EMPLOYMENT TRIBUNALS

OPEN PRELIMINARY HEARING

Claimant: And **Respondents:**

Ms K Patel — Epam Systems (Switzerland) GMBH First Respondent
Mr R Geissmann Second Respondent
Mr G Kiss Third Respondent
Mr A Singhal Fouth Respondent
Mr N Martin Fifth Respondent

Heard by: CVP **On**: 15 April 2021

Before: Employment Judge Nicolle

Representation:

Claimant: in person
Respondent: Mr K Wilson of counsel

JUDGMENT

The Tribunal finds that it does not have jurisdiction to consider the claims against any of the Respondents on the basis that they were submitted out of time, and it would not be just and equitable to extend time, and further the Tribunal does not have territorial jurisdiction to consider them.

REASONS

1. These are the written reasons from a decision delivered orally at an Open Preliminary Hearing heard on 15 April 2021. The Claimant requested written

reasons on 19 April 2021 but unfortunately the Tribunal administrative staff only forwarded this to me on 6 May 2021.

2. References in this judgement to the respondent referred to the First Respondent unless otherwise stated.

The Hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.

5. The parties were able to hear what the Tribunal heard.

6. The participants were told that it is an offence to record the proceedings.

7. From a technical perspective, there were no major difficulties.

8. There was an agreed bundle comprising 255 pages. During the lunch adjournment the Claimant forwarded to the Tribunal and the Respondent a claim form which was submitted on 6 March 2020. That claim was rejected on the basis that it did not contain an ACAS early conciliation certificate. The Claimant nevertheless refers to it as evidence of steps she took to initiate proceedings within the requisite period.

9. The Claimant did not provide a witness statement by 25 February 2021, the stipulated date in Employment Judge Pearl's Case Management Order, following the Hearing on 11 February 2021. Nevertheless, I exercised my discretion to permit the Claimant to give witness evidence based on her two claim forms and an email she had submitted on 18 March 2021 which appears at page 255 in the bundle. She was cross examined extensively by Mr Wilson.

10. Mr Gabor Kiss, Lead Recruiter, employed by the First Respondent, (Mr Kiss) gave evidence on behalf of the Respondents. He produced a three-page witness statement, and he was cross examined by the Claimant. The Claimant had not previously read his statement, but the Tribunal adjourned to allow her time to read it.

The Issues

11. The issues to be determined were as follows:

12. Were the claims submitted in time? The Claimant contends they were submitted in time and in the alternative the Tribunal should exercise is jurisdiction to extend time on the basis that it would be just and equitable to do so.

13. Does the Tribunal have territorial jurisdiction to consider the claims? The Respondent says that the claim is outside the jurisdiction of the English Tribunals and further outside European and/or international jurisdiction referring to the relevant articles within the Lugano Convention 2007 (the Convention).

14. Further, the Respondent contends that the claim should be struck out as having no reasonable prospect of success pursuant to Rule 37.

Procedural history

15. The Claimant issued a claim form on 6 March 2020. This claim was rejected because she did not have a valid ACAS early conciliation certificate. The Claimant contends that she had been given erroneous advice by ACAS regarding the ability to pursue a claim against an entity in a recruitment process rather than where there was an existing or pre-existing employment relationship.

16. The early conciliation certificate which the Claimant finally obtained followed a period of conciliation between 23 March 2020 and 3 April 2020. The Claimant then waited for a period of approximately seven weeks to issue a claim form on 20 May 2020 (the First Claim). The Claimant explains the delay largely because of technical issues with the Tribunal online portal for filing claims and an inability to make telephone contact with administrative staff at the Tribunal during this period.

17. The First Claim set out several different protected characteristics namely age, race, sex and is religion or belief. It also included matters such as defamation in respect of which the Tribunal does not have jurisdiction.

18. The Claimant then commenced a second process of ACAS early conciliation against various individual Respondents starting on 17 September 2020 with ACAS early conciliation certificates being issued on 30 September 2020.

19. The Claimant then issued a second claim form on 1 October 2020 (the Second Claim) which this time included disability in addition to the protected characteristics in the First Claim. The Second Claim did not, however, contain any details as to a specific disability.

