under the contract".

t. Disappointingly, neither Ms McElroy nor the Claimant made a contemporaneous note of what was said during that discussion. I do not however accept the Claimant's evidence that she told Ms McElroy that the letter did not terminate her employment and/or that she stated she would treat the contract as continuing. This was not in her witness statement and Ms McElroy did not recall it being said at all. As I have noted, at its highest the Claimant said that she and Ms McElroy might have been talking at cross-purposes. While one could be critical of how the situation was handled by Ms McElroy, I did not form the impression she was other than honest in her recollection, even when the answers she gave exposed failings on her part or that of the Firm (for instance, she was ready to admit she had been wrong in a subsequent email, to which I return below).

u. I conclude that if the Claimant had challenged her that her employment had not in fact been terminated, as was suggested by the letter, Ms McElroy would not just have ignored such a point (being made by a very senior lawyer in the firm) but would have gone back to seek instruction from Mr Martins about that point, in addition to re-calculating the figures. She would have recalled that it happened.

v. The Second Respondent gave unchallenged evidence that he had been informed by the "equity partners" that a decision had been made to terminate the Claimant's employment and he appreciated that would be a traumatic episode, so he thought it "polite and courteous" to attend as he was visiting the Cayman Islands office, albeit he was at an equivalent level to the Claimant. He did not attend the first part of the meeting since Ms McElroy had had to intercept the Claimant when she appeared to be leaving the building unexpectedly early.

w. The Second Respondent subsequently asserted in answer to my question that by "equity partners" he was referring only to Mr Martins, the Managing Partner of Harneys Gill, who at the time was the only equity partner, another having been appointed subsequently. I find it likely however that the reference to "partners" in the plural conveys the fact that this was not Mr Martins' decision alone, even if he was the only person who actually discussed it with the Second Respondent. It seems to me highly unlikely, given the Claimant's level of seniority and that she worked with senior partners and heads of department across several firms, that Mr Martins would have made the decision in isolation. Indeed, Ms McElroy confirmed in answer to my question that Mr Martins told her on the morning of 29 January 2018 that the decision had been made to terminate the Claimant's employment, saying that it was the decision of the "global partners" (she then said however that she did not recall if he had actually used the word "global", but again I infer there was an element of discussion between more than one of the HWR partners). She printed the letter which she later gave

to the Claimant, showed it to Mr Martins, and he approved it. For the reasons set out elsewhere, I do not consider that such a discussion between the equity partners of the global partnership signifies conclusively that the global partnership was the Claimant's employer.

x. The Second Respondent then entered the meeting and accompanied the Claimant back to her office so that she could collect her personal effects. They also met later that day at a bar across the road from the office. The Claimant again refused to accept the position because, she said, the question of payment of UK tax as promised by the First Respondent had not been addressed. She claims to have said that the termination was "unlawful" and that the contract was still "on foot" but that the Second Respondent advised her she would have to leave the Cayman Islands nonetheless, because of the imminent cancellation of her work permit (I note that this would happen on termination of employment). This conversation was not put to the Second Respondent.

y. The following day, the Claimant forwarded to the Second Respondent a letter from her accountants and stated that she was available to speak again. Later that day, she received an email with a second version of the purported termination letter from Ms McElroy. I gather it is that version which is contained in the bundle, and therefore to which I refer above (and below). This version was also dated 29 January, notwithstanding it was emailed and received on 30th. The covering email said that the firm would "amend and forward over the separation agreement" once advice was received from its own accountants.

z. The Claimant did meet the Second Respondent again that evening and says she was informed that the equity partners had authorised payment of any UK tax incurred by the Claimant. The Claimant asked for the assurance in writing, but was told that the partners wanted to discuss the issue with the UK accountants to see if there was anything that could be done to reduce the tax liability. The Claimant claims to have said again that the letter did not validly terminate her contract and that the Second Respondent repeated that the Claimant could not stay on the island. Again, this alleged conversation was not put to the Second Respondent.

aa. On 31 January, the Claimant returned to London, arriving on 1 February 2018. On 2 February, she received a wire transfer in sterling from Harney Westwood & Riegels' Cayman Islands. The equivalent in dollars was, the Claimant said, fractionally more than that set out in Ms McElroy's second letter.

