EMPLOYMENT TRIBUNALS

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

Heard at: London Central **On**: 3 & 4 December 2019

Before: Employment Judge Nicolle

Representation

For the Claimant: Ms L Hatch, of Counsel
For the Respondent: Mr E Brown, of Counsel

Open Preliminary Hearing

RESERVED JUDGMENT

1. The Judgment of the Tribunal is that it does have jurisdiction to hear the claim.

2. The application for deposit orders under Rule 39 fails.

REASONS

1. This preliminary hearing was listed to decide whether the Tribunal has territorial jurisdiction to hear the claim and also to consider the Respondents' application for deposit orders pursuant to Rule 39.

2. In this Judgement Respondents means R1 and R2 given that the distinction between the two is a point of dispute in this claim.

<u>The Claim</u>

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

4. At a case management hearing on 20 September 2019 Employment Judge Brown listed an open preliminary hearing (OPH) to decide the issue between the parties regarding territorial jurisdiction. Employment Judge Brown provided that the OPH should also consider the Respondents' application for a deposit order but no more than one hour of the time allotted to the hearing should be occupied with this application.

The Hearing

5. The Tribunal heard evidence from the Claimant and on behalf of the Respondents from Christian Truempler, Vice President of the Entrepreneur Governance team at Partners Group AG ("PG Switzerland") (Mr Truempler). There was an agreed bundle comprising 1752 pages. I read the pages in the bundle to which I was referred. I also read the skeleton arguments and the authorities in the bundle provided.

Findings of Fact

The Claimant

6. The Claimant has a passport from and is a citizen of the Democratic Republic of Congo (the "DRC"). Prior to commencing employment with the Respondents on 21 September 2015 the Claimant had been educated at higher education institutions and employed in both the UK and USA.

7. In an employment application dated 14 July 2015 the Claimant listed her most recent employers as being the World Bank based in Washington DC and prior to that eBay and Goldman Sachs in London.

8. The Claimant gave her home address as being in Fairfax Virginia. She gave previous addresses in Charlottesville, Virginia and before that in Paris.

The Respondents' Group Structure

9. Partners Group (USA) Inc ("PG USA"), is incorporated in Delaware. It has US offices in New York, Denver and Houston. It had an office in San Francisco, but this was closed in late 2017.

10. PG USA, Partners Group (UK) Ltd ("PG UK") and PG Switzerland are each part of a global private markets investment management business which is headquartered at Zug, Switzerland. The business operates from twenty offices worldwide. Its principal areas of work are private equity, private real estate, private infrastructure and private debt.

The Claimant's Recruitment

11. The Claimant gave evidence that as well as making an online application to PG US she had also made an online application to PG UK, but it was only the PG US application which proceeded to the next stage.

12. The Claimant received an offer letter from PG US dated 10 July 2015 (the "Offer letter"). Relevant provisions from this letter in the context of the jurisdiction issue are as follows:

> Your home region will be the **Americas**, and you will be a member of the firm's Associate Program;
>
> Base annual salary of $120,000;
>
> Provision for a discretionary cash bonus at the sole and exclusive discretion of PG USA;
>
> Eligibility to participate in Partners Group's Employee Participation Plan with the amount of any reward being at the sole and exclusive discretion of PG USA;
>
> Eligible to participate in PG USA 401(k) Retirement Plan;
>
> Requirement that must comply with the Company Code of Conduct, Company Handbook and other instructions established for PG USA employees;
>
> Provision that employment to be at will; and
>
> Provision for arbitration of disputes to include claims under Title VII of the Civil Rights Act of 1964;
>
> Provision that the offer letter should be governed, construed and enforced in accordance with the laws of the State of New York.

13. The employment offer was contingent upon the Claimant providing PG USA with adequate documentation of her right to work in the US.

14. The Claimant accepted and worked under the terms of the Offer Letter.

The Associate Program

15. The Claimant along with other members of the 2015 cohort received an email from Jennifer Haas (Ms Haas) on 12 October 2015 attaching a document entitled Associate Program Objectives 2015. This included the following relevant provisions:

> Associate Program will last between 12-24 months, determined by the business requirements;
>
> Each rotation will last 3-6 months;
>
> Your start location will typically be within your home office;
>
> We strongly encourage the completion of at least one international rotation in the HQ in Zug, for all non-Zug based AP's. International rotations are driven by business needs;
>
> Housing or accommodation will be provided outside of your home office during international rotations by Partners Group.

The Claimant's Placements

16. Her first placement was in PG USA Real Estate team based in the San Francisco office from 21 September 2015 to April 2016. The second placement was in PG USA Private Debt team based in the New York Office from April 2016 to 16 July 2016. The third placement was to the PG Impact team of PG Impact Investments AG, in Zug, Switzerland from 17 July 2016 until October 2016. The fourth placement was to the Infrastructure Investment team of PG Switzerland, in Zug from October 2016 to 3 March 2017. Then with PG UK, in London, still in the Infrastructure Investment and Private Market teams, until the termination of her employment on 31 August 2018.

17. There is a dispute between the parties as to whether the final period of up to twelve months of the Claimant's employment was part of the Associate Program or fell within a specific category, pertaining to the Claimant's personal circumstances, referred to by the Respondents as the Accommodation Period. I set out my findings in relation to the Accommodation Period below.

The Claimant's Immigration Status

18. As a citizen of the DRC the Claimant had no automatic entitlement to work in the US, UK or Switzerland. Her eligibility to work in these jurisdictions was therefore subject to her obtaining required work permits.

19. The Claimant was employed by PG USA under an OPT/F1 (student visa). This expired on 16 July 2016 at which point she ceased to be eligible to work in the US. The Respondents then secured a Swiss L-permit for a six-month period effective from 17 July 2016 and expiring on 16 January 2017.

20. In September 2016 the Claimant became seriously ill and the Respondents obtained a B1/B2 US visa to enable her to enter the US for surgery and treatment. The Claimant was in the US for surgery and recuperation between 27 October 2016 and 26 November 2016 during which time she underwent surgery to remove a benign tumour from her abdomen.

21. At the Claimant's request she was transferred to PG's London office, but still employed by R2, with effect from 4 March 2017. This was under a long-term tier two Intra Company Transfer Graduate Trainee Visa (ICT) for an initial three-month period and subsequently renewed for further three-month periods until her dismissal on 31 August 2018.

22. I was referred to various correspondence regarding the Claimant's status in the context of immigration applications. This included an email from Gabriela Reimer, Human Resources at PG UK (Ms Reimer) to the Claimant dated 28 November 2017. This contained draft wording for the Claimant to check in relation to an application for a new three-month ICT visa. It included the statement: "Ms Mulumba is employed by Partners Group Inc USA. She participates in an internal graduate training scheme and is currently on a rotation in the London office. In order to finish the various projects assigned to her we would like to extend her assignment for another three months".

23. Other than for the purposes of the medical treatment referred to above the only time that the Claimant returned to the US was to spend time with her family between 21 December 2017 and 3 January 2018. In order to make this visit it was necessary for the Claimant to obtain a US visitor's visa. I was referred to a draft letter prepared by Ms Reimer dated 8 December 2017, and as amended by the Claimant, dated 13 December 2017. The original draft prepared by Ms Reimer stated that the Claimant was employed at Partners Group Inc, New York but this was crossed through in the revised and finalised draft submitted on behalf of the Claimant which referred to her having worked for Partners Group since 21 September 2015.

Pay and Tax

24. At all times throughout her employment with the Respondents the Claimant was paid her salary in US dollars to her US bank account and was always subject to US tax.

25. As the result of the Claimant spending more than 183 days in the UK she became eligible to UK income tax as of 5 September 2017. She was given a notional UK salary for tax purposes of £81,000 as documented in an email from Ms Reimer to the Claimant on 4 October 2017.

26. Various email correspondence exists regarding the Claimant's tax status and in particular her concern that she was being adversely affected as a result of "double taxation" between her employment in Switzerland and then the UK but with US taxes being deducted. She complains that the Respondents failed to provide her with all appropriate support in addressing her tax position, and further contends that they may have had an ulterior motive in maintaining the existing position whereby she was treated as an employee of PG USA seconded to PG UK rather than being localised in the UK, and removed from the US tax system.

27. I was referred to US tax forms W-2 and W-4 for the Claimant in 2017. Whilst form W-2 gave her home address as Fairfax in Virginia form W-4, signed by the Claimant on 31 October 2017, gave her home address as being Flat 7, 16 Queensborough Terrace in London.

Private Health Insurance

28. The Claimant was originally included in PG USA Cigna health insurance program. I was shown a document in the bundle setting out the Claimant's entitlement to various insurance benefits and this showed that the Claimant had a change of status in relation to Cigna cover with effect from 31 July 2016. It is not clear as to what private medical insurance existed subsequent to the Claimant's transfer to Zug and then London.

29. The Claimant was sent a letter from COBRA dated 3 November 2016. This concerned continuing coverage for health care following what the letter described as the end of her employment with effect from 31 July 2016. The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a health insurance program that allows an eligible employee and his or her dependents the continued benefits of health insurance coverage where an employee loses his or her job or experiences a reduction of work hours.

