Appeal No. UKEAT/0018/20/BA
UKEAT/0019/20/BA
UKEATPA/0576/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 27 & 28 October 2020
Judgment handed down on 21 December 2020

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MS M CLARK — APPELLANT

HARNEY WESTWOOD & RIEGELS & 4 OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

FULL HEARING AND APPEAL FROM REGISTRAR'S ORDER

APPEARANCES

For the Appellant	MR STEVEN GEE (One of Her Majesty's Counsel) Instructed by: Direct Access
For the Respondents	MR MOHINDERPAL SETHI (One of Her Majesty's Counsel) Instructed by: Howat Avraam Solicitors 160 Fleet Street London EC4A 2DQ

SUMMARY

PRACTICE AND PROCEDURE

CONTRACT OF EMPLOYMENT

UNLAWFUL DEDUCTION FROM WAGES

JURISDICTIONAL / TIME POINTS

The Claimant was employed under a contract with a Cayman Islands firm, HWR. The Contract stated that it was governed by Cayman Islands law and subject to the jurisdiction of the Cayman Islands Courts. In January 2018, she was dismissed with a payment in lieu. She contended that the notice failed to comply with Cayman Islands Labour Law and was ineffective to terminate her contract. Three of the partners in the firm resided in the UK and the Claimant issued proceedings here. By the time she lodged her claim in the Tribunal, more than three months had elapsed since the payment in lieu. She also failed to obtain an Early Conciliation Certificate before lodging her claim. The Tribunal found that, notwithstanding the terms of her contract, she was employed by another Caymans entity, HG. It also held that there was no territorial jurisdiction to consider the claim, the Caymans being the proper forum, that there had been a failure to comply with EC requirements and that the claim was out of time. The claim was dismissed for want of jurisdiction. In coming to its conclusions the Tribunal rejected the Claimant's claim that certain correspondence was without prejudice.

The Claimant appealed against the findings as to the identity of the employer, EC compliance, time limits, territorial jurisdiction and without prejudice privilege, amongst other matters.

Held, allowing the appeal in part, that the Tribunal had erred in concluding that HG was the employer. The written material was clear that HWR was the employer and everything in the

parties' relationship thereafter was consistent with that. On a proper application of the principles in **Autoclenz**, the only conclusion was that HWR was the employer. It followed that the Claimant was entitled, pursuant to **Brussels Recast**, to issue proceedings against those of the partners in HWR domiciled in the UK. Accordingly, the Tribunal had territorial jurisdiction over the claim. The Tribunal had also erred in failing to treat the correspondence as covered by without prejudice privilege in that there was no unambiguous impropriety here.

However, the Tribunal's conclusions as to EC and the failure to comply with time limits were correct. Those jurisdictional hurdles had not been overcome and so the case remains dismissed for want of jurisdiction, notwithstanding the EAT's findings on other matters.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. I shall refer to the parties as the Claimant and the Respondents as they were below. The Claimant appeals against the judgment of Employment Judge Norris ("**the Judge**") sitting in the Central London Employment Tribunal ("**the Tribunal**") that it did not have jurisdiction to hear the Claimant's claim. The appeal raises, amongst other issues, the principles to be applied in determining the identity of an employee's employer.

Factual background

2. The Claimant is a barrister. In March 2017, the Claimant was practising from Chambers in London. On 2 March 2017, the Claimant received an email from a Mr Strickland who introduced himself as a former Cayman Islands attorney who now assists leading offshore firms looking to hire senior lawyers. In common parlance, Mr Strickland was a head-hunter. Mr Strickland referred to his client as being the firm of Harney Westwood and Riegels ("**HWR**") which he described as an "old-fashioned equity partnership based in the British Virgin Islands" Various discussions took place in subsequent weeks including with individuals described as partners or Heads of Department of HWR. On 13 March 2017, the Claimant attended the London office of HWR and met Mr Kish, described as the Head of Litigation in Cayman. The Claimant and Mr Kish were joined by Mr Kite, the First Respondent, who was introduced to her as the Global Head of Litigation. The Claimant alleges that during this conversation, Mr Kite expressly confirmed that her salary would be paid free of UK tax.

3. Following further discussions and negotiations, conducted via Mr Strickland, an offer was made to the Claimant. The offer was sent by email and was in the form of a letter setting out the

contractual terms of the appointment ("**the Contract**"). The Tribunal pointed out the following features of this offer letter at [37] of its Judgment:

> **"(d)… 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 and Riegels". It was sent by Mr Martins, described at the end of the offer letter as "Managing Partner Harney Westwood and 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 and 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 and 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 Zürich;**
>
> **(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;**
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> **(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…in detail because of its significance before me; both sides seek to rely on its content in support of their positions. it (sic) 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 (sic) 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 garden 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."

4. The Claimant signed and returned the Contract by email on 11 April 2017.

5. The Claimant resigned from her London Chambers and commenced her new employment. Initially, she spent three months in the HWR Hong Kong office where she was given business cards giving her name and details as a partner of HWR. The Claimant took up a role in the Cayman Islands from 1 August 2017. Once there she was again issued with business cards naming her as a partner of HWR. 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 and Riegels with an address given of a PO Box in Grand Cayman.

6. Unbeknownst to the Claimant, an application for a temporary work permit had been made to enable the Claimant to work in the Cayman Islands. This application was made on 23 May 2017 by an entity called Harneys Gill ("**HG**"), a registered partnership arising out of a merger in 2008 between HWR and C S Gill & Co, a Cayman Islands firm of which the sole principal was a Mr Gill, an attorney based in the Cayman Islands. It seems that work permits can only be obtained from the Cayman Islands Department of immigration by entities at least 60% Cayman-owned. Also unbeknownst to the Claimant, on 3 August 2017, an agency called Baraud International, applied for a full work permit on behalf of HG. Both the temporary and full work permits were issued by the Cayman Islands authorities naming HG as the Claimant's employer.

7. The Tribunal found that the Claimant did not see the work permit applications or the permits themselves until these proceedings.

8. On 29 January 2018, the Claimant was spoken to by a Miss McElroy, HR Manager of the Cayman Office, who informed her that the partners had decided to terminate the Claimant's contract. The Claimant asked why, to which Miss McElroy replied the partners did not have to give notice or have a reason. The Claimant was informed that this would be the last day in the office and that her work permit would be cancelled in the next few days. The consequence of that was that she would have to leave the island. Miss McElroy also said that the firm would pay her three months' salary instead of giving notice. Miss McElroy handed the Claimant a letter. The letter was on HWR notepaper in the same manner as the covering email of the offer letter. It was headed "termination notice and final compensation letter" and was signed by Miss McElroy for HWR. The termination letter stated as follows:

> **"This letter serves to advise that your employment with Harney Westwood and 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 (sic) and your obligations post your termination. Your salary and benefits amount is inclusive of any payments, statutory or otherwise (sic) that may be owed to you under the Cayman Islands Labour Law."**

9. The termination letter then sets out figures for three months' salary and 10 days accrued vacation. It confirmed that the Claimant could remain in the firm's health care plan for up to 3 months but at her own cost, otherwise it would end after a month. The Claimant was told that the work permit would be cancelled with effect from 7 February 2018 and that if she intended to remain on the island after that date she would need to regularise her immigration status directly with the authorities.

10. The Claimant did not think that the payment in lieu of notice was sufficient and handed the letter back to Miss McElroy saying that she was not accepting it. The Claimant told Miss McElroy that she was concerned that the letter made no mention of the payment of UK tax. Miss

McElroy replied that she did not know anything about this but that she would speak to the partners and revert. The Tribunal rejected a claim by the Claimant that she told Miss McElroy that she did not regard the letter as having the effect of terminating her employment. The Tribunal found that the decision to terminate the Claimant's employment was one taken by more than one of the HWR partners.

11. There was a further exchange of correspondence the next day, 30 January 2018, during which the Claimant received a second version of the termination letter from Miss McElroy. On 31 January 2018, the Claimant returned to London. On 2 February 2018, she received a wire transfer in sterling from HWR of the amounts stated in the termination letter.

12. On 9 February 2018, Miss McElroy emailed the Claimant stating, amongst other things, that the Claimant's tax liability for 2017/18 was her own, and that the Claimant remained "under contract to the Firm for the three months' notice period, albeit you have received payment in lieu of notice (i.e. until 30 April 2018 "Gardening Period")". This email appears to be wholly at odds with the earlier email suggesting the Claimant's employment had ended with immediate effect on 29 January 2018. The Tribunal accepted Miss McElroy's evidence that the reference to continuing employment was a genuine error.

13. On 13 February 2018, the Claimant wrote to Miss McElroy in what she believed was without prejudice correspondence. I shall return to the content of that letter below, as it relates to one of the grounds of appeal. In subsequent correspondence, the Firm maintained its position that the Claimant was liable for her 2017/18 tax liability. Following a letter before action on 14 August 2018, Mr Martins indicated that he was authorised to accept service in Cayman "of any proceedings you wish to bring against Harney Westwood and Riegels, and its partners".

14. The Claimant's first ET1 claim form was received by the Tribunal on 11 September 2018 ("**the first claim**"). The nature of the first claim was described as "Breach of Contract". The ET1

in the first claim stated that the Claimant did not have an ACAS early conciliation certificate number. Claimants are given various tick box options to explain why the number is not available. The Claimant ticked the box stating, "ACAS doesn't have the power to conciliate on some or all of my claim"

15. The Claimant contended that the First to Fourth Respondents were partners of the Fifth Respondent, which she described as an "unlimited partnership". She claimed that the Respondents were her employer and as such were jointly and severally liable to her. She claimed that the letter of termination from Miss McElroy was ineffective/invalid to terminate her contract, as was the payment into a bank account of the sum of money purporting to be her notice. She also claimed that the Respondents were in breach of their "promises" to be responsible for and to pay her UK tax liabilities, and that the Respondents were in repudiatory breach of contract which breach was accepted by the service of her claim form. The Claimant asserted that her primary case was that the Respondents are liable to pay 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 sum was exceeded.

16. The Claimant stated that it was only in July 2018 that her employer made it clear that it would refuse to pay the UK tax. She stated that her employment ended on 10 September 2018 (although there was no pleaded factual basis for that date). Under a heading, "Extension of Time", the Claimant sought an extension of time for bringing this complaint "if it is needed".