bb. On 9 February 2018, Ms McElroy emailed the Claimant again. She stated that the Claimant's tax liability for 2017/18 was her own; but that the Claimant remained "under contract to the Firm for the three month notice period, albeit you have received payment in lieu of notice (i.e. until 30 April 2018 "**Gardening Period"**)"; any consideration to pay for the tax liability

would require a mutual written agreement under which the Claimant would undertake to refer work back to the Firm in future and would not conduct herself in a way that resulted in a potential referral opportunity being lost to the Firm; and the he email concluded that the Claimant should take steps to minimise her tax liability (e.g. temporary relocation outside the UK).

cc. Ms McElroy accepted in oral evidence that she had been mistaken in suggesting that the Claimant's employment was continuing after 29 January, since the dismissal had been "with immediate effect". The Claimant discussed with me the question of whether Ms McElroy had been the true author of the email; I believe that she was, and that this was a genuine and, as it transpired, significant error. It was that email, with its suggestion that the Claimant remained employed by the Firm, that the Claimant relied on at the PHCM before Employment Judge Segal.

dd. The Claimant replied to Ms McElroy on 13 February 2018 stating that she understood the parties were working towards an amicable and mutually beneficial separation agreement. She stated however, "…the termination notice and final compensation letter of 29 January 2018 is explicit that 29 January was my last day of employment with the firm. There is no mention in the 29 January letter of any garden leave and it was not raised with me or discussed by you or [the Second Respondent] when we met on 29 January 2018 or afterwards. I am applying for tenancy in London as you would expect and, as [the Second Respondent] and I agreed, I am telling chambers that our parting is amicable. …". It is this email over which the Claimant seeks to assert privilege. I return to this issue below.

ee. Despite what appear to be repeated and reasonable requests from the Claimant to establish the current situation thereafter, no response was received from or on behalf of the Firm. On 4 July, the Claimant emailed the Second Respondent and others saying, "…Harneys did not terminate my contract of employment after the first 6 months probation period or for another 3 months after that. When I asked Trisha on 27 January 2018 [sic] why it was terminated on that date, she replied "We do not need to have a reason". …". This was clearly an erroneous reference to 29 January. There has been no suggestion that there was any such discussion prior to that date.

ff. Still without providing any substantive response, on 5 and 16 July, the Second Respondent replied confirming the Firm's position that the Claimant was liable for her 2017/18 tax liability. This was re-stated on 25 July 2018, referring back to the 9 February exchange.

gg. Further emails were exchanged on 14 August (when the Claimant set out her position) and 22 August when Mr Martins indicated he was authorised to accept service in Cayman "of any proceedings you wish to bring against Harney Westwood & Riegels, and its partners".

hh. The Claimant asserts in her witness statement that she treated the contract as continuing after 29 January, and that it remained in full force and effect, until she accepted the Respondents' wrongful termination by service of her claim form on 1 November 2018 (although I note that this is at odds with the September date in the claim form itself). She states that she was "ready, willing and able" to perform the contract "including in the London office" until that date. She confirmed in answer to a question to me that she had not gone in to work at the London office following her return to the UK, nor had she sought to do so.

Conclusions

38. I take the issues in the order we agreed on day one of the PH.

Identity of employer/correct Respondent

39. I preface my conclusions on this point by saying that the paperwork in this regard is something of a shambles and that I am not at all surprised that confusion has arisen. The Second Respondent in evidence agreed that it was confusing, or to use his phrase that in at least one place there was a "drafting glitch". One would certainly expect better of an international elite law firm.

40. Nonetheless, doing the best I can on the evidence in front of me, I find that the Claimant's employer was indeed Harneys Gill and that she was not an employee of the "global unlimited partnership".

41. The Claimant referred me to *Autoclenz Limited v Belcher*[1]. The headnote confirms as follows: "In the context of employment, where, taking into account the relative bargaining power of the parties, the written documentation might not reflect the reality of their relationship, it was necessary to determine the parties' actual agreement by examining all the circumstances, of which the written agreement was only a part, and identifying the parties' actual legal obligations".

42. *Autoclenz* is a well-known case dealing with primarily with "worker status" rather than the parties to an employment contract, and the decision echoed the words of Smith LJ in *Firthglow v Szilagyi*[2] regarding the "genuine" nature of the written document. It seems to me to be correct however that the "man on the Clapham omnibus" test (to which the Claimant also referred) can only take me so far. Most certainly if the man on the Clapham omnibus were to read the Claimant's offer letter/contract, he would think that the Claimant had contracted with HWR; but then if he had read Mr Huntington's contract with Autoclenz, he would have thought the workers were self-employed independent contractors, which the Court found they were not.

