Neutral Citation Number: [2024] EWHC 2957 (KB)

Case No: KB-2024-000702

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 November 2024

Before :

MASTER SULLIVAN

- -

Between :

Ms Sobara Simon-Hart

Claimant

- and -

Standard Chartered Bank

Defendant

- -
- -

Alexander Yean (Advocate) for the Claimant
Edward Kemp (instructed by Simmons & Simmons LLP) for the Defendant

Hearing date: 24 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER SULLIVAN

Master Sullivan:

1. Ms Simon-Hart was employed by Standard Chartered Bank ("SCB") in the Dubai International Financial Centre ("DIFC") from October 2014 to her dismissal on 31 October 2018. She brings a claim for breach of her contract of employment. SCB has applied for summary judgment and/or strike out of the claim.

2. I am grateful for both Mr Kemp and Mr Yean's careful and succinct submissions. I am particularly grateful to Mr Yean who was acting Pro Bono and who had been instructed relatively late in the day but had nonetheless narrowed the issues and enabled a focussed argument.

Background Facts

3. The Claimant was employed by an employment contract that was governed by DIFC Employment Law. At the time of the contract it was governed by the DIFC Employment Law in force at that time, the Employment Law Amendment Law DIFC No. 3 of 2012 ("the Previous Law"). The parties agreed that the employment contract is now governed by the DIFC Employment Law No.2 of 2019 ("DIFC Employment Law").

4. Ms Simon-Hart's case is that during her employment, she was subjected to sex, race and nationality discrimination, and then victimisation following complaints about the discrimination. Following the outcome of her complaint to SCB about her treatment, she asserts that in February 2018 she was diagnosed with insomnia, anxiety and depression which was work related. She returned to the office but was signed off work again from July 2018 until the termination of her employment contract on 31 October 2018. The Claimant alleges breaches of the employment contract in failing to provide treatment for her mental health deterioration. It is pleaded that failure to make reasonable adjustments and termination of her contract was in breach of the contract. It is also pleaded that there was wrongful dismissal when she was dismissed without notice with one month's payment in lieu of notice. There is a claim for unlawful deduction of wages and breach of fiduciary duties, including breach of a duty of mutual trust and confidence. That latter claim for breach of fiduciary duty is not pursued and it is agreed paragraphs 33 to 35(a) of the particulars of claim should be struck out.

5. The particulars of claim allege breaches of "express and implied terms of the Employment Contract (including but not limited to those implied under the relevant employment law …" in respect of her treatment whilst working for SCB under the contract and its termination.

6. SCB's position, in summary, is that there was no sex, race, or nationality discrimination. Ms Simon-Hart's complaints were properly investigated and there was no victimisation.

7. The contract was lawfully terminated in accordance with clause 14.1 of the employment contract by which SCB has a right to terminate the employment for excess sickness absence pursuant to the Previous Law. The Claimnt was paid in lieu of one month's notice in accordance with Clause 14.4 of the contract. The deduction of wages was lawful under clause 13.2 of the contract.

8. SCB's position is that the pleading discloses no reasonable cause of action. No express terms were breached, DIFC Employment Law does not allow for implication of terms into employment contracts and the rights under DIFC Employment Law are not justiciable in the High Court of England and Wales. In any event she suffered no loss as she was paid her contractual notice of a month's pay.

The law

9. The test under CPR 3.4(2)(a) is well known. I remind myself that cases which are suitable for striking out under that rule include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (*Harris v Bolt Burden* [2000] CPP Rep 70) and I should not be drawn into a mini trial (*Kasongo v CRBE Limited* [2023] EWHC 1464).

10. The test under CPR 24.3 for summary judgment is also well known and I bear in mind the oft cited principles set out in *Easyair Limited (trading as Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch*).*

11. I have been asked in this case to give permission for the parties to each rely on reports from experts on foreign law (DIFC law) and did so as such evidence reasonably required to resolve the proceedings (CPR 35.1). It is necessary in this case to have evidence in respect of DIFC law to understand the nature of the foreign law issue.

