Appeal No. UKEAT/0181/14/KN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 30 October 2014
Judgment handed down on 5 December 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

MR A C SMANIA — APPELLANT

STANDARD CHARTERED BANK — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) MS JENNIFER DANVERS (of Counsel) Instructed by: Mr Smania
For the Respondent	MR EDMUND WILLIAMS (of Counsel) MS CATRIONA STIRLING (of Counsel) Instructed by: Standard Chartered Bank Marina Bay Financial Centre Tower 1 8 Marina Boulevard Singapore

SUMMARY

UNFAIR DISMISSAL

HUMAN RIGHTS

WORKING OUTSIDE THE JURISDICTION

An employee of a bank made allegations of financial malpractice, and was dismissed. He was Italian, and both lived and worked in Singapore. The contract under which he worked was subject to Singaporean law. The only connection his case had with the UK was that that was where the head office of the Bank was.

It was accepted that if his claim had been one of "ordinary" unfair dismissal, the test to determine whether the ERA 1996 applied (extra-territorially) would be whether the Claimant's employment had a sufficiently strong connection with Great Britain and with British employment law, and he could not meet it. It was argued however that where the claim was for the suffering of a detriment, or dismissal, on the grounds that the employee had made a public interest disclosure, a "looser" test should apply, such as would permit the Claimant to rely on the protective provisions of the 1996 Act. An ET rejected this argument.

On appeal, it was submitted that the EJ was in error by failing to apply the principle in **Bleuse v MBT**, and had failed to consider what Parliament might reasonably be taken to have indicated should be the position. The right to freedom of expression, guaranteed by Art. 10 ECHR was part of UK Law not least because the EU Charter applied, and Art. 11 of it adopted Art. 10 ECHR; and this freedom involved not only a right to express but a right to listen, which in the case of a disclosure made abroad concerning a British bank therefore involved the rights of UK citizens to hear it.

The appeal was rejected. **Bleuse** did not apply, since neither the ECHR nor EU Law applied in Singapore; nor did the claim involve a directly effective right. There was no sufficient reason to treat the ERA as extending extra-territorially such that whistle-blowing detriments or dismissals fell within its scope whilst other dismissals did not. Parliament inserted the relevant provisions into the ERA 1996 at a time when all such rights were subject to an express geographic limitation: the implied limitation should be no different in the present case from that applied in **Ravat**.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal raises a question which (as such) has not been determined previously: whether the provisions of the **Employment Rights Act 1996** which prohibit detrimental treatment being taken by employers against their employees, or dismissing them, apply to an expatriate worker who makes a disclosure which it is in the public interest of those in the United Kingdom to hear.

The Facts

2. The facts were assumed for the purpose of a preliminary hearing before Employment Judge Baty at London Central Tribunal. I have reservations about this approach, since the determination of whether the **Employment Rights Act** in its relevant respects applies extra-territorially depends not only on identifying the appropriate principle, but also upon the application of that principle to the particular facts of the case. Assumed facts are capable of being artificial and may constrain a Tribunal's enquiry. However, the effect of the hearing was akin to a strike-out (if there were no jurisdiction on the facts taken at their highest as asserted by the Claimant, the claims would fail); the parties requested the Judge to take this course; and I too am content in this case to deal with the appeal on that basis.

3. The Claimant is not a British national. He is Italian. His relevant employment was in Singapore. He was dismissed in Singapore. He resided in Singapore. He paid tax in Singapore. His contract of employment was governed by the law of Singapore. Although I am told that the Claimant had lived in Great Britain, before being recruited to work for the Standard Chartered Bank ("the Bank") in Singapore, the only link which his case had with the United Kingdom and its employment law (he having none personally) was the fact that the

Bank had its headquarters in Great Britain. The operation in Singapore, though large, was a branch of the Bank, and not a separate legal entity.

4. If the **Employment Rights Act** is to be construed as he argues, it would follow that the statute would have within its reach any case in which any employee, of any origin, in any country, asserts detriment or dismissal for making a public interest disclosure, provided only that they are employed by an employer which has a base in the United Kingdom.

The Law

5. Prior to the coming into force in October 1999 of the **Employment Relations Act**, the **Employment Rights Act 1996** contained, as section 196, a provision which limited its territorial application to the United Kingdom. That section was then repealed. The provisions of the **Employment Rights Act** which relate to protecting employees who make disclosures in the public interest were inserted by the **Public Interest Disclosure Act 1999**, which came into force at the start of July 1999, and therefore prior to the repeal of section 196. Accordingly, when introduced those provisions had no territorial application outside the jurisdiction of the United Kingdom.

6. Since, after the repeal of section 196, the **Employment Relations Act** contained no geographic limitation, its provisions would on its face apply to any individual working under a contract of employment anywhere in the world. However, the parties to the cases of **Lawson v Serco Ltd**, **Botham v Ministry of Defence** and **Crofts v Veta Ltd** brought in the wake of the repeal agreed that some territorial limitation was to be implied, and Lord Hoffmann, with whom the other members of the House agreed, held on the ultimate appeal in those cases at [2006] UKHL 3, [2006] ICR 250, paragraph 1, that it was inconceivable that Parliament was intending to confer rights upon employees working in foreign countries and having no connection with

Great Britain. The general principle of construction is that legislation is territorial (paragraph 6). There might however be some exceptions to the general principle.

7. Lord Hoffmann thought it necessary to deal with the principle applicable to determine those situations in which such an exception would be made. He declined to formulate the principle as a rigid rule, not least because Parliament by removing the rule it had originally adopted had indicated that no rigid rule was appropriate. He thought the circumstances would be unusual in which employees who worked and were based abroad would come within the scope of British labour legislation, but recognised that there were some who did. Without drafting a definition, it was possible to identify those characteristics which such exceptional cases would ordinarily have (paragraph 36). He did so first by a process of exclusion: identifying those features which would not place a case within the exceptional category of those to whom the **Employment Rights Act 1996** would apply. It would not be enough for a person working abroad to be working for an employer based in Great Britain. (I note that an application of that point of principle to the appeal now before me would mean that, without more, the case was bound to fail). He continued:

> **"…many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was 'rooted and forged' in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary."**

8. He considered that there were two examples of cases in which the right not to be unfairly dismissed might apply to an expatriate employee: if his position were that of an employee posted abroad to work for a business conducted in Britain, at least as the representative of a business conducted at home, such as would be the case of the foreign correspondent of a newspaper, or if he were an employee working in a political or social British enclave abroad.

9. It is in the nature of case law that it throws up further examples which might fit within a broad scope of principle. The incremental, evolutionary approach of case law, driven by applying or adapting an existing principle to fit new contexts, is demonstrated by those cases which followed **Lawson**. The first of those to reach the highest court was **Duncombe v Secretary of State for Children, Schools and Families** (number 2) [2011] ICR 1312, SC, in which the employment of British teachers, working in Europe in a school intended to accommodate British nationals working for European institutions, was held within the reach of the statute. The teachers were recruited to work in an international enclave. They were recruited as British public servants to be posted abroad. They were employed to fulfil the obligations which the UK Government had undertaken to other European Union states. Their employer was the Government of the United Kingdom. They were employed under contracts governed by English law. The place where they lived had no particular connection with the countries in which they were situated. It would be anomalous if a teacher who happened to be employed by the British Government to work in the European School in England were to enjoy different protection from teachers who happened to be employed to work in the same sort of school in other countries. This "very special combination of factors" distinguished the Claimant employees from locally employed direct labour. Baroness Hale thought (paragraph 8) that the right would "only exceptionally cover employees who are working or based abroad".

10. The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law. There is no hard and fast rule, and it is a mistake, to try to torture the circumstances of one person's employment to make it fit one of the examples given, for they are merely examples of the application of the general principle. Whereas one case of the three cases considered together under the name of **Lawson** concerned an employee who, though employed by a Hong Kong airline, worked from Heathrow, using it as a base and living nearby, and the other two

were cases in which the employees were based abroad, working for the British Forces at an overseas base, and **Duncombe** also concerned a person residing and working abroad, **Ravat v Halliburton Manufacturing Services Ltd** [2012] UKSC1 revealed a new problem: that of the "international commuter" who did not live abroad fulltime. The Claimant lived in Great Britain and travelled to and from his home to work for short periods overseas. Lord Hope drew a distinction between the two classes of cases, at paragraph 28 of his judgment in **Ravat**: -

> **"28. …it will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an especially strong connection with Great Britain and British employment law before an exception can be made for them.**
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> **29. But it does not follow that the connection that must be shown in the case of those who are not truly expatriate, because they were not both working and living overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of Section 94(1) [of the Employment Rights Act 1996] is a question of law, but it is also a question of degree. The fact that the commuter has his home in Great Britain, with all the consequences that flow from this for the terms and conditions of his employment, makes the burden in his case of showing there was a sufficient connection less onerous. [Counsel for the employer] said that a rigorous standard should be applied, but I would not express the test in those terms. The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain."**

11. The test there is one of sufficiently strong connection. It was repeated in paragraph 33, in which Lord Hope expressed himself influenced by the intention of the parties that the relationship between them should be governed by British employment law, and by the practice which the employer adopted, summarising that it all fitted into a pattern which pointed quite strongly to British employment law "as the system with which his employment had the closest connection", and in paragraph 35, in which he accepted a test of substantial connection but thought it better if the Judge had asked himself whether the connection was "sufficiently strong

to enable it to be said that Parliament would have regarded it as appropriate for the Tribunal to deal with the claim."

12. In **Creditsights v Dhunna** [2014] EWCA Civ 1238 Rimer LJ, with whom the other members of the court agreed, adopted the test as being one of a sufficiently strong connection with Great Britain and British employment law, when considering the case of a sales representative who had chosen to live in Dubai, to work there for an employer which was part of a worldwide business ultimately run and managed in New York.

13. A test of "sufficiently" strong connection begs the question, "sufficient" for what. In **Powell v OMV Exploration and Production Ltd** [2014] ICR 63, a decision of the EAT relied on with apparent approval in **Creditsights**, it was said at paragraph 51:

> **"The starting point which must not be forgotten in applying the substantial connection test is that the statute will have no application to work outside the United Kingdom. Parliament would not have intended that unless there were a sufficiently strong connection. "Sufficiently" has to be understood as sufficient to displace that which would otherwise the position."**

14. If ordinary unfair dismissal had been the right at issue in the case before me there could be no hope of success in arguing that the Claimant's employment relationship had a sufficiently strong connection with the United Kingdom to displace the presumption that the statute did not apply to work outside the United Kingdom.

15. The issue of law is thus whether it makes a material difference that the right not to be dismissed in the present case is said to arise under section 103A of the **Employment Rights Act 1996**. This provides, under the heading "Protected Disclosure":

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

16. The "Part" referred to is Part X of the Act, headed "Unfair Dismissal", Chapter 1 of which (within which section 103A falls) is headed "Right not to be Unfairly Dismissed". The right itself is expressed in section 94. It is that right which was under consideration in **Lawson**, **Duncombe**, **Ravat**, **Creditsights** and **Powell.** It is precisely the same right which is under consideration in section 103A. What is different is that the dismissal has to be assessed as unfair by an Employment Tribunal for the right under section 94 to have effect, whereas the effect of section 103A is that once the reason is found to be the making of a protected disclosure its unfairness is to be assumed, and does not require any assessment by the Tribunal.

17. The issue for determination is thus whether the fact that unfairness is to be presumed, rather than assessed as such, has the consequence that a right which does not otherwise extend beyond the jurisdiction potentially has a world-wide scope.

The Judgment of the Employment Tribunal

18. The Tribunal held that the test to be applied was that identified in respect of unfair dismissal by **Lawson**, **Duncombe**, and **Ravat**. In summary, the Judge said:

> **"65. …those cases apply in respect of the right to claim unfair dismissal under the ERA. As I have heard no arguments which I find persuasive that a different test should apply in relation to other provisions of the ERA, including those relating to dismissal and detriment in relation to whistle blowing, I see no reason why the same test should not apply in respect of those provisions which as Lord Hoffmann in Lawson indicated, would certainly be desirable in the interests of simplicity.**
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> **66. As Mr Milsom indicated that, should the "much stronger connection" comparative test apply, then the Tribunal would not have territorial jurisdiction in respect of any of the Claimant's complaints, I find that the Tribunal does not have territorial jurisdiction in respect of any of the Claimant's complaints and I therefore strike out those complaints in their entirety."**

The Grounds of Appeal

19. For two reasons, it was contended that the Employment Judge was in error of law. First, it is said he failed to adopt the approach indicated by **Bleuse v MBT Transport Ltd** [2008] ICR 488, and secondly failed to consider what Parliament might reasonably be taken to have intended where the right concerned was not to suffer detriment or dismissal because of making a protected interest disclosure.

20. In support of the first ground, Mr. Milsom argued that the Tribunal should have applied a "looser" test in deciding if it could accept jurisdiction. "Whistle-blowing" engaged the right to freedom of expression assured by Article 10 of the European Convention on Human Rights ("ECHR") and Article 11 of the EU Charter of Fundamental Rights ("the Charter") the latter of which was applicable, in the light of Article 47 of the Treaty on the Functioning of the European Union, to rights falling within the material scope of EU Law. These provisions made it clear that not only were the rights of the speaker to be protected in giving information, but also the right of a potential listener in receiving it. The right was within scope, since although "whistle-blowing" protection does not stem from a Directive, it is a manifestation of the ECHR which is itself a general principle of EU Law.

21. In **Bleuse v MBT Transport Ltd** the Appeal Tribunal dismissed an appeal by an employee working entirely in mainland Europe against a decision that an Employment Tribunal had no jurisdiction to consider a claim of unfair dismissal, where the only links his employment had with the UK were that the company for which he was working had its base in the UK, his contract of employment was in English, and his contract said it was to be governed by English law. Mr. Milsom (understandably) does not rely on that part of the decision, for the Claimant there had stronger links with the United Kingdom than does Mr. Smania. He relies instead on

the successful appeal against a second aspect of the Tribunal judgment, in respect of a claim for holiday pay arising under the domestic provisions implementing the Working Time Directive. The Appeal Tribunal held that where English law was the proper law of the contract (or the provisions of Article 6 of the Rome Convention applied) an English court, properly exercising its jurisdiction, had to seek to give effect to directly effective rights derived from a Community Directive such as the **Working Time Directive 2003/88**, and although it could not be enforced directly against a private body, the principle of harmonious construction required the court, if possible, to construe domestic legislation so as to give effect to it; and that, accordingly, the **Working Time Regulations 1998** should be construed by modifying the implied territorial limitation in regulation 1(2) so as to ensure the enforcement by the English courts of the right to be paid for annual leave, even if the Claimant was not based in Great Britain. I would comment that central to the reasoning was that without such a construction, a breach of a Community right would be without effective remedy. Implicit in it was a restriction on the extension of the territorial jurisdiction to the Member States of the European Union where the contract of employment was not one to which English law applied.

22. In the present case, the claim for automatically unfair dismissal was founded upon the Claimant raising issues of concern about banking practices which had been adopted by the Singapore branch of the Bank. The Judge accepted that this could have an impact upon a bank which, like it, was based in the UK. Mr. Milsom argued that the Claimant's concerns were thus of public interest to citizens of the UK, as potential listeners. The correct approach was that identified by Lord Hope in **Ravat** at paragraph 26 - that the task of the courts is to give effect to what Parliament may reasonably be taken to have intended, by identifying and applying the relevant principles - as well as at paragraph 29 of **Ravat** (quoted above). Here, contrary to the view of the employment Judge, Parliament must have intended that protection against whistle-blowing should apply to them.

23. The "stronger connection" test expounded in the authorities was an appropriate starting point, but was a means to an end, which was applying Parliamentary intent to a set of specific facts. The interpretative obligation, arising here to give meaningful effect to Articles 10 and 11 of the ECHR and the Charter respectively, provided that which was necessary to displace the presumption that the statute would not apply extraterritorially.

24. As for the second ground, the Claimant divided it into two parts. First, he argued that a purposive approach should be taken. As it was said in **BPC v Elstone** [2010] IRLR 558:

> **"Where statutory expressions are explicitly for the purpose of providing protection from discrimination or victimisation it is appropriate so far as one properly can to provide protection rather than to deny it"**

25. Second, he emphasised that in **Heinisch v Germany** [2011] IRLR 922 the European Court of Human Rights had determined that Article 10 of ECHR operates as a protection for whistle-blowers who act responsibly, such that dismissal was a disproportionate interference with the right it guaranteed. Article 10(1) expressly provides that the right which it guarantees is to be exercised "regardless of frontiers" – the flow of information transcends national borders. In **ERT AE v DEP** (C-260/89) (1991) ECR I-02925 the European Court of Justice stated at paragraphs 41, 42 that:

> **"With regard to Article 10 of the European Convention on Human Rights…it must first be pointed out that…fundamental rights form an integral part of the general principles of law, the observance of which it ensures….It follows that it is for the national court…to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court"**

26. In **Pfleger** (C- 390/12) (30th. April 2014) the CJEU, applying **ERT** , held (paragraph 36) that:

> **"the obligation to comply with fundamental rights manifestly comes within the scope of European Union law and, consequently, within that of the Charter"**

27. Once it was recognised that there was an obligation to comply with Article 10 ECHR/Article 11 Convention rights, a UK court was under a duty to interpret the implicit provision as to territorial extent in such a manner as would best give effect to the fundamental right to freedom of expression, which in this context meant providing protection to a whistle-blower. The territorial limits of the legislation did not constitute a fundamental feature or cardinal principle of the legislation such that it could not be construed so as best to give effect to freedom of expression (involving, in the present case, the freedom to hear).

28. Mr. Milsom devoted a significant part of his argument to the particular field within which the Claimant made his disclosure, that of the financial sector, emphasising that the view of the former Governor of the Bank of England, Sir Mervyn King, had been that "...global banking institutions are global in life, but national in death" in that the effects of the collapse or weakness of such an institution would hurt most in the country in which it was based, the Government of which was most likely to be the one to underwrite its failures. The public therefore had a compelling interest in hearing what a whistle-blower such as the Claimant had to say, and the law should be interpreted to avoid a chilling effect on the expression of such concerns as his.

29. He proposed that in respect of workers employed by an employer domiciled in the UK, making disclosures which are (or are said to be) in the UK public interest, UK courts should have jurisdiction over claims that they had suffered detriment or dismissal because of those disclosures, but if that were held to be too wide (on its face it would apply to workers from Tibet to Timbuktu who had never been, let alone worked, within a thousand miles of the UK)

that it should apply to those who were within the UK at the time, or were UK citizens, and/or that the activities relevant to the disclosures were activities regulated by the UK in the jurisdiction in which they occur.

Conclusions

30. I do not accept these arguments, despite their erudition.

31. First, although I accept that there may be scope in principle for deciding that some rights secured by the **Employment Rights Act 1996** may have a wider territorial application than others, there would have to be a reasoned basis for this.

32. Such a basis is not provided for in respect of public interest disclosures by any principle expressed in **Bleuse**. First, insofar as that case concerned unfair dismissal, its decision was on all fours with that of the Employment judge in the present case. Both cases concerned dismissals: in each, the application of principle was to the same effect. Second, the success of the appeal against the conclusion in respect of working time was based on giving an effective remedy for breach of a right which was common to all Member States of the European Union. That does not apply here. The right relied on in **Bleuse** was directly effective. That does not apply here. There is no suggestion that any European Union legislation has effect in Singapore. Nor does the ECHR. The extension of jurisdiction of the **1996 Act** was implicitly limited to the Member States of the European Union. Mr. Milsom's argument by contrast asserts jurisdiction over a Singaporean resident, in respect of events in Singapore, relating centrally to a workplace in Singapore, and to work done under arrangements to which it had been contractually agreed that Singaporean law would apply. The only basis for asserting that the English statute should have effect is that it is contended as part of the claim that disclosures were made in respect of malpractices which could affect the bank as a whole, and thereby have some effect in the UK,

and therefore be of public interest within this jurisdiction. Insofar as they relate to a breach of regulatory standards, the appropriate standards local to the work would be Singaporean, though it is asserted that UK regulatory authorities have an interest.

33. Mr Williams and Ms Stirling, who appeared for the Bank, argued that some support for rejecting this ground by following this line of reasoning could be gained from the comments of Underhill J. in **Pervez v Macquarie Bank (London Branch)** [2011] ICR 266, where he observed, of a Claimant complaining of acts of race and religious discrimination which had occurred outside the UK, that "he may have been right" not to seek to rely on **Bleuse**. Passing expressions such as this are of little weight, but I note the point. At least his instincts coincide with my judgment. To similar effect are comments of Supperstone J. at paragraph 17 of **Hasan v Shell International Shipping Services Ltd** (a judgment of 14th. January 2014, EAT/242/13), commenting that so far as he was aware **Bleuse** had never been applied to rights arising outside the E.U.

34. As to the first limb of the second ground, advocating a purposive approach to the interpretation of the **1996 Act**, the argument applies to all and any protected disclosures, whatever their nature (for the approach is seeking to give an interpretation in line with the purpose of Parliament enacting the provision in question, and it cannot sensibly be argued that it means one thing in those cases which are more deserving, and another in those which are less so: the same meaning, once determined, must apply to all cases which fall within the words which are to be interpreted, and the interpretation must be consistent). Yet the argument proceeded before me by special reference to the financial sector. Whereas it is understandable that disclosures of malpractice in respect of that sector may be of greater general public interest than those in many other fields, the words of the Act cannot be interpreted as sought by reference to one sector alone. The precise nature of the particular disclosures in the present

case is ultimately irrelevant. I have to ask not whether Parliament would have wished those making disclosures abroad about financial irregularities which could affect the UK to be able to come to the UK and claim protection here against the effect of actions taken against them elsewhere, but whether Parliament intended those who made a disclosure, anywhere in the world, of any nature said to be of public interest should be protected against detriment or dismissal. This is potentially a very wide class. The fact that it is desirable in a general sense that there should be protection does not lead to the interpretation that in respect of public interest disclosures the **1996 Act** should have such a world-wide application.

35. Nor did Parliament itself see it that way when protection was first introduced in the UK, by the Public Interest Disclosure Act. That Act inserted the relevant provisions into a statute which was then expressly limited in the scope of its application to the UK.

36. I cannot accept the test Mr. Milsom proposes by reference to whether the activity in respect of which the disclosure is made is one made in a field which is subject to regulation in the United Kingdom. There is no reason intrinsic to the structure or wording of the **Employment Rights Act 1996** which suggests this. No distinction is made in those sections which deal with public interest disclosures between disclosures in a regulated field and those which are not. Insofar as Parliament can be said to have had any intention as to the territorial application of the provisions of the Act intended to protect whistle-blowers, the form and wording of the Act suggests no distinction between a disclosure of one nature and that of another.

37. Further, any argument that European law (by its adoption of the Convention in the Charter) applies, so as to compel a different interpretation, is itself problematic. As Mr. Williams pointed out on behalf of the Bank, the jurisdictional reach of Article 11 of the Charter

is not greater than Article 10 of the ECHR. The ECHR applies outside the territory of contracting states only in the context of specific state actions such as invasion or occupation (see **Soering v UK** (1989) 11 EHRR 439, **Bankovic v UK** (2007) 44 EHRR SE5; and **Al-Skeini v UK** (2011) 53 EHRR 18, especially at paragraphs 130-140, as applied in **Smith v MOD** [2013] UKSC 41, especially at paragraphs 44-47); the Charter does not extend the scope of Convention rights; and therefore reliance on the Charter cannot confer jurisdiction where none would otherwise exist under domestic law. He relied on a decision of Lloyd Jones J. to this effect in **Zagorski v Secretary of State for Business Innovation And Skills** [2011] HRLR 6. The ECHR does not apply to Singapore. It is not engaged in the present case. I accept Mr. Williams' arguments.

38. Insofar as Mr. Milsom's argument asserts that a purposive approach should be taken to determining whether the **Employment Rights Act** should be construed so as to apply to an overseas disclosure of financial malpractice in a British based bank, there is a further, fundamental, reason for rejecting it. I accept that there may be scope for distinguishing between disclosures only of interest to the public local to where they are made, and those which if true may be of considerable interest to the public within the United Kingdom, when applying the same test to determine whether the statute has extra-territorial effect: but the approach of purposive construction is the approach taken in order to assist in identifying what that test is, not in considering its application to the facts of a particular case. No question as to the proper test arises when the process is not one of identifying, by construction, what that test is, but rather is the process of applying that test to different circumstances. Applying a test appropriately to the circumstances must not be confused with construing the statute purposively: there is one statute, with one meaning (whatever the appropriate construction is), though there are many circumstances to which that construction may then apply, which inevitably will differ.

39. Mr. Milsom's arguments may be good ones – if the test properly to be applied permits this – when deciding whether in the particular circumstances of a given case the statute has extra-territorial reach: but this is a process of application of a given test, and (if adopting a purposive approach) Parliament's intention is relevant only to deciding what the test should be, not in determining its application in any particular case.

40. I do not therefore think that it helps the Claimant to advance an argument which is specific to the circumstances of a particular case by reference to the purpose or intent of Parliament. Whatever the correct test is to determine the extra-territorial applicability of the protected disclosure provisions, I am satisfied that it must be one and the same test whatever the circumstances.

41. Mr. Milsom attempts to side-step these arguments by focussing on the flip-side of the right of free expression, namely the "freedom to hear". However, it is unclear to me precisely what action or failure to act by the State prevents those in the UK from hearing what is said abroad, in circumstances where the State has otherwise no responsibility under the ECHR or Charter to remove any constraint there may be on its being expressed in the first place. The claim subject to the present appeal is in any event brought not by a citizen who is hindered in hearing a whistle-blowing complaint, but by the person expressing it.

42. The chilling effect of being at risk of suffering detriment is that which is central to his claim. Though I recognise that Article 10 ECHR can extend to the European workplace, it has to be borne in mind (as observed in **BP plc v Elstone** [2010] ICR 879) that the issue is not whether the law should recognise the right of a citizen to speak out on matters of public concern

without fear of penalty – it does – but what the precise boundaries of that right are, as laid down by Parliament.

43. This brings me back to the question of what test is to be applied where the allegation is one of dismissal or detriment in respect of public interest disclosure. The rights are to some extent distinct, but in practical terms the most serious of all detriments in the employment context is that of suffering dismissal. It is more likely that the threat of dismissal for making an unwelcome disclosure exerts a chilling effect on potential whistleblowers than that the threat of a lesser detriment does. I would therefore hold that, albeit the rights are distinct, no less stringent a test should apply when asking whether a claim to have suffered detriment short of dismissal is within the scope of the **1996 Act** as applies when asking whether a claim to have been unfairly dismissed because of the disclosure is covered.

44. The statute was drafted such that the essential right in a case of dismissal is that in section 94 (see paragraph 16 above). Supreme Court and House of Lords authority is to the effect that whether the Act extends extra-territorially to a claim based on the right not to be unfairly dismissed the test is that of a sufficiently close connection with the UK and UK employment law. I see no reason to think that the provision by section 103A that it is automatically unfair for dismissal to be on the grounds that an employee has made a protected disclosure should have the effect that this particular species of unfair dismissal should be treated any differently from those other species which fall within the genus of unfair dismissal.

45. Since Mr. Milsom concedes, as is inevitable, that the Claimant cannot satisfy this test the Employment Judge was entirely right to decide as he did, and the appeal is dismissed.

46. After the judgment was circulated in draft to the parties, in accordance with usual practice, the Claimant sought permission to appeal, suggesting both that there was a compelling reason why the appeal should be heard and that it has a real prospect of success. I am insufficiently convinced of either: first, a number of cases in the highest courts have recently and clearly set the parameters within which the 1996 Act extends to cases arising extra-territorially, and further case-law at high appellate level is unnecessary; and second, success depends both on (a) drawing a distinction between the test to be applied to dismissals (or detriment) because the employee made a protected disclosure, and that in respect of dismissals on other grounds – a distinction for which no clear reasoned basis is apparent – and (b) accepting that the reach of any such distinct test, whatever it may be, is such as to encompass a person such as the Claimant who, and whose employment, has such a tenuous link with the U.K. I refuse the application.