EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr U Khan		British American Tobacco (Holdings) Limited

Heard at: London Central (by video) **On**: 30 June 2020

Before: Employment Judge Stout (sitting alone)

Representations
For the claimant: In person
For the respondent: Mr S Brittenden (counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant's claims of unfair dismissal and/or subjection to detriment for having made protected disclosures do not fall within the territorial scope of the Employment Rights Act 1996 and are thus not within the jurisdiction of the Employment Tribunal.

The Claimant's claims are accordingly dismissed.

REASONS

Introduction

1. By a claim form received on 30 January 2020 the Claimant brought claims against Mr Syed Iqbal and "British American Tobacco" for unfair dismissal and subjection a detriment for having made protected disclosures. By notice to the parties of 12 March 2020 the Claimant's claim was accepted against

"British American Tobacco", but the claim against Mr Iqbal was rejected under Rule 10(1)(c).

2. The Respondent responded to the claim on 9 April 2020 contesting the Employment Tribunal's territorial jurisdiction to hear the claim on grounds that the Claimant was employed by Pakistan Tobacco Company Limited ("PTC"), its Pakistan subsidiary. The Respondent identified its correct name as being British American Tobacco (Holdings) Limited and after discussion at the start of this hearing, I understood it to be agreed that there is only one Respondent to these proceedings and that its name should be formally amended to reflect that given in the response. In any event, that appears to me to be the correct name for the Respondent and I so order.

3. I announced my decision on the question of territorial jurisdiction at the end of the hearing and gave summary reasons orally, indicating that I would provide my full reasons in writing, which I now do.

The type of hearing

4. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties. The form of remote hearing was video (V) conducted through the Cloud Video Platform (CVP). A face to face hearing was not held because the London Central Employment Tribunal is closed to the public as a result of the pandemic.

5. The public was invited to observe via a notice on Courtserve.net. No members of the general public joined, although three observers were present with the Respondent.

6. There were a few connection problems that were resolved during the hearing. In particular, Mr Waqas Khan (the Respondent's witness) had a very poor connection from his computer that meant that it was not possible to hear him clearly. For part of his evidence it was agreed that he could answer by typing in the chat function. He then joined via his mobile phone (audio and video) which was much better.

7. The participants were told that it is an offence and/or contempt of court under s 9 of the Contempt of Court Act 1981 and/or s 41 of the Criminal Justice Act 1925 to record the proceedings, including by audio, video or screenshots.

The issue

8. The issue to be determined was whether the Claimant's claims under the Employment Rights Act 1996 (ERA 1996) for unfair dismissal and/or subjection to a detriment for making protected disclosures fall within the territorial scope of that Act and accordingly within the jurisdiction of the Tribunal.

The Evidence and Hearing

9. The parties provided an agreed bundle of documents of 163 pages. The Respondent also supplied a copy of the Tribunal's letter to the parties of 12 March 2020 in which notice was given that the Claimant's claim had been accepted against "British American Tobacco", but not against an individual Respondent (Mr Syed Iqbal) named in the claim form. The Claimant provided a witness statement and the Respondent provided a statement for its witness, Mr Waqas Khan. The Claimant and the Respondent's counsel also provided written skeleton arguments and the Respondent provided copies of legal authorities referred to.

10. The Claimant and Mr Waqas Khan gave evidence on oath and were cross-examined.

The facts

11. I have considered all the oral evidence and the documentary evidence in the bundle and witness statements and the Claimant's skeleton argument. The facts that I have found to be material to my conclusions are as follows. If I do not mention a particular fact in this judgment, it does not mean I have not taken it into account. All my findings of fact are made on the balance of probabilities.

Background

12. The Claimant was employed by the Pakistan Tobacco Company Limited ("PTC") from 13 October 2008 as an Area Manager in its Marketing Department, Regional Office, Rawalpindi, Pakistan (p 43). At that time the Claimant was living in the UK, where he had been studying, but he gave his home address on application for the role as Islamabad, Pakistan.

13. PTC is a company registered in Pakistan and listed on the Pakistan stock exchange. PTC is a subsidiary of the Respondent company. The Respondent is a UK-registered company. Both companies are part of the British American Tobacco (BAT) global group of companies. PTC has a Head Office in Islamabad. There is a Regional Office for BAT South Asia in Hong Kong. BAT's Global Office is in the UK. PTC has no offices in the UK.