20. The First and Second Claims are hereafter referred to as the Claim unless specifically stated.

21. In its Grounds of Resistance, the Respondent raised several preliminary issues to include its contention that the claims were out of time, that it is scandalous or vexatious and should accordingly be struck out, regarding the correct corporate entity and the issue of territorial jurisdiction. The Respondent contended that no territorial jurisdiction exists.

22. In a letter of 7 October 2020 from the Respondent to the London Central Tribunal a formal application was made to strike out the claims for the reasons previously set out.

23. The Claimant has submitted in draft form two versions of further and better particulars of her Claims. There is an amendment application, but it has been agreed, and I concur, that the amendment application would only be considered in the event of jurisdiction existing so for the purposes of the consideration of the issues to be determined the Tribunal referred solely to the claim forms as submitted.

Findings of fact

Summary of EPAM entities

24. The First Respondent is a company incorporated in Switzerland. EPAM Systems Ltd is a company incorporated in the UK. The First Respondent and EPAM Systems Ltd are both wholly owned subsidiaries of EPAM Systems Inc which is incorporated in the United States under Delaware law.

The relevant events in the recruitment process

Application

25. The Claimant applied through the Respondent's online portal. The Tribunal was taken to the advertisement for the job which appears in the bundle at pages 222-223. It refers to a Second Level Support Engineer role for one of Epam's clients based in Zurich. The job advertisement says that the position will be working in the application services team in Zurich.

26. The Claimant has lived in both London and Switzerland. She had previously been employed in Switzerland.

Telephone interviews

27. The Claimant participated in a series of telephone interviews from 26 July 2019. The first was with Mr Kiss on 26 July 2019. Salary was discussed, it being accepted by the Claimant that salary would be paid in Swiss Francs and subject to Swiss tax. The possibility of a relocation allowance was discussed.

28. The Claimant asserts that she was in London at the time of this telephone interview. The Respondent has no evidence to challenge this, and I find that on the balance of probabilities, given the Claimant's evidence, the Claimant having a London address and the acknowledged reference to possible relocation that it is likely that she was in London at the time of this and subsequent interviews.

29. The Respondent says she was asked questions regarding eligibility to work in Switzerland. The Claimant could not specifically recall whether this was asked, but does not deny it would have been, given that she acknowledges the role, at least initially, would have been based in Switzerland.

30. The Claimant had a technical interview by telephone with Alexander Garcia, Senior Systems Engineer, employed by EPAM Systems Mexico SrL and based in Mexico, on 29 July 2019

31. On 5 August 2019, the Claimant had an interview with Mr Roger Geissmann, a Lead People Operations Specialists, employed by the First Respondent and based in Switzerland. (Mr Geissmann). This would have been the final interview stage. He made a note of matters arising from that call which appears at pages 170-171 in the bundle. It records that the Claimant was already aware about the working environment in the financial industry in Switzerland. It records the Claimant are saying that she wanted to come back to Switzerland because she loves the country and believes that she can develop more in Switzerland and her overall goal is to work in Silicon Valley one day.

32. He says that negatives in respect of the Claimant were what he refers to as super high salary expectations for an A3 role, inaccuracies in her CV, to include wrong duration of employment with UBS, gaps in that CV and wrong customer approach. He says at the end, somewhat cryptically, not sure if lying to the client is a good tactic. The Claimant vehemently objects to this comment.

<u>Respondent's decision not to proceed with the Claimant's application.</u>

33. On 12 August 2019 Mr Kiss sent the Claimant an email telling her that following discussions it had been decided not to proceed further with her application as we are looking for a different profile for the position.

34. The Claimant then sought feedback as to the reasons why she was not suitable for the role, or why the role had changed. This included her emailing Mr Amet

Singhall, VP, Head of European Delivery, and employed by EPAM Systems Ltd (Mr Singhal) on 28 August 2019 stating how disappointed she was about the situation and asking for feedback to be given immediately. She said that she proposed instigating legal action if feedback was not provided and concluded by saying better not to ignore this, I am a serious professional and I take my career seriously.

35. On 28 August 2019 she sent an email to Sniazhana Yermalitskaya, an administrative assistant in the EPAM technical interview department who was responsible for organising the technical interview and is based in Minsk in Belarus. In this email the Claimant stated: "Bitch get back to me what the fucking feedback is". The Claimant acknowledged that this was inappropriate and says that she apologised for its content.

