EMPLOYMENT TRIBUNALS

Claimant: Ms S Khan

Respondent: Air India Ltd

Heard at: Watford (over Cloud Video Platform) **On:** 16 April 2024

Before: Employment Judge Dick

Representation
Claimant: In person
Respondent: Mr T Ogg, counsel

JUDGMENT

All complaints (except the complaint for breach of contract) are struck out under Employment Tribunal Rule 37(1)(a) because they have no reasonable prospect of success.

ORDER

The complaint for breach of contract is stayed until further order on the ground of *forum non conveniens*.

REASONS

SUMMARY

1. The claimant, who lives in India, brings a claim against the respondent, an Indian airline, which employed or offered to employ her in India. There was a prospect that the claimant might have spent some of her time working in this country, though her engagement with the respondent was terminated before that in fact happened. The claimant makes complaints of discrimination on the grounds of sex and religion or belief and victimisation (under the Equality Act 2010 "EqA"), whistleblowing, unfair dismissal and "other payments" (under the Employment rights Act 1996, "ERA") and failure to give notice (under the

Tribunal's jurisdiction to hear claims relating to breach of an employment contract).

2. This hearing had been listed (by orders dated 14 January 2024) to determine:
   2.1. Strike out on the basis that the Tribunal does not have jurisdiction to hear the claim.
   2.2. Whether to stay the claimant's contract claim.

3. The claimant appeared on the videolink, very briefly, a number of times, but was unable to properly join the hearing, despite the efforts of my clerk and the respondent's solicitors to assist her. In all the circumstances, including the history of the case, I concluded that it was appropriate to proceed with the hearing despite the claimant's absence, under rule 47.

4. Before going on to consider the matters set out at paragraph 2 above, I considered the claimant's request to postpone the hearing and/or stay the case until she was able to come to the United Kingdom (and so appear at the Tribunal in person) and/or until her various appeals or applications for leave to appeal have been concluded. I heard oral submissions on behalf of the respondent and considered the claimant's written submissions. I refused the claimant's request.

5. I then heard oral submissions relating to the issues at paragraph 2 above on behalf the respondent, supplemented by a skeleton argument and bundle of authorities which I understood had been provided to the claimant. I also considered written submissions that the claimant had emailed to the Tribunal on the morning of the hearing. I upheld the respondent's submission that all complaints (except the complaint for breach of contract) had no realistic prospect of success, there being no realistic prospect that the Tribunal would consider that the territorial reach of the Employment Rights Act 1996 ("ERA") and the Equality Act 2010 ("EqA") would extend to cover the facts of this case; all claims save for the breach of contract claim are therefore struck out. I also upheld the respondent's submissions on the contract claim, which is therefore stayed until further order (i.e., indefinitely) under rule 30 on the grounds of *forum non conveniens*).

6. I had indicated at the hearing that, having given oral reasons I would not provide written ones, but on reflection, given the claimant's absence I thought it better to provide reasons in writing. My apologies to the parties for the delay in providing these reasons.

WHETHER TO PROCEED WITH THE HEARING

7. Rule 47 provides that if a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Given the claimant's efforts to join, I did not consider it appropriate to dismiss the claim (i.e. without consideration of its merits). In all the circumstances I considered it appropriate to proceed with the hearing (i.e. to consider the claimant's application to postpone the hearing and then, if that application was refused, to go on to consider the respondent's applications for strike out and a stay).

8. The claimant clearly tried to attend the hearing by CVP, making multiple attempts over the course of the day. On one occasion my clerk told me that the claimant was briefly on the line, but the connection dropped before I had noticed. The claimant was later able to briefly join the hearing by telephone, but nobody was able to hear her and she was connected for, at most, a minute or two. My clerk was unable to make telephone contact with the claimant – the claimant is in India and as I understand it the Tribunal cannot make overseas calls. Counsel for the respondent took me through a number of emails the claimant sent during the early part of the hearing, in which she informed the respondent that she was trying to log in and it wasn't working. The claimant was also able to email the Tribunal during the course of the morning. Solicitors for the respondent were eventually able to make telephone contact with her. She said that she was getting error messages and was unable to join.

9. I accept that the claimant made repeated efforts to join the hearing but was unable to. This was the second time that had happened. At the last hearing before my colleague Employment Judge ("EJ") Shastri-Hurst, the claimant also tried unsuccessfully to connect. At one point during that hearing somebody else appeared on the link who purported to represent the claimant but that person would not give his name and was only willing or able to offer limited assistance to the Tribunal.