12. However, in accepting I should not conduct a mini trial, the Defendant does not ask me to resolve any disputes between the foreign law experts save insofar as the point is so clear and the opinion expressed by the other lawyer so wrong that the points can be decided summarily (*Edgeworth Capital (Luxembourg) S.A.R.L. v Glenn Maud* [2015] EWHC 2364 (Comm)). I am not, as a result, asked to resolve the arguments that have been raised in respect of prescription and limitation.

Submissions and discussion

13. SCB's application is to strike out of or for summary judgment on specific paragraphs of the particulars of claim. Those paragraphs set out particular causes of action such that if I grant SCB's application, Ms Simon-Hart's case in respect of that cause of action would be determined. The submissions were presented to me under three main headings, express terms, implied terms and the causes of action pleaded under paragraph 35(b) to (e) of the particulars of claim. I will deal with each in turn.

Express terms

14. SCB's position is that none of the express terms pleaded by Ms Simon-Hart support the allegation of breach of contract. Mr Yean's argument rightly focused on the express terms pleaded in paragraph 31 of the particulars of claim and in particular clause 14.5 of the contract. I will deal with that argument first. None of the arguments on the express terms of the contract turn on any point of foreign law.

15. Paragraph 31 of the particulars of claim pleads a wrongful dismissal claim. It is averred that there is no express term in the contract permitting payment in lieu of

notice and that the termination without notice and with one month's payment in lieu of notice breached clauses 14.4, 14.5 and 17.2 of the employment contract.

16. Clause 14.4 provides:

> "The Bank shall be entitled at its absolute discretion to terminate your employment lawfully without notice (or part thereof) by paying to you a sum equal to 100% of your basic salary plus other cash allowances which you receive monthly for the unexpired portion of your entitlement to notice less any appropriate deductions…"

17. Clause 14.5 provides:

> "If at any time you are unable to perform your duties properly because of ill health, accident or otherwise for a period or periods totalling at least six months in any twelve calendar months…then the Bank may at its absolute discretion terminate your Employment by giving not less than three months' written notice…"

18. I set out Clause 17.2 for completeness but it clearly does not take the matter any further:

> "Details of the Bank's discretionary sick pay arrangements are available on iConnect."

19. SCB submits that Ms Simon-Hart's employment was in fact terminated in accordance with clause 14.1 of the contract with payment in lieu of notice at the bank's absolute discretion and there was no breach. The bank did not exercise its discretion under 14.5. In addition, clause 14.5 does not provide any contractual right to the Claimant and the circumstances envisaged did not apply and therefore there cannot have been a breach.

20. The Defence pleads that SCB was entitled to terminate the Claimant's employment contract under clause 14.1, which preserved SCB's right to terminate the Claimant's employment for sickness absence pursuant to article 36 of the Previous Law.

21. Clause 14.1 provides:

> "The Bank is entitled to terminate your Employment with immediate effect and without notice or compensation for the reasons permitted in the [Previous Law]"

22. Article 36 of the Previous Law is under a heading "termination for excessive sick leave":

> "Where an employee takes more than an aggregate of sixty working days of sick leave in any 12 month period, the employer may terminate the employment immediately with written notice to the employee."

23. The argument advanced on behalf of Ms Simon-Hart at the hearing is that as there is an overlap between article 36 of the Previous Law, which gives the right to terminate on notice on an aggregate of 60 days sick in a 12 months period, and clause 14.5 of the contract, which only allows for termination if sickness is 6 months in any 12 (which is a longer period of sickness). Mr Yean submitted that it is arguable that clause 14.5 displaces the ability to rely on article 36 via clause 14.1. The reason for that can be found in article 10 of the Previous Law, which says nothing in the law prevents an employer form providing a contract term that is more favourable than those required by law. Clause 14.5 does just that. Article 54 of the DIFC Contract Law states that contract terms shall be interpreted so as to give effect to all of the terms rather than to deprive some of them of effect. It was submitted that it is arguable that the only way to give effect to the more generous provisions of clause 14.5 is to read down 14.1 to avoid inconsistency. Ms Simon-Hart had not had 6 months period off sick and was not paid 3 months notice so termination for sickness absence was in breach of contract.