43. I am fortified in my conclusion that I should consider all the evidence and not just the written document by the case of *Clifford v Union of Democratic Mineworkers*[3], to which the Claimant also referred me and which confirms that the resolution of

[1] [2011] UKSC 41
[2] [2009] ICR 835 CA
[3] [1991]IRLR 518

the question "whether A is employed by B or C" is dependent on the construction of the relevant documents and the finding and evaluation of the relevant facts.

44. That question (and the manner of its resolution) was repeated in the unreported case of *Dynasystems v Moseley*, heard by Langstaff J in the EAT in 2018. In that case, the claimant had entered a written contract with a Jordanian company, Dynasystems for Trade and General Consulting Company, but was held by the Employment Judge actually to have been employed by the UK company Dynasystems Limited. The EAT found that the Employment Judge had been right to look not just at the parties' intentions at the time of the contract and whether they had changed, but at the overall nature of the relationship. Langstaff J commented, "The eloquence of a chapter is not to be determined by focusing upon the first or isolated paragraphs within it".

45. I accept that the vast majority of the written documentation, and certainly almost everything that the Claimant saw or was told before she started work, showed that she was employed by "HWR". Mr Strickland's initial approach was for "one of the elite law firms in Cayman". As I have found, his subsequent dealings with the Claimant did not mention "Harneys Gill" at all. Mr Strickland was not, however, employed by HWR but was a contractor or agent of theirs. His understanding of the position, while it should have been accurate given that he describes himself as a former attorney and the firm is his client, is not definitive.

46. Similarly, what ought to have been accurate and reliable in any event but particularly given that the employer was a law firm, is the offer letter/contract. All but one (and only an implicit one at that) of the references are to HWR or to "Harneys" (but not to Harneys Gill), both in the document itself and in the covering letter, as well as in the Claimant's business cards, in brochures, plaques, law reports, legal directory entries and other places where the "man on the Clapham omnibus" might reasonably have been expected to look (and indeed where the Claimant did look). At first blush, the assertion that the employer was anyone other than HWR appears doomed. The only (implicit) reference to there being a local Cayman Islands firm that is separate from the global partnership is in the clause about profit-related pay. It does not say that the calculation is based on "the Firm's" profits, but "the HWR global partnership".

47. However, I find that there are other documents, of which the Claimant was not aware on entering the contract, that show otherwise and reinforce that there is such a distinction. Some of them have been produced by the Claimant herself; others disclosed by the Respondents.

48. Of most significance is the work permit, but in order to understand that I first need to look at the Cayman Islands' requirements for carrying on business. I accept Ms McElroy's (and Mr Peake's) unchallenged evidence that the Cayman Islands authorities require a level of local ownership; this is further confirmed by the Baraud letter. That ownership requirement was met by the merger in 2008 of HWR with C S Gill and Co, of which Mr Gill was the sole principal. The merger agreement confirms that thereafter, the merged practice was to be known as

"Harneys" and would adopt "all Harneys branding" save that it would be known as Harneys Gill for up to a year after the effective date of the merger. Mr Gill was to become an equity partner in the "merged Harneys' Cayman partnership" for a period of five years. He was not, on the face of the agreement, to become a partner in the global unlimited partnership of HWR.

49. The "merged Harneys' Cayman partnership" was also to continue benefiting from the existing health insurance scheme, save for those partners and other lawyers employed by the "merged Harneys' Cayman partnership who formerly worked in another Harneys' partnership" who were to continue to be covered by Harneys' existing global health insurance scheme. There is reference in the merger agreement to "new lawyers employed by the merged Harneys' Cayman partnership", who were to be brought into the Harneys' remuneration scheme. The agreement is signed by Mr Gill on behalf of his firm and by a Mr Peters on behalf of HWR.