10. There was no reason in my view to conclude that a third attempt at a video hearing would yield better results, and for reasons which are set out below there was no prospect of the claimant attending in person within a reasonable period. I balanced the claimant's obvious interest in participating in the hearing against the need to progress the case, which was ultimately in both parties' interests. I considered that the claimant's application for a postponement was one I could quite properly have dealt with on the papers, given that the claimant had provided written submissions on the point; it seemed to me that I had as much information as I was reasonably likely to get. For all those reasons, it was in accordance with the overriding objective (see below) to deal with the claimant's application to postpone the hearing.

WHETHER TO POSTPONE/STAY THE CASE PENDING APPEAL AND/OR THE CLAIMANT'S ATTENDANCE

11. Mr Ogg for the respondent directed me to the case management order made on the last occasion, in which the claimant was ordered to set out full reasons for seeking any postponement or stay by 25 March 2024, along with a number of other requirements. That order was not complied with by the claimant and it was not until 11 April 2024 that she set out her reasons in full for asking for a postponement. I took the view that in the round the claimant's various correspondence did comply with the *Presidential Guidance – Seeking a Postponement of a Hearing*. Although the correspondence did not explicitly say why it would be in accordance with the overriding objective to order a postponement, there was sufficient information for me to understand why the claimant was seeking a postponement, and so I did not need to decide whether there were exceptional circumstances which would allow me to consider the application. It was therefore appropriate to deal with the application, and in deciding the application I applied the overriding objective as set out in rule 2:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.

12. As I set out in a little more detail below, the claimant lives in India. Her application was to postpone the hearing and/or stay the case until either or both of two things had happened. The first was her being able to come to this country to appear at the Tribunal in person. The second was for any appeals that she has made against decisions already made during the course of this case to have been decided.

13. In an email sent to the Tribunal during the hearing (at 11.28 a.m.) the claimant said that her application for a visa, which she had made in order to allow her to come to this country to take part in the hearing, had been refused. It seemed to me therefore that it was most unlikely that the claimant would be able to appear in person before the Tribunal within a reasonable time. That reality was not changed by the fact that her absence was entirely beyond the claimant's control. I was therefore not prepared to postpone resolution of this claim for what would effectively be an indefinite period of time.

14. There are so far as I can tell three appeals connected to this case before the EAT. The claimant also made an attempt to appeal a decision, made by the EAT during the course of one of those appeals, to the Court of Appeal. Leave to appeal to the Court of Appeal was refused and I understand that the claimant wishes to appeal that decision to the Supreme Court. Even if it had been appropriate, it was not necessary for me to express a view on how likely those appeals are to succeed. With one exception, the appeals concern procedural points ultimately hinging on whether the respondent should have been allowed to participate in these proceedings by presenting a response out of time. But the issue this hearing was listed for depends on a point about territorial jurisdiction (to use the term loosely) – in other words, something which the Tribunal would have to consider even if there were only one party to the claim. Further, even if a response has not been submitted in time, rule 21 would still give the Tribunal the power to permit the respondent to participate, and in the circumstances I consider that the Tribunal would likely exercise that power, at least to the point of permitting submissions on the jurisdictional point. None of the undisputed facts (which I consider in more detail below) would change if the claimant's appeals were allowed, and nor would the preliminary point for the Tribunal to consider. The one appeal which does not have to do with jurisdiction appears, from what EJ Shastri-Hurst was told at the last hearing, to be to do with the Tribunal's decision to list a preliminary hearing. However, the claimant appears not to have provided any meaningful further information about that (despite the order made by EJ Shastri-Hurst). I therefore concluded that

there was no merit in postponing this hearing to await the outcomes of the appeals.

15. I went on to consider whether, even if the hearing was not to be postponed to await the outcomes of the appeals and/or to allow the claimant to come to this country, it would be appropriate, given the claimant's difficulty joining the hearing, to postpone the hearing for a short period of time to allow the claimant another chance to join remotely. I accept that she made genuine efforts to join by CVP, but that was the second time she had been unable to do so, over the course of the hours allotted to the hearings. In my judgment it was disproportionate to take up more Tribunal time and indeed to put the respondent to further inconvenience by postponing the case again. The claimant would be able to participate in part, having emailed lengthy submissions to the Tribunal on jurisdiction, both on whether I should determine the point that day and the more substantive point or whether the Tribunal has jurisdiction, including the citation of various authorities (albeit provided on the morning of the hearing despite EJ Shastri-Hurst's order to provide the information before that). The email the claimant sent at 11:28 begins with her wondering how much more she should try this (i.e. trying to connect) and I can understand why she wondered that, given that that every effort she seems to have made so far to join the proceedings was unsuccessful. There appeared to me little prospect of the claimant being able to join a video hearing on the third attempt.

16. For all of the above reasons I refused the claimant's application to postpone the hearing. I should say that I also considered the point that without being in this country it would not be practicable for the claimant to give evidence orally. Whilst that argument might have been relevant at a final hearing, the points I was to decide could properly be decided largely on the basis of the pleadings (taking the claimant's case at its highest) and submissions (which the claimant had been able to supply in writing), although see below regarding the evidence of Mr Kulkarni on forum. Oral evidence from the claimant (whether in person or over CVP subject to the rules on giving evidence from overseas) could not in my judgment have assisted me on the points to be decided.

JURISDICTION, STRIKE-OUT and STAY

Law on strike-out

17. So far as is relevant, rule 37 provides that the Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospects of success. In *Cox* v *Adecco* [2021] ICR 1307 the EAT set out the applicable law (from para 21 and summarised at para 28). In a discrimination claim (i.e. such as here) striking out is a draconian step only to be taken in the clearest of cases (or in the most obvious cases, as the House of Lords phrased it in *Anyanwu and anor* v *South Bank Student Union and anor* 2001 ICR 391, because discrimination claims are generally fact-sensitive, and it is a matter of public interest that they should be fully examined to make a proper determination). Where core issues of fact turn to any extent on oral evidence they should not be decided without hearing evidence. The claimant's case should be taken at its highest but may be struck out if conclusively disproved by, or totally and inexplicably inconsistent with, undisputed documents. But there is no absolute bar on

striking out such claims – the time and resources of the Employment Tribunal ought not be taken up by having to hear evidence in cases that are bound to fail.

18. In her 11:28 email the claimant referred to a number of authorities which establish that the power to strike out should not be exercised where there are real factual issues to be decided; where there is a jurisdictional challenge it should be decided by reference to the pleaded claim rather than as a mini trial.

Law on international and territorial jurisdiction

19. In *Simpson* v *Intralinks Ltd* 2012 ICR 1343, EAT, Mr Justice Langstaff (then President of the EAT) emphasised that a clear distinction must be made between three matters:
    (a) the place (forum) where a case is properly determined ("forum or international jurisdiction");
    (b) the applicable law relating to a contract or tort, and;
    (c) the territorial scope/reach of a domestic statute ("territorial jurisdiction").

    Law: Territorial Jurisdiction (ERA and EqA complaints)

19. For all complaints apart from breach of contract, the only issue is (c). It is not the respondent's case that as a matter of law the Employment Tribunal lacks jurisdiction to hear the case on account of the international element of the claim. (I was not, for example, asked to consider s 15C Civil Jurisdiction and Judgments Act 1982 or general principles of private international law as regards these complaints.) Rather, the respondent says, the particular statutory employment rights on which the claimant seeks to rely do not apply to her on account of the international element – ERA and EqA do not have the territorial scope to cover the claimant. (Or, more precisely, the respondent argues that the claim has no reasonable prospect of success since there was no reasonable prospect that the Tribunal could find that ERA and EqA do have such territorial scope.)

20. *Lawson* v *Serco Ltd* [2006] UKHL 3 was a case where the House of Lords considered the territorial scope of ERA, and in particular the right to not to be unfairly dismissed. Their Lordships held that the right generally applies to an employee who is working in Great Britain at time of their dismissal. What was contemplated at the time the contract was made and the prior history may be relevant to whether the employee was really working in Great Britain or whether he or she is merely on a casual visit. Ordinarily, the question should simply be was the employee working in Great Britain at the time of their dismissal. The case goes on to say that in the case of peripatetic workers such as airline pilots, the employee's place of employment would be their base; the terms of the contract would not always be much help in deciding where the base was – what has to be looked at is the conduct of the parties and the way they have been operating the contract.

