EMPLOYMENT TRIBUNALS

Claimant: Ms R Mehta And **1st Respondent:** KRF Services (UK) Ltd
2nd Respondent: Mr C Poos
3rd Respondent: Ms B Collins

Heard by: CVP **On**: 3 March 2021

Before: Employment Judge Nicolle

Representation:

Claimant: Ms V Brown of Counsel
1st and 2nd Respondents: Mr R Lieper QC of Counsel
3rd Respondent: Mr M Lee of Counsel

JUDGMENT

1. The Tribunal has jurisdiction to hear the Claimant's complaint against the 2nd Respondent.

2. The Claimant's application for deposit orders against the 1st and 2nd Respondents fail and are dismissed.

3. The 3rd Respondent's application for a strike out of the claim against her succeeds.

REASONS

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. No members of the public attended the hearing.

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

6. There was an agreed bundle comprising of 202 pages. The Claimant provided a witness statement but did not give evidence. Counsel for the Claimant, 2nd Respondent and 3rd Respondent provided skeleton arguments which I read in advance of the hearing. A case law authorities bundle comprising of 557 pages was extensively referred to by Counsel.

The issues

7. The issues which to be determined at the Open Preliminary Hearing are as agreed and set out in my Case Management Order dated 7 January 2021 and comprise:

(a) Whether the Tribunal has jurisdiction to consider the claim against the 2nd Respondent on the basis that he was based in Luxembourg. The Claimant argues that the claim against the 2nd Respondent was validly presented in accordance with the Rule 8 (2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules). The 2nd Respondent whilst acknowledging that the claim was validly presented contends that the Tribunal does not have jurisdiction to consider a claim under the Equality Act 2010 (the EQA).

(b) Whether the claim against the 3rd Respondent should be struck out under Rule 37 or subject to the payment of a deposit under Rule 39.

(c) Whether the defence of "international jurisdiction" relied on by the 2nd Respondent should be subject to the payment of a deposit under Rule 39.

(d) Whether the 1st Respondent's refusal to acknowledge that the 2nd Respondent said to the 3rd Respondent that "construction is a man's world" should be subject to payment of a deposit under Rule 39.

8. It is not necessary for me to set out the substantive issues between the parties which in any event are as set out in s.8 of my Case Management Order dated 7 January 2021.

Agreed set of facts

9. The parties produced an agreed set of facts in relation to the international jurisdiction issue which is set out below.

10. The Claimant was employed by KRF Services (UK) Ltd ("KRF UK"), a company registered in the UK.

11. KRF UK forms part of a group of companies owned by an offshore trust settled by Mr Viatcheslav Moshe Kantor ("Mr Kantor") for the benefit of him and his family. The group of companies ultimately owned by the offshore

trust together form the private family office of Mr Kantor and his family (together the "Group").

12. The sole shareholder of KRF UK at all material times was KRF Services (Luxembourg) SAS ("KRF Luxembourg"), a company registered in Luxembourg. The sole director of KRF Luxembourg at the material times was Anja Steffen, Head of HR for the Group.

13. Rotco SA ("Rotco"), which is registered in Luxembourg, is part of the Group. The directors of Rotco SA at the material times were the 2nd Respondent, the 3rd Respondent and Alain Descamps, the CFO of the Group.

14. **2nd Respondent:**

(a) was at all material times the CEO of the Group;
(b) was at all material times an employee of Rotco (a company registered in Luxembourg);
(c) was not an employee of KRF UK;
(d) was at all material times a national of Luxembourg;
(e) lived at his family home in Luxembourg during the Claimant's employment;
(f) was not in the UK when the Claimant was informed that her employment would terminate.

15. **3rd Respondent:**

(a) was at all material times Head of Legal of the Group.
(b) was appointed a director of KRF UK on 2 August 2019. From 9 August 2019 to 18 May 2020 R3 was the sole director of KRF UK.

16. The Claimant reported to the 3rd Respondent. The 3rd Respondent reported to the 2nd Respondent. The Claimant did not report to the 2nd Respondent.