36. On 30 August 2019 in an email to various representatives of the Respondent, to include Mr Kiss, the Claimant made a subject access request in relation to all data held about her.

37. On 5 September 2019 Nick Martin, Director Talent Acquisition (Mr Martin) sent an email to the Claimant advising that she was not considered to be a good fit for the role and therefore it had been decided not to progress her application. He said that there would not be further communication with her given the abusive tone of her communications with the Respondent's staff. Mr Martin is based in London and has a London telephone number. He has responsibility for talent acquisition throughout Europe, the Middle East and Africa.

38. The Claimant received a response to her GDPR application on 16 October 2019. She says it was unsatisfactory as certain documents had not been provided and in an email of 29 October 2019 requested that all data was sent correctly, to include telephone call recordings and recording of interviews.

<u>The Claimant's instruction of Swiss lawyers</u>

39. In an email of 29 October 2019, she gave details of her lawyers based in Zurich and said please send all the data to reach my solicitor by 5 November 2019. The Claimant says she instructed the lawyer as it was someone already known to her who was a good lawyer, and the location was in her view irrelevant.

40. Lanter Attorneys & Tax Advisers, based in Zurich, sent a letter to the Respondent on 19 November 2019. It referred to the treatment of the Claimant as having been discriminatory, amongst a plethora of other allegations, and that the Respondent had breached various legal rights. It also made a subject access request referring to the relevant article of the Swiss Federal Law.

The Claimant's instruction of English lawyers

41. The Claimant then instructed English solicitors; Samuels sent a letter dated 15 May 2020. This focused solely on a potential deformation action. It made no reference to discrimination or proceedings in the Employment Tribunal.

The Claimant's place of work had she commenced employment with the Respondent.

42. In respect of where the Claimant would have worked had her application been successful, I make the following findings of fact.

43. The Claimant would have been employed by the First Respondent under a contract of employment governed by Swiss law and subject to the jurisdiction of the Swiss Courts (see pages 214 to 221 in the bundle for a copy of the template contract of employment for the First Respondent).

44. The role would have been, at least initially, based in Zurich, that is not disputed by the Claimant. Swiss residence was required with the ability to work in Switzerland by possessing a Swiss work permit. The possibility may have existed, after a period of not less than 12 months, for an international relocation, however that is a hypothetical possibility rather than a guaranteed opportunity.

45. The role would have been paid in Switzerland, subject to Swiss tax and social security deductions.

46. The First Respondent has its own policies and procedures and its own Employee Handbook.

47. There is no suggestion that the Claimant would have been required to perform any, or any substantial part, of her duties in the UK.

The Law

Time limits

48. First dealing with the issue of time. The primary time limit for a claim of discrimination under the Equality Act 2010 (the EQA) is a period of three months. There is scope under s.123 of the EQA for a tribunal to extend time where it would be just and equitable for do so.

49. It is applicable for a tribunal to consider the check list of factors set out in s.33 of the Limitation Act 1980 which include the length of, and reasons for the delay by the claimant, the promptness with which a claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by a claimant

to obtain appropriate professional advice once he or she knew of the possibility of acting.

50. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: Neary v Governing Body of St Albans Girls' School [2010] ICR 473.

51. The onus is on a claimant to put forward potential reasons to explain why there was a delay and why a tribunal's discretion should be exercised to enable an otherwise out of time claim to proceed. Ultimately time limits are strict, it is a matter of discretion and it is not a right to allow a claim to proceed when it is outside the primary time limit.

52. Whilst discretion is greater for a tribunal in a discrimination claim that does not mean to say there is any automatic expectation that it will be exercised. It involves a fact sensitive enquiry regarding the circumstances, the reasons for the delay, the promptness of action and the potential prejudice to the respondent of a long period of delay in terms of the cogency of the evidence and their ability to defend allegations which have become increasingly stale.

Claimant's submissions on time

53. Ms Patel contended that her claim was submitted in time. She referred to an earlier claim in January 2020, but there is no evidence of a claim being filed at this time. She refers to significant difficulties with the Tribunal's online portal system and difficulty communicating with the Tribunal regarding her various.