21. Mr Ogg for the respondent helpfully referred me to a number of other authorities which deal with the application of the general test set out in the *Lawson* case. I now summarise the three cases which I found to be of particular assistance. In *Duncombe and others* v *Secretary of State for Children, Schools and*

Families [2011] UKSC 36 the Supreme Court held that the right not to be unfairly dismissed can, exceptionally, cover employees who are working or based abroad, the test being whether their employment has much stronger connections with Britain and British employment law than with any other country. (One particular factor in the case was that the employer was not merely based in Britian but was in fact the government of the United Kingdom; other factors which likewise could not be said to apply to this claimant's case were also found to be significant.) In *Ravat* v *Halliburton Manufacturing and Services Ltd* [2012] UKSC 1 the Supreme Court noted that it will always be a question of fact and degree as to whether the connection between Great Britain the employment relationship is sufficiently strong to overcome the general rule that the place of employment is decisive. In *Bates Van Winkelhof* v *Clyde & Co LLP* [2012] EWCA Civ 1207, a Court of Appeal case, Lord Hope said that in the situation where an employee works for part of the time in Great Britain it is not necessary (as it would be where the employee never works in Great Britian) to identify factors which are sufficiently powerful to displace the territorial pull of the place of work. All that is required is that the Tribunal should satisfy itself that the connection is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the Tribunal to deal with the claimant.

22. One other authority of relevance here is *R (on the application of Hottak)* v *Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438, which establishes that the principles that I have just set out apply as much to a case under EqA as they do to a case under ERA.

23. In her 11:28 email the claimant also referred to *British Airways Plc* v *Mak & Ors* [2011] EWCA Civ 184. This was a decision under the now-repealed Race Relations Act 1976, to the effect that that Act applied as long as the claimants' work was done at least partly in Great Britain. This case was of no assistance to me since it was about whether that Act's explicit provisions on territorial jurisdiction were satisfied – in contract, EqA and ERA have no such provisions.

Forum jurisdiction (contract claim)

24. As regards the breach of contract complaint, the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 confers jurisdiction upon the Tribunal to hear disputes about breaches of employment contracts, in certain circumstances, where a court in England and Wales would have jurisdiction to hear the claim. The respondent did not rely upon (c) at para 18 above – i.e. it did not suggest that the Order's territorial scope could not extend to cover this case. The common law, the respondent accepted, provided that a court has jurisdiction where a respondent can be served with proceedings, as was eventually the case here as the respondent does some business in this country. Rather, the respondent relied on (a), arguing that the Employment Tribunal was not the appropriate forum for the dispute and that the contract complaint should be stayed on the ground of *forum non conveniens*. That the Employment tribunal has the power to order a stay on such grounds was made clear in *Crofts* v *Cathay Pacific Airways Ltd* [2005] ICR 1436, where Lord Phillips said, at para 50: "The principles governing the stay of proceedings on the ground of *forum non conveniens* were laid down by the House of Lords in *Spiliada Maritime Corpn* v *Sansulex Ltd* [1987] AC 460. In essence the task of the court is to consider whether England or the foreign

jurisdiction is clearly the more appropriate forum". In *Spiliada* it was said that the task of the court is to identify in which forum the case could most suitably be tried for the interests of all the parties and the ends of justice. Relevant factors included the advantages of efficiency, expedition and economy bringing the action in this country.

Facts and background

25. For the purposes of the issue as to territorial jurisdiction, I take the claimant's case at its highest, considering only facts which it appears to me are not and would not be in dispute. Those facts are as follows. The claimant at all material times lived in India (and so far as I am aware has never been to this country). Any employee of the respondent who might have any involvement in this case is also based in India. The respondent airline is an Indian company and all the events which are relied upon in the claim form took place in India. The claimant applied to be a member of cabin crew for the respondent. She passed some assessments and was made an offer of a job and told that she could start training. In essence her case is that the offer was withdrawn unfairly and for reasons to do with whistleblowing and/or discrimination and also that there was a breach of contract on the respondent's part. The claimant then claims that she suffered various detriments and/or discrimination. The only link to this country on the claimant's own pleaded case was that she was told that once she started flying she would spend three days in India and four in London (I take this to mean per week). There was no suggestion that she was paid in British currency and indeed the contract, which was part of the hearing bundle, shows that she was to be paid in rupees. There is no suggestion that the parties any point stated any intention to be bound by English law or by the English courts, although I was told the written contract itself is silent on the point.