The Claimant:

17. The Claimant had a written employment contract with KRF UK dated 22 November 2018 (the Employment Contract).

(a) The Employment Contract states that the Claimant's usual place of work is an address in London.

(b) Clause 21.1 of the Employment Contract states that:

"The terms in this letter and shall be governed by and construed in accordance with the law of England and Wales. Unless any alternative dispute resolution procedure is agreed between the parties, the parties agree to submit to the exclusive jurisdiction of the Courts of England and Wales in respect of any dispute which arises out of or under this Agreement."

18. The project at 47-49 Winnington Road from which the Claimant was removed (the Project) relates to a property in England.

(a) the Claimant is a British national;
(b) was recruited in England;
(c) lived in England throughout her employment;
(d) is and was throughout her employment resident solely in the UK for tax purposes;
(e) worked wholly in England, save for a small number of trips to Luxembourg which the parties agree are not material to the issue of jurisdiction;
(f) was in England when decisions were taken to remove her from the Project and to terminate her employment; and
(g) was in England when she was informed that she was removed from the Project and that her employment would terminate.

20. As part of the Claimant's recruitment process, in November 2018, she met the 2nd Respondent in London to discuss the job being offered and her career aspirations.

21. The 2nd Respondent travelled to England for business reasons.

22. The 2nd Respondent was in England for the week commencing 3 February 2020 for work reasons.

23. The 2nd Respondent had meetings related to the Project in England on 6 and/or 7 February 2020.

Case History

24. The Claimant was employed by the Respondent as a lawyer from 14 January 2019 until dismissal with effect on 1 March 2020. By a claim form presented on 11 July 2020 she brought complaints of direct sex and race discrimination and for a failure by the 1st Respondent to comply with s1(4)(k) and s2(1) of the Employment Rights Act 1996 (the ERA).

25. The 2nd Respondent filed a short form response denying that the Tribunal has jurisdiction to hear and determine a claim against him.

26. The 3rd Respondent initially filed a relatively short form response denying that the Tribunal had jurisdiction to hear a complaint against her but subsequently filed a more detailed response. It is significant that in this response the 3rd Respondent was broadly supportive of the Claimant's case. She made the following points:

- At paragraph 13 that she had reported to the Claimant that the 2nd Respondent had said to her that "construction is a man's world".

- At 26.3 that the 2nd Respondent had said that he needed someone to take with him to property meetings, that he could not see himself taking the Claimant with him, and that in any case, everyone knew that "construction is a man's world".

27. On 12 December 2020, the Claimant's solicitors made an application for deposit orders in respect of:

- The 1st Respondent's denial at paragraph 19 of its Grounds of Resistance that the 2nd Respondent did not consider Mr Paillardon's gender to be relevant and, specifically, that the 2nd Respondent did not refer to the construction/property industry as a "man's world".

- The 2nd Respondent's denial that the Tribunal has jurisdiction to hear and determine a claim against him.

Findings of Fact

28. In these findings of fact quotations included from a document in the bundle have been changed for consistency to refer to the parties as the Claimant, 2nd Respondent and 3rd Respondent.

Territorial jurisdiction

29. Given that there is an agreed set of facts for the territorial jurisdiction issue it is not necessary for me to set these out and make findings of fact. I do, however, need to set out findings of fact which are material to the other issues I need to determine.

Organisational Structure

30. There was a dispute between the Claimant and the 1st Respondent regarding the correct organigram. The 1st Respondent having produced a document at page 132 in the bundle which shows KRF UK being a wholly and subsidiary of KRF Luxembourg which in turn is a 100% owned subsidiary of the Family Office Trust.

31. The Claimant produced an alternative handwritten organigram at Appendix 1 to her witness statement. However, given that this also showed KRF UK being a wholly and subsidiary of KRF Luxembourg, which in turn is a wholly and subsidiary of KRB PTC (which is also the Family Office Trust) it did not in my view constitute a material distinction. The corporate relationship is therefore a commonly established position between the parties and accepted by the Tribunal.

