EMPLOYMENT TRIBUNALS

Claimant: Mr S Bacho

v

Respondent: Quantel Limited

PRELIMINARY HEARING

Heard at: Reading **On:** 3 August 2018

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: Ms J Stone of Counsel
For the Respondent: Mr S Brittenden of Counsel

RESERVED JUDGMENT

1. The Employment Tribunal does have territorial jurisdiction to consider the Claimant's claims.

2. The Respondent's application that the Claimant's claims should be struck out under rule 37 of the Employment Tribunals Rules of Procedure is dismissed.

3. The claimant is ordered to pay a deposit in the sum of £250 as a condition of continuing to advance the allegation or argument that he made a protected disclosures within the meaning of section 43B of the Employment Rights Act 1996 in emails dated 18 March 2017 and 12 April 2017.

REASONS

1. In deciding the question of territorial jurisdiction and the application to strike out the claim or order a deposit, I heard evidence from the claimant and from Mr Matthew York. I was also provided with a hearing bundle of 200 pages of documents. From these sources I made the findings of fact set out below.

2. The Respondent is a company registered in the United Kingdom. The Respondent operates in the field of broadcast media technology and has offices and employees in a number of locations around the world. The Respondent employs approximately 330 employees in the United Kingdom out of 550 employees worldwide. All the respondent's core business functions are located in the United Kingdom. The Respondent's Chief Executive at the

relevant time and the majority of the management team are based in the United Kingdom. The Chairman of the Board and all the directors are based in the United Kingdom. Also, in the United Kingdom are teams working on sales and marketing operations, a supply chain team, a research and development team, manufacturing, service and support. Most of the Respondent's external suppliers and service providers are based in the United Kingdom, including auditors, corporate counsel, payroll company, PR agencies, hardware and software suppliers.

3. The Claimant resides in Lebanon. When the Claimant applied for employment with the Respondent, he was living in Lebanon. He was interviewed in the United Kingdom on three occasions. On 14 April 2016, the Claimant was offered the position of Chief Business Development and Marketing Officer. The offer was made subject to the receipt of satisfactory references, proof of identification in accordance with the Asylum and Immigration Act 1996, and eligibility to work in the United Kingdom. The Claimant's contract of employment provided that the address of normal place of work for the Claimant was *"Snell Advanced Media, Turnpike Road, Newbury, Berkshire RG14 2NX, United Kingdom where you will be expected to work between 10-12 days per month."*

4. The Claimant's contract provided that it will be governed and construed in accordance with English law, that the United Kingdom courts would have jurisdiction, that the Claimant's normal place of work was on Turnpike Road, Newbury, that the Claimant was expected to work at the normal United Kingdom place of work between 10-12 days per month, that the Claimant's employer is in the United Kingdom, that United Kingdom legislation such as the written particulars relate to section 1 of the Employment Rights Act 1996, and that the Claimant was opting out of the Working Time Regulations 1998, and setting out duties under the Health and Safety at Work Act 1974, that the Claimant would report to Mr Thorsteinson who was based in the United Kingdom. The Claimant was issued with an employee information booklet which is specifically written for the United Kingdom, the Claimant was given access to the Respondent's United Kingdom HR portal, giving him access to UK-specific policies.

5. The Claimant started work on 16 April 2016 and generally attended the Newbury office for ten days a month unless he was travelling for business. The Claimant had an office in the Newbury headquarters; this was the only office that was provided for him by the Respondent.

6. The Claimant had a global role. The focus of the Claimant's role was business development and marketing globally. During his employment, the Claimant held meetings in the United Kingdom with potential clients, strategic partners suppliers and service providers.

7. The Claimant managed a team who were based in the United Kingdom and he had one to one meetings with his team members which took place in the United Kingdom. The Claimant attended meetings with his colleagues in the United Kingdom on a weekly or bi-weekly basis. In respect of some of these meetings, the Claimant would phone in from his home in Lebanon rather than be physically present. The Claimant was involved in bi-weekly meetings with

the leadership team; he did not attend all these meetings as he was on occasion travelling and unable to attend. There is some discrepancy between the number of times that the Claimant said he attended and the number of times that the Respondent said he attended. It is the Respondent's case that the Claimant was more often not at the meetings rather than present.

