EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Ms S Simon-Hart	**AND**	Standard Chartered Bank

OPEN PRELIMINARY HEARING

London Central via CVP **On**: 10 June 2021

Before: Employment Judge Nicolle

Representation:
Claimant: In person
Respondent: Mr E Kemp, of Counsel.

JUDGMENT

1. The Employment Tribunal does not have statutory jurisdiction to hear a claim pursued under the DIFC Employment Law on which the Claimant relies.

2. The proceedings are an abuse of process because (a) the Tribunal has already determined that the Claimant's employment is outside the territorial scope of UK statutory employment law and (b) has issued a judgement in respect of the Claimant's breach of contract claim.

REASONS

1. Oral reasons were given at the Hearing, but the Claimant then requested written reasons.

The Issues

2. The issues to be determined are whether the Tribunal has statutory jurisdiction to hear a claim pursued under the DIFC Law, that is the law applicable to Dubai Economic Area, on which the Claimant relies and whether the proceedings are an abuse of

process because the Tribunal has already determined that the Claimant's employment is outside the territorial scope of UK statutory employment law and has issued a Judgment in respect of the Claimant's breach of contract claim.

The Hearing

3. The Hearing took place via CVP in accordance with Rule 46. There were no technical issues, all parties could see and hear what the Tribunal saw and heard.

4. There were two bundles of documents, the initial bundle comprising 77 pages, which the Claimant says was not an agreed bundle, and a longer bundle to which she referred me comprising 106 pages, which contained much of the material from the shorter bundle but in addition some additional material she had included primarily a 15 page document entitled "grounds of opposition" dated 7 May 2021which is an expanded version in effect of her skeleton arguments. I read that document together with other additional documents I had not previously seen during the adjournment before giving my decision. I heard submissions from the Claimant and Mr. Kemp.

Findings of Fact

1st Claim dated 23 November 2018.

5. The Claimant issued an initial complaint to the Employment Tribunal dated 23 November 2018 (the 1st Claim). The 1st Claim related to her employment as Senior Legal Counsel with the Respondent between 26 October 2018 (I think an error as I assume it was an earlier date in 2014) ending on 31 October 2018. She claimed that she had been subject to discrimination on account of race, disability and sex, that she had been unfairly dismissed and in respect of notice pay and other payments. Her claim form at s8.2 set out various matters relied on in the between 2015 and 2018.

Decision of Employment Judge Glennie

6. There was an Open Preliminary Hearing before Employment Judge Glennie on 13 and 14 June 2019. That Hearing was to decide the question of whether the Tribunal had territorial jurisdiction over the complaints brought by the Claimant. In the opening preamble of his reserved judgement dated 21 August 2019 Employment Judge Glennie said that the Respondent concedes that there is such jurisdiction in respect of the complaint of breach of contract and that will continue to a hearing. The question that remains is whether the relevant legislation, that is the Employment Rights Act 1996 (the ERA) in respect of the complaint of unfair dismissal and the Equality Act 2010 (the EQA) in respect of the various discrimination complaints, applied to the Claimant's employment, in other words the question is does the Claimant claim fall within the territorial scope of the relevant provisions concerned.

7. At paragraph 2 he said this question is not to be confused with any question of the territorial jurisdiction of the Tribunal itself which is a different point. He went on to refer to the Claimant's reference to the Supreme Court's decision in Vedanta Resources v Longowe [2019] UK SC 20 concerning the territorial jurisdiction of the Civil Courts. It does not relate to the territorial reach of the legislation which is the issue with which I am concerned.

8. Employment Judge Glennie heard evidence from the Claimant, Ms. Jo Richardson, Head of HR and Mr. Robert Tobias the Respondent's Head of Legal Private Banking.

9. He set out the relevant facts which includes at paragraph 6 the Claimant being a British citizen, a solicitor of the Supreme Court of England and Wales and that since 2011 she had lived and worked in Dubai.

10. At paragraph 12 that her complaints related to the termination of her employment and other events that occurred on her account during her employment.

11. At paragraph 13 that when considering the territorial reach of the legislation the starting point is that a person living and working in a foreign country, even when employee and employer are both British, will be subject to the employment law of the country in which they are working. In the present case the Claimant is British, and the Respondent is a British company. He found that she was living and working in the UAE and so the question is whether this is one of the exceptional cases where the factors connecting the employment to Great Britain and British employment law pull sufficiently strongly in the opposite direction.