50. In support of her argument, the Claimant relies on a writ she has found from 2011 in the Cayman Islands Grand Court. This was issued against 14 defendants, the first of which was "Harney Westwood & Riegels aka Harneys Gill". The addresses for service were the PO Box in the Cayman Islands and another in the BVI. The other 13 defendants, who included the First, Third and Fourth Respondents before me, were served care of the different addresses of HWR globally. I consider that this reinforces, rather than otherwise, the fact that following the merger, the HWR firm operating in the Cayman Islands was known locally as Harneys Gill, in accordance with the agreement, and that, accordingly, it is a distinct entity from the global unlimited partnership. The global unlimited partnership is **not** also known as Harneys Gill. Once the Claimant's employment by Harneys Gill was terminated, her work permit was invalid; there was no other reason to cancel it.

51. I have also looked at the privacy policy on the Harneys.com website. This is another area where I would expect the strict legal position of the group entities to be reflected, and on this occasion, it is. The policy states "Harneys consists of Harney Westwood & Riegels, Harney Westwood & Riegels LP, Harneys BVI Limited, Harneys Gill, Harney Westwood & Riegels LLP, Harney Westwood & Riegels Singapore LLP, Aristodemou Loizides Yiolitis LLC (practising as Harneys) and Zuill & Co and/or Zuill & Co Limited (practising as Harneys) Harney Westwood & Riegels, Harneys Fiduciary Limited, Harneys Corporate and Trust Services Limited and Harneys Fiduciary (Cayman) Limited (together with their affiliates, *Harneys Entities*)". It continues "In each case, your personal data will controlled [sic] by the Harneys Entity which you have given instructions to, or with which you are otherwise dealing or receiving communications from or the Harneys Entity which provides services to a third party which you are associated with…".

52. All of this supports the Second Respondent's evidence in chief, in which he was asked whether HWR employs anyone; his answer was no. Of course, to a large extent that is a self-serving answer and might be unreliable if the facts all pointed the other way, but I conclude that it is the right answer in this case where on close

examination, the facts support it. Each of those entities is just that – a corporate entity in its own right.

53. For instance, the firm Harney Westwood & Riegels LLP is the London entity, and until his appointment to the global equity partnership, that was the Second Respondent's employer. His own offer letter appears in the bundle, dated 20 February 2014. As one would hope, in his case, the letter is clear: "We are pleased to be able to offer you employment as a Senior Associate Lawyer at Harney Westwood & Riegels LLP, a UK LLP ("**UK Partnership**") in our London office on the following terms: …". Just as with the Claimant's offer letter, his PRP is based on a percentage of realised fee income of the HWR global partnership. Again, like the Claimant, he is referred to the Staff Handbook, which did not in 2014 make any reference to Harney Westwood & Riegels LLP. That does not mean that Harney Westwood & Riegels LLP did not exist, nor that the Second Respondent was employed by the global unlimited partnership. I conclude that what it meant was that the paperwork in some cases, and in particular the Cayman Islands offer letter and the global staff handbook, had failed to keep pace with the expansion of the Harneys brand. Similarly, Ms McElroy was correct when she said that in fact, Harneys Gill is also her employer.

54. I accept the Respondent's submission that entries in legal directories or those in law reports also reflect global branding rather than the strict legal structure of a group, and that similarly one cannot place stock in the name that appears on a bank account because it may be a trading name. Likewise, the 2013 Cayman Islands law reports to which the Claimant took me and in which a party to litigation is said to have been represented by Harney Westwood & Riegels are therefore not definitive. I cannot imagine that if the Claimant had represented a client in a case that was reported, the reporter would have taken care to establish what it said on her work permit. They would undoubtedly have reported her as being from HWR.

55. I also do not consider it definitive that Mr Martins emailed the Claimant on 22 August 2018 to say that he was authorised to accept service in Cayman of any proceedings she wished to bring against "Harney Westwood & Riegels and its partners". Most regrettably, in my view, this is part of the shambolic approach taken by partners in a law firm who should have known better and should have been far clearer in their written and oral communications with the Claimant about the correct identity of her employer, but that is all it is. It does not imply that the global partnership was her employer.

56. More significantly, in my view, in a writ lodged in the Grand Court of the Cayman Islands in 2016, the plaintiff is Harneys Gill. The writ begins "The Plaintiff is a firm of attorneys which takes the form of a partnership and which, at all relevant times, carried on the business of providing legal services in the Cayman Islands and traded under the name "Harneys Gill". The Claimant seeks to rely on the fact that the attorney of record for the Plaintiff in that case is Harney Westwood & Riegels; but I find that it is evidence that the correct legal entity and therefore her employer is in fact Harneys Gill.

57. In summary, where there is a strict legal definition to be set out (for the work permit, in the merger agreement, on its privacy notice on the website and when the firm is a party to litigation) the name given is Harneys Gill; in all matters where branding is key (business cards, brochures, plaques, letterhead and the like) the name is the brand either of Harney Westwood & Riegels or simply Harneys; the exception to that is the offer letter to the Claimant, but while the Claimant can be entirely excused for not appreciating the correct identity of her employer, at least until she had had the chance to look at the work permit and question it, the correct employer following analysis of all the facts and written documentation was Harneys Gill.

58. The first point to note from this conclusion is that the five named Respondents were not the Claimant's employer and as such the Tribunal does not have jurisdiction to hear a claim against them, or any of them. I should have reached that conclusion in relation to the Second Respondent in any event (had I found that the employer was the global unlimited partnership Harney Westwood & Riegels) because at the relevant times, whatever they were, the Second Respondent was not an equity partner. He did not achieve that status until January 2019, notwithstanding the Claimant asserted it was an open secret well in advance of that date. None of the Respondents named in the claim is or ever has been a partner of Harneys Gill. I would however consider whether the correct Respondent could be substituted for the First and Third to Fifth Respondents named.

59. In order to substitute Respondents, I would need to be satisfied that there is a valid claim on foot. I turn then to consider whether the rules on EC were applicable to the Claimant and, if so, whether she has complied with them.

60. Pursuant to section 18 Employment Tribunals Act 1996 (ETA), "relevant proceedings" includes (ss.18(1)(b)) employment tribunal proceedings under sections 11, 23, 34 etc Employment Rights Act 1996 (ERA) and (ss.18(1)(g)) those under article 6, Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (Order).

61. Section 18A ETA confirms that prior to instituting relevant proceedings in relation to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter. A conciliation officer issues a certificate to the prospective claimant if they conclude that a settlement is not possible or where the prescribed period expires without a settlement being reached. The requirements of the section on the prospective claimant are lifted in certain circumstances, none of which is applicable here.

62. So far as is applicable, sections 11 and 23 of ERA are concerned with references/complaints to Employment Tribunals concerning: (section 11) a failure to give a section 1 statement of terms and condition (or a section 4 update thereto) or an itemised pay statement under section 8; (section 23) a deduction from/shortfall in wages contrary to sections 13, 15, 18 or 20. Article 6 of the Order

confirms that proceedings on a contract claim may be brought before an employment tribunal by presenting a complaint to an employment tribunal. Such claim must (pursuant to article 3) be one which a court in England and Wales has jurisdiction to hear and which arises or is outstanding on the termination of the employee's employment.

63. There was some confusion as to the complaints raised by the Claimant's initial claim form. As I have noted above, she appeared to be bringing a claim squarely (and solely) for breach of contract. That was the only box ticked (she had not ticked arrears of pay), and that was what she had written in the free text space. However, there are two issues around that conclusion. First, according to the Claimant's current position, her employment had not terminated as at the date she submitted the first claim, though I have noted that in the first claim form she said that her employment had ended the day before she lodged the claim with the Employment Tribunal. Second, at the PHCM before Employment Judge Segal, the Claimant asserted that there was also a complaint, or more than one, of unpaid wages.

64. I conclude that whether the Claimant was bringing a claim solely for breach of contract or for breach of contract and/or unlawful deductions from wages (which would include a situation where the amount received was less than the amount properly payable), the rules as to EC applied. Both types of complaint fall into the category of "relevant proceedings"; I do not accept the Claimant's argument that (for instance) she is bringing a complaint under section 13 ERA itself and that that is not "relevant proceedings" for these purposes. Complaints of a breach of section 13 ERA are instituted in the Employment Tribunal under section 23; they are relevant proceedings, and hence the requirement to have an EC certificate is a mandatory one unless other provisions were applicable, none of which was argued before me.

65. I have considered what might have been meant by Employment Judge Segal's discussion point in the PHCM summary, where he says: "The Claimant pointed to certain paragraphs of the original ET1 … which she said were, or included, claims for unpaid wages; if so, that is a jurisdiction which would not have required her to obtain an EC Certificate before issuing". I do not believe Employment Judge Segal was saying that an unlawful deductions claim does not require the prospective claimant to obtain an EC certificate before issuing; I believe he was saying that this was the Claimant's argument, as indeed she continued to advance it, in my view incorrectly, before me.