24. In response, SCB's argument was that clause 14.5 is a clause available to SCB in particular circumstances, namely where an employee is unable to perform their duties properly due to ill health, accident or otherwise, for the relevant period. Clause 14.1 also entitles the bank to terminate for any of the reasons in the Previous Law including if there are 60 days sickness absence in 12 months. They are alternatives available to the Bank to exercise in their discretion in appropriate circumstances. There is no contractual right given to the employee in either clause.

25. In my judgment, SCB's submissions are correct. The clauses are not identical and provide for different discretion which can be applied in different circumstances. They may overlap but not so much that one removes the point of the other. One is for a discretion based purely on the number of days sick leave taken in a period, the other provides a discretion to terminate where an employee is unable to undertake their duties properly due to ill health, accident or otherwise. Those two may not be the same circumstances.

26. In respect of the other claims for breach of express terms, paragraphs 11, 16 and 22 of the particulars of claim have no real prospect of success. These paragraphs plead breaches of SCB's Group Conduct, Grievance and Speak Up policy. Clause 2 of the contract states "whilst reference is made to the Bank policies and Procedures, those are not contractual in effect unless otherwise expressly stated." The policies do not state that they are contractual.

27. Ms Simon-Hart also relies on clause 30 of the contract which provides "*It is a term of the agreement that you comply with the Group's Code of Conduct... and any other policies from time to time in force that are communicated to you*." That clause does not impose any obligation on SCB and therefore it cannot be said SCB has breached it.

28. The Claimant alleges breaches of clauses 17.3 and 18 in providing no treatment for the deterioration of her physical and mental health (paragraph 26 of the particulars of claim). Clause 17.3 provides that the employee might be entitled to consideration for benefits under the Bank's Health and Insurance programme if absent from duties for periods in excess of 6 months as a result of illness or injury. Entitlement to benefits is without prejudice to the Bank's right to terminate the employment. That clause does

not impose any obligation on SCB to provide details to access the Health and Insurance programme. It does not impose any obligation not to terminate employment whilst the employee is absent from their duties due to illness or injury.

29. Clause 18 makes provisions for an employee to be eligible to join an employee benefit plan and life insurance plan. There is no suggestion how this clause has been breached in the particulars of claim. There is no contractual obligation in this clause to provide any medical treatment. Paragraph 26 of the particulars of claim has no real prospect of success.

30. Paragraph 32 of the particulars of claim pleads that SCB was in breach of clause 13.2 of the contract in instructing that Ms Simon-Hart's bank account with SCB's UAE banking arm be blocked and all payments issued thereby withheld and applied against her loan with the UAE banking arm. Ms Simon-Hart's case is that clause 13.2 provides that SCB's DIFC branch is authorised to deduct remuneration at any time, not SCB's UAE subsidiary. Clause 13.2 authorises "the Bank" to make deductions on termination. "The Bank" is defined as SCB. There is no geographical or branch limit. There is no prospect of successfully arguing otherwise. Paragraph 32 of the particulars of claim is therefore struck out.

Implied terms

31. The particulars of claim contain a number of allegations of breach of implied terms. The implied terms pleaded are all sections of the DIFC Employment Law. The pleadings do not specify the basis on which it is said terms should be implied into the contract. It is the Defendant's submission that the DIFC Employment Law does not contain any provisions that imply terms into the contract and even if that is wrong, any rights given by DIFC law are only justiciable in the DIFC court. It is this argument to which the expert evidence on foreign law is relevant and I remind myself that I should not undertake a mini trial. Where there are valid disputes between experts, I must not determine them.

32. In respect of justiciability, it is submitted by SCB that DIFC Employment Law provides statutory rights to employees that are only enforceable in the DIFC Court so absent there terms being implied into the contract, there is no real prospect of success in seeking to rely on them in these proceedings.

