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EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Miss S Simon-Hart **AND** **Standard Chartered Bank**

PRELIMINARY HEARING

HELD AT: **London Central** **ON:** 13 & 14 June 2019

BEFORE: Employment Judge Glennie (Sitting alone)

Representation:

For Claimant: In person
For Respondent: Mr E Kemp, of Counsel

REASONS

1. This preliminary hearing has as the issue to be decided the question whether the Tribunal has territorial jurisdiction over the complaints brought by the Claimant. The Respondent concedes that there is such jurisdiction in respect of the complaint of breach of contract and that will continue to a hearing. The question that remains is whether the relevant legislation, that is the Employment Rights Act 1996 in respect of the complaint of unfair dismissal, and the Equality Act 2010 in respect of the various discrimination complaints, applied to the Claimant's employment. In other words, the question is does the Claimant's claim fall within the territorial scope of the relevant provisions concerned. They are s.94(1) of the Employment Rights Act; and under the Equality Act, s.13 dealing with direct discrimination, s.21 dealing with reasonable adjustments, s.26 dealing with harassment, and s.27 dealing with victimisation.

2. This question is not to be confused with any question of the territorial jurisdiction of the Tribunal itself, which is a different point. I can understand why the Claimant has referred in her evidence and her arguments to rule 8 of the Tribunal's Rules of Procedure, which deals with the territorial jurisdiction of the Tribunal and in particular with issues between the England and Wales Tribunal and the Scotland Tribunal. But that is not the issue with which I am concerned. The same is true of the Claimant's reliance on **Vedanta**

Resources Plc v Longowe [2019] UK SC 20 which was a case in the Supreme Court concerning the territorial jurisdiction of the Civil Courts. It does not relate to the territorial reach of the legislation, which is the issue with which I am concerned.

3. The law in this regard has recently been summarised by Lord Justice Underhill LJ in **Jeffery v The British Council [2019] IRLR 123.** In paragraph 2 of Underhill LJ's judgment his Lordship set out a summary of the authorities on territorial jurisdiction to date, and I quote the following parts of this:

> "(3) In the generality of cases Parliament can be taken to have intended that an expatriate worker, that is someone who lives and works in a particular foreign country even if they are British and working for a British employer, will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case law as 'the territorial pull of the place of work.'"
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> "(4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain and British employment law which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as 'the sufficient connection question'."
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> "(6) In the case of a worker who is truly expatriate in the sense that he or she both lives and works abroad as opposed, for example, to a commuting expatriate……the factors connecting the employment with Great Britain and British employment law will have to be especially strong to overcome the territorial pull of the place of work. There have however been such cases, including the case of British employees of Government/EU funded international schools considered in **Duncome**. The position is that each case is to be looked at on its own facts. In particular the examples given by Lord Hoffman in **Lawson v Serco Limited [2006] IRLR 289** are examples of cases where an employee works abroad but where there may be a sufficient connection with Great Britain. They are not the only categories of case where this may be so. A further point was emphasised by Gross LJ in **Bamieh v Eulex [2019] EWCA Civ 803,** namely that it is the strength of the connection that matters not the strength of the protection. This dictum was in turn referring to an argument advanced before and rejected by the Court of Appeal in **CreditSights Limited v Dhunna [2014] IRLR 953** that the Court should examine the relative merits of the potentially competing systems of labour law".

4. I turn then to the facts of this case. I heard evidence from the Claimant herself; also from Ms Jo Richardson, Head of HR for Retail Banking Wealth Audit and Legal for the Respondent; and Mr Robert Tobias currently the

Respondent's Head of Legal Private Banking and Wealth Management and at the material time the Regional Head of Financial Markets Legal for Africa, Middle East and Pakistan, known as AME. There was a bundle of documents and page numbers that follow refer to that bundle.

5. There was in the event little dispute of fact between the parties and the issues were mainly about the legal consequences of the facts. The background to the case is that there is within the United Arab Emirates, specifically in Dubai, the Dubai International Finance Centre (the DIFC), which is an economic free zone within Dubai. The evidence is that this is a significant location for the carrying out of international financial transactions.

6. The Claimant is a British citizen and a solicitor of the Supreme Court of England and Wales. Her family home, which is her mother's home where she grew up, is in Southampton. Since 2011 she has lived and worked in Dubai, accompanied by her school aged daughter. Before joining the Respondent in 2014 she worked for three previous employers in Dubai. I should say that for an expatriate to remain in Dubai it is necessary to have employment because of visa requirements. There are only thirty days grace on termination of employment after which, if the ex-employee remains in Dubai, they do so illegally and are at risk of being fined in the first instance and ultimately of being imprisoned.