66. Further, the Claimant cannot correct the omission of the certificate number by going to ACAS **after** the proceedings have been brought; the requirement is to enter EC **prior to** the proceedings being lodged. The Claimant lodged her first claim on 11 September. She did not start EC until 17 September. Therefore, in and of itself, this is fatal to her first claim, because it means the Tribunal does not have jurisdiction to hear it, even if the correct Respondents were named or if they could be substituted.

67. There is also the question of whether the Claimant's employment had ended prior to her lodging the claim for breach of contract (which on the Respondents' case it had) or whether it continued until the Employment Tribunal served the claim on the Respondents (the Claimant's case before me). If her employment ended on 29 January 2018 as suggested by the letter, or 30 April as suggested by Ms McElroy in her subsequent email, or on 10 September 2018 as indicated in the claim form, the complaint for breach of contract could (subject to other jurisdictional points) be brought on 11 September. If the employment did not end until the Employment Tribunal served the claim form on the Respondent (understood to be 1 November), the Tribunal does not have jurisdiction to hear the complaint of breach of contract in the first claim form but does have jurisdiction to hear it – again, subject to other jurisdictional points – if the Claimant subsequently goes to ACAS within three months of the termination date and thereafter brings a claim for breach of contract. There is of course also the £25,000 cap issue, of which I reminded the Claimant and she said she was fully aware.

68. The position on the unlawful deductions claim is slightly more straightforward. If the Claimant's employment ended in January or April 2018, her first claim is out of time because she did not go to EC until after the primary time limit of three months expired. If her employment ended in September or November, her first claim is in time but again falls foul of the requirement to go to EC before instituting proceedings. (Her second claim however is both in time and she has gone to EC before lodging it, although I am not dealing with that claim directly in this decision; however, for the reasons set out elsewhere in this decision I do not consider the Tribunal would have jurisdiction to hear it in any event). I therefore have to determine two further issues: does the Tribunal have jurisdiction to hear this claim and when did the Claimant's employment end?

69. I take the first point quite shortly. I accept Mr Sethi's submission that the Cayman Islands is clearly the proper forum in which to hear a claim of breach of contract against the Caymanian firm Harneys Gill about matters of contract arising in the Cayman Islands. I have specifically not heard evidence that would enable me to make any determination as to whether the Claimant has a serious issue to be tried on the merits of the claim; I cannot decide whether she has a real, as opposed to a fanciful, prospect of success. What I can see is that the parties have agreed to give exclusive jurisdiction to the Cayman Islands courts and that the contract was to be governed by and construed in accordance with the laws of the Cayman Islands (to which the Claimant has indeed made reference throughout her submissions). All her complaints are capable of being heard in the Grand Court and in one set of proceedings, thus being more efficient, expedient and less costly than doing so in the UK where, not least as a result of the Employment Tribunal's jurisdictional cap in a claim for breach of contract of £25,000, the Tribunal could not even deal with the entire matter.

70. Hence in light of Article 4(a) of the Order, the Tribunal does not have jurisdiction to hear the first claim.

71. However, I further conclude that under Article 4(c) of the Order, the Tribunal would have had jurisdiction to hear the first claim, had it been brought in time and against the correct Respondents and with prior EC compliance, had it not been struck out under Article 4(a). In other words, I have concluded that the Claimant's employment terminated on 29 January 2018 and therefore it had arisen by the date that she submitted the first claim.

72. I reach this conclusion notwithstanding the email from Ms McElroy dated 9 February 2018. The Claimant seeks to rely on the Supreme Court's decision in *Societe Generale v Geys*[4]. In that case the employer, a bank, purported to dismiss an employee, Mr Geys, summarily, pursuant to a pay in lieu of notice (PILON) clause. Mr Geys argued that the bank had not operated the PILON in accordance with the terms of his contract, which said, "[The bank] reserves the right to terminate your employment at any time with immediate effect by making a payment to you in lieu of notice". In fact, the PILON was not paid until three weeks after a meeting on 29 November 2007, at which Mr Geys had been told his employment was being terminated with immediate effect. Mr Geys then wrote to the bank on 2 January 2008, via his solicitors, electing to affirm his contract and reserving his position until he understood what the monies paid into his account constituted. The bank wrote to him on 4 January (deemed received by him on 6 January) explaining that it had elected to exercise the PILON clause and confirming the calculation of the PILON.