17. The Claimant contacted ACAS on 17 September 2018 (i.e. after lodging her claim) and received a certificate for each of the five respondents. She forwarded these to the Tribunal stating that ACAS agreed with her view that it did not have the power to conciliate in her claim.

18. The first claim was served on the Respondents on 1 November 2018.

19. 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 all of them ("**the second claim**"). The second claim made complaints arising out of the same facts and made claims for notice pay, holiday pay, arrears of pay, other payments and breach of contract.

20. The second claim form was not served on the Respondents. It appears that this was because the preliminary issues as to jurisdiction in the first claim were still being determined.

21. The Respondents lodged their response to the first claim on 28 November 2018 along with an application to strike out the claim and/or seek a deposit order. The Respondents' case was that the Claimant's employment had terminated on 29 January 2018. The Respondents denied that the Claimant had ever been employed by any of them and instead asserted that she was employed by HG. It also suggested that the Fifth Respondent should correctly be identified as Harneys Westwood and Riegels LLP ("**the LLP**"), that being the name of the registered law firm in London. The Respondents also contended that the claim was out of time, that time should not be extended, and that the Cayman Islands was clearly the proper forum in which to hear the claim in any event. It asserted that the Tribunal did not have territorial jurisdiction to hear the Claimant's claim.

22. At a preliminary case management hearing before Employment Judge Segal QC on 16 January 2019, several issues were identified for determination at a subsequent open preliminary hearing ("**OPH**"). Those issues came before Employment Judge Norris at the OPH on 14 February 2018. The Claimant represented herself at the OPH whilst the Respondents were represented (as they were before me) by Mr Sethi QC.

The Tribunal's Decision

23. In a careful and clearly written reserved judgement, the Tribunal held that it did not have jurisdiction to hear the Claimant's claim and struck it out.

24. The Tribunal found that the Respondents were not the Claimant's employer and that she was in fact employed by HG:

> **"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.**
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> **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 blue shirts, 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 calculations based on "the Firm's" profits, but "the HWR global partnership".**
>
> **47. However, I found 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 CS 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."**

25. The Tribunal considered some further documents as to the status of HG and HWR, as well as the status of the LLP. It concluded as follows:

> **"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 and 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 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."**

26. The Tribunal then went on to consider whether there was a valid claim, and, in particular, whether the rules on early conciliation ("**EC**") had been complied with. As to this issue the Tribunal held as follows:

> **"64. I conclude that whether the Claimant was bringing a claim solely for breach of contract over breach of contract and/or unlawful deduction from wages, (which will 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" [within the meaning of s.18 of the Employment Tribunals Act 1996]; 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.**
> **…**
> **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 <u>prior to</u> 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 that the Tribunal does not have jurisdiction to hear it, even if the correct Respondents were named or if they could be substituted." (Emphasis in original)**

27. The Tribunal then went on to consider the proper forum for the Claimant's claims. It accepted the Respondents' submission that the proper forum in which to hear a claim of breach of contract against the Cayman Islands firm, HG, about matters of contract arising in the Cayman Islands was the Cayman Islands. The Tribunal referred to the fact that the parties had agreed to give exclusive jurisdiction to the Cayman Islands courts and the Contract was to be governed by and construed in accordance with the laws of the Cayman Islands. On that basis, the Tribunal concluded that her complaints were capable of being heard in the Grand Court of the Cayman Islands and that that would be more efficient, expedient and less costly than doing so in the UK.

A The Tribunal also noted that the limit on its jurisdiction in respect of contract claims of £25,000 meant that the Tribunal could not deal with the entire matter in any event. Accordingly, the Tribunal held that it did not have jurisdiction to hear the first claim.

B 28. The Tribunal also concluded that the Claimant's employment terminated on 29 January 2018. It rejected an argument that the payment in lieu of notice was not made in accordance with contractual or legal requirements in the Cayman Islands, thereby rendering it ineffective. The Tribunal was satisfied that the provisions as to payment in lieu of notice in the Claimant's contract

C entitled the termination of the Contract by paying sums representing three months' base salary and 10 days' accrued but untaken holiday.

29. In coming to that conclusion, the Tribunal took into account the Claimant's email of 13

D February 2018 in which, as the Tribunal found, the Claimant appeared to accept – indeed, assert – that employment was explicitly and unambiguously terminated on 29 January 2018. The Tribunal rejected the Claimant's argument that this email should be excluded on the grounds that

E it was privileged having been sent in the course of without prejudice discussions. It said:

> **"79. Further, I am concerned, …, 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**

F **employment is continuing because your position was entirely 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."**

30. The Tribunal also took into account some further correspondence sent by the Claimant

G after the end of January 2018 which appeared to it to indicate that the Claimant did accept the termination of contract. Accordingly, the Tribunal found that the first claim had been presented out of time in any event (it having been lodged with the Tribunal more than three months after 29 January 2018) and struck out the Claimant's claim for lack of jurisdiction.

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31. The second claim was referred to Employment Judge Norris on 30 April 2019. The Judge decided to reject the second claim under Rule 12 (1) (a) of the **Employment Tribunal Rules 2013** ("ETR") on the basis that the Tribunal had no jurisdiction to consider the complaints set out in that claim for the same reasons that it lacked jurisdiction to hear them in the first claim.

32. On 3 May 2019, the Claimant applied for reconsideration of the rejection of the second claim. By a letter dated 4 June 2019, the Judge refused the Claimant's application for reconsideration stating that there is no reasonable prospect of the original decision being varied or revoked. By that stage, the Claimant had lodged her appeal against the first claim. As to that, the Tribunal stated:

> **"The fact of an appeal having been lodged in [the first claim] does not impact on whether the Tribunal has jurisdiction in this case. Indeed, if the appeal in that case is successful, this claim would be bad for duplicity (sic)".**

The Claimant's Appeals

33. The Claimant's appeal against the decision in the first claim was lodged on 1 May 2019 ("**the Jurisdiction Appeal**"), and her appeal against the rejection of the second claim was lodged on 14 June 2019 ("**the Rejection Appeal**"). The Claimant, on the latter date, also lodged an appeal against the refusal to reconsider the rejection of the second claim ("**Reconsideration Appeal**").

34. The Registrar of the Employment Appeal Tribunal considered that the Rejection Appeal was presented three days out of time and invited the Claimant to file an application to extend time. The Claimant duly made such an application. On 5 March 2020, the Registrar refused an extension of time. The Claimant appealed against the Registrar's Order ("**ARO**").

35. Permission to appeal in the Jurisdiction Appeal and the Reconsideration Appeal was granted by Lord Summers on the sift on 18 January 2020. On 18 May 2020, Linden J ordered

A that the outstanding issues in the Rejection Appeal, including the ARO, were to be heard with the main appeal.

36. There are therefore three appeals to be determined now: the Jurisdiction Appeal; the Reconsideration Appeal and the ARO.

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The Grounds of Appeal

37. The grounds of appeal in each of the three appeals were drafted by the Claimant. Although an experienced barrister, her expertise does not lie in employment law, and the grounds (which extend to 15 grounds and 10 sub-grounds in the Jurisdiction Appeal alone) failed to set out the challenges of law in any order of priority. That can be seen from the fact that the principal issue before the Tribunal, and the one on which some of the Claimant's other grounds rest, namely the identity of her employer, appears only as a sub-issue under ground 5 and under ground 14 of the 15 grounds. The skeleton argument was somewhat opaque and far from skeletal. However, in oral submissions, Mr Gee developed the grounds of appeal more thematically, and helpfully identified the following issues. For convenience, I shall number these as Grounds 1 to 9:

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a. Ground 1 - *Identity of the Employer*: The Judge erred in law in concluding that HG was the Claimant's employer and ought to have held that she was in fact employed by all of the individual equity partners in HWR wherever situated. It is also said that even if the contracting employer had been HG that would have comprised the individual partners in HWR together with Mr Gill.

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b. Ground 2 - *PILON termination provisions*: The Judge erred finding that there had been valid termination through the use of the PILON provisions in the Contract on 29 January 2018;

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c. Ground 3 - *Early Conciliation on the First Claim*: the Judge erred in finding that there had been a failure to comply with the EC provisions. In doing so the judge incorrectly treated the claim for Unlawful Deductions from Wages ("**UDW**") as "relevant proceedings" within the meaning of s.18 of the **Employment Tribunals Act 1996** ("ETA"):

d. Ground 4 - *Time Limits*: the Judge failed to apply the provisions of **Rome I** and treated the first claim as if the contractual issues were governed by English law. A proper application of Rome I meant that the applicable law was that of the Cayman Islands, which provided for a limitation period of six years, rather than three months;

e. Ground 5 - *Territorial Jurisdiction*: the Judge erred in determining that there was no jurisdiction to consider the claim. That decision was based on its earlier finding that HG was the employer whereas the issue of territorial jurisdiction should have been determined by reference to the party that was sued in proceedings, namely HWR;

f. Ground 6 - *ET3:* The Judge erred in failing to strike out the Respondents' ET3 in the first claim for failure to comply with the requirements of Rule 17 of the ET rules;

g. Ground 7 - *Date of Termination*: the Judge erred in searching for a different unpleaded date of termination and not focusing on two pleaded alternatives, namely 29 of January 2018 (as contended for by the Respondents) and 1 November 2018 (as contended for by the Claimant).

h. Ground 8 - *Without Prejudice Privilege*: the Judge erred in concluding that there had been unambiguous impropriety in respect of the Claimant's email dated 13 February 2018;

i. Ground 9 - *Failure to give adequate reasons*.

38. Mr Sethi did not accept that Mr Gee's thematic approach to the grounds in the Jurisdiction Appeal properly reflected the permitted grounds of appeal, but did not suggest that it was inappropriate to consider the issues in this way. I permitted Mr Gee to make his submissions on the basis of these reformulated grounds.

39. The Reconsideration Appeal raised six grounds, several of which overlapped with those in the out of time Rejection Appeal.

40. Finally, in the ARO, the Claimant contended that the Registrar had erred in refusing an extension of time in respect of the Rejection Appeal and that the unusual circumstances of these claims meant that an extension was warranted.

41. I begin with the Jurisdiction Appeal.

Jurisdiction Appeal

Ground 1 - Did the Tribunal err in concluding that HG was the employer?