30. It is accepted that the Claimant's medical treatment in the US between 27 October 2016 to 26 November 2016 was covered under COBRA and that her coverage pursuant to COBRA was at least in part facilitated by the Respondents. The Claimant acknowledged that, save for a limited contribution she was required to make, her medical costs were reimbursed via COBRA. Whilst the Claimant referred to having made initial exploratory enquiries regarding the possibility of medical cover in Switzerland this was either too complicated or expensive and it was therefore her preferred option to return to the US.

Other Insurance Benefits

31. The Claimant was provided with US life insurance.

Expenses

32. Throughout her employment the Claimant's expenses were reimbursed in US dollars and paid to her US bank account. The Claimant was provided with a US dollar-denominated corporate AMEX card.

Corporate Policies and Procedures

33. The Claimant provided signed confirmation dated 21 September 2015 that she had received a copy of the PG USA Handbook. Mr Brown referred me to s.3 of the Handbook which contains the policy of PG USA regarding sexual harassment. This included detail of the bodies which any complaints regarding sexual harassment should be made to which for New York based employees comprised the New York State Division of Human Rights and New York City Commission on Human Rights.

Pension

34. The Claimant was entitled to make contributions to PG USA 401(k) Retirement Plan. The Claimant gave evidence that she only made two such contributions and then she discontinued ongoing contributions but did not withdraw from the Plan. She did not set up any alternative pension coverage.

Housing

35. The Claimant received an initial housing allowance from PG USA in US dollars in respect of her accommodation in London. This was approximately £1,000 per month. I was referred to an email from Thomas McArdle, Private Equity Directs of PG USA, (Mr McArdle) to the Claimant of 8 May 2017 regarding provision of the Claimant's housing in London. In this email he stated that PG only covers the first three months of housing in London after which they give a stipend equal to the amount it would incur for giving the Claimant a corporate apartment in Zug. This meant that the Claimant was treated as an ex patriate on secondment.

The Claimant's status whilst in London

36. As indicated above there is a dispute between the Claimant and the Respondents regarding her status in London for up to the last twelve months of her employment. The Claimant's position is that up until a meeting on 5 July 2018 that she regarded herself as a continuing participant in the Associate Program with an opportunity of a permanent position with the Respondents. The Respondents' position is that it was made clear to the Claimant at a meeting on

31 August 2017 that her employment with the Respondents was being continued on a good will basis with the opportunity to obtain longer term immigration status in the UK and to secure alternative employment. The position of the Respondents being that this was to assist the Claimant who wished to avoid any possibility of having to return to the DRC.

37. I consider that the existence, or otherwise, of the Accommodation Period and the Claimant's knowledge of it has some relevance to the question of jurisdiction given that the existence of, what the Respondents term the Accommodation Period, significantly elongated the Claimant's employment in the UK. I also consider that whether the Claimant had a genuine expectation of a permanent position of employment with the Respondents during the Accommodation Period is relevant. This relates to whether she should properly be regarded as an employee seconded to the UK for a relatively short duration or in the expectation of a more permanent arrangement.

38. I was not shown any notes regarding the meeting which the Respondents say was held with the Claimant on 31 August 2017. I was however shown an email from Mr Truempler to Mr McArdle on 21 March 2018 which refers to a meeting he and Mr McArdle had held with the Claimant on 31 August 2017 to offer her a 12-month Accommodation Period. The Claimant denies that this meeting took place.

39. The Claimant attended a meeting in London with Mr Truempler on 5 July 2018. Ms Reimer attended in a note taking capacity. During this meeting the Claimant denied any knowledge of the Accommodation Period and stated that she understood that her continuation in London had been part of an "extended rotation". Any grounds for doubt as to the existence of the Accommodation Period ceased with effect from this meeting.

40. I was shown various emails regarding the Claimant's performance and future intentions regarding her continuing employment. I consider that most of these emails go to the question of the Respondents' perception of her performance and are not directly relevant to the issue of jurisdiction. I do, however, consider the following emails are potentially relevant to the parties' knowledge regarding the Claimant's employment status, continuing possibility of a permanent position at the end of the Associate Program and to the existence or otherwise of the Accommodation Period:

- In an email from Mr McArdle to Rene Biner, Partner, Chairman Global Investment Committee at Partners Group AG in Zug, and copied to Mr Truempler on 28 June 2017 he stated:

  "It is time to let her go but we will need to give her at least six months to find a new role. My recommendation would be to assign her to Debt for

the six months and let her build more experience during the separation period".

- In an email of 22 January 2018 from Reto Munz, Liquid Private Markets at Partners Group AG in Zug, to the Claimant he asked her how the job search is progressing. There is no evidence of any reply being sent by the Claimant.

- In an email of 2 May 2018 from Benno Luchinger, the European Head of the Associate Program and employed by PG UK, to Baylor Miller, CFA and Senior Vice President, Real Estate at PG USA, and the US Manager of the Associate Program, he stated as follows:

  "She is not on the European programme, very confidentially, this is a very special case handled directly by Rene and Christian Truempler".

41. In giving evidence Mr Truempler confirmed that the Claimant's "special" status, at least in part, related to the fact that lawyers acting for her had by this time initiated a discrimination complaint in New York.

42. In relation to where the Accommodation Period I find that the Claimant would, on the balance of probabilities, have been aware that her ongoing employment in London was for reasons outside the normal Associate Program and I make this finding for the following reasons:

- that the Claimant's total duration of employment with the Respondents significantly exceeded the year normal two year maximum duration of the Associate Program;

- that there is some evidence that communications took place between various members of the Respondents' management regarding the Claimant's status, and in particular immigration status, and what could be done to assist her position;

- that there is evidence that the Respondents had concerns regarding the Claimant's performance which would have meant that it was unlikely that she would be offered a permanent position on completion of the Associate Program;

- that in an email sent to the Claimant in early 2018 she was asked as to her progress in securing alternative employment to which the Claimant did not respond, but the existence of such an email would have been inconsistent with the Claimant's position that she was on continuing ongoing rotas as normal as part of the Associate Program.

<u>Consideration of the localisation of the Claimant's employment in London</u>

43. In an email from Mr McArdle to William Berry and Christopher Bone of 16 July 2017 he stated that the Claimant "will have to be domiciled in London, we tried and could not get her clear to work in the US".

44. In an email from Mr Truempler to Mr McArdle dated 23 August 2016 he suggested that they should discuss a more permanent transfer to Europe for the Claimant and the possibility of her being localised in London rather than sending her on a costly assignment. This was on the basis of Mr Truempler's understanding that she would not be able to obtain a US work permit in the near future.

45. I was shown various further emails regarding the possibility of the Claimant's employment being localised in London. This included an email from Mr McArdle to Mr Truempler of 31 August 2016 asking what the costs would be but then saying that if things did not work out that we will be bound by UK labor law to keep her for six months on salary. At no point did the Respondents "localize" the Claimant in the UK.

Integration of the Claimant into the London Office

46. The Claimant's evidence was that for all relevant purposes she was fully integrated into the London office. She says that she only undertook work for non-US clients and worked more or less exclusively with UK colleagues. From a regulatory perspective the work she undertook was subject to the FCA. She did not undertake any work in the US, and nor would she have been eligible to do so as a result of her immigration status, whilst working in London. As such, I find that she was working and living in London.

The Claimant's Home

47. The Claimant says that the Fairfax Virginia address is her parents' home. Whilst she used this address on various correspondence, to include in respect of her US tax status, this was for convenience only rather than this being her regular or intended principal place of abode. I find that it is clear that the Claimant was not living at the Fairfax address and that her home during her employment with the Respondents in London was in rented accommodation at 16 Queensborough Terrace. In the broader sense I consider that the Claimant was a citizen of the world.

The Termination Letter

48. Following the meeting on 5 July 2018 the Claimant was sent a letter dated 5 July 2018 advising her that her employment with Partners Group will be terminated on 31 August 2018. The letter referred to reaching the end of a

period of an additional twelve months employment in the UK by way of a transitional period (referred to as the Accommodation Period by the Respondents). The letter was signed by David Layton, Director PG USA, Nicole Meade, Vice President PG USA, Sergio Jones, Director PG UK and Ms Reimer, Vice President of PG UK. It stated that it constituted notice on behalf of PG USA and PG UK.

49.Mr Truempler was unable to explain why the letter had been signed by representatives of PG UK but considered it was likely to be, at least in part, as a result of the legal proceedings which the Claimant had issued in New York and the additional sensitivity her continuing employment thereby incurred. Mr Truempler gave evidence that decision to dismiss the Claimant was jointly determined by Mr Layton, Chief Officer based in London and Andre Frei, Chief Officer based in Switzerland.

The New York Proceedings

50. As a result of the various matters, which in part form the basis of the claim before the tribunal, the Claimant instructed New York lawyers, Bailey Duquette P. C. and they sent a letter dated 3 January 2018 to Oliver Jimenez, Chief Compliance Officer of PG USA. In the opening paragraph of this letter Bailey Duquette referred to the Claimant as "currently serving as a Partners Group USA, Inc. Investment Associate.

51. Bailey Duquette issued a Charge of Discrimination in the New York Division of Human Rights and New York City Commission on Human Rights dated 23 March 2018 (the "Complaint"). This stated that the named employer was PG USA. At paragraph 7 of the Complaint the Claimant stated she had always remained an employee of the U.S. entity as set forth in her offer letter, with decisions concerning her employment made in the US.