7. The Claimant's employment with the Respondent began on 29 October 2014 as legal counsel in the AME team. She progressed in due course to senior legal counsel, but at the outset she was interviewed twice at the Respondent's offices in the DIFC. There was an element of dispute about what was said in the course of the first interview, which was conducted by Mr Tobias. In her witness statement at paragraph 5 the Claimant said that she asked about a potential transfer between offices, and a return to the UK with the Respondent, as it was important to her to return to the UK at some point. In cross-examination Mr Tobias said that he did not recall the Claimant asking about moving offices but he did remember discussing the question of career progression and how he himself had moved around from one office to another in that regard. He said, and I accept because it is logical that he would require this, that he wanted to be sure that the Claimant was intending to remain in the UAE for a reasonable period, but he understood that everyone's intention, including his own, would be to return to the UK one day.

8. Ultimately, I find that there is no difference of any significance between the Claimant and Mr Tobias in this respect. The Claimant was clearly willing to remain in the UAE for a reasonable period and she in fact remained there until her employment was terminated in October 2018. She nonetheless intended to return to the UK at some point and would have contemplated moving offices for career progression purposes in the meantime.

9. There was a contract of employment dated 14 October 2014 at pages 25-41, and I will refer to the terms that I find material when setting out the factors that form the basis of my decision. From then on, the Claimant was based in the DIFC office of the Respondent. I accept that at times she worked

from home in Dubai and on occasions from the family home in Southampton when she was on leave there. She had a home in Dubai and her daughter went to kindergarten school there.

10. The Claimant's work was in the field of international financial transactions and she was in a team of UK qualified lawyers. Whatever the origin of the transactions concerned, they were generally governed by the law of England and Wales, hence the need for lawyers with that qualification. Where questions of local law arose, then locally qualified lawyers would become involved.

11. Mr Tobias was the Claimant's line manager, based in Dubai, until April 2018 when he moved to Singapore to take up a new role. The Claimant was then briefly managed from Singapore by Mr JH. She became unwell and went off on sickness absence in July 2018 and did not return to work thereafter. Her employment was terminated on 31 October 2018.

12. The Claimant's complaints relate to that termination and to other events that occurred, on her account, during the course of her employment. I have already summarised the causes of action which she seeks to rely on.

13. When considering the territorial reach of the legislation, the starting point is that a person living and working in a foreign country, even when employee and employer are both British, will be subject to the employment law of the country in which they are working. In the present case, the Claimant is British and the Respondent is a British company. It is also, I find, the case that the Claimant is correctly regarded as being domiciled in the United Kingdom, but that is not the same as the factual question of where she was living and working at the time of her employment with the Respondent. I find that she was living and working in the UAE, and so the question is whether this is one of the exceptional cases where the factors connecting the employment to Great Britain and to British employment law pull sufficiently strongly in the opposite direction.

14. I find that there is a collection of factors which, in fact, tends to reinforce the connection with the UAE and/or DIFC. They are as follows: first, the terms of the contract between the parties. Clause 5.1 provided that the Claimant's current place of work was Dubai International Financial Centre, DIFC Dubai United Arab Emirates. The bank reserved the right to change the place of work to any other location either temporary or permanently as the business might require, and the bank might require the Claimant to work any other bank office at any location overseas as the bank might from time to time determine. Although that does contain a reservation about being able to require a move of office, the clause does specify the place of work at that point as being at the DIFC. That was reflected in reality in that the Claimant was based in the DIFC, and the fact that she carried out some items of work (I find not many) while on leave and back in the UK does not detract from that.

15. Clause 8.1 provides for the salary to be paid in the local currency of Dhirams. Clause 12.1 refers to DIFC employment law and says that at the

end of service the employee would be entitled to receive an end of service gratuity subject to and in accordance with the provisions of DIFC employment law. In clause 14.1 it was provided that the bank would be entitled to terminate the employment, again for the reasons permitted in DIFC employment law. In clause 21 it was stated that the employment was conditional on the Respondent being able to obtain a UAE visa for the employee, as would be required to enable them to work in the DIFC. The clause provided that if the Respondent could not comply with some of the obligations under that clause, then there would be the right to summarily terminate the agreement in writing without notice, but without prejudice to the right to receive any compensation for the termination, as set out in the agreement or in DIFC employment law.

16. Finally on this point, clause 44 provided in sub clause 1 that the agreement takes effect under, is governed by, and is to be interpreted according to, the employment law amendment law DIFC3 of 2012, as may be amended from time to time and supplemented where appropriate by the laws in place in the DIFC. Clause 34.2 provided that the bank and the employee both submitted to the exclusive jurisdiction of the DIFC courts, while also providing that the agreement may be enforced by the bank in any court of competent jurisdiction.