42. Mr Gee submits that the Contract, which is the only written agreement of relevance, is clear that the employer is HWR and that position cannot be altered by subsequent events, of which the Claimant was unaware, such as the application for a work permit on behalf of HG. In the absence of any novation of the Contract so as to introduce HG as the employer (whether on its own or in conjunction with others) the terms of the initial written agreement are conclusive. In any event submits Mr Gee, the fact that HG is itself a partnership comprising HWR and Mr Gill means the question is really whether the employer is HWR (i.e. all of the partners in that unlimited general partnership) or HWR *and* Mr Gill. Even if (contrary to the Claimant's case) it is the latter, the Claimant was entitled to bring the claim against the partners of HWR named in the Claim Form as they are "anchor defendants" who are sued as of right as a result of being domiciled in the UK. This was not a case where the Contract did not reflect the reality of the

relationship between the parties or where the written agreement can be said to be a sham, neither of which was asserted by the Respondents. The Tribunal erred in failing to treat the Contract as determinative of the issue.

43. Mr Sethi submits that the Tribunal was correct to investigate whether the Contract represented the reality of the relationship and did so in a "realistic and wordly wise" manner: **Autoclenz Ltd v Belcher** [2011] ICR 1157 at [34]. This was a case where the Tribunal was entitled to disregard the Contract and "instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties": **Autoclenz** at [17]. In particular, it is said that the Tribunal was entitled to consider the position, not just at the inception of the Contract (as Mr Gee argues should be the case) but "as time goes by": **Autoclenz** at [30] (citing from **Firthglow Trading v Szilagyi** [2009] ICR 835, CA). The Tribunal was entitled to find that there were two classes of documents: those where strict legal definitions are required and those which are primarily for branding or marketing. In the former class (save for the Contract itself), HG is identified as the employer, whereas in the latter, it was or appeared to be HWR. In those circumstances, submits Mr Sethi, it was open to the Tribunal to conclude that the correct employer was HG and not HWR. Furthermore, these findings were made in a context where it was clear, as a matter of Cayman Islands law, that the employer had to be an entity such as HG, which satisfied the local ownership requirements.

Discussion

44. The question, "Who is the employer?", will in most cases be capable of being answered without difficulty. However, in any situation where the corporate structure of the "employer" comprises more than one entity, the answer might not be quite so straightforward. That is perhaps all the more so where the relevant corporate entities are situated in different jurisdictions.

45. The earliest case cited before me where the identity of the employer was in issue is **Clifford v Union of Democratic Mineworkers** [1991] IRLR 518. Mrs Clifford commenced employment with the National Union of Mineworkers (Nottingham Area) in 1972. The NUM was at that stage organised in a federal structure consisting of a number of area unions of which Nottingham was one. Although employed at the local level, Mrs Clifford's employment was on a "national grade" as opposed to an "area grade". The national miners' dispute in 1984/5 resulted in the Nottingham Area of the NUM declaring itself independent of the federation and the subsequent establishment of the Union of Democratic Mineworkers (UDM). Mrs Clifford's employer was thereafter the UDM. Mrs Clifford was dismissed in 1986. In order to meet the two-year service requirement for a claim of unfair dismissal, she had to establish that her employment before commencing with the UDM was with its predecessor, i.e. the Nottingham Area, and not the national NUM. The UDM resisted the claim and relied upon a 1983 document, headed "Contract of Employment" and which set out "particulars of employment between NUM and Mrs Clifford". The Industrial Tribunal concluded that the reality of the situation was that Mrs Clifford remained under the control of the Nottingham Area and had been employed by that branch as opposed to the national body. As such, she had the requisite service. The Court of Appeal upheld the tribunal's decision. In considering the identity of the employer, Mann LJ said as follows at [7]:

> **"A question as to whether A is employed by B or by C is apparently a question of law for it is a question as to between whom there is the legal relationship of employer and employee. The resolution of that question is dependent upon the construction of the relevant documents and the finding and evaluation of the relevant facts. Where the only relevant material is documentary in nature then the question is not only apparently, but is also actually, a question of law (compare *Davies v Presbyterian Church of Wales* [1986] IRLR 194). Where, however, the relevant material is an amalgam of documents and facts then the apparent question of law is often said to be a mixed question of law and fact (for a recent decision see *Lee v Chung* [1990] IRLR 236. The present case is one where the relevant material is an amalgam of documents and facts and it can thus be described as a case of mixed law and fact. This description does not, however, in my judgment mask the reality that the answer to the question is determined by the determination and evaluation of the relevant material. This is the task of the Industrial Tribunal and is not for either the**

> **Appeal Tribunal or this Court. Neither can interfere with the resolution of an issue of fact unless the resolution contains an explicit or implicit misdirection in law. I appreciate as did Fox LJ in a somewhat similar context (see [1983] IRLR at p.380), that the inability to interfere means accepting that my question as to B or C can possibly be answered as to B or as to C. One body's evaluation may lead to B whilst another body's evaluation of the same material may lead to C. If neither body misdirects itself neither is 'wrong' although in theory what is apparently a question of law should admit to only one 'correct' answer. In the present case therefore the question is not whether the Industrial Tribunal were 'wrong' but whether their conclusion betrays a self-misdirection."**

46. It is notable that in **Clifford**, the 1983 "Contract of Employment" document, which the tribunal had concluded did not reflect the reality of the situation, was not one that was entered into at the inception of the employment relationship, but was drawn up some time later. Indeed, the letters that were exchanged at the commencement of the employment relationship in 1972 were "entirely consonant with employment by the Area", and the 1983 documents were considered to be unexplained and suspected by the tribunal to "have been an early move in the 'Byzantine manoeuvres' between the NUM and the Area": **Clifford** at [12].

47. The next case to which I was referred is **Secretary of State for Education and Employment v Bearman & Others** [1998] IRLR 431. In that case, an issue arose as to whether Miss Bearman was employed by Royal British Legion Industries, with whom she had a contract of employment, or the Employment Service, with which she had been placed by RBLI in accordance with a scheme to provide disabled persons with employment. The Industrial Tribunal considered that although the "formal" position suggested that the employer was RBLI, as a "matter of reality" and in particular due to the extent to which she was integrated into the Employment Service, the employer was the Employment Service. The EAT, Morrison P, allowed the latter's appeal and held (having considered **Clifford**) as follows at [22]:

> **"We are unanimously of the view that there has been a misdirection in this case. It seems to us that the correct approach would have been to start with the written contractual arrangements and to have inquired whether they truly reflected the intention of the parties. If they did, then the next question was whether, on the commencement of their employment, the applicants were employees of the Employment Service or employees of RBLI. <u>If the conclusion was that, when properly construed, on commencement of their employment the applicants were employed by RBLI, then the chairman ought to have asked the question: did that position change and, if so, how and when?</u>**

> **23. As we read the decision, the chairman was not saying that the contractual documents did not tell the truth about the relationship between the parties. If the tribunal had felt, as the tribunal felt in the Clifford [1991] IRLR 518 case, that the documents had been 'created', it should, and we consider would, have said so. If so, and this appears to be his approach, the parties expressly intended to create a position in which the applicants were employed by RBLI and their services 'hired out' to the Employment Service. <u>On what basis, therefore, did the tribunal reach the conclusion that the position changed?</u> …**
>
> **24 By not adopting what we consider to be the correct approach in law, there has been a material misdirection. It will be seen from the decision that the RBLI contended for some kind of novation; presumably a new contract between the Employment Service and the applicants. No doubt that submission was made because, in order to succeed, RBLI had to say either that the documents were 'created' and did not tell the truth about the relationship, or that the position changed at some unspecified time and in some unspecified way. Whilst in theory there might have been a new contract which changed the relationship between the parties, it does not appear, on the findings of fact, that that is what the parties thought had happened. As the tribunal found, new statements were issued by RBLI after any promotion and RBLI effected the dismissal." (Emphasis added)**

48. The EAT's decision highlights the importance of starting with the written contractual arrangements, and, if those point to a particular employer, requires the tribunal to ask if that position changed thereafter and, if so, how.

49. I was next referred to the decision of Langstaff J in **Dynasystems for Trade and General Consulting v Moseley**, UKEAT/0091/17/BA (Unreported). In that case, the employee signed what appeared to be a formal contract of employment in respect of employment in the Middle East with a Jordanian company, Dynasystems for Trade and General Consulting. However, on the same day, he was also provided with a letter from a UK company, Dynasystems Ltd, for him to present to the passport office in order to obtain a second passport necessary for his work in the Middle East. On appeal, the EAT noted that there was nothing in the early exchange of communications to identify which of the UK or Jordanian companies would be the employer, although the contract did refer expressly to the latter. The Employment Tribunal found that the proper Respondent was the UK Company and that the express term identifying the employer as the Jordanian company "does not reflect the actual agreement between the parties". In dismissing

A the Jordanian company's appeal, the EAT considered an argument that the tribunal ought to have focused on the initial agreement rather than looking to what happened subsequently:

> **"35. [Counsel for the Appellant] has a point, for if evidence of what contractual terms were agreed in 2010 or 2011 was in part provided by that which happened in 2015, it might be thought at first blush that a matter which could have no real bearing was taken into account. The retort by [Counsel for the Respondent], however, is persuasive to me. That is that if one sees a seamless stream of events - all of which are consistent, one with the other - which appear to demonstrate that at no stage throughout the entirety of the time when, on the Respondents' argument, the Jordanian Company was the employer did the Respondents and their Associated Companies ever behave as if he were (save in one respect, which is the identity of the bank account from which he was paid) this is good evidence as to what was initially agreed. It is not shown that any other Company was acting as employer on the Jordanian Company's behalf. Thus, understood as part of the whole picture, the point the Judge made is compelling; the argument against it falls away. This is not a case, as it seems to me, in which one can forensically separate out a succession of single events and argue that they are single events upon which too much weight has been placed. The eloquence of a chapter is not to be determined by focusing upon the first or isolated paragraphs within it. The Judge found that the whole story was of employment by a Company which was not the Jordanian one." (Emphasis added)**

50. Thus, it is not necessarily erroneous to look beyond the terms of the initial written agreement (even where that agreement is not said to be a sham) and to consider what transpired between the parties thereafter in order to ascertain what was initially agreed as a matter of reality. This is no more than an application of the principles established in **Autoclenz**, which I consider next.