52. The Claimant's position is that she initiated the New York Complaint on the advice of Bailey Duquette.

53. At paragraph 25 of the Complaint the Claimant asserted protection under Title VII of the Civil Rights Act 1964.

54. In a detailed letter dated 27 August 2018 Proskauer Rose LLP, acting for PG USA, responded to the Complaint. In this letter they set out a detailed rebuttal to the Claimant's substantive allegations which are outside the scope of this decision. It is, however, relevant that in the letter they stated that as a non-citizen working in Europe, the Claimant is not entitled to relief pursuant to Title VII as it did not apply to the employment of "aliens outside of any State". The letter went on to state that the majority –if not all – of the specific allegations of alleged

harassment and discrimination in the Charge describe conduct which occurred while Ms Mulumba was working abroad, not in the US.

55. In a letter from the New York District Office of the US Equal Employment Opportunity Commission dated 31 August 2018 the Claimant was advised that the Complaint would be dismissed. This was on the basis that the Commission would only take on those cases which, given their limited resources, were most likely to result in findings of violations of the laws they enforce.

The Respondents' HR Department

56. Mr Truempler explained that HR matters are primarily administered from Zug where there are between 15 and 20 HR personnel. London specific matters are the responsibility of Ms Reimer in London and in the New York Office, there are between 3 and 5 HR personnel.

The Law

57. It is agreed by the parties that the tribunal's territorial jurisdiction is the same under both the Equality Act and the ERA.

58. Following the repeal of s.196 of the ERA in October 1999, the ERA contains no generally applicable geographical limitation. The EQA 2010 is also silent on mainstream questions of territorial scope and leaves the gap to be filled by the courts. The Explanatory Notes (paragaraph 15) to the Act 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".

59. Following the judgment of Lord Hoffman in Lawson v Serco [2006] IRLR 289 the relevant approach requires an analysis of the factual matrix. This will include looking at the contract, and how the contract was being operated in practice and as a whole. 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.

60. It is common ground between the parties that of the above examples it is only the standard case and peripatetic employees which are potentially relevant.

61. In Ravat v Halliburton Manufacturing and Services Ltd [2012] IRLR 315, the Supreme Court held that the Lawson v Serco categories could be subsumed within a single question or overriding principle:

> "The question of law is whether s.94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment in Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain".

62. In Ravat the Supreme Court went on to say 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. If an individual lives and/or works partly in Great Britain they need only to show that there is a sufficient connection to employment in the UK in order to establish jurisdiction.

63. The House of Lords in Lawson v Serco and the Supreme Court in Ravat ruled that whether an employee is entitled to bring an unfair dismissal claim will generally depend on whether he or she was working in Great Britain at the time of dismissal, though exceptions may be made where an employee works abroad. In considering whether an employee was actually working in Great Britain or was merely on a casual visit, the terms of the contract of employment and the history of the contractual relationship may be relevant but are not determinative.

64. The implication of Lawson v Serco is that if an employee is 'merely on a casual visit' to Great Britain at the time of dismissal, then he or she will not be regarded as working here for the purposes of establishing the right to claim under the ERA. What the decision leaves unclear is at what point on the sliding scale between being 'on a casual visit' and 'really working in Great Britain' is the employee to be regarded as being employed here. For example, what is the situation where an employee is on an extended business trip or working on a temporary secondment to Great Britain? It is unlikely that someone on an extended trip would be able to bring a claim under the ERA, whereas someone on a secondment might possibly have a better chance. In such cases, it would be appropriate to ask the crucial question expounded by the Supreme Court in Ravat as to whether the connection of the employment relationship with Great Britain sufficiently strong for it to be said that Parliament would have regarded it as appropriate for the employment tribunal to deal with the claim? In answering this question, a tribunal will need to consider the broader circumstances; for example, the reasons the employee was in Great Britain, the length of the trip and the place where the contract was being operated from at the time of dismissal.

65. The Respondents sought to place particular reliance on the EAT decision in Fuller v United Healthcare Services Inc [2014] 9W:UK143. This involved an employee based in the USA who had worked in the UK on a two-year placement where an employment tribunal held his claims were outside the territorial scope of the tribunal. Mr Brown argued that the case was largely analogous with the facts of the case involving the Claimant. Ms Hatch argued that the Fuller case was of little assistance and sought to draw distinctions between the position of Mr Fuller and that of the Claimant.

66. Ms Hatch referred to the decision of the EAT in Ravisy v Simmons & Simmons LLP UK EAT/0085/18 where in relation to cases in which a claimant lived and worked for at least a part of the time in Great Britain that such cases do not have to be "truly exceptional" for territorial jurisdiction to be established. It was merely necessary that there was a sufficiently strong connection with Great Britian and British Law.

67. I was also referred to case law regarding whether, if I should determine that jurisdiction existed for that part of the Claimant's employment which was in the UK, it would be open for the tribunal to consider those allegations which predated the Claimant commencing work in the offices of PG UK in London on 4 March 2017. Ms Hatch argued that whilst there may not be jurisdiction for the tribunal to determine such allegations they should nevertheless be considered as "background" material relevant to those complaints which occurred whilst the Claimant was based in the UK. Mr Brown referred to the decision of the EAT in Tradition Securities v Futures SA v X [2008] IRLR 934 where it was held that there is no scope for using the concept of an act extending over a period in s.123 of the EQA to confer jurisdiction retrospectively on a tribunal so as to enable an employee who works at an establishment in Great Britain to make a claim in respect of acts which occurred when he or she worked abroad prior to working in Britian and which would not at that time been justiciable in Britain.

68. The EAT in the Tradition case did say that it would be at an employment tribunal's discretion as to what extent, and in what detail, it would allow evidence of matters prior to the UK employment to be considered as background material tending to support or weaken either sides' case as to what had occurred later in London.

69. As to whether such acts may be admissible as "background material" Mr Brown referred to the EAT decision in HSBC Asia Holdings BV v Gillespie - [2011] IRLR 209 where earlier allegations relating to sexual harassment which were said to have occurred in various parts of Asia between 1991 and 2001 were not admissible in the context of claims of sex discrimination in the UK between January 2006 and December 2008.

Conclusions

70. This is a complex case concerning an employment relationship which evolved over the course of the Claimant's employment. The question I have to determine is whether during the Claimant's employment in London that she established a sufficient connection with the UK for the Tribunal to have jurisdiction. For the reasons as set out below I conclude that she did.

71. Mr Brown's position in relation to the apparently contradictory arguments being advanced by the Respondents in response to the New York and UK proceedings is that different tests apply and that the Respondents are entitled to avail themselves of applicable arguments within each jurisdiction to resist the respective proceedings. He goes on to say that the absence of jurisdiction in one set of proceedings does not automatically mean that jurisdiction will exist in an alternative country. Whilst the arguments advanced on behalf of the Respondents would appear inconsistent, and also somewhat unattractive, I find it to be consistent with the legal position. My determination of the existence, or otherwise, of territorial jurisdiction within the UK is not predicated on the existence or absence of jurisdiction in the US or elsewhere but rather is a question to be decided based on the tests set out in the relevant UK case law.

72. In reaching the conclusion that the Tribunal has jurisdiction I consider that a sensible starting point is what Mr Brown contended represent a largely analogous set of facts in the Fuller case. Whilst I acknowledge that the Fuller case has many factual similarities to that of the Claimant, I find that there are a number of important distinctions which assist the Claimant in establishing UK jurisdiction.

73. In Fuller it was clear that he maintained his home in the US. I do not find that this was the case for the Claimant. I find that the Fairfax address was her parents' home and not what could reasonably be construed as the Claimant's home. I do not place any particular significance on the Claimant using her parents' address for the purposes of some employment and tax related correspondence. I find that that the Claimant's home was in London from 4 March 2017 onwards. As such, I find that the US was no longer her "home" base and that she had no reason to return, and given her immigration status, it would not have been possible for her to do so.

74. It is also relevant that Mr Fuller, unlike the Claimant , in places other than London during his assignment. There is no evidence that the Claimant undertook any significant work outside London in the period from 4 March 2017 and it is clear that her immigration status made any travel outside the UK problematic.

75. I also consider it relevant that for the entirety of her employment in London, and at the time of its termination, it was not legally possible for the Claimant to work in the US. Therefore, there was no prospect of her returning in the foreseeable future to the US at the end of the Associate Program or during the

Accommodation Period. This is a clear distinction from the position of Mr Fuller, who as a US citizen could return to the US at any time. A further distinction from the position of Mr Fuller was that his assignment to the UK had finished before his employment was eventually terminated in the US. The Claimant was dismissed in the UK whilst working in London.

76. Whilst the Respondents place significant reliance on the terms of the Offer Letter, the Claimant's employment being subject to the provision of US benefits and discretion exercised by PG USA in respect of eligibility for and determination of bonuses and awards under the EPP, I find that the position as it evolved is a matter of fact to be considered in addition to the originally stated contractual position. I consider this to be consistent with the judgment of Lord Denning MR in Todd v British Midland Airways [1978] IRLR 370 where he observed that the terms of the contract are not of much help in determining where an employee's base is and that it is necessary to go by the conduct of the parties and to the way they have been operating the contract: "a man's base is the place where he should be regarded as ordinarily working".

77. Whilst in London the Claimant reported to London based managers and worked with UK Presidents and Vice Presidents in the Infrastructure and Private Market teams. At various points the possibility of the Claimant's employment being "localised" to the UK was considered by the Respondents. Further, I find it significant that the letter of dismissal dated 5 July 2018 was signed by both representatives of PG USA and PG UK. I also find it probable, that as contended by the Claimant, that a process of "global calibration" existed regarding the determination of discretionary awards under the Respondents' various incentive-based programs. I therefore find that the reality, as opposed to the contractually documented position, is that the entitlement to, and amount of, such benefits would have been largely determined by London or Swiss based employees in respect of the Claimant, during the course of an 18-month period in London, rather than by employees of PG USA in the US.

78. Given that the last 18 months of the Claimant's employment was based exclusively in London I do not consider that her employment was peripatetic. Her location was largely determined by her immigration status. I find that on the balance of probabilities the Claimant's employment in London was significantly extended as a result of the Respondents' expressed wish to assist her, given her immigration status, and her wish to avoid returning to the DRC. I reach this finding based on the Associate Program being for a normal maximum period of 24 months, the Claimant having been employed as at the date of her termination for nearly three years, various emails (albeit not all sent to the Claimant) talking about her "special" situation, emails referring (albeit not necessarily contemporaneously) to the Accommodation Period, an email enquiring as to her

progress in securing alternative employment and the various documentary evidence that the Claimant did not, on the Respondents' case, meet the required standards for a permanent position at the end of the Associate Program. I do, not, however, find that the status of the Accommodation Period was it itself the determining factor in my finding that the Tribunal has jurisdiction but it was rather the fact, and duration of the Claimant's employment in London, rather than the label the parties placed on it.

79. Whilst there were clearly potential inconsistencies between statements made by, and on behalf of the Claimant, in respect of the New York Complaint I consider that these statements are not in themselves conclusive as to the underlying employment relationship and how this evolved. This is particularly the case given that the original letter from the Claimant's US lawyers was dated 3 January 2018 and she acquired further connection with the UK in the period from then till the termination of her employment on 31 August 2018. I do not, however, find that the arguments deployed on behalf of PG USA to argue that jurisdiction did not exist in the US, in respect of the New York Complaint, were in themselves material factors militating in favour of UK jurisdiction. In reaching my decision I have considered the case solely on the basis of the overriding factual matrix and the question of whether the Claimant had a sufficiently strong connection with Great Britain to give rise to the jurisdiction of the tribunal. I find that she did. I find that she was a US employee based in the UK for work and domestic purposes.

80. I reach this finding notwithstanding that many elements of the Claimant's employment pointed to a continuing level of connection with the US. However, I consider it to be relevant that a number of these factors were determined by the Respondents, and some of these determinations were arguably made with a view to reducing the Claimant's level of connection with the UK, possibly with the express purpose of her not acquiring statutory employment protection in the UK. For example, the Claimant's position is that she was disadvantaged in respect of her tax treatment by her pay and tax not being solely subject to UK determination and deductions. I therefore focus on the underlying reality of the situation which was that from 4 March 2017 the Claimant was undertaking her work for the Respondents wholly in the UK and that her pay, after the initial 183 days based in London, was subject to UK tax.

81. I find that the Claimant's employment in London was not consistent with a normal short term three-month (or at most six months) rota under the Associate Program. Had it been confined to a three, or possibly even a six-month period, and the Claimant had then returned to her "home" base in New York I would not have found that UK jurisdiction applied for the period of the assignment. However, I consider that the Claimant's case is distinguishable from this scenario, and if not immediately, that during the course of her 18-month period

during which she lived and worked in London evolved to one where UK statutory employment protection applied.

82. I find that the Claimant remained an employee of PG US throughout her employment and I make this finding for the following reasons:

- that the terms of the Offer Letter continued to apply throughout her employment;
- that she was paid in US dollars and subject to the deduction of the US tax; and
- that during her time in London her employment status was not "localised" despite various requests made by the claimant for this are to be done.

I find that the identity of the Claimant's employer as PG US is not, however, determinative of the jurisdiction question.

83. I find that the Claimant's workplace was in the UK by the time her employment was terminated on 31 August 2018. I make this finding for the following reasons:

- the Claimant had lived and worked in London exclusively for the last 18 months of her employment;
- the Claimant worked almost exclusively on UK matters and non-relating to US business or clients, during her time in London;
- the Claimant was exclusively resident in London during her time with PG UK; and
- the Claimant did not return to the US either in advance of or subsequent to the termination of her employment.

84. As set out above I consider that the decision in Fuller is distinguishable for the following reasons:

- Mr Fuller retained a US home throughout his time working in the UK;
- Mr Fuller's partner remained in the US notwithstanding his being engaged in the UK; and
- that prior to the termination of his employment Mr Fuller was required to return to the US and remained in the US immediately subsequent to the termination of his employment.

85. I therefore find that the Tribunal has jurisdiction to hear the various complaints particularised by the Claimant under the ERA and the Equality Act on the basis that her time in London did not constitute a casual, short-term secondment but rather that the terms and duration of the Claimant's time in London is consistent with UK statutory employment protection applying.

86. I do not accept Ms. Hatch's argument that there was a frustration of the contract of employment with PG USA. Whilst it was legally not possible for the Claimant to work in the US given her immigration status it was nevertheless possible for her to continue as an employee of the Respondents but based outside the US. In any event I do not consider the argument as to frustration to be relevant to my finding as the existence of UK jurisdiction.

87. In relation to whether those allegations which pre-date the Claimant's employment in London should be considered as "background" matters I have considered the authorities cited in Tradition Securities and HSBC v Gillespie. I find that the Claimant's position is more analogous with that of the claimant in Tradition Securities than that of Ms Gillespie in HSBC. In reaching this determination I consider it to be relevant that the allegations, of events in various parts of Asia, relied upon by Ms Gillespie were at least five years earlier than the complaints arising from matters alleged to have taken place in the UK. Further, the business units and managers concerned were different. This contrasts with the position of the Claimant where the course of alleged events involves a significant commonality between business units and personnel. Therefore, whilst I find that those allegations pre-dating the commencement of the Claimant's employment in London on 4 March 2017 are not individual matters upon which the tribunal could make determinations they are nevertheless potentially relevant as background matters, tending to support or weaken, either sides' case as to what occurred later in London.

Deposit Orders

88. I now address the Respondents' application for deposit orders on the basis that the specific allegations at L, N, P, R, S, T, U, X and Z of the agreed list of issues dated 13 September 2019 have "little reasonable prospect of success" in accordance with Rule 39(1). Mr Brown stated that the Respondents were seeking a deposit of £1,000 in respect of each of the nine allegations above.

89. The Claimant declined to give any evidence as to her means to pay such deposits on the basis that Ms. Hatch submitted the applications were inherently misconceived but further that the Claimant having to provide evidence of her means would be unnecessarily intrusive.

90. In summary Mr Brown argued that various of the Claimant's allegations had little reasonable prospect of success given the consistently poor feedback given regarding the Claimant's performance and also the absence of allegations of race discrimination brought by the Claimant against the majority of those who had provided such feedback. He argued that the feedback was overwhelming, and it was "fanciful" to consider that a conspiracy existed to manipulate the Claimant's performance assessments.

91. I consider that broadly there is an interrelationship between the matters pertaining to allegations L, N, P, R, S, U and Z. These allegations all broadly relate to the Claimant's performance, rotation, completion of the Associate Program, whether there was a conversion to an Accommodation Period and the termination of the Claimant's employment.

92. Ms. Hatch's position is that any attempt by me to determine that these allegations have little reasonable prospect of success would be inappropriate outside the hearing of full evidence at a full merits hearing. In relation to Mr Brown's contention that the Claimant had received consistently poor feedback she argued it was inherently possible that a process of "reverse engineering" had been applied and that it was necessary to properly test the evidence in respect of the Claimant's apparently poor performance reviews.

93. In relation to the matters referred to in paragraph 78 above I consider that it would be inappropriate for the continuation of these allegations to be subject to the payment of deposits. I am mindful of the fact that only an hour of the hearing was allocated to the consideration of the applications for deposit orders but in the context of a bundle of documents for the hearing running to a total of 1752 pages. Whilst I have been referred to documents within the bundle going to the underlying merits of the claim, I do not consider that I can realistically determine the prospects of success without significant more time and hearing relevant evidence.

94. Whilst I consider that allegations T and X, concerning the Claimant's immigration status in the UK and arguable deficiencies in the Respondents' efforts in this respect, are potentially weak I do not consider that looked at in totality it would be appropriate to require the payment of deposit orders of £1,000 each in respect of these allegations. I make this finding in the context of what is a complex claim involving 27 individual allegations of direct race and sex discrimination. I consider that it will inevitably be the case that some allegations are weaker than others, but I do not consider that it would be appropriate for one or more of the arguably weaker allegations to be subject to deposit orders.

95. In reaching this decision I have considered the guidance provided by the EAT in Hemdan v Ishmail and another (UK EAT/0021/16/DM). I refer specifically

to the judgment of Mrs Simler that a mini trial of the facts is to be avoided because it defeats the object of the exercise. She went on state that: “if there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested”.

Employment Judge Nicolle

Dated: **10 January 2020**

Sent to the parties on:

14 January 2020

For the Tribunal Office