33. Mr Yean submits that it is arguable that there are implied terms, not by the DIFC Employment Law itself but by other statutes or common law. First DIFC Contract Law provides that terms can be implied into contracts, and provides for particular implied terms. It is clear from DIFC case law that the *Braganza* duty to exercise a discretion given in a contract in good faith and for proper purposes can be implied as a term of a contract. The expert's view is that the DIFC Employment law can be implied into a contract and therefore there is a dispute on this issue in the expert evidence and so I should not strike out or give summary judgment.

34. I note that in Ms Simon-Hart's witness statement dated 20 October 2024, at paragraph 24, she states that she will seek permission to amend the particulars of claim to properly plead an overarching breach of duty of care as set out in paragraph 33 of the particulars of claim. In addition she seeks the Court's permission to amend the claim to include terms implied into the employment contract under UAE law for

(unspecified) actions which occurred outside the DIFC. No such amendments have been proposed, and I note that it is agreed that paragraph 33 of the claim should be struck out.

The foreign law experts

35. The Defendant relies on the report of Ben Brown, a solicitor of the courts of England and Wales who has been practicing in the UAE and advising on the laws of DIFC since 2014.

36. Ms Simon-Hart relies on the report of Mr Ameen Al Shariedeh who is a member of the Jordanian Bar Association and has been practicing law in the UAE since 2008 including in the DIFC.

37. The experts agree that the DIFC is a distinct legal jurisdiction with its own legal and regulatory framework and is exempt from UAE federal civil and commercial laws, but not other UAE laws (eg criminal). It is a common law and English language jurisdiction modelled on the English Commercial Court. Where DIFC law is silent on a particular issue, the DIFC courts may have regard to English Law, although it is not under any obligation to do so. Mr Al Shariedeh says that the ethos in practice is that DIFC statues are "backstopped" by English common law.

38. Mr Brown opines that there is no provision of the DIFC Employment Law that implies its terms into contract. He is of the opinion, based a on a decision of the DIFC Court of Appeal *Hana Al Herz v The Dubai International Financial Centre Authority* [2013] DIFC CA, that where there is a statutory scheme that regulates the relationship between parties (in this case the DIFC Employment Law), implied contractual terms should not be deployed to circumvent that regime. He relies in particular on paragraphs 67-70 of that judgment.

39. In respect of articles 43 and 44 of DIFC Employment Law, breaches are subject to liability to a fine or such other penalty as the DIFC court determines. Further in respect of general contraventions of the DIFC Employment Law, article 67 of the DIFC Employment Law provides that an employer who contravenes the law may be liable to a fine or such penalty as the court (that being the DIFC Court) determines. On that basis, the DIFC Court is the appropriate forum for disputes about breaches of the DIFC Employment Law. In respect of contravention of Part 9 of the Law, which are the provisions around discrimination, the DIFC court of fifrst instance is specified as the court.

40. Mr Al Shariedeh disagrees with Mr Brown that terms cannot be implied in to DIFC employment contracts and as to the ratio of *Al Herz*. He is of the view it decides that DIFC courts will not introduce implied terms such as a duty of good faith, fair dealing and reasonableness such as to justify the introduction of a claim for unfair dismissal in to DIFC law. He distinguishes Ms Simon-Hart's case on the basis she relies on the doctrine of wrongful termination, a cause of action which is available under DIFC law. He also later states in slightly different language that there is no implied term of mutual trust and confidence under DIFC law to fetter the employers right to dismiss (paragraph 42).

41. He goes on to state sources of implied terms under DIFC laws, including DIFC Contract Law and DIFC Implied Terms in Contracts and Unfair Terms Law. He goes on, under a heading of "implied terms at common law", to opine that in paragraph 67, the *Al Herz* decision highlighted that the employment relationship was regulated by DIFC Employment law and the minimum standard and that law could not be contracted out of. He states at paragraph 36 of his report:

> "It is therefore my opinion that these statutory standards function as implied terms governing DIFC contracts of employment".