51. The final case to which I was referred in this context is **Autoclenz**. The issue there was not the identity of the employer, but whether a contract stating that the claimants were sub-contractors and not employees reflected the reality of the employment relationship. The Employment Tribunal found that it did not. The Supreme Court, dismissing the company's appeal, upheld that decision. In concluding that a different approach to the interpretation of employment contracts from that in the commercial context was justified, Lord Clarke said as follows:

> **"34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:**

> **"I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so."**
>
> **35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."**

52. In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is employed by B or C, emerge from those authorities:

a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: **Clifford** at [7].

b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence: **Clifford** at [7].

c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: **Bearman** at [22], **Autoclenz** at [35].

d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: **Bearman** at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?

e. In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: **Dynasystems** at [35].

53. To that list, I would add this: documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. The primacy of the written agreement, entered into by the parties, would be seriously undermined if hidden or undisclosed material could readily be regarded as evidence of a different intention than that reflected in the agreement. It would be a rare case where a document about which a party has no knowledge could contain persuasive evidence of the intention of that party. Attaching weight to a document drawn up solely by one party without the other's knowledge or agreement could risk concentrating too much weight on the private intentions of that party at the expense of discerning what was actually agreed.

54. Applying these principles to the present case, my conclusions are as follows:

a. The question in this case is not solely one of law. The Tribunal was entitled to inquire as to what happened *between the parties* in discerning their true intention. The question is a mixed one of fact and law.

b. That said, the Contract in this case, provides clear and unequivocal evidence as to intention. The Respondents did not contend that it was a sham, relying instead on what was said to be a "drafting glitch". However, as the Tribunal itself found, the "vast majority of the written documentation and certainly almost everything the Claimant saw…" showed that she was employed by HWR: [45]. The Contract was on notepaper from "Harneys" and indicated that "A list of partners is available for inspection at our offices". Those offices were said to be at an address in the Caymans. The Contract

was signed on behalf of HWR by Mr Martins, Managing Partner. The entirety of the Contract refers to the employer as HWR with no mention anywhere of HG. The Tribunal found that there was one "implicit" exception to that in that it refers to profit-related pay as being based on the profits of the "HWR global partnership" as opposed to those of HWR. However, that does not point to HG as being the employer; indeed, no reference is made to HG at all.

c. Nothing happened thereafter as between the parties to suggest that the position had changed. There was no novation of the Contract to substitute HG as the employer.

d. All interactions with the Claimant, from the initial offer through to her termination, were consistent with HWR being the employer:

   i. The Tribunal appeared to diminish the significance of the head-hunter's statements as being "not definitive". It is not clear why the statements of an authorised agent should not be regarded as such. The parties to whom she was introduced prior to signing the contract were all described as being part of HWR with no reference being made to HG or specifically to the LLP.

   ii. From the business cards provided to the source of her salary, everything during the course of employment of which the Claimant would have been aware pointed to HWR as her employer.

   iii. Even her notice was on HWR notepaper signed by Ms McElroy "for [HWR]". The contents of the notice referred to her employment with HWR terminating. The decision to terminate was made, not by HG, but by "more than one of the HWR partners".

   iv. Once litigation was intimated, Mr Martins said that he was authorised to accept service in Cayman "of any proceedings you wish to bring against HWR and

its partners". It is, at the very least, implicit in that that the correct party to be sued as employer was HWR. To the extent that the Tribunal reached the opposite conclusion on the basis that this was another example of the Respondents' "shambolic approach" to written and oral communications, I consider that conclusion to be incorrect. This was not an inconsequential item of correspondence; it was a clear statement (written by a lawyer) as to the proper identity of the party to be served. The intentions evident from this significant document cannot be readily cast aside because of a finding that the Respondents were generally "shambolic" in their dealings. Such an approach would be contrary to well-established principles relating to the interpretation of written documents.

e. The Tribunal's reliance on the work permit documentation was misplaced. This was, as the Tribunal found, not seen by the Claimant at the time and does not provide any evidence as to her intentions. It might be evidence as to the private intentions of HG and/or HWR but to the extent that these differed from that which is clearly expressed by the Contract, the Contract ought to prevail. Mr Sethi submits that the fact that the Claimant had the opportunity to find out about this documentation means that it cannot be placed in the same category as documents about which she had no knowledge. I do not agree. In the absence of any finding that the Claimant deliberately sought to ignore the obvious, or disregarded an instruction to consider the documentation, the fact remains that she was not aware of the contents, and it cannot provide evidence of what was agreed.

f. It may well be correct, as the Tribunal found, that there is a distinction between documents where there is strict legal definition to be set out and documents concerned

with branding, in that the former tended to refer to HG whereas the latter to HWR. However, that tells one very little, if anything at all, about the intentions of the parties at the time of the Contract. It is one thing to look at what happened *between the parties* after the Contract was entered into in order to discern the true intentions of the parties; it is quite another to look at separate documentation, perhaps prepared for entirely unrelated purposes (e.g. a privacy notice or Court documents for separate litigation) and about which one party had no knowledge, to do so. The latter would be far less likely to tell one what was agreed between the parties and should certainly not be treated, as it appears it was in this case, as determinative of (or even particularly germane to) that question. As stated by Lord Clarke in **Autoclenz**:

> **"32. Aikens LJ stressed at paras 90–92 [of the Court of Appeal's judgment] the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in the Szilagyi case and in paras 47–53 in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:**
>
> **"What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the Chartbrook case [2009] AC 1101 , paras 64–65. <u>But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed</u>."**
>
> **<u>I agree</u>." (Emphasis added)**

55. The fact that it was a legal requirement in the Cayman Islands for an entity with a substantial element of local ownership to be an employer does not preclude a non-compliant entity from being an employer. Such employment may well be in breach of local laws, but it is not necessarily a nullity. Similarly, the fact that Mr Peake gave evidence that HWR did not employ anyone does not preclude the conclusion that, on a proper analysis of the evidence in this case, HWR was the Claimant's employer. A point made before Judge Segal QC was that HWR

is not a legal entity. It was not suggested by Mr Sethi that that of itself means that HWR cannot be the employer. He was right not to do so; as with any general unlimited partnership, the name of the firm is little more than shorthand for each and every one of the partners, who would all be jointly and severally liable.

56. For these reasons, I consider that the Tribunal did err in concluding that the employer was not HWR. A proper application of the legal principles could lead to only one conclusion on the facts of this case and that is that the employer was HWR.

57. Ground 1 of the Appeal is upheld.

Ground 2 - Did the Judge err in finding that there had been valid termination through the use of the PILON provisions on 29 January 2018?

58. The Tribunal concluded that the Claimant's employment terminated on 29 January 2018: [71]. This was on the basis that termination was effected in accordance with the termination clause in the Contract, which provides that either party may terminate the Contract upon the three months' notice and confers upon the Firm the right to provide a payment in lieu of notice ("PILON").

59. Mr Gee submits that the Tribunal erred in failing to take account of the **Cayman Islands Labour Law (2011 Revision)** ("**the Labour Law**") in construing the relevant provisions of the Contract. Had it done so, the Tribunal would, he submits, have been bound to conclude that termination was ineffective. The key points in the submission, if I have understood it correctly, may be summarised as follows:

a. Section 5 of the **Labour Law** provides that an employer who offers or provides employment on non-conforming terms and conditions commits an offence. It further provides that any provision in a contract of employment falling below the minimum

standards of the **Labour Law** "shall be, to the extent of the contravention, void and of no effect"

b. Section 10(2) of the **Labour Law** provides:

> **"Having given due advance notice to terminate employment, an employer may terminate the employment prior to the effective date of termination under the notice, provided that he pay the employee a sum equivalent to that which he would have paid if the employee had worked throughout the period." (Emphasis added)**

c. Mr Gee contends that the effect of Section 10(2) of the **Labour Law**, and, in particular, of the underlined words, is that the entitlement to make a PILON only arises if the employer first gives the full contractual or minimum notice to terminate. There is, in other words, no right to effect summary dismissal (save where there is gross misconduct, which is not alleged here);

d. Here, the PILON clause in the Contract is non-compliant as it does not require the giving of advance notice, and is therefore void and of no effect. The minimum standards for a PILON clause in Section 10(2) would apply. This requires advance due notice of termination.

e. The employer purported to terminate employment summarily upon making a PILON. Furthermore, the sums paid fell short of what was properly due. Accordingly, the termination by the exercise of the PILON clause was ineffective.

f. The Tribunal ought to have found that the Contract was terminated on 1 November 2018, when the ET1 was served on the Respondents.

60. Mr Sethi submits that this argument is without foundation. He says that the Tribunal reached a clear conclusion that the termination letter was "unambiguous", and that the money paid reflected the contractual entitlement of three months' base salary and ten days' accrued but untaken leave. As to the **Labour Law**, Mr Sethi submits that there is nothing there to suggest that termination by invoking the right to make a contractual PILON cannot bring the contract to

an end. It might give rise to remedies or sanctions but the contract of employment would *de facto* come to an end.

Discussion

61. The Tribunal did not expressly address the argument based on the **Labour Law**, although I am told that it was invited to do so by the Claimant. I presume, from the Respondent's stance, that it does not agree with the Claimant's interpretation of the **Labour Law**. I must, in these circumstances, proceed with caution, not only because this was an issue on which the Tribunal expressed no conclusions but also because it involves interpretation of a foreign statute on which there has not been any expert evidence. I note that the interpretation of the **Labour Law** was not expressly identified as an issue by Judge Segal QC and nor was any request or provision made for expert evidence. I also note that insofar as the Tribunal reached any conclusions on the meaning of the foreign law, those would be treated as questions of fact: *International Employment Disputes, Oudkerk and Rogers, 1st edition at 13-01*. In the usual way, this appellate tribunal would be slow to interfere with such conclusions.

62. In the absence of any evidence or express findings as to the proper meaning and effect of the **Labour Law**, the starting point must be the Contract. In this regard, the EAT does have the benefit of the Tribunal's conclusions.

63. The PILON provision in clause 19 of the Contract is not dissimilar to the PILON provisions one might see in a domestic contract. The letter of termination is consistent with clause 19 of the Contract; it provides for a payment in lieu of the three months' notice to which the Claimant would otherwise be entitled. In my judgment, the Tribunal was entirely right to say that the letter of termination was unambiguous.

64. If my caution is misplaced, and the EAT is able to express a view on the meaning and effect of the **Labour Law** provisions highlighted, I would comment briefly on Mr Gee's arguments as follows (applying a domestic law approach to interpretation):

a. Section 10(2) of the **Labour Law** does, on its face, suggest that a payment in lieu of notice can only be made once due notice has been given, such notice being at least 24 hours for an employee within the probation period or at least equal to the interval of time between pay days "unless an employment contract calls for a longer notice period". This would mean that under the Contract, the employer wishing to terminate with a PILON would have to give three months' notice of termination first.

b. However, this interpretation would not preclude an employer from giving three months' notice and then immediately proceeding to make a PILON. There is indeed no reason that both steps could not be incorporated in the same letter of termination as there is no requirement for any period of time after giving notice to elapse before making the PILON. The ability to take that course would render the two-stage process suggested by Mr Gee's interpretation somewhat futile, since the employee would be in no better position than the employee who is summarily dismissed with a PILON. This tends to suggest, in my judgment, that effective summary termination with a PILON is not necessarily precluded by the **Labour Law**;

c. In any event, I agree with Mr Sethi's submission that even if Section 10(2) of the **Labour Law** were to apply as contended for by Mr Gee, there is nothing in the **Labour Law** to suggest that a summary termination with a PILON would be of no effect. Whilst the effect of Section 5 of the **Labour Law** might be to render Clause 19 of the Contract void and of no effect, the statutory notice requirements could still be breached by an employer so as to bring the employment to an end immediately.

That course of action might attract criminal sanction and/or financial remedies, but would not, in the absence of injunctive relief preventing the dismissal, be ineffectual.

65. For these reasons, I consider that the **Labour Law** provisions, if applicable, would not assist the Claimant, and the Tribunal did not err in law in concluding that the Contract terminated on 29 January 2018. That finding was consistent with the facts and the law as presented to the Tribunal.

66. Ground 2 is therefore dismissed.

Ground 3 - Did the Judge err in finding that there had been a failure to comply with the EC provisions?

67. Section 18A of the ETA, so far as relevant, provides:

> **"(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. This is subject to subsection (7).**
>
> **(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.**
>
> **(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.**
>
> **…**
>
> **(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.**
>
> **The cases that may be prescribed include (in particular)—**
> **…**
> **(b) cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;**
> **…"**

68. "Relevant proceedings" for these purposes are defined in s.18, **ETA** as:

> **"…employment tribunal proceedings –**
> **…**
> **(b) under section 11, 23, 34, 63I, 70, 70A, 80(1), 80H, 93, 111, 163, or 177 of the Employment Rights Act 1996 or under Part 5 or 6 of that Act.**
> **…**

> **(g) under article 6 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994,**
> **…**

69. Section 23 of the **Employment Rights Act 1996** ("**ERA**"), so far as relevant, provides:

> **"(1). A worker may present a complaint to an employment tribunal –**
> **a. That his employer has made a deduction from his wages in contravention of section 13 …**
> **(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –**
> **a. In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…"**

70. The Claimant's first claim was a claim for breach of contract. It was, on the face of it, a claim under the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** ("the 1994 Order") within the meaning of s.18(1)(g), **ETA**, which would be subject to the EC requirements of s.18A, **ETA**. The Tribunal also held that insofar as the first claim also contained a complaint in respect of UDW, that too would comprise "relevant proceedings". That is because a claim arising out of a breach of s.13, **ERA** is a claim that is brought under s.23, **ERA**.

71. Mr Gee submits that the Tribunal erred in the following ways:

a. There was no legal requirement for EC in respect of a claim governed by foreign law because the statutory provisions are not extra territorial.

b. The claim for UDW was part of the first claim, but this did not amount to relevant proceedings.

c. Even if there was a requirement for EC, any "defect" in complying with EC requirements had been rectified by the obtaining of an EC certificate after issuing the claim. The claim should therefore have been treated as if presented on the date that it was rectified in accordance with Rule 13(4), **ETR**.

d. There had been EC compliance in respect of the second claim which should have been consolidated with the first claim.

e. The matter was not apt to be struck out.

72. Mr Sethi submits that the Employment Tribunal only has jurisdiction to hear those claims conferred on it by statute. Breach of contract claims can only be heard pursuant to the **1994 Order** and that cannot be circumvented or trumped by foreign law. That means in turn that the EC requirements remain. In the present case, there was a failure to comply with the EC requirements in respect of the claim brought pursuant to the **1994 Order**. Furthermore, even if there was a claim for UDW in the first claim, which Mr Sethi does not accept, it too would amount to relevant proceedings for the purposes of s.18A, **ETA**.

Discussion

73. A claim for breach of contract under the **1994 Order** is one which "a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine". That means that the Tribunal has jurisdiction to determine any such claim that could be heard in a court. The claim in this case was, on the face of it, brought under the **1994 Order**. The reference to "Breach of Contract" in Question 8 of the ET1 ("Type and Details of Claim") does not specify that this was a claim for damages only (or alternatively) under foreign law, and the attached Particulars of Claim, whilst making reference to Cayman Islands Law, merely claim "Damages for breach of contract". That is a claim to which the EC requirements apply as it is one falling within s.18(1)(g), **ETA**.

74. Even if that were not the case, and the claim was solely one for breach of contract being brought under foreign law, that would not, in my judgment, displace the need for EC. The EC requirements under s.18A, **ETA** apply, as we have seen, in relation to the institution of "relevant proceedings". By s.18(1)(g), "relevant proceedings" includes employment tribunal proceedings under the **1994 Order**. Thus, any claim for damages for breach of contract arising or outstanding upon termination of employment that could be brought in the ordinary courts may be brought in

A the Tribunal. A claim for breach of contract under foreign law could be brought in the ordinary courts; and it can also, therefore, be brought in the Tribunal: see **Dickie v Cathay Pacific airways Ltd** [2004] ICR 1733 at [49] to [51]. There is nothing in ss.18 or 18A, **ETA** to suggest that the mere inclusion of a foreign law element displaces the requirements for EC. Mr Gee suggests that Parliament cannot have intended for EC to apply where foreign law claims are involved because ACAS would not be in a position to "advise" on such claims. However, it seems to me that this misunderstands the role of ACAS in EC. ACAS does not take sides in the dispute; it merely "endeavours to promote a settlement between the prospective claimant and the prospective respondent": Rule 6 of the **Early Conciliation Rules of Procedure** (as set out in the Schedule to the **Employment Tribunals (Early Conciliation and Rules of Procedure) Regulations 2014**. There is nothing to suggest that ACAS officers cannot fulfil that role merely because foreign law is or may be involved. It may be that settlement is not achievable because of that involvement, but ACAS would still have a role in getting to that stage.

75. For these reasons, I am satisfied the EC requirements did apply and the Tribunal was correct to approach the matter on that basis.

76. As for the UDW claim, although the ET1 and the attached Particulars of Claim in the first claim did not expressly include such a claim, paragraph 51 of the Particulars of Claim does refer to a "significant underpayment and/or a significant and unlawful deduction from her salary under the Contract;…". It seems to me that the Tribunal was correct in these circumstances to approach the matter on the basis that it did, namely, "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)."

77. The UDW claim also constituted relevant proceedings for the purposes of ss.18 and 18A, **ETA** as a claim that there has been a failure to comply with s.13, **ERA** (UDW) is brought under

s.23, ERA, and that section (s.23) is expressly included in the list of **ERA** provisions amounting to relevant proceedings in s.18(1)(b), **ETA**.

78. Mr Gee did not pursue an argument, apparently pursued by the Claimant below, that a claim for UDW, being a claim under s.13, **ERA**, is not a relevant proceeding as that section is not mentioned in s.18(1)(b), **ETA**. He was right not to do so. That argument was misconceived and correctly rejected by the Tribunal: [64].

79. Mr Gee did, however, seek to persuade me that an UDW claim is not a relevant proceeding for a different reason. If I understood the argument correctly (which was not one prefaced, as far as I could tell, in the skeleton argument), it is based on the fact that although s.23, **ERA** is listed in the list of relevant proceedings in s.18(1)(b) of **ETA**, the specific subsection of s.23 that refers to claims for UDW in contravention of s.13, **ERA**, i.e. s.23(1), is not. That is significant says Mr Gee because subsections (1), (2) and (4) of s.23, **ERA** were introduced at the same time by the **Employment Rights (Dispute Resolution) Act 1998** ("**DRA**").

80. I probably have not done justice to Mr Gee's argument in that brief summary, but my view is that it is misconceived in any event. It is quite clear, as a matter of statutory construction, that a claim "under…s.23" of **ERA** would include any claim that might be brought under any subsection of that provision. That is confirmed by the fact that where Parliament intended to confine the scope of relevant proceedings to those that only arise under a specific subsection, that subsection is expressly mentioned: see e.g. the reference in s.18(1)(b), **ETA** to s.80(1), **ERA**. Furthermore, the only amendment to the provisions of s23(1), (2) and (4), **ERA** introduced by the **DRA** was to substitute "employment tribunal" for "industrial tribunal" and not to introduce entire subsections. The argument would appear, therefore, to be based on an incorrect premise.

81. Much reliance was placed on what was said to be a conclusion of Judge Segal QC at the first Preliminary Hearing, where he said as follows:

> **"6. In relation to whether a valid claim had been presented by the Claimant, given that she had not approached ACAS prior to the presentation of the claim, it was quickly clear that there were difficult issues of interpretation and/or law. The Claimant pointed to certain paragraphs of the original ET1, including paras 49-51, which she said were, or included, claims for unpaid wages; <u>if so, that is a jurisdiction which would not have required her to obtain an EC Certificate before issuing</u>." (Emphasis added)**

82. Mr Gee submitted that the highlighted words showed that Judge Segal QC agreed that an UDW claim was not subject to EC requirements. I disagree. It is clear to me, as Mr Sethi submitted, that the Judge was doing no more than setting out the Claimant's argument on this issue. It seems highly unlikely that the Judge would have expressed a conclusion on this issue, which conclusion would be at odds with the ordinary and natural reading of the relevant statutory provisions, without giving some explanation for it.

83. Mr Gee's next point under this ground was that even if the claims were subject to EC, the Tribunal erred in not treating the "defect" as having been rectified by the obtaining of an EC certificate after issuing the claim.

84. Rules 12 of the ET Rules deals with those claims that must be rejected. It provides:

> **"12.— Rejection: substantive defects**
>
> **(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—**
> **(a) one which the Tribunal has no jurisdiction to consider;**
>
> **(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;**
>
> **(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;**
>
> **(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;**
>
> **(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;**
>
> **(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or**

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) [, (b), (c) or (d) of paragraph (1).