73. The Supreme Court held that the wronged party is entitled to elect when it accepts the other party's breach. It also held that Mr Geys needed to be told that the payment was being made pursuant to the PILON, to avoid (as Lady Hale said) the situation where he would have to check his bank account regularly to see if he was still employed. It determined that his employment ended on receipt of the letter of 6 January.

74. In my view, the present case bears little resemblance to the facts in *Geys*. The termination clause in the Claimant's contract says, as I have noted, that either party may terminate the contract "on giving the other three months' notice in writing… The Firm may, at its sole discretion, provide payment in lieu of notice". The termination letter handed to the Claimant on 29 and 30 January is unambiguous and again I have set out its contents above so far as they are relevant. The money representing pay in lieu of three months' base salary including the guaranteed PRP element and ten days' accrued but untaken holiday was wired to the Claimant's UK bank account on 31 January, the day after Ms McElroy had emailed the Claimant showing the amount that was to be transferred.

75. A number of points therefore arise. The first is that at no stage, on the evidence before me, did the Claimant or anyone on her behalf positively assert that she was electing to treat the contract as continuing. This issue also gave rise to the question of privilege and whether the correspondence in the bundle was "without

[4] [2013] 1 AC 523

prejudice" insofar as the Claimant's email of 13 February appeared to accept – indeed, assert - that her employment was explicitly and unambiguously terminated on 29 January.

76. I remain of the view, notwithstanding the Claimant's carefully worded and detailed submissions on the point, that her 13 February email was not "without prejudice" or, if it was, that privilege was waived by her. It refers to a separate "separation agreement", which I have not seen in any draft or final form but which I assume is similar in nature to a "settlement agreement" in this jurisdiction. The 13 February email says that "once terms have been agreed" [in that agreement], the Claimant will include part of Ms McElroy's 9 February email wherein the Firm said it would agree to pay any of the Claimant's tax liability provided the Claimant undertook to refer work back to the Firm and would agree not to conduct herself in a way that might result in a potential opportunity being lost to it.

77. It is my understanding that the Claimant has not sought to argue that Ms McElroy's 9 February email was privileged (or indeed that of 30 January, which also referred to a separation agreement); indeed, it was the Claimant who brought the 9 February email to Employment Judge Segal's attention at the PHCM. The Claimant also argues that one cannot "cherry pick" parts of a communication which are properly to be deemed "without prejudice". That, for the Claimant, must cut both ways. She cannot rely on the 9 February email but seek to have the 13 February email excluded.

78. That being so, either both the 13 February **and** the 9 February emails are properly privileged and neither are before me (in which case I would not need even to consider Ms McElroy's claim that the Claimant remained "under contract" to the Firm for three months albeit she had received payment in lieu) or neither is privileged and I do need to consider it. I consider that the latter is the case. The parties are clearly, from this exchange, contemplating entering an agreement to extinguish their potential claims against each other. The terms of that agreement are being decided in other correspondence, not before me. Notwithstanding *Portnykh v Nomura International PLC*[5], these emails are separate from that discussion and on discreet issues, including the manner in which the Claimant might minimise her tax liability in that tax year. There was no "continuity of dispute" over whether or when the Claimant's employment had ended. Indeed, until comparatively recently and other than through Ms McElroy's error, there was no dispute about that at all.

79. Further, I am concerned, as I said when I made the original decision, that to find the 13 February email privileged would potentially allow the Claimant to take a position in evidence that is the opposite of the factual position that she was taking in the email and generally. She was not compromising her position by saying, "I will accept your repudiatory breach and/or agree that my employment has ended, subject to the following conditions: …". She was saying, in terms, "You cannot argue that my employment is continuing because your position was entirely

[5] UKEAT/0448/13

unequivocal both in what you said and in what you wrote on 29 and 30 January". To allow her to use the cloak of privilege would, in my view, amount to an unambiguous impropriety.