12. At paragraph 14 he says, I find that there is a collection of factors which in fact tends to reinforce the connection with the UAE and/or DIFC.

13. At paragraph 16 he referred to provisions within the Claimant's employment contract to include, clauses 44 that the agreement takes effect and is governed by and interpreted according to the employment law amendment law DIFC3 of 2012, and 34.2 that the bank and the employee both submit to the exclusive jurisdiction of the DIFC Courts.

14. At paragraph 17 he says all the factors set out above show a strong connection between the employment in the UAE and/or the DIFC.

15. At paragraph 18 although domiciled in the UK the Claimant was not resident in the UK and did not pay UK income tax or national insurance.

16. At paragraph 19 all these factors point to a strong connection with the UAE or the DIFC. For the present purposes I assume without making any findings about it that the Claimant's claim has substantial merits as it stands but that does not affect the question of the territorial reach of the legislation concerned.

17. At paragraph 24 he referred to the Claimant relying on a more general appeal based on notions of equity, justice and access to justice. He expressed some sympathy with her position, he noted that it does not much assist that the DIFC courts are available to her and referred to the high fees which are applicable for bringing such claims.

18. At paragraph 25 he said having said all of that I find that this falls under what was said by Lord Justice Gross in Bamieh v Eulex [2019] EWCA Civ 803, about looking at the strength of the connection not the strength of protection.

19. And finally, at paragraph 26 looking at the case overall he found that the factors that show a connection with the law of the UAE and/or DIFC greatly outweigh such elements to show any connection to the UK and therefore he found that there is no

jurisdiction to hear the complaints under the ERA or the EQA, those complaints must therefore be struck out. That decision was sent to the parties on 28 August 2019.

20. The Claimant did not seek reconsideration of that decision and nor was it appealed. In fact, she says that she does not dispute the findings of Employment Judge Glennie and does not say that he misapplied the law.

Breach of contract claim

21. The claim for breach of contract was withdrawn by the Claimant and dismissed in a short form Judgment of Employment Judge Glennie date 4 July 2019 and sent to the parties on 10 July 2019. That Judgment simply read, "the complaint of breach of contract is dismissed following a withdrawal by the Claimant". Again, there was no application for reconsideration and the Claimant has not issued proceedings in the High Court.

2nd Claim dated 27 February 2020.

22. The Claimant issued a second claim dated 27 February 2020 which is the subject of this Hearing. The 2nd Claim again refers to her employment as a Senior Legal Counsel between 29 October 2014 and 31 October 2018. She ticked the boxes for race, disability and sex discrimination and below said she was also claiming victimisation and statutory wrongful termination. The details of the claim are set out in attachment which under the heading sexual discrimination referred to matters in the period 2014 to 2017, race discrimination matters between July 2015 and November 2017, disability discrimination reference to a diagnosis with anxiety, insomnia and depression in February 2018. In respect of breach of contract, she concludes by saying since the amount of the breach of contract claim exceeds the Tribunal's jurisdiction this will be presented separately via the High Court.

The submissions of the parties

Claimant

23. Summarising her arguments from both her grounds of opposition dated 7 May 2021 and her skeleton argument she makes the following points.

24. She quotes from an article in the Industrial Law Journey 2010 from Louise Merritt but from that quotation it is relevant that some elements of it do not assist the Claimant's case. It includes "whereas statutory employment rights must be enforced through the Employment Tribunals" and "in the case of statutory employment rights, the claimant must show that he or she falls within the scope of the relevant legislation, most statutory rights have either express or implied territorial limits which must be satisfied. This last issue will be referred to as territorial scope".

25. She made extensive reference to the Brussels (Recast) Regulation quoting various articles which I need not set out. She said that the Respondent is domiciled in the United Kingdom as recorded in the Judgment of Employment Judge Glennie.

26. At paragraph 15 of her grounds of opposition she says the only jurisdiction challenged by the Respondent at the hearing before Employment Judge Glennie was that of the territorial scope of the laws on which the Claimant sought to rely.

27. At paragraph 26 she referred to Vedanta and the Supreme Court applying Zambian law in a claim brought in the UK. It is significant that the reference to Vedanta had also been made before Employment Judge Glennie.

28. Under the heading substantial justice, she talks about the cost of issuing proceedings in DIFC.

29. She refers to the Employment Tribunals Act 1996 s.3(2) which provides for the potential additional scope of claims to be brought in the Employment Tribunals. It is acknowledged, of course, that claims for breach of contract subject to the statutory cap can be pursued. The Claimant places emphasis on the reference to "any enactment" in s.3(2) (c) to potentially include claims under various other statutory regimes to include that of the DIFC.

30. At paragraph 41 she says that the Claimant in consideration of the Judgment of Employment Judge Glennie has ensured that none of the claims presented in the 2nd Claim have been made under UK statutory employment law.

31. In her oral submissions the Claimant referred to the discrimination she had experienced and the effect it had on her. She applied for reconsideration of the Judgment dismissing her breach of contract claim, and I will come to that in my conclusions. She says that there had been a change in DIFC law in August 2019 which permitted historic claims to be heard. She set out much of what had been previously covered in her grounds of opposition.

Respondent

32. Mr. Kemp spoke briefly to his skeleton arguments. He set out the procedural history and says that the Claimant is seeking to recycle the same complaints as alleged breaches of a foreign statue that the Tribunal has no statutory jurisdiction to hear and apparently seeks to amend her claim to include a breach of contract claim that has already been finally determined by a Judgment and is in any event over two years out of time. He says it is an abuse of process.

33. He referred to relevant case law to include Secretary of State for Scotland v Mann [2001) ICR 1005 and Lawson v Serco Ltd [2006) ICR 250. He says the statutory jurisdiction of the Employment Tribunal can only be provided by national legislation. He says the claim is further barred by course of action issue estoppel.

34. He referred to Rules 51 and 52 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules).

35. Rule 51 provides:

Where a claimant informs the Tribunal, either in writing or in the course of the hearing, that a claim, or part of it, is withdrawn, the claim, all part, comes to an end.

Rule 52 provides:

Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgement dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless-
(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be a legitimate reason for doing so; or
(b) the Tribunal believes that to issue such a judgement would not be in the interests of justice.

36. He says the Claimant withdrew her breach of contract claim by a letter dated 15 June 2019. There was no reference her reserving the right to bring a breach of contract claim in the High Court.

37. He says the Claimant cannot commence a further claim against the Respondent raising the same, or substantially the same, complaint as she seeks to do here. He referred to the Court of Appeal's decision in Barber v Staffordshire County Council [1996] IRLR 209.

38. He also says the claims would be woefully out of time. He refers to the well-established principals in Henderson and public policy based on the desirability of finality in litigation.

39. He says the Claimant is seeking to reinvent the wheel by arguing the same complaint as a fundamentally misconceived one of alleged breaches of foreign law. He says the claim should be struck out for want of jurisdiction in that the Tribunal cannot apply DFIC law. He says that the breach of contract claim is prohibited and that the Claimant's reference to "any enactment" in the Employment Tribunals Act 1996 is wholly misconceived.

The Law

40. Given the extensive references above to the decision of Employment Judge Glennie and the parties' submissions it is not necessary for me to further set out the relevant law and, in any event, the legal principles of cause of action issue estoppel are well established.

Conclusions

Breach of contract claim

41. I find that the complaint in relation to breach of contract has been the subject of a final and binding decision. That is the Claimant withdrew that claim and it was dismissed in the normal way in accordance with Rules 51 and 52 by a Judgment of Employment Judge Glennie sent to the parties on 10 July 2019.

42. The Claimant appears somewhat uncertain as to what her intention is in pursuing this claim. What is unequivocal is that she is not able to pursue the claim in the Tribunal. It may be open to her to pursue it in another forum but the claim as far as the Tribunal

is concerned has been dismissed, and that constitutes a Judgment, and is not capable of review.

Application for reconsideration of the withdrawal of the breach of contract claim

43. The Claimant says that she would like the Judgment of Employment Judge Glennie to be reconsidered. She says that she was going through a stressful period at the time she gave notice of withdrawing that claim. In retrospect she would not have done so, albeit her position appears somewhat ambiguous because it appears to still be the case that her intention would be to pursue the matter in the High Court given the cap on breach of contract claims in the Employment Tribunals.

44. I advised the Claimant during her submissions that she was woefully out of time in seeking to apply for reconsideration. Rule 71 makes it clear that an application for reconsideration needs to be made within 14 days of a decision being sent to the parties. Nearly two years has elapsed. The Claimant says that it was within the course of a hearing that the application was made. However, there is no basis for this contention as that is a reference to the proceedings which give rise to the reconsideration application. So, for example, where on day three of a 10-day hearing where an interlocutory ruling is made, and an application made for reconsideration. It cannot possibly apply to a subsequent set of proceedings which have been issued a substantial time later where an attempt is retrospectively made to revisit an earlier judicial determination.

45. In any event it is not clear on what basis it is contended that that the judgement should be reconsidered. The fact that a party may subsequently regret their unequivocal withdrawal of a claim does not form the basis for a reconsideration application.

Other complaints brought in the 2nd Claim.

46. The other issue I need to address is whether the Claimant can pursue a complaint in relation to her allegations of sex, race and disability discrimination. I find that she does not. The reasons for this are as follows.

47. The first substantial impediment the Claimant faces is that there is already a judgment on these issues, that of Employment Judge Glennie following a two-day hearing on 13 and 14 June 2019 and his reserved Judgment sent to the parties on 28 August 2019. I do not accept the Claimant's argument that she is in effect bringing a different claim. The factual and legal basis of her complaints in the year 2nd Claim, whilst not in identical wording, are the same issues as were the subject of the 1st Claim. They both involved allegations of sex, race and disability discrimination during her employment in Dubai with the Respondent. They covered the same period and the same fundamental acts.

48. The argument that the Claimant advances that she is now seeking to apply DIFC law rather than the UK statutory provisions is in my view wholly misconceived. It is fundamentally the position that the UK Tribunals are creatures of UK statue and apply UK statutory provisions. That was the issue which was primarily the subject of the hearing before Employment Judge Glennie. I have set out above relevant sections of his Judgment and he was unequivocally of the view that there was an inadequate level

of connection between the Claimant's employment with the Respondent and UK employment law for the Tribunal to have jurisdiction.

49. It is significant that much of the UK and European legislation/regulation and case law referred to by the Claimant are matters which were either referred to at the hearing before Employment Judge Glennie or could have been. There is simply no basis for me to go behind that decision.

50. In any event had this matter been one I was asked to determine in the absence of a previous decision giving rise to issue estoppel I would almost certainly have reached the same conclusion based on the factual matrix set out and the findings of fact made by Employment Judge Glennie. But that ultimately is beside the point. The fundamental issue is that this is an attempt to relitigate what has already been determined. There are no substantial differences between the two claims. It is the same cause of action in broad terms which the Claimant seeks to bring again and have a second bite of the cherry having found the initial decision not to be conducive to her ability to pursue these matters. Had she wished to challenge the decision of Employment Judge Glennie, and there is no suggestion that she does challenge it from a legal perspective, she could have sought reconsideration or appealed to the EAT. She did neither.

Out of time

51. Again, not strictly relevant given my above findings, is that the matters complained on 31 October 2018. The 2nd Claim was not brought until 27 February 2020, 14 months had elapsed and therefore those claims would be substantially out of time and a Tribunal would have to consider whether it would be just and equitable to extend time. There is no need for me to consider that question given that there was already a binding judgement and cause of action estoppel applies in relation to findings giving rise to that earlier judgement.

Conclusion

52. Therefore, the claims are struck out on the basis that there is no jurisdiction for the Tribunal to hear them primarily because of earlier Judgments on the breach of contract claim on withdrawal and the statutory claims since the UK Tribunals do not have statutory jurisdiction to hear those complaints. There is no basis for that to be revisited.

53. The claims brought under the 2nd Claim are therefore struck out as being an abuse of process and I use that term in the context of there already being a binding decision and the Claimant's 2nd Claim represents an attempt to circumvent an earlier Judgment.

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Employment Judge Nicolle

13 June 2021

Sent to the parties on:

14/06/2021.

For the Tribunal:

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