17. All of the factors set out above show a strong connection between the employment and the UAE and/or the DIFC. They all point in that direction. Further to this, there are other factual matters that I find have the same tendency. The Claimant was recruited in Dubai, she worked very substantially in the DIFC, and as a matter of fact was based there. If the Claimant did go occasionally to other locations to work, including the London office, that would not detract from her base being in the DIFC. It is perfectly possible for an employee to work away from where they are based on occasions without changing the essential location of their employment.

18. The contract was signed on behalf of the Respondent by a manager based in the UAE. When the Claimant was dismissed, that was handled by HR based in the UAE and in the letter informing her that her employment was to be terminated, which is at pages 142-144, there was specific reference to the DIFC employment law to which I have already referred. Further to all of this it is the case that, although domiciled in the UK, the Claimant was not resident in the UK and did not pay UK income tax or national insurance on her earnings from the employment.

19. All of these factors point to a strong connection with the UAE or the DIFC, and so I have asked myself what does the Claimant point to? The Claimant says that the Respondent has not entered a substantive defence to her claims and further says that the internal grievance which she raised about the earlier matters was resolved partly at least, and significantly she says, in her favour. For the present purposes I assume, without making any findings about it, that the Claimant's claim has substantial merits as it stands, but that does not affect the question of the territorial reach of the legislation concerned.

20. The Claimant says, and she is right, that both she and the Respondent are British. But as Underhill LJ said in sub paragraph 3 of paragraph 2 of his judgment in **Jeffery**, that is not really the point. It will often be the case that where there is a British employee working in a foreign country for a British employer, nonetheless the employment law of the foreign country will be applicable to the relationship.

21. The Claimant is a UK qualified lawyer. That, I find, does not really take matters further. This was necessary for her to carry out the work that was being done because, as I have said, the overwhelming majoring of the transactions that she was engaged on would be governed by UK law and therefore a UK qualified lawyer would be required to carry out the work.

22. Another point that the Claimant has made is to say that the employment law of the DIFC is based on UK employment law and that the judges in DIFC are UK qualified lawyers. I have not had any direct evidence of that, but I have no reason to doubt it and I accept that this is the case. But that gets nowhere near to creating something like a territorial enclave or a close connection with the UK. There are many countries around the world which have common law systems, and there are some that recruit UK lawyers as judges. That does not create any sort of territorial enclave of the UK and nor, as I find, does it reflect on whether there is any connection and if so how strong a connection, between the employment and the UK.

23. A further point is that the Respondent is subject to regulators in the DIFC and the UK, and the Claimant points to the latter. This, I find, is a point to be taken into consideration. There is UK regulatory oversight by the Prudential Regulation Authority and the Financial Conduct Authority in relation to the Respondent's activities. It is not, ultimately, a very compelling point because it reflects the fact that the Respondent is a British company and so one would expect British regulators as well as regulators for the various countries where it is operating around the world would have oversight of it. I find that this does not have a great deal of impact on any question of the connection of the Claimant's employment with the UK, although I acknowledge that it has some degree of impact.

24. More broadly, the Claimant relies on a more general appeal based on notions of equity, or justice, or access to justice. She has said, and so far as it goes I feel bound to express some sympathy for her position on this, that it really does not assist her to say that the DIFC courts are available to her or have been available to her and that is the legal system which has jurisdiction, because that leaves her effectively without any remedy in the matter. This is not only because of the fees regime which is operated in the DIFC, but perhaps even more fundamentally because the Claimant had to leave the United Arab Emirates when her employment terminated or at least within thirty days of that, as she no longer had a visa. She simply could not stay there and therefore her ability to bring any claim in Dubai was not a reality.

25. Having said all of that, I find that this falls under what was said by Gross LJ in **Bamieh** about looking at the strength of the connection, not the strength of protection. I remind myself that the question for me is the strength of the connection, if any, between the Claimant's employment and the United Kingdom or UK employment law. This argument about access to justice cannot give the legislation a territorial reach that it does not otherwise have.

26. Looking at the case overall, I find that the factors that show a connection with the law of the UAE and on DIFC greatly outweigh such elements as show any connection to the UK and that therefore I find that there is no jurisdiction to hear the complaints under the Employment Rights Act or the Equality Act. Those complaints must therefore be struck out.

Employment Judge Glennie

Dated: 21 August 2019

Judgment and Reasons sent to the parties on:

28/08/2019

For the Tribunal Office