80. I am also mindful of the Court of Appeal's decision in *Somatra Limited v Sinclair Roche & Temperley*[6], in which Clarke LJ allowed into evidence material properly described as "without prejudice". He referred (at paragraph 29) to Templeman LJ's approval, in another case, of Mustill J's "statement of principle" in *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corporation*:

> "I believe that the principle underlying the rule of practice exemplified in *Burnell v British Transport Commission* [1956] 1 QB 187 is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.
>
> 30. I recognise that in those cases the court was considering waiver of privilege and not the use of without prejudice communications, but I do not think that the principle can be any different in such a case. Fairness requires that where a party deploys privileged or without prejudice material as part of its case at a trial the other party should be entitled, in the one case, to see the whole of the privileged document and, in the other case, to rely upon the other without prejudice material which came into existence as part of the same without prejudice process. The question here is whether the same is true where the without prejudice material is deployed, not at the trial, but at an interlocutory application.
>
> 31. The authorities show that the mere fact that without prejudice material is deployed on an interlocutory application does not entitle the other party to deploy it at the trial before a different trial judge. An example of such a case is *Family Housing Association (Manchester) Ltd v Michael Hyde & Partners* [1993] 1 WLR 354. In that case the plaintiffs filed evidence of the contents of without prejudice negotiations in order to resist an application by the defendants to strike the action out for want of prosecution. The question was whether they were entitled to rely on such evidence or whether they were precluded from doing by reason of the fact that the negotiations were without prejudice. It was held by this court that they were entitled to rely on it. Hirst LJ, with whom Mann and Balcombe LJJ agreed, recognised the public policy in favour of excluding such evidence but held that there was what he called (at page 363) a preponderant public policy in favour of admitting the evidence on applications of that kind. He expressed the view that to admit it would not infringe the public policy in favour of exclusion. He concluded in this way (at p 363):
>
> Consequently I am unable to see how exposure to the course of negotiations in this narrow context is in any way harmful to either side. If the application

[6] [2000] EWCA Civ 229

succeeds, the action will be at an end. If it fails, and the case proceeds to trial, the material will not be available to the trial judge and he will not be in any way embarrassed."

81. Clearly, then, the assertion of privilege in relation to these emails could be re-made at trial, if the Claimant were to succeed on all the other preliminary issues. However, even if I am wrong on this point and the 13 February should indeed be excluded, there is other evidence (excluding the disputed email) that clearly indicates the Claimant **did** accept the termination of her contract:

    a. On 15 February, the Second Respondent wrote to the Claimant agreeing to provide some skeleton arguments on which the Claimant had worked, "as we appreciate you will require this information for your applications to Chambers". The Claimant in turn emailed him the following day, in relation to time she had spent in the UK and the impact this might have on her tax liability, "There will also be interviews for tenancy in London to be taken into consideration, which I cannot delay". Clearly, from that, she was confirming that she would be undertaking interviews before the end of the tax year on 5 April, i.e. she considered herself to be free to work elsewhere because she had been dismissed by the Firm.

    b. On 27 March, the Claimant emailed Ms McElroy thus, "The only leave I had while at Harneys was over Christmas 2017 and I spent the majority of that leave in France"; the past tense is obviously referring to the fact she is no longer "at Harneys".

    c. I have also set out above the contents of her email of 4 July in which she referred to Harneys not terminating her contract in her six-month probation period "or for another 3 months after that".

    d. In what might be termed an "email before action", on 14 August, the Claimant stated, "The Employer has acted in breach of contract including and without prejudice to the generality of this, the implied term of good faith, in dismissing me as it did and in its subsequent conduct which had the effect of compelling me to return to the UK and not obtain another position with another employer in the Cayman Islands. I have received a remittance from you which you claim to be instead of 3 months' notice. That notice was invalid. I am retaining this as a payment on account of damages arising in connection with the contract of employment."

    e. Significantly, at no stage in that email did the Claimant positively affirm the contract; and one minute later, she sent a second email asking for a P45 to be sent to her "within the next 7 days". None of this is suggestive of an employee who is waiving a breach and/or electing to treat a contract as continuing. Nobody who elects to continue working or who thinks they are still employed somewhere demands to be sent a P45 before the week is out.

82. Accordingly, the claim is out of time in any event and no argument has been advanced that it was not reasonably practicable to submit it in time. It is therefore struck out for lack of jurisdiction.

83. Since the claim has been struck out, I vacate the Hearing listed for October and I do not go on to consider the proposed amendments to the claim.

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Employment Judge Norris
23 April 2019

Sent to the parties on:

25 April 2019

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For the Tribunal:

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