54. She said for the first time during her closing submissions, and a matter in respect of which the Tribunal heard no evidence, that she suffers from bipolar personality disorder. However, given that this was not referred to in the documents, in a witness statement, or in respect of which medical evidence was provided, it is not a matter I consider appropriate to consider as a potential explanatory factor for the delay in submitting the Claims, and was not a matter referred to by the Claimant when cross examined by Mr Wilson.

Territorial jurisdiction

55. Turning now to the question of territorial jurisdiction, which has been covered in some detail in Mr Wilson's submissions, my intention for the purpose of this judgment is merely to highlight the relevant elements of the law considered. This is not intended to be a detailed review of all the relevant case law.

56. It is for the Claimant to show that the Tribunal has territorial jurisdiction, not for the Respondent to show that it does not.

Position under the EQA and the Employment Rights Act 1996 (the ERA)

57. The applicable test for a tribunal having territorial jurisdiction is the same under the EQA to that which applies, albeit not directly applicable to this case, in the case law for unfair dismissal claims under the ERA. As much of the relevant case law concerns the jurisdiction of tribunals to hear complaints of unfair dismissal under the ERA many of the authorities referred to involve claims under the ERA, rather than the EQA, but the principles are equally applicable.

58. Following the repeal of s.196 in October 1999, the ERA contains no generally applicable geographical limitation. The EQA is also silent on mainstream questions of territorial scope and leaves the gap to be filled by the courts. The Explanatory Notes (paragraph 15) to the EQA says as follows:

> As far as territorial application is concerned, in relation to Part 5 (work) and following the precedent of the ERA, the Act leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain.

Lawson v Serco

59. Following Lawson v Serco [2006] IRLR 289 an analysis of the factual matrix is required. Lord Hoffman gave guidance as to what sort of employee would be "within the legislative grasp" of the ERA by reference to three examples:

- the standard case (working in Great Britain);
- peripatetic employees; and
- ex-patriate employees.

60. Lord Hoffmann identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely:

- where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception"); and

- where he or she works in a "British enclave" abroad.

61. In respect of peripatetic employees, the House of Lords in Lawson agreed with the common-sense approach adopted by the Court of Appeal in Todd v British Midland Airways 1978 ICR 959, CA. Peripatetic employees do not perform their services in one territory, owing to the nature of their work. Lord Hoffmann held that in such cases, the employee's base, the place at which he or she started and ended assignments, should be treated as his or her place of employment. Determining where an employee's base is requires more than just looking at the terms of the contract; it is necessary to look at the conduct of the parties and the way they operated the contract in practice.

62. The basic rule is that the ERA only applies to employment in Great Britain. However, in exceptional circumstances it may cover working abroad. As summarised by the Court of Appeal in Bates van Winkelhof v Clyde and Co LLP and anor 2013 ICR 883, CA:

"Where an employee works partly in Great Britain and partly abroad, the question is whether the connection with Great Britain and British employment law is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment Tribunal to deal with the claim".

63. Where an employee works and lives wholly abroad, it will be more appropriate to ask whether his or her employment relationship has much stronger connections both with Great Britain and with British employment law than with any other system of law — Duncombe v Secretary of State for Children, Schools and Families (No.2) 2011 ICR 1312, SC.

64. In Ravat v Halliburton Manufacturing and Services Ltd 2012 ICR 389, SC the Supreme Court said that the resolution of territorial jurisdiction will depend on a careful analysis of the facts of each case, rather than deciding whether a given employee fits within categories created by previous case law. If an individual lives and/or works partly in Great Britain they need only to show that there is a sufficient connection to employment in the UK to establish jurisdiction.

65. In Ravat, Lord Hope stated that "the case of those who are truly ex-patriate because they not only work but also live outside Great Britain requires a specially strong connection with Great Britain and British employment law.'

66. Underhill LJ's judgement in Jeffery v British Council [2019] ICR 929 included:

a) As originally enacted, section 196 of the ERA contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then, the ERA has contained no express provision about the territorial reach of the rights and obligations which it enacts.

b) The House of Lords held in Lawson v Serco that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the ERA in cases where an employee works overseas.

c) In the generality of cases Parliament can be taken to have intended that an ex-patriate worker—that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer—will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the ERA or EQA. This is referred to in the subsequent case law as "the territorial pull of the place of work. This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended the ERA to apply if they are based in Great Britain.

d) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation.