8. The Claimant's reporting line was based in the United Kingdom. The team that the Claimant managed was based in Newbury. A large part of the Claimant's work involved managing the UK-based team. The Claimant's personal assistant was based in the United Kingdom and all the head office functions with which he was required to engage were based in the United Kingdom.

9. When the Claimant was not working in Newbury, he was often travelling throughout the world on business to meet customers and channel partners and attend corporate events and trade shows. The Claimant would regularly commute from his home in Lebanon to cities around the world in order to carry out his role. When the Claimant was not in Newbury or travelling on business, he would work from home in Lebanon. While working from Lebanon, he would receive regular phone calls from his line manager, team members and peers, all of whom were based in the United Kingdom.

10. During his employment, the Claimant was in Newbury working for 121 working days. The Claimant's salary and benefits were based in GB pounds. His pay was processed and declared to HMRC. 70% of the Claimant's pay was not operated under the PAYE scheme. The Respondent applied to HMRC to operate PAYE on 30% of the Claimant's earnings. This was intended to reflect the part of his working time that he spent conducting work in the United Kingdom rather than travelling or working from home.

11. Throughout his employment with the Respondent, the Claimant's family home was in Lebanon. The Respondent has no other link to Lebanon. None of its staff are employed to work in Lebanon. The respondent does not have an office in Lebanon. The Respondent has no group, company, subsidiary or payroll service in Lebanon. This was the Claimant's working pattern throughout his employment with the Respondent.

12. The Claimant explained that when he took on the role with the Respondent, it was always his intention to continue to reside in Lebanon. He did not discuss relocation to the United Kingdom at any time with the Respondent. He did not ask for relocation and the Respondent did not ask him to relocate to the United Kingdom. It was not an issue.

13. The Claimant said that his role was a global role and that the United Kingdom was part of the territory but not the only part of his mandate. Looking at his workload, the Claimant states that a proportion of his workload globally was about 80% and 20% was in the United Kingdom. This split in the workload, he states, generally aligned with the Respondent's global business. The Claimant said that the function that he was running was a global function which required him to be in the United Kingdom for a significant period of the time.

14. The Claimant disputed the Respondent's figures that he spent 4.6 days a month working in the United Kingdom. The differences between the Claimant

and the Respondent appeared to arise from the way one treats the days when the Claimant flies in and flies out of the United Kingdom and whether or not these are given as working days or not. The Claimant produced documentation relating to his tax self-assessment which indicated that just over 30% of his pay was subjected to tax on the PAYE scheme.

15. The Respondent's case on territorial jurisdiction is that the Claimant has an insufficiently strong connection with Britain to attract the protection of the legislation. The factors that the Respondent particularly relies on were that the Claimant always intended to reside in Lebanon and made it clear that this was his choice. It was said by Mr York in his evidence that around the time that the Claimant was interviewed, he made much of his contacts in Lebanon and EMEA countries. The Respondent points out that the Claimant had no place of abode or residence in the United Kingdom. The Respondent also points to the fact that the Claimant was performing a global role. The Respondent further points out that the Claimant's estimate was that 20% of the time he was working overseeing operations in the United Kingdom; the remainder of the time working outside the United Kingdom.

The applicable law

16. The Employment Tribunals Rules of Procedure 2013 provide that a claim may be presented in England and Wales if, the respondent carries on business in England and Wales; one or more of the acts or omissions complained of took place in England and Wales; the claim relates to a contract under which the work is or has been performed partly in England and Wales; or the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales (rule 8(2)).

17. The claimant brings a compliant of unfair dismissal. There is an implied territorial limitation to a claim for unfair dismissal (Lawson v Serco [2006] UKHL 3. The claimant who did not have two years qualifying employment brings his claim pursuant to section 103A of the Employment Rights Act 1996.

18. The Employment Rights Act 1996 applies to employment in Great Britain. It may in some circumstances cover employment abroad. Where an employee works partly in Great Britain and partly abroad the question is whether the connection with Great Britain and British employment law 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. Where an employee works and lives wholly abroad the question is whether his or her employment relationship has much stronger connections both with Great Britain and with British employment law than with any other system of law.

19. In Lawson v Serco[1] Lord Hoffmann stated that Parliament must have intended, as a general principle, for the unfair dismissal rules to apply to 'the employee who was working in Great Britain'. He divided employees into three categories for the purpose of establishing whether a UK employment tribunal has territorial jurisdiction to hear a claim of unfair dismissal.

20. In the standard case, the question will depend on whether the employee was working in Great Britain at the time of dismissal, rather than upon what was

[1] Lawson v Serco Limited [2006] UKHL 3

contemplated when the contract was entered into. Though they are not determinative of that question, the terms of the contract and any prior contractual relationship between the parties may be of relevance in determining whether the employee was actually working in Great Britain or on a casual visit.

21. In the case of peripatetic employees, who owing to the nature of their work do not perform services in one territory, 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. The question then is whether the base was in Great Britain at the time of dismissal. 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 had been operating the contract in practice.

22. Expatriate' employees working and based abroad may in exceptional circumstances be entitled to claim unfair dismissal.

23. In Ravat v Halliburton Manufacturing and Services Ltd[2], Lord Hope stated a general principle: that the right to claim unfair dismissal will only exceptionally cover employees working and based abroad and, for it to apply, the employment must have stronger connections with Great Britain and British employment law than with any other legal system. Although the general rule was that the place of employment is decisive, it is not an absolute rule.

24. In the case of a peripatetic employee the connection between Great Britain and the employment relationship is sufficiently strong for it to be presumed that Parliament must have intended that the provisions of section 94(1) to apply to that employment.

25. 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 really 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 they are not determinative.

26. In respect of peripatetic employees, who 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.

The Parties submissions

27. The Respondent points to the judgment of Lord Hope in the ***Ravat*** case where Lord Hope states that it is not open to the parties to contract into the jurisdiction of the Employment Tribunals.

28. The Respondent points to the evidence of Mr York that the Claimant spent 4.6 days per calendar month working in the United Kingdom in the 14 months that he was employed by the Respondent. The Respondent points to the tax arrangements which meant that 70% of the Claimant's earnings were subject to a tax regime which is in another jurisdiction. The Respondent says that

[2] Ravat v Halliburton Manufacturing and Service Limited [2010] UKSC 1

where the lion's share of the Claimant's income is taxed outside the UK it points away from having sufficiently close connection with the United Kingdom to give jurisdiction to the Employment Tribunal.

29. The Respondent states that, properly analysed, the Claimant's situation falls squarely within observations made by Lord Hoffman in the case of *Lawson* where he stated: *"I think that it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough."*

30. The Respondent also refer to the comments made by Lord Hope in the case of *Ravat* where he stated that: *"The circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of our British labour legislation and 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."*

31. The Claimant points to several matters which are not in dispute. The Claimant's employer was based in Great Britain. The contract provided that the Claimant's normal place of work was in Great Britain. This was also described as his primary work location. The contract was expressly agreed to be governed by English law in the English courts. The contract was a Great Britain-style contract referring to entitlements under GB law. No other system of law is referred to in the contract. The contract stated that the Claimant was expected to work in the Respondent's Great Britain office for 10-12 days per month and there was no other place where the Claimant was contractually required to work. The Claimant received his salary and benefits in UK Sterling. The Claimant's business card gave his work address as being in Great Britain. The Claimant also refers to a number of other points which were drawn out from evidence given by the Claimant which are contentious between the parties.

32. The Claimant's submission is that he was working in Great Britain and that was his principal place of work even though he happened not to be actually working in Great Britain on the particular day when he was dismissed. The Claimant rejects the contention that he was an expatriate as he conducted at least some of his work in Great Britain.

33. The Claimant says alternatively he was a peripatetic employee; he was expected to, and did, work in Great Britain for part of the year. His contract required him to work 10-12 days a month. The Claimant says that the Respondent's suggestion that the stronger connection test was the appropriate test is wrong, but even if that contention were right and the stronger connection test is to be applied in the Claimant's case, the Claimant argues that the Claimant was able to demonstrate a strong connection with Great Britain, far closer than with any other jurisdiction. There was no suggestion of any other jurisdiction being identified as having a closer connection.

Conclusions on the territorial jurisdiction issue

34. In this case, the Respondent says that there is not a sufficiently strong connection with Great Britain to justify a finding that there is territorial jurisdiction. The Claimant says this is a clear case where the Employment Tribunal has territorial jurisdiction to consider the Claimant's complaint.

35. Was the Claimant working in Great Britain at the time of his dismissal? I am satisfied that he was. The Claimant's employer was based in Great Britain and

the contract provided that the Claimant's normal place of work was in Great Britain. This was described in his contract as his primary location. The contract was expressly agreed to be governed by English law and the English court. The contract was a Great Britain-style contract referring to entitlements under GB law. The contract stated that the Claimant was expected to work in the Respondent's UK office for 10-12 days a month. There was no other place that the Claimant was contractually required to work. In all the circumstances, I agree with the Claimant's submissions that at the time of his dismissal, the Claimant was in fact working in Great Britain and that his principal place of work even though he happened to be actually not working in Great Britain on the particular day that he was dismissed by telephone.

36. Based on the factual circumstances of this case it would have made no difference in my view whether the claimant lived in Berkshire or Saida, Lebanon the claimant's working pattern would have been the same. In carrying out his duties he was required to spend a considerable amount of time travelling on business. The claimant's working pattern from inception included a realisation that he would be away from the Newbury headquarters for much of the time because of the travel requirements of the role and the fact that he lived in Lebanon. The claimant's contract included a provision that set out the expectation as to the amount of time that the claimant was to spend working in Newbury.

37. If I am wrong about that then I would in any event have concluded that the Claimant was a peripatetic employee and his place of employment or base was in Great Britain. The Claimant's contract of employment established that the Claimant's normal place of work was in Great Britain and that he was expected to be there 10-12 days a month. The Newbury address was given as his contact details on his business card. The Claimant spent a significant amount of time working in Great Britain for the Respondent. When he was in Great Britain he was performing vital aspects of his role which including meeting with the team he managed, other managers, and with customers. The claimant had no other work place. When he was not working in Great Britain, he was working from home or travelling.

38. In the circumstances of this case, I am satisfied that the Employment Tribunal has the territorial jurisdiction to deal with the Claimant's case.

Application to strike out pursuant to rule 37

39. The Respondent says that if the Tribunal has territorial jurisdiction to consider this case, the claim should be struck out under rule 37 of the Employment Tribunals Rules 2013 or the Claimant should be required to pay a deposit of not more than £1,000 to be permitted to advance his claims.

40. The Respondent contends that the Claimant will not be able to establish either that his alleged disclosures satisfy the qualifying disclosures' requirement of the Employment Rights Act 1996 or that there was a causal link between the alleged protected disclosures (if established) and the Claimant's dismissal or his alleged detriments.

41. The Respondent says that the disclosures cannot amount to qualifying disclosures for the purposes of the Employment Rights Act 1996 because the alleged disclosures were not made in the public interest: they relate purely to internal matters. One of the alleged disclosures it was said amounted to a allegations and not disclosure of information. It is said that the alleged disclosures did not tend to show that the Respondent has failed, is failing or is

likely to fail to comply with any legal obligation to which it is subject. Instead, they relate to purely internal matters and the Claimant has not identified the specific legal obligation on which his claims are based. Finally it is said that as a result of failure to show that there is a failure on the part of somebody to comply with the legal obligation, the Claimant will not be able to show that he had a reasonable belief that the alleged disclosure tended to show that the Respondent has failed, is failing or is likely to fail to comply with any legal obligation to which it is subject.

42. The first disclosure is contained in an email from the Claimant to Matthew York, which attached an email that he sent to one of his direct reports (p131). The relevant part is as follows:

> *"I am not approving this RTP (at nearly £100k per year) or any other RTP for that matter that does not follow Purchasing and Finance guidelines in relation to due diligence and authorisations for marketing suppliers.*
>
> *Until and unless I receive full details on how we engaged this company, based on what criteria they have been selected, what other companies have been considered, who authorised and signed the contract without prior discussion & approval, this RTP remains on hold."*

43. The second disclosure is also contained in an email sent by the Claimant to his colleague, Matthew York (p135). In that email, it includes the following passage:

> *"On KOM, in view of the evidence (some of which is documented by Finance & Purchasing), I think we have a case of 'neglect and misconduct', so I would push back on anything beyond a 3-month settlement but will leave this to you to manage. Here are some recent incidents starting January this year which could be helpful:"*

The claimant then sets out in the email a number of instances of actions carried out by one of his direct reports who is referred to as 'KOM'. It is important to note that this email was sent in circumstances where there had been discussion about terminating the employment of KOM by the Respondent. Matthew York, in an email correspondence with the Claimant, had indicated that the most likely scenario with KOM was to negotiate a settlement agreement.

44. The Respondent says that both matters relied on as disclosures concern internal matters to the Respondent. The first concerns a failure by a subordinate to obtain approval before entering into a contract with a third party and refers to a departure from protocol. It is said that this type of thing will occur almost daily and that it would be surprising if something like this fell within the public interest. The second disclosure, it is said, was sent solely for the purpose of providing grounds as to why a subordinate should be dismissed and/or any severance payment kept to a minimum. The Respondent says that there is nothing in the public interest contained in that disclosure relied on by the Claimant. The Respondent contends that it is an allegation not information.

45. The Respondent states that to fall within section 43B, it is not sufficient for a worker to simply suggest that something is not unlawful. Reliance is then placed on the case of Fincham v HM Prison Service[3]. The Respondent says that as a matter of common sense, it cannot be suggested that the failure to

[3] Fincham v HM Prison Service (UKEAT 0925/01)

comply with any process or protocol, or that for the claimant to suggest that a subordinate should be dismissed or should receive less by way of severance pay, can amount to a disclosure of information that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The Respondent states that it therefore follows that there cannot have been a reasonable belief in a breach of a legal obligation.

46. Finally, the Respondent points out that causation cannot be established by the Claimant. The Respondent contends that the principal reason for the dismissal was not the alleged disclosures but the fact that the Claimant was performing poorly, which was the real reason for the decision to dismiss. It is said that the Claimant was not subjected to any detriment as a result of the protected disclosures.

47. The Claimant's response to the Respondent's submissions are stated quite shortly. Dealing with the question of causation, the Claimant says that the case on causation in this case is unusually strong. But in any event, whether causation is made out is something that has to be determined in the full light of all the evidence in the case having been considered and cannot be determined on the basis of this application made relying on rule 37(1)(a).

48. Turning to the question of a breach of a legal obligation. What the Claimant says is that in his witness statement he will set out evidence setting out why he considers that there were breaches of regulations which he understood to be in line with UK anti-corruption and anti-bribery legislation and that he considered it to be in the interests of the respondent, its shareholders and generally for the smooth operation of the market. What the claimant says is that it will be a question for trial whether or not his belief that these breaches were legal obligations was reasonable and that it is not appropriate to strike these claims out at a preliminary hearing where there has not been an examination of the surrounding facts.

49. The Claimant makes a distinction between this application to strike out which is made pursuant to rule 37 on the grounds that the claim has no reasonable prospect of success and a preliminary hearing where the issue to be determined by the Tribunal is whether or not the Claimant has made a protected disclosure.

50. As I understand the Claimant's position, the difference put forward is that in this application, all the Claimant has to do is identify ways in which the case can be argued and to show that there is some basis for presenting an argument in the way that the Claimant would wish to do. In contrast, were this an application at a preliminary hearing to determine whether or not there was a protected disclosure then in that case it would for the Tribunal to make findings of fact, consider the arguments put forward on behalf of the Claimant and Respondent, and apply the appropriate law before giving a ruling on that question which is binding in the proceedings.

51. As I understand the Claimant's submission, it is said that on the basis that that is not the approach being taken here, it is really not open to me on the state of this case presented so far for me to strike out the claim because essentially there has not yet been an examination of the facts that needs to be made before the determination asked for can be made.

52. In broad terms, I agree with the way that the case is put by the Claimant on this. It seems to me that this is a case where findings of fact need to be made in order to make a determination. The apparent arguments presented have to

be considered in their full and proper context. It is not a case which is so clear that it can be seen without further examination that the matter can only be decided in one way and that it therefore necessarily follows that the claim is bound to fail or succeed. The facts which underpin the positions of the Claimant and the Respondent are hotly contested between the parties. This is not a case where there are a set of agreed facts that I am asked to give a determination on. I am not satisfied that this is a case which is so clear that it is possible for me to say that there are no reasonable prospects of success. I therefore decline to strike out the Claimant's claim in respect of protected disclosures.

53. The question arises whether I should order a deposit. The area that has given me cause for concern in relation to the Claimant's case concerns the nature of the disclosures relied upon and the contention whether in the light of the decision in the case of Fincham v HM Prison Service, it can be said that there is a disclosure which identifies a breach of a legal obligation on which the employee is relying.

54. I have considered the way that the Claimant put the matter in answer to the Respondent's application. I note that paragraph 26 of the Claimant's submissions reads in part as follows:

> *"The Claimant has set out in his witness evidence why he considers that there were breaches of regulations which he understood to be in line with UK anti-corruption and anti-bribery legislation and which he considered to be in the interests not only of the Respondent's shareholders but also to the smooth operation of the market. It will be a question for trial whether or not his belief that these were breaches of legal obligations were reasonable. It is submitted that it cannot be said that this position has no or even little reasonable prospect of success. The protected disclosures will need to be considered and understood in the context of the surrounding facts."*

55. While I agree with the last sentence in the passage quoted, I consider that looking at that passage and comparing it with the plain text contained in the two disclosures, it is a construction which is possible but it appears to me that it is strained. While I am not satisfied that it is possible for me to say that it has no reasonable prospect of success. I am satisfied that it will be difficult, bearing in mind Fincham, for the Claimant to show that the construction put on the two emails relied on as the disclosures is on the balance of probabilities the correct construction. The evident context in which those emails were written appears to me to suggest that the Claimant's construction of those emails to show a protected disclosure is strained and is not likely to be accepted. In the circumstances, I am satisfied that the contention that the Claimant made protected disclosures for that reason has little reasonable prospect of success. I therefore consider that it is appropriate to order a deposit.

56. I have not been provided with evidence of the Claimant's means. I am required by rule 39(2) of the Employment Tribunals Rules of Procedure 2013 to make reasonable enquiries into the Claimant's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

57. I also take into account the fact that the Claimant is represented by solicitors and that they have prepared a witness statement for the purposes of this application and in resisting this application have clearly understood it to

include an application for a deposit. Taking those two factors into account in the absence of information about the claimant's means, I am satisfied that an appropriate deposit in this case is one in the sum of £250.

58. My reasons for making the deposit order are that I am not satisfied that the Claimant will be able to show that there was a disclosure of information tending to show a breach of the legal obligation and therefore the claimant will fail in his attempt to establish that there was a protected disclosure.

59. A telephone preliminary hearing will be listed to take place on a date to be notified to the parties separately on the first available date.

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Employment Judge Gumbiti-Zimuto

Date: 10 September 2018
15 October 2018
Sent to the parties on: .....