Meeting on 13 February 2020

32. The Claimant attended a meeting with the 3rd Respondent on 13 February 2020 at the 1st Respondent's office at 53 Davies Street in London. The Claimant produced a handwritten note of that meeting which appears at pages 89-90 in the bundle. She says that this was produced within a week of the meeting. At paragraph 7 it includes a reference to "a white man's world". The word "white" having been inserted. A typed transcript of this note was produced, and the relevant paragraph is 7 which reads:

> "The 2nd Respondent said that irrespective of that, he is the head of this family office and this is his decision – there is nothing anyone can do about that. Ultimately, the construction/property is a white man's world – TP is a man, and the Claimant is not".

33. The Tribunal was referred to an exchange of WhatsApp messages between the Claimant and the 2nd Respondent on 20 February 2020. This included the Claimant saying:

> "I understand why the 2nd Respondent says that construction is a man's world, but it is still hard for me knowing I was good at my job".

Ms Brown says that the 3rd Respondent's failure to correct this comment indicates that it was impliedly accepted as having been made.

The position of the 3rd Respondent

34. The 3rd Respondent's employment with Rotco SA was terminated largely because of the perception that she had contradicted the decision of the 2nd Respondent that the Claimant's employment should be terminated on the grounds of redundancy. The 3rd Respondent was sent a 10-page letter dated 19 June 2019. This included the following:

- You further reiterated to the 2nd Respondent that in your opinion, it was not a good decision to terminate the Claimant's employment.

- During your discussions with the Claimant, you did not properly support the decision of the 2nd Respondent, but instead you systematically and vehemently criticised it, as well as the arguments of the 2nd Respondent.

- You clearly undermined the 2nd Respondent's authority, which is unacceptable.

- It is even more unacceptable given that you incorrectly reported to the Claimant certain elements, which are false, since the 2nd Respondent firmly denies saying at any point during this meeting (or on any other occasion) that the construction/real estate business was a "man's world", let alone that it was a "white man's world".

- This attitude is a form of insubordination. Even though you finally, and reluctantly, complied with the decision of the 2nd Respondent and terminated the Claimant's employment contract, you vehemently questioned this decision in front of the employee concerned.

35. In a letter dated 17 July 2020 from lawyers acting for the 3rd Respondent the following paragraph said:

> "In not one meeting with the Claimant, did the 3rd Respondent tell her that the 2nd Respondent "just didn't want her around", or that "it's a white man's world", or that the Claimant is an "Indian woman".

The Law

Territorial jurisdiction in relation to the claim against the 2nd Respondent

General position

36. It is for the Claimant to show that the Tribunal has territorial jurisdiction, not for the 2nd Respondent to show that it does not.

37. I have confined sections quoted from judgements to what I consider relevant.

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

38. The applicable test for a tribunal having territorial jurisdiction is the same under the EQA to that which applies in the case law for unfair dismissal claims under the ERA. As much of the relevant case law concerns the jurisdiction of tribunals to hear complaints of unfair dismissal under the ERA many of the authorities referred to involve claims under the ERA, rather than the EQA, but the principles are equally applicable.

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

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

40. 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.

Territorial Scope

41. I was referred to paragraph 10.70 of the Equality and Human Rights Commission Code of Practice on Employment (2011) which provides:

The employment provisions in the EQA form part of the law of England. The Act leaves it to employment tribunals to determine whether these provisions apply in the circumstances being considered, in line with domestic and European case law. This requires that protection be afforded when then is a sufficiently close link between the employment relationship and Great Britain.

Lawson v Serco

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

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

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

43. In Ravat v Halliburton Manufacturing and Services Ltd 2012 ICR 389, SC the Supreme Court said that the resolution of territorial jurisdiction will depend on a careful analysis of the facts of each case, rather than deciding whether a given employee fits within categories created by previous case law.

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

European authorities

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

> In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

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

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

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

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

49. Also, in Wallis and the judgment of Mummery LJ at paragraph 3:

> "The country in which the contract of employment was made, or the alleged unfair dismissal or unlawful discrimination took place are not connecting factors affecting the employment tribunal's jurisdiction".

51. Mummery LJ, applying Lawson, as the Claimant's base was outside of Great Britain, it was necessary to consider the strength of the connection of the employment relationship to Great Britain this involved the following:

(a) under the general rule the employer's basis is the decisive factor; and
(b) that where the act took place does not affect jurisdiction.

52. I was referred extensively to the decision in Hottak to include the following:

In paragraph 47:

> "To impute Parliament an intention to engraft on to that test an unidentified qualification to the effect that a more generous standard is to be applied when the relevant inquiry is the availability of discrimination provisions in part 5 of the EQA is a course I would regard as artificial, unjustified and unwise. I would decline to do it".

In paragraph 48:

> "In my view the principles applicable to claims for unfair dismissal by employees engaged abroad, as explained in the authorities I have referred to, provide the relevant guidance".

In paragraph 56:

> "It is also a question of fact and agree as to whether the connection with Great Britain and British employment law is sufficiently strong to overcome the general rule that the place of employment is decisive".

53. I was referred to Crofts v Veta Ltd [2005] ICR 1436. Mr Crofts was based at Heathrow, which enabled him to live in the United Kingdom. He was dismissed by Veta, a Hong Kong company. It was held that employees of a foreign airline can be based in Great Britain and that this was the situation of Mr Crofts.

54. I was also referred to extensively to Bamieh v Foreign and Commonwealth Office and Others [2019] EWCA Civ 803. The Court of Appeal rejected the argument that it was sufficient that there was a common employer for the claimant and the respondent co-worker. Gross LJ considered that the correct point of focus lay in the factual reality of the relationship. On the facts it was decided that the whistleblowing provisions did not have extra territorial application.

At paragraph 67 Gross LJ said:

> "While it is necessary for the claimant and the co-workers to have a common employer to pounds a claim under s47B(1A) of the ERA, the fact that there is a common employer is plainly not sufficient to determine that s47(B)(1A) applies extraterritorially to the relationship between them so as to confer jurisdiction on the employment tribunal to entertain the claim under s48(1A)".

At paragraph 68:

> "Instead, given the duality in a secondment, the key to the correct point of focus lies in the factual reality of the relationships with which they are concerned".

At paragraph 80 he said:

> "In these other areas (referring to discrimination and sexual harassment claims) there is a far greater international consensus then there is in respect of whistleblowing. He went on to say:
>
> "Contrary, with respect, Hottak cannot be read as authority equating the territorial sphere of application of Part 5 of the EQA with the ERA whistleblowing protection provisions".

The effect of Hottak is that the EQA does not have wider territorial extent than the ERA. The remarks of Gross LJ on the EQA were, however, obiter.

55. Ms Brown argues that from reading Lawson and Bamieh together, that where a claimant is employed in Great Britain, they are protected by the EQA, regardless of the place that the employer is based or the place of employment of the individual discriminator.

Deposit Orders

56. Under Rule 39 a tribunal can make that the continuation of a claim, or part of a claim, conditional on the payment of a deposit not exceeding £1,000 where the tribunal considers that it has little reasonable prospect of success.

Strike Out

The Relevant Law

57. I reminded myself of the well-established principles in relation to strike out under Rule 37(1) on the basis that a case has no reasonable prospect of success. Mechkarov v Citibank NA [2016] ICR 1121 is authority for it should only being in the clearest case that a discrimination case should be struck out and that a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

58. Anyanwu v South Bank Students' Union [2001) IRLR305, HL, per Lord Steyn at para 24, to the effect that it should be only in the most obvious and plainest cases that discrimination claims should be struck out and that such cases are generally fact sensitive.

59. Tribunals should be reluctant to strike claims out other than in the clearest cases and as set out in Citibank a claimant's case must ordinarily be taken at its highest.

60. Mr Lee says that the EAT has emphasised that tribunals are not restrained from striking out hopeless cases simply because there are unresolved factual issues within them: see Patel v Lloyds Pharmacy Ltd UK EAT/0418/12 per Mitting J at paragraphs 18-21. As Mitting J put it: "In a case that otherwise has no reasonable prospect of success, it cannot be right to allow it to proceed simply on the basis that something may turn up".