(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim.

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

85. Rule 13 deals with the reconsideration of a rejection. It provides:

"13.— Reconsideration of rejection

(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—
(a) the decision to reject was wrong; or

(b) the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.

(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

86. Mr Gee contends that the defect here was of the type that could be rectified and that the claim ought to have been treated as presented on the date of rectification pursuant to Rule 13(4).

87. This is not really a proper ground of appeal in the Jurisdiction Appeal since it goes to the treatment of the second claim. The Tribunal made it clear that it would "not deal with the second claim directly in this decision…": [16]. Even if it were appropriate to consider this ground as part

of the Jurisdiction Appeal, I would reject the point for the simple reason that the Tribunal, having concluded in the first claim that there was no jurisdiction to consider it, was bound to reject the similar second claim pursuant to Rules 12(1)(a) and 12(2) of the ET Rules.

88. Furthermore, as provided for by Rule 13(1), an application for reconsideration may be made either on the grounds that the decision was wrong or that the defect can be rectified. The Claimant's application for reconsideration was brought only on the first basis in that the Tribunal had erred in its decision that there was no jurisdiction. There was no suggestion that there was any defect that could be rectified, and the application did not seek to do so within the meaning of Rule 13(2). In these circumstances, it was hardly open to the Judge to determine, on the basis of the application, that the defect has been rectified so as to enable the claim to be treated as if presented on the date that the defect was rectified. Accordingly, this argument does not succeed.

89. Mr Gee's fourth point is also based on the Tribunal's treatment of the second claim. It does not arise in the Jurisdiction Appeal. Whether or not there had been compliance with EC requirements in the second claim and whether it should have been consolidated are matters relevant to the Rejection and Reconsideration Appeals, which are considered below.

90. Mr Gee's final point under this ground is that the strike out power under Rule 37 of the ET Rules should not be used to circumvent Rules 12 and 13 of the ET Rules. I do not understand this argument. The Tribunal struck out for want of jurisdiction and not for the kinds of reasons set out under Rule 37.

91. Ground 3 is dismissed.

Ground 4 - Time Limits

92. The Claimant's argument is that the Judge failed to apply the provisions of the **EU Regulation 593/2008/EC** on the law applicable to contractual obligations ("**Rome I**") and treated

the first claim as if the contractual issues were governed by English law. Mr Gee contends that a proper application of **Rome I** meant that the applicable law was that of the Cayman Islands, which provided for a limitation period of six years, rather than three months, and that the Tribunal was obliged, in accordance with **Rome 1** and the **Foreign Limitation Periods Act 1984**, to apply the foreign law time limit.

93. A difficulty that is immediately apparent is that this was not an issue on which the Tribunal expressed any view at all. The Tribunal proceeded as if the only applicable time limit was that set out in Article 7 of the **1994 Order**. That is obvious from the reference in [82] to whether it would have been "reasonably practicable" for the Claimant to have presented her claim in time, that being the test under Article 7. The reason for that is not surprising: the six-year time limit under Cayman Islands law was not one that was identified in the pleaded case or in the list of issues accepted by Judge Segal QC as setting out those to be determined at the OPH. The Claimant's Particulars of Claim, under the heading "Extension of Time", refer only to Rule 5 of the ET Rules. No reference is made to a six-year time limit, whether under foreign law or otherwise. The list of preliminary issues at paragraph 5 refers to the reasonable practicability test under Article 7 of the **1994 Order**. Whilst this list was drafted by Mr Sethi, Judge Segal considered it "helpful" and recorded no objection from the Claimant to it forming the basis of the issues to be determined at the OPH. At paragraph 7 of his decision he directed that (save for one amendment), "That document will stand as the List of issues for the OPH". This was confirmed by the Notice of the Preliminary Hearing sent to the parties on 30 January 2019, which stated that the issues to be determined would be those set out by Judge Segal QC. Furthermore, although the Grounds of Appeal mention **Rome I**, no specific mention is made of a six-year time limit. There is a passing reference in the Reconsideration Appeal to the second claim being in time. However, nowhere does it mention that that is because of an extended limitation period applicable under

foreign law. It is not enough, in my view, simply for foreign law to be mentioned; that cannot of itself require the Tribunal to consider potentially unlimited issues which that foreign law could raise. It is for the Claimant to identify which aspects of the foreign law are relied upon and to invite the Tribunal to determine specifically identified issues (with appropriate evidence). In particular, if a six-year time limit was being invoked, it was incumbent on the Claimant to say so. It is not acceptable to proceed on the basis only of domestic time limits and then subsequently complain that the Judge did not consider the foreign one.

94. It seems to me, in those circumstances, that this was not an issue that was properly before the Tribunal. As such, the Claimant is not permitted to raise it unless I were to determine, in the exercise of my discretion, that this new point of law should be considered at this stage. That discretion is only to be exercised in exceptional circumstances: see **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719 at [18]. I bear in mind that the Claimant was unrepresented below. However, that in itself does not provide an exceptional circumstance. The Claimant is an experienced lawyer, and although not an expert in employment law, was able to present many detailed arguments, both legal and factual, in accordance with the list of issues which Judge Segal QC accepted. I also note that, as mentioned above, any conclusions as to meaning and effect of foreign law would be treated as findings of fact. It follows that the necessary findings of fact have not been made by the Judge in this case, through no fault of her own. Permitting this issue to be raised now would be to open up fresh issues of fact; that provides further reason for not considering it now. Mr Sethi, who confined his skeleton argument to the issues raised in the grounds of appeal, did not deal with the issue in any substantive way and provided little assistance. Were I to attempt to determine this issue now, the Respondents would rightly be able to say that they are disadvantaged.

95. For these reasons, I do not consider it appropriate to determine this issue and refuse permission for Ground 4 to be considered. I do not deal with it further.

Ground 5 - Territorial Jurisdiction: Did the Judge err in determining that there was no jurisdiction to consider the claim?

96. Mr Gee's contention is that the Tribunal's decision was based on its finding that HG was the employer whereas the issue of territorial jurisdiction should have been determined by reference to the party that was sued in proceedings, namely HWR. He referred me to **EU Regulation 1215/2012/EU** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("**Brussels Recast**"), Article 21 of which provides:

> **"An employer domiciled in a Member State may be sued:**
> **In the courts of the Member State in which he is domiciled; …"**

97. Mr Gee's simple contention is that if HWR is the employer, as was alleged, then the fact that three of the Respondents, who were general equity partners in HWR at the relevant time, reside in the UK entitled the Claimant to issue proceedings here.

98. Mr Sethi, very fairly, conceded that if HWR was the employer, the Claimant could bring her complaint here. Of course, his primary case was that HG was the employer, and that as HG was based in the Cayman Islands, the Tribunal was entitled to consider whether the Tribunal was the proper forum to hear the claim.

99. As I have found that the Tribunal erred in determining that HG was the employer and that the employer was in fact HWR, it follows, pursuant to Article 21 of **Brussels Recast**, that the Claimant is entitled to bring her claim before the Employment Tribunal. The forum arguments are rendered redundant. Although only some of the partners of HWR were resident in the UK, the fact that each was jointly and severally liable for the partnership means that it is sufficient for the Claimant to pursue her claims against them. Insofar as there are other partners based outside

A the jurisdiction, the Claimant was not obliged to join them as well: see **Wilson v Balcarras** [1893] QB 422.

100. The consequence of the conclusion that HWR was the employer is that the Tribunal's conclusions on territorial jurisdiction, based as they were on the non-domiciled HG being the employer, cannot stand.

B

101. Ground 5 is upheld.

C

Ground 6 - ET3: Did the Judge err in failing to strike out the Respondents' ET3 in the first claim for failure to comply with the requirements of Rule 17 of the ET rules?

102. Rule 17 of the ET Rules, so far as relevant, provides:

D

> **"17.— Rejection: form not used or failure to supply minimum information**
>
> **(1) The Tribunal shall reject a response if—**
> **(a) it is not made on a prescribed form; or**
>
> **(b) it does not contain all of the following information—**
> **(i) the respondent's full name;**
>
> E **(ii) the respondent's address;**
>
> **(iii) whether the respondent wishes to resist any part of the claim.**
>
> **(2) The form shall be returned to the respondent with a notice of rejection explaining why it has been rejected. The notice shall explain what steps may be taken by the respondent, including the need (if appropriate) to apply for an extension of time, and how to apply for a reconsideration of the rejection."**

F

103. Mr Gee submits that there has been a failure to comply with Rule 17(1)(b) in that the Respondents' ET3 did not contain the prescribed information. In particular, it is said that there was not a compliant response in respect of the Fifth Respondent, HWR, and that a response was

G provided, instead, by LLP and its partners. The mandatory provisions in Rule 17 required the Tribunal to reject the ET3 accordingly, and the failure to do so amounted to an error of law. It should be noted that this is the first ground of appeal relied upon by the Claimant in her self-

H drafted grounds. Mr Gee, not surprisingly, gave it somewhat less prominence in his submissions.

104. Mr Sethi submits that there was no failure to comply. HWR does not exist as a separate legal entity, and given that the address in the claim form was that used by the LLP, the Respondents understandably took the view that the LLP was the party being sued. Each of the named partners, who were also designated members of the LLP, and the LLP provided the details required by Rule 17(1)(b).

Discussion

105. In my judgment, Mr Sethi's submissions are to be preferred. Although the Claimant's Particulars of Claim referred to HWR as an "unlimited partnership", it was described as carrying on business from an address in London, which was that of the LLP. Indeed, as was made clear in the Respondents' agenda for case management served on 16 January 2019, the only legal entity registered at that address was the LLP. It was not unreasonable, in these circumstances, for the Respondents to take the view that the LLP was the target. Information satisfying the requirements of Rule 17(1)(b) was provided in that the full name, address and intention to resist the claim was disclosed for each of the five Respondents (albeit in the case of the First to Fourth Respondents, in their capacity as designated partners of the LLP). There was certainly nothing on the face of the ET3 that would suggest that the form should be rejected at that stage for a failure to supply the minimum information. Of course, the parties were at odds as to the identity of the employer, but that was an issue to be determined at a preliminary hearing (as it eventually was), and did not provide a basis for rejecting the form from the outset. That would effectively have involved a decision by the Tribunal as to the correct employer without hearing from the parties.