42. He goes on in the same section to refer to three cases. Two cases discuss the application of the *Braganza* duty in contracts; that employer's contractual discretion must be applied in a rational way, in good faith and for proper purpose. The third case refers to the DIFC Contract Law in the context of a DIFC Employment Law case. His summary is as follows:

> "The primary law governing employment is the DIFC Employment Law, but elements of the DIFC Contract Law, Law of Obligations, Implied Terms and Unfair Terms Law and UAE Federal Law apply to ensure good faith, fairness, care and proper handling of employment contracts. Further the DIFC courts themselves have indicted a willingness to apply such principles into the reading of employment contracts, Consequently it is my opinion that Mr Brown errs in Fact and Law when he states in paragraph 6.7 of his expert report the DIFC law does not imply terms into an employees employment contract. "

43. Mr Al Shariedeh does not expressly deal with Mr Brown's point that the DIFC Employment Law itself does not itself imply terms into an employment contract. That assertion must be correct and I assume that is why Mr Al Shariedeh does not express disagreement.

44. In respect of articles 43 and 44 of the DIFC Employment Law, which establish that employers are under a duty to prevent discrimination, harassment and ensure a safe working environment, he agrees they do not directly confer any remedies to the Claimant. However he says it should be read in light of article 109 of the DIFC Contract Law which confers on the Claimant a right to damages in conjunction with any other remedies applicable in the case of breach of contract.

45. Mr Al Shariedeh also agrees with Mr Brown that the DIFC courts are the appropriate forum for determination of contraventions of DIFC Employment Law but says Mr Brown fails to consider how choice of law and jurisdiction may be considered to underpin the existence of the DIFC. None of what he goes on to say appears to apply to this case or the point made by Mr Brown. It refers to the parties ability to agree on and agree to amend the forum for resolving any contractual dispute. That is not relevant if the articles are not contractual terms.

46. Mr Al Shariedeh also relies throughout his report on proposed amendments to DIFC law which were set out in a consultation paper dated May 2024. I have not set out

those arguments as they are not current law. They are under consultation. They are therefore in my judgment not relevant to the issues before me.

47. I consider that the following relevant matters are not controversial between the experts:

i) The DIFC Employment Law does not itself imply terms into an employment contract.

ii) The DIFC Employment Law sets minimum standards that can not be contracted out of.

iii) Articles 43 and 44 do not directly confer any right to remedies in these proceedings.

Conclusions on the implied terms arguments

48. The Defendant's case is simply that Mr Al Shariedeh has not identified anywhere in his report any cases or authorities which support the proposition that DIFC Employment Law can be implied into an employment contract. Nor does he identify any particular provision of other statutes which imply those terms into the contract. This is a case where Mr Brown is clearly right and Mr Al Shariedeh clearly wrong.

49. It seems to me there are three distinct parts of the claim which I have to consider. The first is any implied terms in respect of termination of the claim. The second is implied terms in relation to the contractual relationship between the parties whilst the contract was continuing and thirdly the wrongful dismissal claim. The first and third are properly dealt with together.

50. I remind myself that this is an application for strike out and/or summary judgment and so I must not conduct a mini trial but only give summary judgment or strike out if one expert is plainly right and the other plainly wrong. As there is a dispute as to the ratio of *Al Herz,* I have looked at the relevant passages to see if one expert is plainly right or the other plainly wrong in their opinion of what it says. I note the quoted paragraph 67 in Mr Brown's report which states:

> "[The unamended DIFC Employment law] sets out at Article 3 all the statutory rights and protections of the employee, and at Article 8 the minimum standard and requirements of employment which the parties cannot contract out of. In substance, then, the Employment Law has a regulatory content and is the only law that governs the employee who works for any entity having a place of business in the DIFC. Therefore there is no basis to adopt any other law than the DIFC Employment Law to determine the rights of the Appellant, and her contractual relationship with the respondent is regulated by the DIFC Employment Law."