67. The decisions of the Supreme Court in Duncombe and Ravat make it clear that the correct approach was not to treat the Lawson categories as fixed, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.

68. Where the worker is "truly ex-patriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting ex-patriate", which is what Ravat was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be especially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/European Union-funded international schools considered in Duncombe.

69. In his submissions Mr Wilson referred to the above authorities together with Ravisy v Simmons and Simmons LLP [2018] UKEAT/0085/18/00 which sets out three separate categories of employees:

- those working wholly in Great Britain;
- those working outside Great Britain; and
- those who for at least part of their time work in Great Britain.

70. The judgment of the EAT sets out a non-exhaustive list of factors which could be relevant, involving a question of fact and degree, as to whether there was a sufficient level of connection with Great Britain.

71. Reference was also made by both the Claimant and the Respondent to the EAT's decision in Crew Employment Services Camelot v Gould [2021] UKEAT/0330/19/VP which says that the third category in Ravisy should be regarded as those who lived and/or worked at least a part of their time in the UK.

Choice of Law

72. In Jeffrey, the employers argued that an express choice of English law as the law of the contract was immaterial. Underhill LJ disagreed, and held that the Court of Appeal was bound by the Judgment of the Supreme Court in Duncombe No 2: [2011] ICR 1312, in which the Court "expressly took account of the existence of an English choice of law clause in considering the sufficient connection issue".

In Duncombe No. 2, Lady Hale noted that:

> "The claimants were employed under contracts governed by English law; the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Although this factor is not mentioned in Lawson it must be relevant to the expectation of each party as to the protection which the employees would enjoy. The law of unfair dismissal does not form part of the contractual terms and conditions of employment, but it was devised by Parliament in order to fill a well-known gap in the protection offered by the common law to those whose contracts of employment were ended."

73. Underhill LJ in Jeffrey also noted that Lord Hope had made similar observations in Ravat, in which the Supreme Court was faced with the situation of a "commuting ex-patriate". Lord Hope held:

"Lady Smith said in the EAT that the employment tribunal was wrong to take account of the proper law of the parties' contract and the reassurance given to the claimant by the employer about the availability to him of UK employment law, as neither of them were relevant. The better view, I think, is that, while neither of these things can be regarded as determinative, they are nevertheless relevant. Of course, it was not open to the parties to contract into the jurisdiction of the employment tribunal. The question whether the tribunal has jurisdiction will always depend on whether it can be held that Parliament can reasonably be taken to have intended that an employee in the claimant's position should have the right to take his claim to an employment tribunal. But, as this is a question of fact and degree, factors such as any assurance that the employer may have given to the employee and the way the employment relationship is then handled in practice must play a part in the assessment".

74. The assurances that were given in Ravat's case were made in response to his understandable concern that his position under British employment law might be compromised by his assignment to Libya. The documentation he was given indicated that it was the employer's intention that the relationship should be governed by British employment law. This was borne out in practice, as matters relating to the termination of his employment were handled by the employer's human resources department in Aberdeen. This all fits into a pattern, which points quite strongly to British employment law as the system with which his employment had the closest connection.

75. Hottak and anor v Secretary of State for Foreign and Commonwealth Affairs and anor 2016 ICR 975, CA demonstrates that the scope of the EQA is narrower than that of previous discrimination legislation, since it appears to exclude those recruited in Britain for a British business but who work outside Great Britain unless their circumstances constitute a connection with Great Britain that is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim. However, such circumstances will be rare.

European case law authorities

76. For completeness, as the Claimant is a national of a European union country, I include reference to applicable European case law authorities.

77. The EQA is the measure adopted by the United Kingdom which gives effect to the Employment Equality Directive, which provides at Article 5 that:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a

particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

78. In Bleuse v MBT Transport Ltd and anor 2008 ICR 488, EAT, B, a German national, was employed by a company registered in England but he lived in Germany and worked solely in mainland Europe. His unfair dismissal claim failed because, as the EAT held, although he worked for a company based in the UK, he did not operate out of the UK and had virtually no connection with it. It made no difference that his contract provided that it was to be governed by, and construed in accordance with, English law as s.204 ERA makes it plain that the law of the contract of employment is 'immaterial'. The only issue was whether, as a matter of fact, the employee was based in the UK and neither the terms of the contract nor its applicable law determined that question. The EAT did allow B's claim under the Working Time Regulations 1998.