106. Ground 6 fails and is dismissed.

Ground 7 - Date of Termination

107. This ground is unclear. It is suggested that the Judge erred in searching for a different unpleaded date of termination and not focusing on two pleaded alternatives, namely 29 of January 2018 (as contended for by the Respondents) and 1 November 2018 (as contended for by the Claimant). The Tribunal's decision was that the former was the date of termination. It is not correct to say that no other dates were pleaded: the first claim stated that the date of termination was 10 September 2018. The only other date considered by the Tribunal was 30 April 2018, which arose out of Ms McElroy's email of 9 February 2018. That date was not relied upon by the Respondent, but I do not see any error of law in the Tribunal mentioning it as a possibility for the date of termination, given that it arose directly from the evidence.

108. Complaint is made about [81] of the judgment in which the Judge noted that:

> **"…there is other evidence … that clearly indicates that the Claimant <u>did</u> accept the termination of her contract:" (Emphasis in original)**

109. It is suggested that the Judge was here impermissibly considering the unpleaded issue of whether the Claimant was accepting a repudiatory breach. However, it is clear from the context in which that passage appears that the Tribunal was concerned with whether the Claimant had accepted the *fact* of her termination on 29 January 2018 (by, for example, not insisting that the Contract was continuing), rather than whether the Claimant was by her actions bringing the contract to an end by accepting a repudiatory breach. Repudiation is not mentioned. I do not see any error of law here either.

110. Ground 7 is dismissed.

Ground 8 - Did the Judge err in concluding that there had been unambiguous impropriety in respect of the Claimant's email dated 13 February 2018?

111. The Tribunal's findings in relation to this email were as follows:

> **"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 PLC5, 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 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."**

112. Mr Gee submits that the Judge erred both in treating this correspondence as "separate" from the discussion as to the terms on which their potential claims against each other might be settled and in concluding that the email amounted to an instance of unambiguous impropriety.

113. Mr Sethi submits that as the Claimant sought to rely upon Ms McElroy's email of 9 February 2018, in which it was suggested (erroneously) that the Claimant was being placed on "gardening leave", it was not open to her to "cherry pick" that email to the exclusion of her response. To do so would be misleading. He maintains that there was unambiguous impropriety as the Claimant was effectively setting out a dishonest position in correspondence as compared to her stance subsequently.

Discussion

114. The relevant principles were helpfully summarised by HHJ Hand QC in **Portnykh v Nomura International Plc** [2014] IRLR 251:

"17.Firstly, the concept that "without prejudice" negotiations are not admissible is an exception to the rule that admissions against interest are admissible and the exception rests on the public policy "… of encouraging litigants to settle their differences rather than litigate them to the finish" per Lord Griffiths in Rush & Tompkins Ltd v Greater London Council [1989] AC 1280 at 1299. In the same passage Robert Walker LJ quotes from the judgment of Clauson J in Scott Paper Company v Drayton Paper Works Limited (1927) 44 RPC 151 at page 156 where he said:

"The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."

18.Secondly, in some circumstances the exception may rest on "the express or implied agreement of the parties themselves that communications in the course of their negotiation should not be admissible in evidence if, despite the negotiations, a contested hearing ensues" (see 2442D). Thirdly, the exclusion may not operate where it might lead to "some more powerful principle… such as the need to prevent a litigant deceiving the court with perjured evidence" (see 2442E) or where the exclusion would "act as a cloak for perjury, blackmail or "other unambiguous impropriety" (the expression used by Hoffman LJ in Forster v Friedland)" (see 2444G). Fourthly, the "rule" has a "wide and compelling effect" (see 2443H to 2444A). Fifthly, in a number of other situations the "without prejudice" label will not be effective to exclude the evidence (see 2444D to 2445H). Sixthly, the "without prejudice" label cannot be "used indiscriminately so as to immunise an act from its normal legal consequences where there is no genuine dispute or negotiation" (2448 B).

19.Robert Walker LJ's conclusion is at 2448H to 2449B:

"In those circumstances I consider this court should, in determining this appeal, give effect to the principles stated in the modern cases….Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the Rush & Tompkins case… "to speak freely about all issues of the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting on their shoulders as minders."

20.The phrase "unambiguous impropriety" appears to have been "coined by Hoffman LJ in Forster v Friedland " (unreported; transcript No. 1052 of 1992), according to Rix LJ in Savings & Investment Bank Limited (in liquidation) v Finken [2004] 1 WLR 667 (see 669H). But, as the head note makes clear, in that case the Court of Appeal was at pains to point out that this exception should not be applied too readily. At paragraphs 57 to 63 of the judgment of Rix LJ (see pages 684C to 686B) is another relatively long passage, which whilst better studied in full, can be summarised, for the purposes of this judgment, by saying that no matter how important the admission might be for the potential litigation, unless it can be said to arise out of an abuse of the privileged occasion, such as where it is made to utter "a blackmailing threat of perjury" (see 684E) its

significance alone cannot result in the admission being released from the cocoon of the "without prejudice" exclusion and into the glare of the forensic arena."

115. In my judgment, the Tribunal did err both in treating the email as separate from without prejudice settlement discussions and in treating it as an instance of unambiguous impropriety. The Tribunal acknowledges, correctly, that the parties are "contemplating entering an agreement to extinguish their potential claims against each other". However, the Tribunal considers that the terms of that agreement are being considered elsewhere, that this correspondence is separate from that discussion and is about ways in which her tax liability might be minimised. In so doing, the Judge misconstrued the letter and/or misdirected herself as to what formed part of the dispute. On a proper reading of the email of 13 February 2018, it seems to me that it is not separate and contains several items that point to its contents being part of the overall dispute with her employer:

a. First, the Claimant confirms that she is writing "in the spirit of" the ongoing discussions aimed at achieving an "amicable and mutually beneficial separation agreement". This indicates that this correspondence is intended to further those discussions;

b. The Claimant agrees to include two points raised by Ms McElroy (concerned with referring work to the Firm) in the agreed terms. That is a direct reference, it seems to me, of elements of the overall agreement being discussed in this correspondence;

c. There is a further offer to recommend HWR for certain types of work. That is an offer that the Claimant was not bound to make and again appears to be aimed at achieving the mutually beneficial arrangement alluded to earlier in the letter;

d. There is then a clear dispute as to the proposed garden leave. It is in that context that the Claimant mentions that the termination letter was explicit as to the last day of

employment. It is difficult to see how this issue, which goes to the mechanics of separation, can properly be separated from the ongoing discussions to agree terms.

e. The Claimant also raises a concern as to the effect of the termination letter on tax liability. In support of her position that she is now, by implication unfairly, being held liable for the tax, she attaches information from her accountant. This goes further than merely seeking to minimise liability: she is disputing that she should be liable at all. This too would have to be an issue that formed part of the ongoing discussions as the invitation to "discuss any matter that arises" makes clear.

116. The Judge found that it would be unambiguously improper to allow her to "take a position in evidence that is the opposite of the factual position that she was taking in the email and generally". That, it seems to me, is to set the bar for unambiguous impropriety far too low. The authorities are clear that the kinds of matter that would amount to unambiguous impropriety are those which can be said to "arise out of an abuse of the privileged occasion, such as where it is made to utter a "blackmailing threat of perjury": **Portnykh** at [20]. The authorities also warn that "the exception should only be applied in the clearest cases of an abuse of a privileged occasion": see **Unilever Plc v Procter & Gamble Co** [2000] 1 WLR 2436 at 2444F-H. An admission, or a stance that is contrary to a party's open position, will not generally amount to impropriety, let alone an unambiguous one. Indeed, that is one of the main instances where the privilege will apply, public policy being in favour of permitting parties to speak freely with a view to resolving their disputes. In the present case, I can discern no impropriety and certainly no abuse of the privileged occasion. The Claimant was quite properly setting out her reading of the effect of the termination letter. She was doing so at that stage with a view to resisting Ms McElroy's suggestion that she would be placed on garden leave. Clearly, the Claimant subsequently took the view that her employment was continuing and brought her claim on that basis. What she said

in the email can properly be said to be an admission made in the context of discussions aimed at achieving an amicable settlement of issues between her and her employer. It was said without threat, or other conduct that might be regarded as an abuse of the privileged occasion.

117. Mr Sethi sought to persuade me that the Claimant, by subsequently arguing that her employment had not terminated on 29 January 2018, was putting forward a dishonest case. He referred me to **Independent Research Services v Catterall** [1993] ICR 1, where Knox J held at 6E-H:

> **"… But the existence of the conflict is not of itself, in our view, sufficient to warrant our giving priority to the first of the two principles, namely, that the courts should have all available material before them, over the other, namely, protection for "without prejudice" correspondence. It seems to us, particularly having regard to the authorities that are collected in Mr. Foskett's book, that the yardstick that should be applied in this category of cases is whether the "without prejudice" material involves, if it is suppressed, something amounting to a dishonest case being prosecuted if the pleaded case continues. The nearest example amongst the quoted cases in Mr. Foskett's book, to which we were referred, is a decision of Mr. Anthony May Q.C., Hawick Jersey International Ltd. v. Caplan, The Times, 11 March 1988, and the account given of it is this:**
>
> **"P claimed a repayment of a loan to D of £10,000 made by means of a cheque. D denied the transaction was a loan because he had supplied £10,000 cash. D secretly tape recorded a "without prejudice" meeting at which (a) P did not dispute and indeed accepted D's repeated assertions that the transaction was not a loan but one involving an exchange for £10,000 in cash and (b) P expressly or impliedly said that the proceedings were brought to persuade D to reach a fairer settlement or to settle other differences."**
>
> **and Mr. May, sitting as a deputy judge of the Queen's Bench Division, held that P was threatening to persist with dishonest proceedings and accordingly that "without prejudice" privilege did not apply to the discussion."**

118. It is evident that in the example of a "dishonest case" considered by Knox J, the protagonist was seeking to put forward a different version of events from what had actually transpired, and, moreover, was abusing the privileged occasion by making threats to continue with his dishonest case in order to pressure the other party to settle. Neither of those factors is present here. The Claimant was putting forward a perfectly reasonable interpretation of the correspondence received as at 13 February 2018; indeed, that was the interpretation the Tribunal found to be correct. By putting forward a different interpretation later she was not seeking to

present alternative facts. In any case, and more importantly, there was no conduct that could be said to be improper or an abuse of the privileged occasion. The cloak of privilege was wrongly removed.

119. That said, it seems to me that even if the Judge had found that the email was privileged, it would not have assisted the Claimant. As the Judge expressly stated:

> **"81. …However, even if I am wrong on this [without prejudice privilege] 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:" (Emphasis in original)**

120. The Judge then proceeds to list five matters which are not privileged, and which led her to the same conclusion as to the termination date. Mr Gee objects that the Judge's earlier reliance on the privileged correspondence has "infected" her decision-making such that her findings on the date of termination cannot be regarded as safe. I disagree. The analytical exercise undertaken by the Judge, whereby she considered the position on the basis that the privileged email was excluded, is one that was perfectly open to the Judge, and is the sort of exercise routinely carried out where a Judge is invited to rule on purportedly privileged material in the course of proceedings. There may be some cases where sight of privileged material might disqualify a decision-maker from further involvement, and in such cases, a separate hearing before a different Judge to deal solely with that issue might be appropriate. But it is wrong, in my view, to suggest that any exposure to privileged material suffices to warrant such measures. I was not taken to any authority in support of that proposition.

121. In conclusion, although the Judge did err in treating the February 2018 email as admissible, that does not affect the finding of fact as to the date of termination.

122. Ground 8 is upheld in part.

Ground 9 – Did the Judge err by failing to give adequate reasons for the decision?

123. This ground does not add anything to the grounds considered above. In any event, I consider the reasons to be more than adequate. They clearly explain to the Claimant why she won or lost on certain issues. The reasons need do no more.

Conclusions on the Jurisdiction Appeal.

124. Grounds 1, 5 and 8 (in part) are upheld. Ground 4 is not considered. The remaining grounds fail and are dismissed.

125. Given my view that the partners in HWR were the employer (that being the only possible conclusion on the evidence) I substitute that for the Tribunal's conclusion. Since the First, Third and Fourth Respondents were domiciled in the UK, the only correct conclusion in respect of territorial jurisdiction is that the Tribunal did have such jurisdiction. However, that was only one of the jurisdictional bases on which the first claim was dismissed: the Tribunal also found that there was a lack of jurisdiction on the grounds of failure to comply with EC requirements and that the claim was out of time. The grounds of appeal in relation to those jurisdictional issues have not succeeded. Accordingly, the first claim remains dismissed for want of jurisdiction.

126. I do not consider that the Claimant's success on Grounds 1 and 5 undermines the Tribunal's conclusions on those further two jurisdictional hurdles, both of which would have to be overcome for the first claim to proceed. Mr Gee submitted that the incorrect stance adopted by the Respondents as to the employer would have enabled the Claimant to argue that it was not reasonably practicable for her to present her claim in time. It was not apparent to me how any such argument could succeed. There is nothing to suggest that the identity of the employer (or any confusion in relation thereto) caused the delay. It was, in any case, open to the Claimant to

run reasonable practicability arguments below, but, as the Tribunal notes at [82] of the Judgment, she did not do so.

127. Similarly, the Claimant's success in relation to Ground 8 makes no difference to the outcome for the reasons discussed. As such, I do not direct that the matter be remitted and the Tribunal's decision that the first claim be dismissed remains effective.

ARO

128. The background to this appeal may be briefly stated as follows:

a. The decision to reject the second claim was sent to the parties on 30 April 2019. Any appeal had to be lodged by 11 June 2019.

b. The Claimant's application for reconsideration was refused on 4 June 2019.

c. The Rejection Appeal and the Reconsideration Appeal were both lodged on 14 June 2019.

d. By the Registrar's letter dated 28 August 2019, the Rejection Appeal was considered to be three days out of time. The Reconsideration Appeal was dealt with separately;

e. On 2 September 2019, the Claimant applied for an extension of time. A witness statement in support was provided. In it the Claimant contended, amongst other matters, that, "Any default by me in the date of filing an appeal from the Decision was unintentional and honestly based on the analysis as to the law and the facts in the appeal from the Registrar."

f. By a decision dated 5 March 2020, that application was refused. The Registrar found that the explanations put forward by the Claimant did not amount to a good excuse.

129. Mr Gee's submission is that the Registrar erred in refusing an extension of time in respect of the Rejection Appeal and that the unusual circumstances of this claim meant that an extension was warranted.

130. Mr Sethi submits that the authorities are clear: the time limit is to be strictly applied, and the reasons for the delay and for seeking an extension in this case are inadequate.

Discussion

131. Rule 3(3) of the **Employment Appeal Tribunal Rules 1993** ("EAT Rules") provides: "The period within which an appeal to the Appeal Tribunal may be instituted is –

> **"(a) in the case of an appeal from a judgment of the employment tribunal … 42 days from the date on which the written record of the judgment was sent to the parties."**

132. Paragraph 4.7 of the **Employment Appeal Tribunal's Practice Direction 2018** states as follows:

> **"4.7. In determining whether to extend the time for appealing, particular attention will be paid to whether any good excuse for the delay has been shown and to the guidance contained in the decisions of the EAT and the Court of Appeal, as summarised in cases such as United Arab Emirates v Abdelghafar [1995] ICR 65, Aziz v Bethnal Green City Challenge Co Ltd [2000] IRLR 111, Jurkowska v HLMAD Ltd [2008] ICR 841 and Muschett v London Borough of Hounslow [2009] ICR 424."**

133. In summary, the general position is that the time limit in the EAT is very strictly enforced and time limits are only extended in exceptional circumstances where the EAT is satisfied that there is good reason to do so. Some of the key points established in the cases mentioned are as follows.

134. Firstly, it is the Claimant's duty to be aware of the time limits. Secondly, although more sympathy is shown towards unrepresented parties, that does not of itself excuse failure to comply with the time limit or to recognise the importance of compliance. Thirdly, the EAT's discretion to extend will not be exercised unless a full and honest explanation for non-compliance is

provided. However, that explanation must cover the entire period in which the Notice of Appeal can be lodged. Fourthly, the same strict approach is taken to the late lodging of the necessary accompanying document after the lodging of the appeal itself. The authority for that proposition is **O'Cathail v Transport for London** [2012] IRLR 1011 at paragraph 25. Fifthly, the merits of the appeal may be relevant but are usually of little weight. However, the EAT may consider that there is no point in granting an extension of time if it is plain that the underlying appeal is bound to fail; see **Aziz v Bethnal Green City Challenge Company Limited** [2000] IRLR 111 at paragraph 23. Finally, the questions to be asked when considering whether an application to extend time should be granted were set out by the Court of Appeal in the **United Arab Emirates v Abdelghafar** case and these are as follows: Firstly, what is the explanation for the default? Secondly, does it provide a good excuse for the default? Thirdly, are there other circumstances which justify the Tribunal taking the exceptional step of granting an extension of time?

135. Applying these principles to the present case, my conclusions are as follows:

a. The explanation for the default is essentially that it was unintentional and that the EAT's separation of the Reconsideration and Rejection Appeals was an error of law and partly to blame.

b. That explanation is wholly inadequate. It would have been quite clear to the Claimant from the correspondence issued with decisions below that there are separate time limits in respect of both an appeal against the decision and an application for reconsideration, and that the Claimant must make a decision as to whether to pursue either or both. The Claimant did pursue both, but ought to have realised that an application for reconsideration did not affect the time limits in respect of an appeal. The guidance available to prospective appellants also makes that clear.

c. It is the EAT's normal practice to treat appeals against different decisions of the employment tribunal separately. There is nothing confusing or inherently problematic in that.

d. The fact that the default was unintentional does not assist the Claimant. It is incumbent on her to be aware of and to ensure compliance with the time limits. There is nothing to explain why the Claimant waited until three days after the time limit had expired to lodge the Rejection Appeal.

e. The Claimant is unrepresented. However, she is an experienced lawyer, and her unrepresented status does not come to her aid in the circumstances of this case.

f. There are no exceptional circumstances here that would warrant the granting of an extension. Mr Gee's submission is that this is an unusual case warranting an extension. However, even if it is not an ordinary case, the circumstances are far from exceptional. More importantly, it is not the complexity or rarefied nature of the case that will generally give rise to exceptional circumstances, but matters that impede or prevent the lodging of the appeal in time. There are no such matters in this case.

g. The Claimant places considerable reliance in her statement on the merits of the underlying appeal. However, as is well-established, those are of little assistance.

h. The time limits are there for good reason and are consistent with the public interest in the finality of litigation. They were not complied with here.

136. For these reasons, the ARO is dismissed.

The Reconsideration Appeal

137. The Tribunal said as follows in the Reconsideration Decision:

> **"There is no reasonable prospect of the original decision being varied or revoked, because the Tribunal rejected the claim after a claim in the same or similar terms**

> **[the first claim] against the same respondents and based on the same facts has been struck out for want of jurisdiction.**
> **The fact of [the Jurisdiction Appeal] does not impact on whether the tribunal has jurisdiction in this case. Indeed, if the [Jurisdiction Appeal] is successful, this claim would be bad for duplicity."**

138. The Reconsideration Appeal was not pursued with any great vigour in oral submissions. Mr Gee acknowledged that the real issues were contained within the Jurisdiction Appeal thereby rendering the Reconsideration Appeal largely academic. The only two grounds in the Reconsideration Appeal which might be said to relate specifically to the Reconsideration Decision (as opposed to repeating grounds relevant to the out of time Rejection Appeal) are: (1) that the Tribunal erred in considering that the second claim is "bad for duplicity"; and (2) that the Tribunal erred in considering that there was duplication because the second claim was made after completing the EC requirements.

139. The Jurisdiction Appeal has been successful in part. The result for the second claim is that some of the jurisdictional obstacles that affected the first claim no longer apply. In particular, the second claim cannot be said to have been brought against the wrong Respondents and the Tribunal does not lack territorial jurisdiction to hear it. As to the EC requirements, that too would have been removed because an EC certificate was obtained prior to issuing the second claim. However, the final jurisdictional hurdle, namely that the claim is out of time, remains intact. In these circumstances, the Tribunal's conclusion that there was no reasonable prospect of the rejection decision being revoked is not undermined.

140. As to duplication, the fact that the second claim was brought having complied with EC requirements does not mean that the second claim is not otherwise a duplication of the first claim. The substantive content of the claims was indeed similar. For these reasons, I do not consider that the Tribunal erred in law in refusing to reconsider its decision.

141. The Reconsideration Appeal fails and is dismissed.