14. The Claimant was paid in Rupees (Pakistan currency) and paid tax in Pakistan whilst he was employed by PTC in Pakistan. I understood him to say that he paid tax in Sri Lanka while on secondment there. In any event, there is no dispute that he did not at any point pay UK tax or national insurance.

15. On appointment the Claimant's place of work was Rawalpindi, Pakistan. It was a condition of his appointment that he would *"serve the Company at any place designated by the Company in Pakistan"* (pp 44 and 46). He could not

accordingly be required to relocate to the UK under his contract of employment. At no point during his 11 years of employment did the Claimant attend the UK on business. He did not have immigration clearance to work in the UK. However, he did frequently participate in conference calls with colleagues in the UK.

16. The Claimant's immediate line manager, and that person's line manager, were employees of PTC. Mr Syed Iqbal, against whom the Claimant initially sought to bring these proceedings, was given a UK employment contract, but he was General Manager level, several rungs above the Claimant. All General Managers are on UK employment contracts.

17. By letter dated 29 March 2018 the Claimant was informed that he was being assigned to Ceylon Tobacco Company plc ("CTC") in Sri Lanka (p 62). This letter described PTC as his "Home Company" and CTC as his "Host Company". It stated that this temporary amendment to his employment contract with the Home Company *"will be governed by and construed in accordance with the laws of the country in which your Home Company is based"*. This same document provided that in the event of termination of employment, this would be dealt with in accordance with the laws of Pakistan as the Claimant's Home Company.

18. The Claimant confirmed on joining that he agreed to abide by the Pakistan Tobacco Limited Standards of Business Conduct (p 47). These appear to have been superceded by the global British American Tobacco (BAT) Standards of Business Conduct (SOBC) and there is no dispute that the Claimant, like every employee of companies within the BAT global group (c 53,000 in total), was required to (and did) sign up every year to the SOBC. The Claimant's contract of employment provided that failure to abide by the SOBC could result in disciplinary action or dismissal. The Claimant and Mr Waqas Khan agreed that there are many occasions each year where employees are disciplined for failing to abide by the SOBC.

19. The SOBC is 'printed' in the UK and seems to me to bear the hallmarks of having been prepared in the UK, as one would expect given that the BAT global group is headquartered here. The SOBC is available on BAT's website, which indicates that it is updated regularly and has recently been updated to comply with UK anti-money-laundering and tax evasion legislation amongst other things. However, the SOBC does not itself explicitly refer to any UK laws, but sets out global standards of conduct that BAT has chosen to adopt and which it evidently considers will meet legal standards in the various countries in which it operates. The only particular legal provisions referred to are US law, EU law and international legal norms (such as those set by the International Labour Organisation). At one point it makes provision that is clearly different to UK law in that, when dealing with discrimination, it indicates that discrimination on the basis of 'smoking habits' is not permitted in addition to the usual protected characteristics protected in UK law under the Equality Act 2010 (EA 2010). The SOBC states at a number of points that local law will always prevail over the SOBC in the event of a conflict.

20. The 'Speak Up' policy on whistleblowing indicates that employees may escalate issues to officers in the UK, and the Claimant has done so in this case. The Claimant also gave evidence, which I accept, that he has repeatedly been reminded during his employment about the need to comply with UK anti-bribery laws.

21. In July 2019 the Claimant's secondment was terminated prematurely and he was repatriated to Pakistan that summer with his family. His employment with PTC was terminated with effect from 31 October 2019.

The law

22. There have been a number of cases that have considered the principles to be applied in determining whether a claim falls within the territorial jurisdiction of British employment legislation, including *Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250, *Duncombe v Secretary of State for Children, Schools and Families (No 2)* [2009] EWCA Civ 1355, [2011] ICR 1312; *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1, [2012] ICR 389, *Bates van Winkelhof v Clyde & Co LLP* [2012] EWCA Civ 1207, [2013] ICR 883, *Dhunna v CreditSights Ltd* [2014] EWCA Civ 1238, [2015] ICR 105 and *Jeffery v British Council* [2018] EWCA Civ 2253, [2019] ICR 929. The same approach is to be applied to both the Equality Act 2010 (EA 2010) and the Employment Rights Act 1996 (ERA 1996): see *R (Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 438, [2016] ICR 975. The legal principles developed in those cases are conveniently summarised by Underhill LJ in *Jeffery* at para 2 (Longmore and Peter Jackson LJJ agreed with Underhill LJ). Although Underhill LJ did not intend that paragraph to be a comprehensive summary of those cases, it suffices for present purposes:

> (1) As originally enacted, section 196 of the Employment Rights Act 1996 contained provisions governing the application of the Act to employment outside Great Britain. That section was repealed by the Employment Relations Act 1999. Since then the 1996 Act has contained no express provision about the territorial reach of the rights and obligations which it enacts (in the case of unfair dismissal, by section 94(1) of the Act); nor is there any such provision in the Equality Act 2010.
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> (2) The House of Lords held in *Lawson v Serco Ltd* that it was in those circumstances necessary to infer what principles Parliament must have intended should be applied to ascertain the applicability of the 1996 Act in cases where an employee works overseas.
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> (3) In the generality of cases Parliament can be taken to have intended that an expatriate worker - that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer - will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of the 1996 or 2010 Acts. This is referred to in the subsequent case law as "the territorial pull of the place of work". (This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended the 1996 Act to apply if they are based in Great Britain.)
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> (4) However, there will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull

> sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work and justify the conclusion that Parliament must have intended the employment to be governed by British employment legislation. I will refer to the question whether that is so in any given case as "the sufficient connection question".
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> (5) In *Lawson* Lord Hoffmann, with whose opinion the other members of the Appellate Committee agreed, identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely (a) where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception") and (b) where he or she works in a British enclave abroad. But the decisions of the Supreme Court in Duncombe and Ravat made it clear that the correct approach was not to treat those as fixed categories of exception, or as the only categories, but simply as examples. In each case what is required is to compare and evaluate the strength of the competing connections with the place of work on the one hand and with Great Britain on the other.
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> (6) In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate", which is what *Ravat* was concerned with), the factors connecting the employment with Great Britain and British employment law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases, including the case of British employees of government/European Union-funded international schools considered in *Duncombe*.

23. I should add that in *Duncombe* the Supreme Court (Baroness Hale giving the judgment of the Court) emphasised that the key question in expatriate employee cases is whether the connection with Great Britain and British employment law is much stronger than the connection with any other system of law (*Duncombe*, para 8). In *Duncombe* the connection with Great Britain was found to be much stronger in part because the claimants were employed by the British Government working in an international enclave and so their only connection with a national employment law system was with the employment law of Great Britain. They were not subject to local employment law and there is no applicable international system of employment law: *Duncombe,* paras 16 and 17.

24. The cases indicate that the other factors that may be relevant to whether there is a sufficiently strong connection with Great Britain to overcome the general rule that place of employment is decisive and bring an expatriate worker within the territorial jurisdiction of British employment law include:

    a. where the worker was working at the time of the allegedly unlawful act complained of (*Lawson* at para 27), although the key question is whether the employment relationship is within jurisdiction not whether by chance a particular act was done within the geographical jurisdiction (*Jeffrey* at para 119 *per* Underhill LJ);
    b. the terms of the contract, including whether it is governed by English law (*Duncombe* at para 16), although this is not a decisive factor (see *Jeffrey* at paras 60-67 *per* Underhill LJ) and it is not open to the parties by contract either to 'contract in' or 'contract out' of the

territorial scope of the legislation (*cf Ravat*, per Lord Hope at para 32);

c. whether the employer is based in Great Britain or the employee recruited in Great Britain, although again neither is decisive, and the fact that the business is owned by a British company is not sufficient (*Lawson*, para 37);
d. where the worker's 'home' is (*Ravat*, para 34); and,
e. whether the worker pays local taxes or would be subject to local labour law (*Duncombe*, para 17).

25. I do not intend the above list to be exhaustive either of the factors that I may take into account or the legal authorities to which I have referred, but it suffices by way of guidance for present purposes.

26. Finally, the Claimant in this case referred to ERA 1996, s 204 which provides that *"For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom, or not."* However, this takes matters no further. Although the Supreme Court's decision in *Duncombe* was reached without reference to s 204, the Court of Appeal in *Jeffery* held that this was immaterial and that *Duncombe* was nonetheless binding: see *Jeffery* at paras 60-62 *per* Underhill LJ. The law thus requires that the principles in the above cases be applied in order to determine whether the particular claim falls within the territorial scope of the ERA 1996 and therefore within the jurisdiction of the Employment Tribunal.

Conclusions

27. In this case the Claimant lived and worked exclusively in Pakistan (or on secondment in Sri Lanka) and never in the UK. The starting-point therefore is that his claim falls outside the territorial scope of the ERA 1996, unless there are factors which in his case are sufficient to overcome that territorial pull. In my judgment there are not. Indeed, the territorial pull in this case appears to be almost entirely toward Pakistan. There is, on analysis, very little to connect the Claimant's employment to the UK other than the fact that his employer PTC is part of a group of companies headed up by this British-owned respondent. The legal authorities (set out above) indicate that that will rarely be sufficient to bring a claim within jurisdiction.

28. So far as concerns the other factors in this case, I find that the following factors point away from their being any sufficient connection with the UK in the Claimant's case:

    a. The Claimant's employer, PTC, is a Pakistan-registered company with no offices in the UK.

    b. The Claimant lived and worked exclusively in Pakistan or on secondment in Sri Lanka, never in the UK.

c. He could not under his contract have been required by his employer to work in the UK and he did not have the legal right to work in the UK. Although he may well have been able to obtain immigration clearance had he applied, the absence of a right to work in the UK points strongly away from there being a sufficient connection with the UK.

d. The law governing the Claimant's contract was that of Pakistan. This was explicit in the secondment agreement and (in my judgment) implicit in his contract. The secondment agreement also made clear that in the event of termination the laws of Pakistan would apply.

e. The dismissal took place when the Claimant was in Pakistan, and the detriments must have taken place when the Claimant was either in Sri Lanka or Pakistan.

f. The Claimant's immediate line managers were all employees of PTC. He was not reporting directly to anyone in the UK.

29. The Claimant points to the following factors as displacing the territorial pull of Pakistan in his case, but in my judgment they do not assist him for the following reasons:-

a. I accept that the fact that the Claimant worked closely through electronic means with UK colleagues might be relevant, but in this case even if he had been a frequent visitor to the UK for work purposes, that would not in my judgment have been sufficient to counterbalance the strength of connection with Pakistan;

b. The SOBC does not assist the Claimant. That is a set of global standards and not specifically British at all. It is immaterial that there is no 'local' version of the SOBC. The fact that there is no 'local' version does not make the version that exists 'British' any more than it makes it 'American'. Even if it did expressly require all employees to comply with UK law (which it does not) that could not itself confer jurisdiction under the ERA 1996 because the legal principles show jurisdiction cannot be conferred by agreement. The fact that the SOBC emanates from the UK is a consequence of the group being British-owned and headquartered in the UK, but the authorities are clear that British ownership is not enough to confer jurisdiction.

c. The fact that the Claimant was required by his employer to comply with UK anti-bribery and competition laws also does not assist, because they are governed by different legislative provisions, the territorial reach of which I am not concerned with and may not be the same as that of the ERA 1996.

d. The fact that the Respondent's whistle-blowing procedures may permit employees all over the globe to take matters to officers in the UK (and that the Claimant has evidently done this), is again merely

a function of the global group being British-owned and headquartered here.

Overall conclusion

30. For all these reasons I have concluded that the Claimant's claims fall outside the territorial scope of the ERA 1996 and thus outside the jurisdiction of the Tribunal under that Act.

31. It follows that I must dismiss the Claimant's claims.

Note:

32. I add at this point that the hearing, and this judgment, did not deal with a further potential obstacle to the Claimant's claim, namely that a claim for unfair dismissal under ERA 1996, s 111(1) must be brought against the Claimant's employer (which is PTC and not the Respondent). The Respondent in this case perhaps wisely concentrated on what I have ultimately found to be the substantive obstacle to the Claimant's case, which was the question of territorial jurisdiction and that is the only issue that I have determined in this judgment.

Employment Judge Stout

1 July 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

08/07/2020.

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FOR THE TRIBUNAL OFFICE