26. For the purposes of its application to stay the contract claim, the respondent relied also upon written evidence from Mr Alhad Narasinh Kulkarni, managing counsel at Air India. As Mr Kulkarni was in India it was not proposed that he should give oral evidence. Despite the evidence not being tested in cross-examination, I did consider it fair to take account of it, even in the claimant's absence, to the following extent. I did not need to consider what Mr Kularni had to say about the facts of the case given that I was taking the claimant's case at its highest, beyond where he referred to documentary evidence such as the employment contract which would clearly not be in dispute. The only point which did assist me was Mr Kulkarni's assertion that the Indian courts would have jurisdiction over the contract complaint, based upon his summary of Indian law, which the claimant had not taken issue with in writing, despite having the opportunity to do so. On the undisputed facts of this case it was clear to me that there was not, and could not, be any issue with Mr Kulkarni's conclusion. His evidence established simply that the Indian courts would have jurisdiction; whether they would be the better forum would be a question for me.

Conclusions

Conclusions: Territorial Jurisdiction (ERA and EqA complaints)

27. For the purposes of my decision I assume that, aside from the issue as to the

international nature of the claim, the claim would otherwise have a reasonable prospect of success.

28. The claimant does not live in this country and the respondent is not a British company (though it does do business here). None of the events complained of took place in this country and the contract was not agreed in this country. The claimant was not working in this country at the time of her dismissal – in fact she never worked in this country. The only connection that this case has with this country is that the claimant might have worked in this country for part of the time had the respondent not terminated her engagement. Because she never did work here, I cannot look to what the parties' conduct was in operating the contract in considering where the claimant's base would have been. The most I can conclude is that there was a possibility that, had the claimant's employment continued, she would have been based in this country, though it does not seem to me to be a very strong possibility, given all the connections her employment had with India. But the claimant's employment did not continue – she was never based in this country. This is not a case which in my judgment should be considered to be an exception to the general rule in *Lawson.* Although there does not appear to me to be any clear authority on the point, in my judgment it is inconceivable that Parliament would have intended EqA and the ERA to have reach over a situation where the parties had formed an employment relationship in a foreign country and merely foresaw that the employee would at some future point work in this country. Until that point, the employment plainly had a stronger connection with Indian law than with British law – indeed it had no connection with the latter. Essentially, this is a case about a promise or a proposal made in another country that the claimant might have some work to do in this country in the future. It has the most minimal connection with British law and in fact the connection with British law was only ever potential. By far the stronger connection and in reality the only connection was with Indian law. On that basis, in my judgment the claim has no reasonable prospect of success – there is no prospect that a Tribunal would come to any conclusion other than that the territorial reach of EqA and ERA does not extend to the facts of this case. All complaints (with the exception of the contract claim) are therefore struck out.

Conclusions: Forum jurisdiction (contract claim)

29. On the contract claim, it is clear that both this Tribunal and the Indian courts have jurisdiction. The question is, which is the better forum? The Indian courts are clearly the more appropriate forum in my judgment. All the potential witnesses, including the claimant, are in India. It is not clear whether all those witnesses speak English, though that point alone would not be insurmountable. Even if the rules on remote evidence were to permit them to give evidence from India, the time difference would present further difficulties. If the rules did not permit remote evidence, the witnesses would have to be flown over at considerable expense (and it is unclear whether the claimant would herself be able to attend, for the reasons set out above). Given that the contract was formed in India, I accept the respondent's submission that it is likely right that the governing law for the purpose of the contract would be Indian law, which would mean that this Tribunal, if it heard the case, might need to hear expert evidence about Indian contract law. All those procedural difficulties weigh

heavily in favour of India being the more appropriate forum. But more fundamentally, this is a case about a contract formed in India, with little or no connection to this country. All the relevant events took place in India and that is where the dispute is best tried. I therefore order that the contract complaint is stayed indefinitely.

30. I would have come to that conclusion even if I had not already disposed of the other elements of this claim on the basis that this Tribunal did not have jurisdiction. But that earlier conclusion fortifies my later conclusion that the contractual dispute is better tried in India.

Employment Judge Dick

4 June 2024

JUDGMENT SENT TO THE PARTIES ON
6 June 2024

FOR THE TRIBUNAL OFFICE