79. The Bleuse principle provides that the Lawson guidance ought to be modified in its application to UK law where necessary to give effect to directly effective rights derived from EU law. Since most discrimination laws are so derived, it is arguable that a wider test should apply to claims brought under the EQA.

80. Further, in Ministry of Defence v Wallis and another [2011] I.C.R. 617 Elias LJ held that:

"Indeed, in my judgment once a claimant is seeking to enforce a directly effective EU right, it matters not which national law is applicable to the right in question, provided at least that it is the law of a Member State. This is because whichever system of law within the European Union is the appropriate state law to apply, either it gives effect to the EU right when appropriately construed, or it must be disapplied to the extent that it does not. So, once the British court is properly seized of the issue, it would be obliged to give effect to the directly effective right one way or another, irrespective of which body of national rules applies. I suspect that in most cases at least it would involve the denial of an effective remedy to require the claimant who is properly before the British courts to go elsewhere to enforce the right, particularly if other claims are properly before the court".

International jurisdiction

81. Mr Wilson also addressed the question of international jurisdiction and says that if the Tribunal does not have territorial jurisdiction in the sense that the Claimant does not have rights under English law the question of international jurisdiction is arguably moot.

82. Given that these proceedings were ongoing on 31 December 2020, when the UK left the European Union, the transitional rules apply.

83. Mr Wilson refers to various articles within the Convention to include 18, 19, 4 and 24. He says that none of the provisions within the Convention apply.

Submissions on territorial jurisdiction by the Respondent

84. Mr Wilson says the Claimant never in fact worked for the Respondent.

85. That the Tribunal should consider what the position would have been had the Claimant become employed arguing that this would be consistent with the approached adopted in s.285 of the Trade Union and Labour Relations (Consolidation) Act 1992.

86. That the Claimant was truly an expatriate employee pointing to a series of factors connecting her putative employment with Switzerland and Swiss law. He says at its highest the level of connectivity with the UK was the Claimant's brief interactions with Mr Singhal, who he says did not actually interact with her, and Mr Martin based on a single email.

87. In relation to international jurisdiction, he says there is a lack of international jurisdiction in respect of the corporate Respondent, Mr Kiss and Mr Geissmann. He says the employer is domiciled in a state which is party to the Convention and that the UK does not have jurisdiction under article 19.1 of the Convention because the employer is domiciled in Switzerland and this has the effect of converting jurisdiction on the Swiss courts. Nor does the UK have jurisdiction under article 19.2 because the Claimant did not habitually carry out work for the Respondent in the UK.

88. He says that the corporate Respondent does not have a branch, agency or other establishment in the UK and even if it did the Claimatn's dispute does not arise out of the operation of that branch, agency or establishment. The dispute fundamentally arises from the Swiss operation.

89. Finally, he says that that as per Duncombe this is a case of a truly expatriate employee. He says that the pull of Switzerland applies and even in category c of Ravisy there is no sufficiently close connection to the UK.

Claimant's submissions on territorial jurisdiction

90. She says there was clearly a connection with the UK with her primary argument being that the telephone interviews she undertook were when she was in London and further that there was an expectation in an international company with global operations that she would have the opportunity of working in different locations, to include the possibility of the UK, at some point in the future.

Conclusions

Out of time

91. There can be no doubt that the First Claim was not validly issued until 20 May 2020. The Second Claim was not issued until 1 October 2020. Both claims are substantially outside the permitted time limit. Any earlier claim is only potentially relevant in terms of a just and equitable extension to time. The First Claim was already approximately eight months after the date upon which the Claimant was advised that the role was not going to be offered to her. Even if a later date were to be taken in terms of the response to the data subject access request it would still be many months out of time with the last potential act being the Claimant's email of 29 October 2019. At the time the claimant commenced ACAS early conciliation on 23 March 2020 she was already at least two months out of time. The Second Claim was even later.

92. Therefore, the sole issue I need to consider is whether it would be appropriate to extend time under s.123 on the basis that it would be just and equitable. I find that it would not. I reach this finding for the following reasons.

93. The onus is on the Claimant to provide reasons as to why the Tribunal should exercise its discretion to extend time and I find that she has not done so. She seeks to blame purported shortcomings of the Tribunal administrative staff and systems but fails to provide any proper explanation for her own delays.

94. The Claimant is a professional person. She accepts that she was aware of the three-month time limit. She engaged professional advisors at various points. Even based on her own contentions she says that a claim was initially issued in January 2020 and this would have been outside the primary limit based on the initial ACAS early conciliation notification on 12 August 2019.

95. In any event the claim which was submitted, and was rejected by the Tribunal, was dated 6 March 2020 this was way outside the applicable time periods even allowing for a possible extension to the date to reflect the response to the subject access request. In any event there was no ACAS early conciliation certificate.

96. The Claimant explains that delay at least in part because of erroneous advice provided by ACAS. There is, however, no evidence on that merely the Claimant's assertion. In any event the delay of the Claimant from finally obtaining a valid

ACAS early conciliation certificate on 3 April 2020, until submitting the claim on 20 May 2020, cannot in my view be reasonably explained. The Claimant was already aware of the importance of time limits. She would already have had the advantage of previously submitting a claim, albeit invalid, and therefore had a template to rely on and familiarity with the online process.

97. I find there is no evidence to support the contention that it was not practicable to submit a claim in that period. Whilst I accept there may have been some technical difficulties, the Claimant has not been able to provide any evidence to support the fact that she was experiencing delays, for example, a note of an email sent to the Tribunal during that period stating that she had been trying but had been unable to submit a claim. In any event she was already many months too late by that stage.

98. Therefore, the Claims are out of time and no extension of time is granted.

Territorial jurisdiction

99. I then go on to consider the question of territorial jurisdiction. Based on the findings of fact I have made I am unequivocally of the view that no territorial jurisdiction exists.

100. This was an application for a position which was clearly based in Zurich. It was not a UK position with the employee then being seconded to an overseas location. The role was advertised online, and it was made clear that it would be based in Zurich. There would be therefore no substantive connection with the UK and certainly non-sufficient to bring the Claimant's case within category c as envisaged in Ravisy.

101. The Claimant was interviewed by two individuals based in Switzerland and employed by the First Respondent, and another based in Mexico. Nobody employed by or under the direction of any UK entity, or themselves UK based, was involved in the Claimant's application and interview process.

102. The only real level of connection with the UK is the fact that the Claimant had UK accommodation in which she was arguably resident at the time of various telephone calls during the interview process. However, the logic of that argument would be that the place of location during a remote interview, whether by telephone or online video, would be potentially a relevant factor to determine jurisdiction. That simply cannot be correct otherwise applicants for positions anywhere in the world would be able to point to the jurisdiction of the UK Tribunals merely because at the time of the application being made and interviews undertaken, they happened to be based in the UK.

103. The relevant factors to consider are where the role would be based, what the terms and conditions would be, what the governing law would be, where benefits would be provided, where control would exist and the jurisdiction of the corporate employer. All these factors, as set out above point, to the stronger connection, indeed the overwhelming connection, being with Switzerland and Swiss law and only very minor factors, such as the presence of Mr Martin being in London, pointing to a connection with the UK.

104. I find the factors arguably indicative of a connection with the UK to be of a peripheral nature, and certainly not sufficient to create a substantial level of connection sufficient to rebut the territorial pull of Switzerland, which would have been the place of employment had the offer been made.

International jurisdiction

105. I further find, albeit not strictly relevant for the decision given the above, that the Convention would not provide international territorial jurisdiction in the UK, none of the various factors within the provisions of the relevant articles in the Convention are consistent with UK jurisdiction.

106. Therefore, the case does not have territorial jurisdiction to proceed in the UK Tribunal.

Strikeout application under Rule 37

107. It is not therefore necessary for me to consider separately the strike out application under Rule 37 and given the absence of jurisdiction both based on time and extra territoriality it would be an artificial exercise to then say that the substantive claim should be struck out as legally there is no valid claim to strike out.

Employment Judge Nicolle

18 May 2021

Sent to the parties on:

18/05/2021.

For the Tribunal: