EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Ms M Mulumba	**AND**	Partners Group (UK) Ltd (R1) Partners Group (USA) Inc (R2)

Heard by: CVP **On**: 19 & 20 August 2021

Before: Employment Judge Nicolle

Representation

For the Claimant: In person
For the Respondent: Mr D Craig QC
Ms F Onslow, of Counsel

Open Preliminary Hearing

JUDGMENT

1. The Tribunal has jurisdiction to hear the claims notwithstanding the existence of a New York governing law provision in the Claimant's offer letter.

2. The Tribunal concludes that UK jurisdiction existed with effect from 7 September 2017 and therefore all claims relied upon prior to this date are dismissed but can be relied on as background evidence.

REASONS

The Hearing

1. 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.

2. 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.

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

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

5. Members of the public were in attendance and arrangements were made to facilitate the provision to them (on request) of the skeleton arguments and witness statements.

6. The Respondent provided a supplemental bundle comprising of 340 pages. Counsel also provided skeleton arguments and a bundle of case law authorities comprising of 404 pages. The Claimant provided a separate bundle of documents (initially unpaginated) but comprising approximately 250 pages. She also provided a witness statement and skeleton arguments.

7. I decided that the entirety of the Claimant's witness statement was admissible notwithstanding significant parts of it not being relevant, or at least not directly, relevant to the issues to be determined. However, I gave an oral ruling that a witness statement submitted by the Claimant in the name of Ms Megan Burke Leeds was inadmissible and her evidence would therefore not be heard.

8. Whilst the Respondent had prepared a supplemental witness statement in the name of Christian Truempler, Vice President of the Entrepreneur Governance Team at Partners Group AG (Mr.Truempler) the Respondents did not consider it necessary to call him as his evidence had been provisional in the event that the Claimant sought to admit certain additional documents.

9. I also had access to the bundles from the Open Preliminary Hearing which I heard on 3 and 4 December 2019 (the 1st Hearing) comprising 1752 pages and was taken to a relatively small number of documents within these bundles by the parties.

Procedural background

10. By a claim form presented on 28 January 2019, the Claimant brought complaints of direct race, sex and (perceived) disability discrimination (s.13 Equality Act 2010 (EQA), harassment (s.26 EQA), victimisation (s.27 EQA), automatic unfair dismissal (s.103A Employment Rights Act 1996 (the ERA), ordinary unfair dismissal and protected disclosure detriments against the Respondents.

11. Following the 1st Hearing I determined in a judgment dated 10 January 2020 (the Judgement) that the Tribunal had jurisdiction to hear the claim.

12. In a letter from the Respondents' solicitors dated 21 January 2020 they sought reconsideration of certain elements of the Judgment. This primarily

related to my failure to specify on which date the Claimant acquired UK jurisdiction.

13. I refused the application for reconsideration in a judgment with reasons dated 13 February 2020.

14. The Respondents appealed against the Judgment in a Notice of Appeal dated 20 February 2020.

15. The appeal was referred to Judge Keith in accordance with Rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended) (the EAT Rules) and he decided that it disclosed no reasonable grounds for bringing the appeal.

16. The Respondents sought reconsideration of this decision under Rule 3(10) of the EAT Rules which was considered by the Honourable Mr Justice Linden who allowed the application to proceed in his Order dated 13 October 2020.

17. The appeal was heard by the Honourable Mrs Justice Eady DBE on 11 May 2021 and her judgment was handed down on 25 May 2021 (the EAT Judgement).

Relevant parts of the EAT Judgment

Summary

18. It was incumbent upon the ET to state when it found that the Claimant's employment had fallen within the reach of the relevant statutory protections.

19. Although the ET had generally carried out a careful evaluation of the different factors relevant to the question of territorial reach it had apparently failed to have any regard to the fact that it had been provided that the contract of employment was subject to New York law. The failure to take account of this factor had rendered the ET's conclusion unsafe and the Respondents' appeal on this ground would be allowed.

20. The appeal on the wider basis was dismissed.

Relevant paragraphs within the EAT Judgement

21. At paragraph 46:

> "The assessment must, however, be of the position at the time of the matter of which complaint is made. In particular, if the relevant act, omission or decision fell within a period of employment outside the territorial reach of British Employment Law, it will not subsequently fall within scope as result of the employee later establishing the requisite connection with Great Britain in the statutory protections afforded within this jurisdiction".

22. At paragraph 64:

> "The ET's reasons do not suggest it found that the Claimant fell within the territorial reach of British employment protections immediately upon her move to London, but the point is never expressly addressed and there is no finding that states when the Claimant fell within the scope of the statute she sought to rely on".

23. At paragraph 69:

> "Whilst it found that the Claimant would have been aware that her ongoing employment in London was outside the Associate Program, it did not make a clear finding as to whether she might still have held out hope to be kept on in some permanent capacity".

24. At paragraph 71:

> "That is not to say that the ET was bound to find that a reference in 2015 to New York law being the relevant governing law, and to this being employment "at will", continued to represent the reality of the position during the Claimant's employment in London in 2017/2018".

Remitted case and issues to be determined

25. Mrs Justice Eady remitted the case to the Tribunal to reconsider its decision considering that the governing law of the Claimant's offer letter from the 2nd Respondent dated 10 July 2015 (the Offer Letter) provided that it should be governed, construed and enforced in accordance with the laws of the State of New York and to the extent still necessary, to then decide at what date it found that the Claimant fell within the territorial scope of the ERA and EQA.

Summary of relevant parts of the Judgment

26. To avoid repetition, I will keep this brief and merely highlight by way of para phrasing those sections of the Judgment which are directly referable to the issues which have been remitted to me for reconsideration. This judgment should nevertheless be read in conjunction with the Judgment.

27. At paragraph 25:

> As a result of the Claimant spending more than 183 days in the UK, she became eligible to UK income tax as of 5 September 2017.

28. At paragraph 39:

> The Claimant attended a meeting in London with Mr Truempler on 5 July 2018. Any grounds for doubt as to the existence of the Accommodation Period ceased from with effect from this meeting.

29. At paragraph 42:

I find that the Claimant would, on balance of probability, have been aware that her ongoing employment in London was for reasons outside the normal Associate Program.

30. At paragraph 70:

This is a complex case concerning an employment relationship which evolved over the course of the Claimant's employment.

31. At paragraph 73:

I find that the US was no longer her "home" base and that she had no reason to return, and given her immigration status, it would not have been possible for her to do so.

32. At paragraph 78:

Given that the last 18 months of the Claimant's employment was based exclusively in London I do not consider that her employment was peripatetic.

33. At paragraph 81:

I find that the Claimant's employment in London was not consistent with a normal short term three month "or at most six months" rota under the Associate Program. If not immediately, that during her 18-month period during which she lived and worked in London, her employment evolved to one where UK statutory employment protection applied.

34. At paragraph 82:

That the Claimant remained an employee of the Second Respondent throughout her employment. I find that the identity of the Claimant's employer as the Second Respondent is not, however, determinative of the jurisdiction question.

35. At paragraph 83:

I find that the Claimant's workplace was in the UK by the time her employment was terminated on 31 August 2018.

The parties' submissions

36. Given that the party's submissions each lasted for over three hours it would be disproportionate and, in any event, unnecessary to do more than summarise the key points relied on.

<u>The Respondents</u>

37. That the Offer Letter provided that the governing law of the contract was New York law.

38. That the agreed forum for the resolution of any dispute was arbitration before the Financial Industry Regulatory Authority (FINRA) or administered by JAMS, Inc.

39. That complaints regarding sexual harassment should first be made to the New York State Division of Human Rights and New York City Commission on Human Rights.

40. That the employment was stated to be "at will".

41. That throughout the Accommodation Period there was no prospect of the Claimant being offered a permanent role with the Respondents.

42. That if the Claimant had no genuine expectation of a permanent position, then that strongly militates against her gaining British employment law rights.

43. The parties had no expectation that the protections of British employment legislation would extend to the Claimant.

44. That any UK jurisdiction, the existence of which is denied, must have been established well after the start of the Accommodation Period and, most likely, only just before her ultimate dismissal.

45. Mr Craig referred me to a small number of documents from the trial bundle for the 1st Hearing. These were:

46. The discrimination proceedings issued on behalf of the Claimant in the New York Division of Human Rights and New York City Commission on Human Rights dated 23 March 2018 in which she claimed, interalia, protection under title VII of the Civil Rights Act of 1964 for discrimination and retaliation.

47. Email from Zachary Moran, Human Resources, to Mr Truempler dated 5 July 2016 in which he said that the Claimant had not been selected for H1B US Work Permit and that this was an unfortunate outcome and means that she will no longer be eligible to work in the US. Mr Craig says that this is evidence to rebut the Claimant's assertion that it had always been intended that her initial period of work in the US would be relatively short with the long-term intention that she would be based in the UK.

48. Email from Prabal Sidana to Reto Munz (Mr Munz) dated 18 September 2017 in which he said:

> "Her motivation is quite low – she arrives in office past 9, is often away from her desk for hours, and leaves just after 5, she has shown very little inclination to understand what we do, or discuss about public markets, or even investments for that matter".

49. Email from Thomas McArdle, Private Equity Directs of the 2nd Respondent, (Mr McArdle) to Mr Munz of 13:49 on 19 September 2017 in which he said:

> "I am happy to step in a reinforce the message that her one-year wind down period is conditioned on performance".

50. Email from Mr Munz to Mr Truempler, Rene Biner, Partner, Chairman Global Investment Committee at Partners Group AG in Zug, (Mr Biner) and Mr McArdle of 5am on 19 September 2017 in which he said:

> "I spoke to a lot of people about the Claimant and feedback is rather negative".

51. The Respondent relies on the above emails as evidence that the Claimant had no legitimate expectation that her position in London was likely to be a permanent one. The Claimant disputes that she was aware of such concerns and points to evidence that she says supports her contention that she had an ongoing expectation that a permanent position remained a possibility.

52. Mr Craig referred to a table included in an email from Mr Truempler to Mr Biner of 7 May 2018. This referred to a total class size (those on the Associate Program) of 19 and of that total one was listed as being a "special case" and this referred to a 12-month Accommodation Period. This related to the Claimant who was specifically named as being assigned to the Americas and on a 12-month accommodation until September 2018.

53. He referred to an email from Mr Truempler to Mr McArdle of 31 August 2017 in reference to the Claimant in which he said that he wanted to explore the Zug option with her and see what her thoughts are, and what her plan b would be. He says that this supports the Respondents' contention that the position remained open, and it was not always seen as the parties' intention that the Claimant would be based in London for the indefinite future.

<u>The Claimant's submissions</u>

54. In addition to her 62-paragraph skeleton argument the Claimant provided a 135-paragraph witness statement. She spoke to this statement rather than giving witness evidence. Much of her statement did not directly relate to the issues I needed to determine. Nevertheless, I provided her with the opportunity to highlight those issues she wished to do so.

55. I explained to the Claimant that while she may dispute certain findings, I had previously made that these would not be revisited, for example, her contention that she was not aware of the existence of the Accommodation Period. I nevertheless allowed a degree of latitude given that she was seeking to argue that her subjective expectation during the Accommodation Period of the possibility of a permanent position in London was relevant as to the date from which UK jurisdiction applied.

56. Much of the Claimant's witness statement was a repetition of the evidence she had given at the 1st Hearing, and I need not repeat it. Points she emphasised included:

57. She had been based in the UK for six of the eight years prior to commencing with the Respondents' and the two years in the US was solely to undertake her MBA.

58. She applied to the Respondents both in the UK and the US. It was only the US application which was taken forward.

59. That it was always the intention that she would ultimately end up in London and that the initial period in the US would be of short duration. She says this was because of her immigration status. The Respondents dispute this and say that it was not originally anticipated that she would not receive the requisite authorisation to live and work in the US.

60. She could not recall whether she had noticed the New York governing law provision in the Offer Letter but believes, given that she is extremely diligent regarding such matters, that she would have read it but not necessarily seen it as being of particular significance.

61. She says that the Respondents cynically failed to take steps to localise her employment in the UK with the objective of minimising the risk of her acquiring UK statutory employment protection. She refers specifically to what she contends was the extremely unhelpful stance of the Respondents in continuing to deduct US tax from her pay to her significant detriment notwithstanding her becoming liable to the deduction of UK tax after 183 days working and living in the UK.

62. She spoke at some length with a view to rebutting the Respondents' contention that there were concerns regarding her performance. I advised her that I would not be making any findings regarding her performance as that would be an issue potentially to be determined at any full merits hearing.

63. She says that nothing would have changed from her being on the Associate Program to not being and this would not have been apparent to her. I reiterated that I would not be revising my previous findings on this issue.

64. She contends that it is disingenuous of the Respondents to seek to rely on her having sought to pursue proceedings in New York to prevent her having jurisdiction to pursue proceedings in the UK. She says that this step was taken because of what she regards as the "not fit for purpose" Offer Letter, which with its New York governing law provision no longer reflected the reality of her employment relationship.

65. The Claimant referred me to various documents within her bundle of documents and from the bundles for the 1st Hearing. These included:

66. The table included within an email from Amelia Raess (Ms Raess) to Mr Binder and Mr Truempler dated 27 January 2017. Ms Raess stated that the US was a no for the Claimant (because of her immigration status). The table referred to her current position being in Zug and an extension having been applied for on her current permit until 30 April 2017. At this point there remained a possibility of ongoing employment in Switzerland.

67. The Claimant says that this document demonstrates that she was clearly not ordinarily resident in the US. She says that the UK was not a steppingstone to New York or Zug. She poses the question as to where the Respondents contend she would have been transferred to after London. The Respondents' position is that there was nothing to suggest from this document, or otherwise, that the UK was intended to be permanent.

68. She refers to a document dated 29 September 2015 prepared by Lukas Bucher and sent to the Strategy Committee. This refers to the Associate Program and the 19 participants. The Claimant says that she was listed as of UK nationality albeit her name does not appear, she says that it was by implication attributable to her. Mr Craig referred to page five of that document which specifically names the Claimant as being Congolese and on an OPT visa for 12 months after graduation (that being in the US).

69. The Claimant referred to the investigation report produced by Levy Employment Law, LLC dated 16 February 2018 (the Investigation Report). This was not provided to the Claimant until she made an application for specific disclosure after the 1st Hearing. The Claimant disputes that it is a genuinely independent report and says that it fails to consider her complaints properly and objectively. This is outside the scope of the issues I need to determine.

70. She specifically referred to a paragraph of page 12 of the Investigation Report which says:

> "Rene said LPM was in need of resources at the time and if she did an awesome job there, he would have hoped they would make her an offer but because she is now out of the Program, he is not in touch with how she is doing".

The Law

71. It is not necessary for me to repeat the summary of the law which appeared at paragraphs 57-69 in the Judgement.

72. I take account of the judgment of Justice Langstaff in Simpson v Intralinks Limited [2012] ICR 1343 in which he referred to three overlapping questions in cases such as this, all of which sometimes attract the label of "jurisdiction" namely:

a) The place/forum where a case is determined, in other words whether the Courts of England and Wales have the power to entertain the claim at all

and can be a question of jurisdiction in the sense that it asks whether the court or tribunal is properly seized of the matter.

b) The applicable law relating to a contract in other words which system of law applies to the dispute.

c) The territorial scope of a domestic statute in other words the territorial effect question.

Choice of Law

73. In British Council v Jeffrey [2019] ICR 929, 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 v Secretary of State for Children, Schools and Families (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".

74. Underhill LJ in Jeffrey also noted that Lord Hope had made similar observations in Ravat v Haliburton Manufacturing and Services Ltd (2012) ICR 3, 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".

75. I also take note of Underhill LJ's reference in Jeffrey at paragraph 58 where he stated:

> "It will be noted that Baroness Hale JSC (referring to her judgment in Duncombe No 2) expressly acknowledges the difference between the rights governed by the contract and those afforded by the statue, but she treats the question of what law governs the former as relevant to the territorial reach of the latter".

76. 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.

77. I took account of the guidance at paragraph 29 in Ravat that the question whether, on given facts, a case falls within the scope of s.94(1) of the Employment Rights Act 1996 (the ERA) is a question of law, but it is also a question of degree. The question of law is whether s.94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain.

78. A relevant factor in Ravat was the governing law of Mr Ravat's contract of employment and associated with this what the reasonable expectation of the parties was regarding his employment.

79. In his judgment at paragraph 32, Lord Hope in discussing the significance of Mr Ravat's contract of employment and the governing law provision stated:

"The better view, I think, is that, while neither of these things can be regarded as determinative (the proper law of the parties' contract and the reassurance given to Mr Ravat by the employer about the availability to him of UK employment law), they are nevertheless relevant. Of course, it was not open to the parties to contract into the jurisdiction of the Employment Tribunal. The parties cannot alter the statutory reach of s.94(1) by an estoppel based on what they agreed to".

He went on to say:

"The way the employment relationship is then handed in practice must play a part in the assessment".

80. 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."

81. I reminded myself of the guidance provided by Baroness Hale in Duncombe (No 2) in which she said:

"There is no hard and fast rule, and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples given, for they are merely examples of the application of the general principle".

82. At paragraph 16 of her judgment, she summarised relevant applicable factors in the determination of that case which included where their employer was based, that they were employed under contracts governed by English law and where they paid taxes.

83. R (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.

84. Mr Craig placed considerable reliance on the EAT's decision in Powell v OMB Exploration & Production Limited UK EAT/131/13. Mr Powell lived in England and had a working cycle of three weeks in Dubai and then a week in England. He was employed by an Isle of Man company with the governing law being Manx Law. Justice Langstaff noted at paragraph 48 that none of the leading authorities considered a factual case in which the employee was non-British. At paragraph 56 he held that whilst the employer not being a British company was not conclusive it was none the less highly material. He found that the Employment Judge was entitled to conclude that the essential work performed by the claimant was performed extraterritorially. Further, the Employment Judge would have been bound to take account of the fact that the parties had agreed that UK law would not apply to the contract.

85. Whilst Mr Craig referred to the EAT's decision in Fuller v United Health Care Services Inc UK EAT/0464/13 I do not consider it necessary to make further reference to this authority given that I distinguished the Claimant's circumstances from those of Mr Fuller in the Judgment.

86. Mr Craig referred me to the EAT's decision in ESS Support Services LLP v Pabani UK EAT/0161/15. This case involved a British citizen whose home was in the UK and who was recruited in the UK. His initial offer letter was with Compass, a UK company, but he was subsequently employed by ESS a Kazakhstan based company. Prior to his dismissal he returned to the UK where he was suspended for 200 days.

87. At paragraph 75 of the judgment of the Honourable Mr Justice Singh stated:

> "It was wrong as a matter of law, in my judgment for the Employment Tribunal to take the view, as it did, that a decisive factor in weighing up the matter was the asserted link that the Claimant had with the UK".

If there is jurisdiction from when did it apply?

88. There is limited authority on this point. However, it was made clear in Dhunna v CreditSights Limited [2015] ICR 105 that it is critical to identify whether there was territorial jurisdiction at the time of the act complained of. Jurisdiction cannot be conferred retrospectively see Tradition Securities v Futures S.A. v X [2009] ICR 88.

89. Mr Craig sought to rely by analogy to the judgment of Underhill LJ in Abrahall v Nottingham City Council [2019] ICR 1425 which is a case concerning unilateral contractual variation by an employer and acceptance by conduct. At paragraph 89 of his judgment the following:

> "I do not think that the difficulty in identifying the precise moment at which an employee should be treated as first accepting a contractual pay cut means that the question has to be answered once and for all at the point of implementation".

Conclusions

The relevance of the governing law provision in the Offer Letter

90. Having given the matter further consideration I find that the New York governing law provision in the Offer Letter, whilst a relevant factor, does not in itself alter my original decision that the Tribunal has jurisdiction. In referring to the New York governing law provision I also take account of the arbitration provisions and that the employment is "at will" in the Offer Letter. I reach this finding for the reasons set out below.

91. First, whilst I accept that the Judgement did not refer to the significance of the governing law provision in its conclusions, I nevertheless applied an approach which assessed the totality of the employment relationship and undertook a careful balancing exercise between those factors militating in favour and against the existence of UK jurisdiction. It was following this exercise that I determined that the Claimant had acquired UK jurisdiction during her time in London from 6 March 2017 until the termination of her employment on 31 August 2018.

92. I acknowledge from the relevant case law authorities the significance of the applicable governing law in the contract of employment particularly in assessing the parties' expectations. Nevertheless, I take note of the guidance from the case law authorities, particularly in Ravat, that whilst it is a factor to be considered it is one amongst many and not in itself decisive.

93. Further, whilst I acknowledge the relevance of the parties' reasonable expectations, I consider that these will inevitably evolve over time to reflect the reality of the relationship as it developed rather than necessarily being set in stone as existed at the commencement of the employment. Therefore, whilst it was arguably self-evident that the initial intention of the parties was that New York governing law would apply I do not consider that it automatically follows that this would remain the case indefinitely. The consequence of such an approach would be that an individual could work in, for example, London for 10 or more years, after a brief initial period in New York, and forever be precluded from acquiring UK statutory employment protection. I consider that this would be inconsistent with the guidance provided in the case law authorities that one needs to consider the overall factual and legal circumstances and apply these in assessing whether an individual's employment had the requisite level of connection with the UK. For the reasons set out I find that it did.

94. In considering the reality of the situation, as opposed to the contractual agreement entered between the parties, I took account of the Supreme Court's judgment in Uber and others v Aslam and others [2021] UK SC 5 and specifically the requirement to look at the reality of a working relationship and not necessarily the label the parties have placed on it. In this respect I took account of the Claimant's evidence, which is not disputed, that all recruits to the Associate Program were required to sign a standard offer letter and had little scope to negotiate alternative terms, to include an alternative governing law provision, even had they wanted to, which I consider unlikely at the commencement of an employment relationship, particularly in the context of graduate recruits eager to impress.

95. I find that the position as it evolved is a matter of fact to be considered in addition to the originally stated contractual position. I consider this to be consistent with the judgment of Lord Denning MR in Todd v British Midland Airways [1978] IRLR 370 where he observed that the terms of the contract are not of much help in determining where an employee's base is and that it is necessary to go by the conduct of the parties and to the way they have been operating the contract: "a man's base is the place where he should be regarded as ordinarily working".

96. Whilst I do not consider that the contractual relationship relied upon by the Respondents represented a "sham" arrangement, I nevertheless accept the Claimant's argument that as her time in London progressed, particularly once the Respondents became aware that she was seeking to pursue potentially substantial legal proceedings against them, that the Respondents were likely to have been motivated by the wish to avoid taking any steps which may inadvertently have enhanced the possibility of the Claimant acquiring UK statutory employment protection. I consider it significant in this respect that the Respondents did not take actions to "localise" the Claimant's employment in the UK and appear to have been motivated by a wish to maintain a level of US connection in continuing to deduct US taxes from the Claimant's pay notwithstanding that after 183 days in London she was subject to the deduction of UK tax via PAYE.

97. In relation to the US arbitration provisions, given that I have found that the Claimant had acquired a sufficient level of connection with the UK to found UK jurisdiction, I do not therefore consider that any reference to arbitration as the means of resolving disputes is sufficient to preclude her ability to pursue UK statutory employment proceedings. This would not have applied to an exclusively UK recruited and based employee subject to the terms of the Offer Letter and given that I have found that the Claimant's overall level of connection with the UK is sufficient to give rise to UK jurisdiction nor should it apply to her.

98. Further, I do not accept that the Claimant's employment being described as "at will" in the Offer Letter means that she is unable to pursue an unfair dismissal claim in the UK. It is habitual practice in the US for employment to be "at will". I do not accept Mr Craig's argument that "at will" employment was in return for higher salary and in any event, I do not consider this to be a relevant consideration. Once an employee has been in the UK for a sufficient period to give rise to UK jurisdiction the initial label placed on the relationship, in my opinion, ceases to apply. Any contrary position would in effect enable employers of employees based in the UK to provide for the applicability of a foreign governing law provision and describing the employment as "at will" with a view to negating UK statutory employment protection. I consider that this would be contrary to public policy and the prohibition on contracting out of UK statutory employment protections pursuant to s.203 of the ERA and s.144 of the EQA.

99. I have therefore concluded that looked at overall the connection between the circumstances of the Claimant's employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be consistent with parliamentary intention in the drafting of the ERA and EQA for the Claimant to have the ability to pursue claims in Great Britain.

100. I reach this finding notwithstanding that many elements of the Claimant's employment pointed to a continuing level of connection with the US. However, I consider it to be relevant that several of these factors were determined by the Respondents, and some of these determinations were arguably made with a view to reducing the Claimant's level of connection with the UK, possibly with the express purpose of her not acquiring statutory employment protection in the UK.

<u>Given my decision above at what point did the Claimant acquire UK jurisdiction?</u>

101. The parties and the EAT acknowledge that this is something of an artificial exercise, but it is nevertheless one which I am obligated to undertake.

102. I consider this to be a more difficult issue. In approaching this question, I deliberately avoided referring in advance of my decision to the list of acts and omissions relied upon by the Claimant and when they occurred, but rather have approached matters from the perspective of how I consider her employment relationship evolved in the UK.

103. The earliest date upon which UK jurisdiction could have existed is when the Claimant commenced in London on 6 March 2017 and the latest is the date of

her dismissal on 31 August 2018. It has already been held that all acts and omissions prior to 6 March 2017 are dismissed albeit they can be referred to by the Claimant as background matters.

104. It is relevant to consider what the Claimant's realistic expectations were as to the possibility of ongoing employment at the end of the Accommodation Period. Whilst I consider that it may have been objectively and subjectively reasonable for her to believe, based on communications made to by representatives of the Respondents, in the first 6 to 12 months of the Accommodation Period that the possibility existed of her performance in London being rewarded with an offer of a permanent position, I consider that this would have become a diminishing possibility, before being extinguished entirely following her meeting with Mr Truempler on 5 July 2018.

105. I also consider it relevant that in an email of 22 January 2018 from Mr Munz to the Claimant he asked her how the job search is progressing which was clearly in relation to an external position. The Claimant did not reply, but it nevertheless would have been indicative to her that she was not seen as having a realistic prospect of a permanent position of employment with the Respondents. Whilst the Claimant says that she suspects this email was a retaliatory action in respect of the letter from her New York lawyers, Bailey Duquette P. C. dated 3 January 2018 to Oliver Jimenez, Chief Compliance Officer of the 2nd Respondent, it would, whatever the reason which motivated it being sent, have highlighted to the Claimant that she was highly unlikely to have a long-term future with the Respondents.

106. Given that I have previously found a distinction exists between the Associate Program and the Accommodation Period I have decided that the point at which it could reasonably be considered that the Claimant's status transferred from being on the Associate Program to the Accommodation Period represents an appropriate starting point for UK jurisdiction. Given that the normal expectation for a given "seat" on a rotation during the Associate Program is between three and six months I have decided that the first six months of the Claimant's employment in London is the maximum period during which it could be said to fall within the normal scope of the revolving seats within the Associate Program. This therefore gives a date of 6 September 2017. Therefore, I have concluded that UK jurisdiction applies in respect of all acts and omissions relied on by the Claimant after 7 September 2017.

107. I do, not, however, find that the status of the Accommodation Period was the sole determining factor in my finding that the Tribunal has jurisdiction, with it being the duration of the Claimant's employment in London, rather than the label the parties placed on it which I consider significant.

108. In reaching this decision it is not solely the Claimant's realistic expectations as to the duration of a seat on the Associate Program I have relied on but various other factors pointing to the Claimant acquiring an increasing level of connection with the UK. These were as set out in the Judgment but for completeness include the factors set out at paragraphs 109 to 117 below.

109. The Claimant having a substantial level of connection with the UK in that she had lived here for six of the eight years prior to commencing employment with the Respondents and has lived here since that employment ended.

110. The Claimant's employment in London was under the guidance and direction of the UK office. She reported to London based managers and worked with UK Presidents and Vice Presidents in the Infrastructure and Private Market teams

111. She worked on behalf of UK based clients and was subject to applicable UK regulatory bodies e.g., the FCA.

112. The Claimant becoming liable for the deduction of a UK tax after 183 days in the UK as of 5 September 2017. She was given a notional UK salary for tax purposes of £81,000 as documented in an email from Gabriela Reimer, Human Resources of the 1st Respondent to the Claimant on 4 October 2017 which coincidentally is at about the same time as I have found she morphed from being on the Associate Program to working under the Accommodation Period.

113. US tax form W-4, signed by the Claimant on 31 October 2017, gave her home address as being Flat 7, 16 Queensborough Terrace in London

114. Determinations regarding the Claimant's entitlement to a bonus being made in London and/or Zug and ultimately not New York.

115. The Claimant's notice of termination letter being signed by a representative of the 1st Respondent as well as the 2nd Respondent.

116. At various points the possibility of the Claimant's employment being "localised" to the UK was considered by the Respondents.

117. The evidence that the Respondents regarded the Claimant's situation as being a "special case" and in their decision making were self-evidently cognisant of, and potentially influenced by, her being a potential litigant and therefore sought to take steps to minimise her acquiring further levels of connectivity with the UK beyond the various matters I have relied on.

Concluding summary

118. For the reasons as set I have determined that the Tribunal is properly seized of the matter i.e., the existence of international jurisdiction. Further, I have determined that UK statutory law is applicable to the determination of the Claimant's remaining claims. For the reasons as set out I do not consider that it would be appropriate to apply New York or US law and refer to my findings regarding the attempt by the Respondents to label the Claimant's employment relationship as being "at will". Finally, I have determined that the UK Employment Tribunals and UK statutory employment law have territorial effect on the basis that I consider the circumstances of the Claimant's employment as it existed after 7 September 2017 were such that it could be reasonably considered

that it was intended by Parliament that the relevant statutory employment rights would be capable of exercise by her.

119. Therefore, I have concluded that the Tribunal has jurisdiction to hear the Claimant's complaints which arise on or after 7 September 2017. All causes of action which rely on an act or omission prior to 7 September 2017 are therefore dismissed but can nevertheless be relied on by the Claimant as background matters.

120. The effect of the above is that the parties are ordered to agree an updated version of the list of issues by no later than 4pm on 14 September 2021 to reflect the Tribunal's judgment.

Employment Judge Nicolle

Dated: **27 August 2021**

Sent to the parties on:

28/08/2021.

For the Tribunal Office