51. At Paragraph 70:

> "DCJ Colman was correct to rule that any introduction of implied terms such as the duty of good faith, confidentiality,

> fair dealing and reasonableness, so as to justify the claim of unfair dismissal, would be problematic as such terms are difficult to define and uncertain in terms of application, and that, if any such principle of unfair dismissal is to be introduced, it should therefore be by legislation and not by judicial innovation. "

52. Under the heading "Invalid termination because of implied terms" the judgment sets out the argument made that terms fettering the right to terminate were to be implied into the contract including that the parties would act in good faith and deal fairly and act reasonably. At paragraph 114 the court held:

> "The trial judge adverted to the difficulties of definition and uncertain application of implied terms of this nature. One aspect of this is that the present question is one of termination of employment, not performance of employment obligations… Even as an incident of the employment relationship, an implied term must be consistent with, and yields to, the express terms of the employment contract. …The Employment Law comprehensively regulated contracts of employment in the DIFC, but it had not been thought appropriate to regulate a contractual power of termination by notions of mutual trust and confidence, good faith or reasonableness. There is no legislative basis in the DIFC for fettering such a power, rather, the indication is that it should not be fettered. "

53. Paragraph 121 specifically deals with articles of the DIFC Contract Law and Implied Terms in Contracts and Unfair Terms Law in this context. It is stated that:

> "articles 56 and 57 (of the Contract Law) envisage that implied obligations can arise, but say nothing about the implication and application of terms in particular contracts and particular situations."

54. It was further stated that reliance in *Al Herz* on these articles was misplaced. Insofar as Mr Al Shariedeh opines that there can be any implied terms of good faith and reasonableness in respect of termination of the contract, he is plainly wrong. *Al Herz* clearly does not simply decide that there is no claim for unfair dismissal in DIFC law. There is no implied term as to fairness or good faith or mutual trust and confidence which would exist under DIFC law to fetter the employers right to dismiss. That applies just as much to a claim for wrongful termination as to unfair dismissal. I must therefore give summary judgment on that point which covers paragraphs 29 and 31 of the particulars of claim which are claims arising out of termination of the contract.

55. In respect of the claims arising out of breach of contract during the performance of the contract, which are the claims for sex, race and nationality discrimination and victimisation, Mr Al-Shariedeh does not identify how those terms are to be implied into the contract. He does not identify which of the other DIFC Laws imply the DIFC Employment Law into the contract. It is not sufficient to say that DIFC Contract Law says implied obligations can arise from good faith or reasonableness. What he does not do is opine on whether any of those terms are implied into this particular contract,

and if so how that then would provide a hook for the provisions of the DIFC Employment Law to be implied into the contract. In the absence of a pleading or explanation of how such terms are implied and how they have been breached I cannot say there is a real prospect of success in such a claim.

56. The statement in paragraph 36 of Mr Al Shariedeh's report under the heading terms implied by common law; "*it is therefore my opinion that these statutory standard function as implied terms governing DIFC contract of Employment*" is a bare assertion with no justification or explanation. It is not supported by *Al Herz* and is inconsistent with it. The cases he cites are not on point.

57. The only parts of the DIFC Employment Law that Mr Al Shariedeh explicitly deals with are articles 43 and 44. He accepts they do not directly confer any right to remedies. He suggests that article 109 of the DIFC Contract Law gives a right to damages. That article is not pleaded in the particulars of claim. It is not clear how he says article 109 would imply a term into the contract that articles 43 and 44 are contractual rights. The pleading in respect of the terms implied as to ongoing performance of the contract are struck out as having no real prospect of success.

58. SCB's secondary argument, if there is any right to rely on the DIFC Employment Law, is that the rights are only justiciable in the DIFC Court. In respect of articles 43 and 44 and 67 (which is a provision for adjudication of discrimination claims which is similar to those claims under the Equality Act 2010), I accept that the court with proper jurisdiction to hear them is the DIFC Court and not the High Court. The discussion in Mr Al Shariedeh's report of jurisdiction does not address this point directly and I cannot see that it is addressed at all.

Paragraphs 35(b) to (e)

59. SCB's case is that these paragraphs do not raise actionable claims. They are either simple assertion to set out injuries or losses. I agree. They do not plead the basic requirements of any cause of action and therefore are struck out.

60. In conclusion, the various paragraphs pleading the causes of action as above are struck out or summary judgment is given as appropriate.