Likewise, in ABN Amro v Hogben UK EAT/0266/09, the EAT held that a tribunal erred by failing to strike out an otherwise implausible discrimination claim on the basis that something might emerge during a full hearing: see per Underhill J at paragraphs 13-16.

The Law relating to the application made by the 3rd Respondent

61. The Claimant claims against the 2nd Respondent pursuant to s111 of the EQA in that he instructed caused or induced the 3rd Respondent to carry out actions resulting in the dismissal of the Claimant.

62. The Claimant claims that the 3rd Respondent breached s112 of the EQA by knowingly helping the 2nd Respondent to carry out the actions of removing the Claimant from the Project and then dismissing her on the grounds of redundancy.

63. I was referred to extensive case law regarding the application of s111 and s112 of the EQA. In Hallam and another v Avery and another [2001] UKHL/15 I was referred, interalia, to paragraph 18 of the judgment of Lord Millett and in particular:

> "The man who helps another to make up his mind does not thereby and without more help the other to do that which he decides to do. He may advise, encourage, incite or induce him to do the act; but he does not aid him to do it. Aiding requires a much

closer involvement in the actual act of the principal than do either encouraging or inducing on the one hand or causing or procuring on the other".

64. I was referred to the judgement of Underhill J in Amnesty International v Ahmed [2009] ICR and at paragraph 38 as follows:

> "In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The ground of his action being inherent in the act itself, no further enquiry is needed. It follows that, as the majority in James v Eastleigh Borough Council decided, a respondent who has treated a claimant less favourably on the ground of his or her sex or race cannot escape liability because he had a benign motive".

65. In May and Baker Ltd t/a Sanofi-Aventis Pharma v Okerago UK EAT/0278/09/ZT I was referred to paragraph 49 of the judgment of His Honour Judge Birtles:

> "In any event, allowing an environment where particular conduct could take place does not amount to aiding that conduct. Merely allowing an environment to exist does not amount to the relationship of corporation and collaboration referred to in Anyanwu. See also Hallam where a general attitude of helpfulness and cooperation was held not to be enough to constitute aiding".

66. I was also referred to the judgment of Underhill LJ in Reynolds v CLFIS (UK) Ltd and others [2015] EWCA Civ 439 and the following:

Paragraph 32:

> "If this were in truth a case where the decision to terminate the claimant's contract had been made jointly by Mr Gilmour and others the tribunal would have had to be concerned with the motivation of all those responsible, since a discriminatory motivation on the part of any of them would be sufficient to taint the decision".

Paragraph 36:

> "In my view the composite approach in unacceptable in principle. I believe that it is fundamental to the scheme of the legislation that liability cannot only attach to an employer where an individual employee or agent for whose act here is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation".

And further:

> "It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation".

67. I was also referred to the judgment of Judge Hand QC in NHS Trust Development Authority v Saiger [2018] ICR and in particular at paragraph 118:

> "Putting it another way, there must be evidence of instruction, or causation or inducement for there to be a breach of s111. That Mr Blythin was in a position to instruct, cause or induce a basic contravention is not enough to establish liability.

And further:

> "That he was a party to a discussion or that he played a material part in the decision is in my judgment not, without more to be equated with an instruction, causation or inducement. Nor do any of these findings amount to giving help knowingly".

Conclusions

The position of the 2nd Respondent

68. I find that the Tribunal does have jurisdiction to hear the Claimant's claim against the 2nd Respondent. I reach this decision for the following reasons:

(a) The alleged comment and actions of the 2nd Respondent had direct applicability to the Claimant's employment, and its termination, in the UK.

(b) Whilst the 2nd Respondent is a national of Luxembourg, lives and primarily works there, his duties include responsibility for the 1st Respondent's business in the UK. In other words, there is not a clear line of demarcation between KRF Luxembourg and KRF UK particularly given that both the 2nd and 3rd Respondents are primarily based in Luxembourg.

(c) I find that the 2nd Respondent did periodically visit and carry-on business activities for the 1st Respondent in London. This included 4 or 5 separate occasions on which he met with the Claimant.

(d) It is apparent that the 2nd Respondent was involved, at least to some degree in the decision that the Claimant's role on the Project should be transferred to Mr Paillardon and subsequently, that because of the Claimant having an insufficient level of work, that her position should be made redundant.

(e) Whilst the 2nd Respondent, being an individual residing outside the jurisdiction is clearly a factor militating against the jurisdiction of the Tribunal, it is not in my view necessarily determinative. This is not a case where, for example, an individual named respondent had no level of connection and/or involvement in the business of the UK employer.

(f) The 1st Respondent is part of a family trust and as such represents a relatively small business with a relatively small number of directors, senior managers and employees. Its position can be contrasted with that of a large international corporate structure where it would be much more likely that decisions relating to the position of an individual employee in the UK would be made and implemented by directors and managers in the UK.

(g) Further, I find that if the Claimant's contention that the 2nd Respondent used words to the effect of it is a "man's world" that this would potentially constitute instructing, causing and/or inducing under s111 of the EQA.

(h) As well as the 2nd Respondent the 3rd Respondent is also a national of Luxembourg and employed by a company outside the UK. Given that a combination of the 2nd and 3rd Respondents had responsibility for making and implementing decisions in relation to the Claimant's employment, in what is a relatively small business managing a family trust, it would in my view be artificial to find that the actions of the 2nd Respondent in relation to the business and employment activities of the Family Trust were outside the jurisdiction of the Tribunal based on the 2nd Respondent's nationality and place of residence, in circumstances where it is apparent that he had a significant and regular level of involvement with the business activities of the Family Trust in the UK. It would potentially have been equally available as a line of defence for the 3rd Respondent to contend that the claim against her was outside the jurisdiction based on her residence, but I would have found such an argument equally unattractive in the circumstances of the business, for reasons set out above.

Claimant's application for a deposit order against the 2nd Respondent

69. I do not find it appropriate to make such a deposit order. Ms Brown stated that the purpose of a deposit order in circumstances where I found in the Claimant's favour as to the existence of territorial jurisdiction in respect of the 2nd Respondent was to deter the possibility of an application for reconsideration and/or an appeal. First, I consider that what I am determining is not the merits, or otherwise, of any such application but rather whether the 2nd Respondent's argument as to the absence of territorial jurisdiction had little reasonable prospect of success. Whilst I have found in favour of the Claimant on this issue, I do not consider that it was a contention raised by the 2nd Respondent which could properly be considered to have had little reasonable prospect of success. I consider that this is evidenced by the very substantial time spent on this issue by Counsel for the Claimant and the 2nd Respondent, but also the careful consideration I have given, in reaching my determination on this point.

70. Further, as I indicated to Ms Brown during the hearing the effect of my making a deposit order in the circumstances would in effect be to apply a potential fetter on my discretion in the event of an application for reconsideration being made and/or imposing a deposit as a deterrent against the 2nd Respondent appealing my decision on jurisdiction to the Employment Appeal Tribunal. I consider that this would be inappropriate and outside the generally accepted parameters as to the purpose of a deposit order and the circumstances in which it would be made by a tribunal.

Application by the Claimant for a deposit against the 1st Respondent

71. I do not consider it appropriate to make the 1st Respondent's refusal to admit that the 2nd Respondent used words to the effect of "it's a man's world" conditional on the payment of a deposit. I make this finding for the following reasons:

(a) The evidence of the Claimant as to whether the comment made by the 2nd Respondent was a "man's world" or a "white man's world" is equivocal.

(b) The Claimant did not actually hear the comment it was merely reported to her by the 3rd Respondent.

(c) Given the above inconsistences as how this was reported by the Claimant, and variously referred to in her contemporaneous note, her Grounds of Complaint and the substantive Grounds of Resistance of the 3rd Respondent I consider that sufficient ambiguity exists that it represents a proper question for cross examination at the Full Merits Hearing.

The position of the 3rd Respondent

72. I will consider the 3rd Respondent's application for the strike out of the claim against her, and in the alternative its condition being conditional on the payment of a deposit by the Claimant, concurrently. In effect the same issues are engaged.

73. I find that the claim against the 3rd Respondent has no reasonable prospect of success and it is accordingly struck out under Rule 37(1)(a). I reach this finding for the following reasons:

74. I have been extremely cautious about striking out a complaint of discrimination and have considered the various factors as set out in the applicable case law to include Anyanwu. Nevertheless, I consider that this is a claim where my discretion to strike out is properly exercised.

75. In reaching this decision I have accepted the Claimant's case against the 3rd Respondent at its highest. Even assuming that the key facts, which in any event are largely agreed, might not be disputed, the defence might be wholly inconsistent with incontrovertible documents, or, even if it is assumed that evidence in a disputed matter will be accepted, the claim would still be hopeless. A fanciful aspect of success is not sufficient. No one stands to gain by hopeless claims going to trial. I do, however, need to be sure that there really is no realistic hope of success.

76. It is relevant that this does not deprive the Claimant of the opportunity to bring her claims for sex and race discrimination against the 1st and 2nd Respondents. As such my decision to strike out the claim against the 3rd Respondent would appear to have limited prejudice as far as the Claimant's position is concerned. Against this I have balanced the very significant prejudice the 3rd Respondent would suffer by being required to participate in a 5-day hearing.

77. Nevertheless, it is not just the prejudice to the 3rd Respondent which is relevant but rather an assessment of what grounds there would be to support the Claimant's contention that the 3rd Respondent was an accessory to alleged acts of discrimination suffered by the Claimant.

78. I find that the 3rd Respondent was opposed to the decision to remove the Claimant from the Project and terminate her employment on the grounds of redundancy. I find that she voiced her opposition to this course of conduct to the 2nd Respondent but nevertheless was compelled to implement the decisions. It is significant that because of her reluctance to implement these decisions, and opposition to them, to include her

communications with the Claimant to this effect, the 3rd Respondent was herself dismissed.

79. It is further relevant that the 2nd Grounds of Resistance served by the 3rd Respondent are broadly supportive of the Claimant's position. It would in these circumstances be, in my view, unusual for a Claimant to seek to add an individual in the position of the 3rd Respondent as a respondent to such a claim.

80. The argument of Ms Brown is that by failing to refuse to implement the decision the 3rd Respondent in effect therefore aided and abetted it. I consider that this would give rise to an inappropriately wide interpretation of the applicable legislation set out in s111 and s112 of the EQA and the relevant case law authorities. The effect of these provisions extending to an individual in the position of the 3rd Respondent would result in very wide potential liability of individuals who passively acquiesce in and/or were involved in the implementation of decisions made by others which arguably had a discriminatory impact.

81. I do not consider that absent any evidence at all to infer that the 3rd Respondent herself had been influenced by the Claimant's race and/or gender that it would be appropriate for her to be a respondent to the claim. In effect the Claimant's position amounts to I am not exactly sure who at an individual level was responsible for the discriminatory actions, but it could have been the 2nd Respondent, the 3rd Respondent or a combination of the 2nd and 3rd Respondents acting jointly. I find this to be purely speculative and not a situation where a claim specifically against the 3rd Respondent has a reasonable prospect of success.

82. I also do not consider that the Claimant's argument that the purported policy that the role as performed by the Claimant on the Project needed to be undertaken by man necessarily constituted a sufficiently wide inherently discriminatory policy that it would create an umbrella pursuant to which a claim against not just the 2nd Respondent but also the 3rd Respondent would have a reasonable prospect of success. In reaching this finding I have taken account of the judgment of Underhill LJ in Reynolds that the composite approach is unacceptable in principle.

Overall Conclusion

83. The Tribunal has jurisdiction to hear the Claimant's complaint against the 2nd Respondent. The 2nd Respondent is therefore granted leave to serve a substantive response to the claim against him within 28 days of this Judgment.

84. The Claimant's application for deposit orders against the 1st and 2nd Respondents fail and are dismissed.

85. The 3rd Respondent's application for a strike out of the claim against her succeeds.

86. For the avoidance of doubt the Claimant's claims against the 1st and 2nd Respondents will continue to a full merits hearing but are not subject to any deposit orders.

Employment Judge Nicolle

13 March 2021

Sent to the parties on:

15th March 2021

For the Tribunal: