EMPLOYMENT TRIBUNALS

Claimant: Mr M. Saxena

Respondents: BP Exploration Operating Company Limited

Heard at: Watford (remotely CVP) **On**: 8, 9 October 2020

Before: Employment Judge McNeill QC, sitting alone

Appearances

For the Claimant: In person **For the Respondent:** Ms Tutin, Counsel

JUDGMENT having been sent to the parties on 20 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed by the Respondent as a Rotating Equipment Engineer from 16 July 2012 to 1 July 2019, when he resigned from his employment. His claim is for unfair (constructive) dismissal.

The Claimant's claim in summary

2. At the time that he was recruited by the Respondent, the Claimant, who is an Australian citizen, was working in Japan. His claim arises out of an alleged breach of the term of mutual trust and confidence in his contract of employment and whether the Respondent had any liability to pay tax remittance charges of £30,000, potentially payable by him and his wife if they were resident in the UK for seven years, pursuant to that term.

3. In his letter of resignation dated 1 April 2019, the Claimant stated that those from BP involved in the negotiations leading to his recruitment did not provide him with "full and factual information regarding the applicability

of UK tax laws on his global income". BP having declined to bear the tax liabilities "and associated cost" that the Claimant would have to pay if he remained in the UK after seven years, the Claimant said that it was not possible for him to bear the tax burden resulting from the tax remittance charge, which is an annual charge. At the time, he stated that his net income was about £4,700 a month. The Claimant stated in the letter that he had no option but to resign from his employment. He gave three months' notice in accordance with his contract of employment. He moved back to Australia before the tax remittance charges became payable and has, in consequence, not had to pay those charges.

4. It was not in dispute that the Respondent refused to pay the tax remittance charges nor that shortly before resigning the Claimant had asked to move back to Australia and to continue working from BP remotely and that this request had been refused by the Respondent. If he had been able to move back to Australia, the Claimant would not have had to pay the tax remittance charges. He alleged that this refusal to accede to this request contributed to his decision to resign.

5. The tax remittance charges arose under what has been called "the seven-year tax rule" because the Claimant had opted to pay tax on the "remittance" rather than the "arising" basis when he moved to work for the Respondent and had continued to be taxed on that basis.

6. The Claimant claims against the Respondent for his relocation costs to Australia, the costs of his time spent on relocation and a substantial loss of earnings.

Issues

7. The parties were unable to agree a List of Issues. They provided their own lists. Both lists set out what the parties defined as the issues to be determined in relation to the Claimant's claim for constructive dismissal. The Claimant, in an email requesting written reasons for the judgment stated that the Tribunal did not deal with claims which were "in addition" to constructive dismissal. There were no such additional claims before the Tribunal.

8. The Claimant's own List of Issues was headed: "RESPONDENT'S DECEPTIVE BEHAVIOUR, FRAUDULENT ACTIONS, BREACH OF CONTRACT AND CONSEQUENT CONSTRUCTIVE UNFAIR DISMISSAL". The issues then set out were all issues relevant to his constructive dismissal claim. No additional claim was referred to in the Claimant's list of issues.

9. On the basis of the parties' respective Lists and matters arising at the hearing, I summarise the issues as follows. The first three

issues go to the question of whether there was a dismissal within the meaning of s95(1)(c) of the Employment Rights Act 1996 (ERA), that is whether: *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"*.

First Issue

(i) Did the Respondent, without reasonable or proper cause, act in a manner which was calculated or likely to destroy the relationship of mutual trust and confidence between the Claimant and the Respondent? If the Respondent did act in breach of the mutual term of trust and confidence, it was in repudiatory breach of contract.

(ii) The Claimant relies on a number of matters in support of his allegation of repudiatory breach, in summary:

a. A failure by the Respondent at any time to inform him that his employment in the UK would be or was on the basis of a Permanent International Relocation (PIR) or to provide him with any policy document relating to PIR or tell him that there was no such policy;

b. A failure to provide him with full information regarding the applicability of UK tax on his personal non-employment income before his employment commenced;

c. An alleged breach of an obligation of utmost good faith by failing to disclose matters relevant to his tax position and the categorisation of his employment (PIR or International Assignment);

d. A failure to provide him with the full details of his expected income and salary deductions before he commenced employment with the Respondent;

e. Providing him with documents prior to the commencement of his employment stating that the Respondent would support his work visa in the UK for a maximum period of five years, which the Claimant says led him to believe that he would return to Australia after that period;

f. A failure to relocate him outside the UK after five years or to inform him that his contract conditions had changed;

g. A failure to inform him of a change in his contract terms after six years when his second visa was coming to an end, on the basis that his contract would become impossible after 7 years because of the tax remittance charge;

h. The Respondent declining the Claimant's request made on 7 February 2019 to work out of the Respondent's office in Perth, Australia;

i. The Respondent declining to pay the annual tax remittance charges of £30,000 in respect of the Claimant and his wife after this was requested by the Claimant on 6 February 2019;

j. The Respondent instructing PwC to give him advice on a "non-localisation basis", so that he was advised to submit tax returns on a remittance basis on the basis that he was "nonlocal".

10. An allegation was made in relation to a representation made by the Respondent to the UK Border Agency in June 2018 that the Respondent understood that the Claimant intended to make the UK his permanent home. The Claimant confirmed in evidence that he did not know about this representation at the time of his decision to resign. It could not therefore have been relevant to his decision to resign and I did not consider this question further.

11. Further wide-ranging allegations were made including allegations stated to be under the Fraud Act 2006; whether the Claimant received the same benefits as other internationally relocated employees; and alleged breaches of directors' duties. Save where these matters were specifically relevant to the Claimant's constructive dismissal claim, these matters fell outside the statutory jurisdiction of the Tribunal.

Second Issue

12. If there was a repudiatory breach, did the Claimant resign in response to the breach?

Third Issue

13. If there was a repudiatory breach, did the Claimant waive the breach by affirming the contract rather than resigning?

Fourth Issue

14. If there was a dismissal, what was the reason for the dismissal and was the dismissal fair, applying the provisions of s98 of the ERA?

15. It was agreed that issues of liability would be determined first. If the Claimant succeeded, I would go on to consider remedy on the second day of the hearing if time permitted.

Evidence

16. I heard oral evidence from the Claimant and from three witnesses on behalf of the Respondent, Mr Gamblin (the Claimant's line manager at the relevant times), Ms Louw (who worked at the relevant time in a People Advisor role) and Mr Aitken (Chief Engineer for Process and Process Safety, who dealt with the Claimant's grievance relating to matters relevant to his claim).

17. The Claimant gave evidence by video link (CVP) from Australia. Steps were taken to ensure that breaks were offered at appropriate times, agreed with the parties, and to start early on the second day to take into account time differences. Both the parties were keen for the case to be concluded in the two days which had been listed after consultation with the parties.

18. I was provided with an 870 page bundle. I read the pages to which I was taken in that bundle. I also read in full the ET1, ET3, the Claimant's reply to the ET3, the record of a Preliminary Hearing on 1 July 2020 and all of the pages 400-490 of the bundle (this is a reference to the electronic numbered pages rather than the page numbers shown on the PDF). I also read three letters from the Claimant to the Tribunal dated 8 May 2020, 25 May 2020 and 23 June 2020 which were provided to me at the Claimant's request during the course of the hearing. These letters had all been provided to the Tribunal before the preliminary hearing and related to matters already addressed at that hearing.

19. The parties wanted the matter resolved within the two days which had been agreed for the hearing. I gave oral reasons for my conclusions at the hearing. These written reasons do not repeat those oral reasons word-for-word but the conclusions and reasons for those conclusions reflect what the parties were told at the hearing.

Findings of Fact

20. The Claimant is an engineer of many years' experience who has considerable expertise in his field. In early 2012, he was working as a contractor for INPEX in Japan. He was paid a salary and substantial fringe benefits. He was also offering services through his own consultancy business in Perth, Western Australia, but his primary role was in Japan.

21. On 15 February 2012, the Claimant was contacted by a Ms Sara Johnson, Talent Sourcer in the BP Global Recruitment Team, who said that she was interested in networking with him regarding Rotating Equipment/Mechanical Engineering Opportunities at BP. She requested that he contact her and send a copy of his resumé, which he did.

22. On 20 February 2012, by email, Ms Johnson sought to set up an informal phone interview with the Claimant. She provided a list of locations where BP might have work. Some of these locations were described as "relocation only"; some were described as "expatriate 1-3 yr duration familial status"; and some as "28/28 rotation". These descriptions referred to the different types of arrangement which would apply to employees recruited to work in the locations specified. One of the locations described, "UK Sunbury and North Sea Aberdeen", was described as "relocation only". The Claimant responded on 21 February
that the locations in which he was interested were UK Sunbury and Australia, with his first preference being the UK.

23. A general job advertisement was published for Rotating Equipment Engineers. Engineers were sought for many locations around the world, including in the centralised team in Sunbury. The Claimant applied for one of the roles in Sunbury and was successful.

24. After sending details of his current compensation package and his Japanese tax returns for the financial year 2010, the Claimant was sent a New Hire Statement with details of his proposed reward package. After he raised some queries, including a query about the tax implications of his salary package and what was taxable and non-taxable salary, the Claimant was sent a revised New Hire Statement. In relation to his question about tax, by an email of 25 April 2012, the Respondent asked the Claimant whether he was asking which of the benefits available from the Respondent were considered taxable or whether he was requesting "more comprehensive tax advice". There was no written reply from the Claimant to this question. However, on 2 May 2012, following a conversation between the Claimant and Tim Bieri, the Claimant was sent a sheet which indicated the potential tax implications of choosing different benefits, suggesting that he wished to know about the taxation of benefits.

25. The revised New Hire Statement contained details of the Claimant's base pay, allowances, bonus and certain benefits, all expressed in pounds sterling. In Notes to the statement, it was provided that the information in the statement as to pay and benefits was only for the Claimant's personal use. It was not to be relied on or used for tax purposes. The information in the statement was for information purposes only. It did not create a contract with the Claimant. Contractual terms in relation to salary, contractual allowances and annual holiday were stated to be set out in the Statement of Terms and Conditions of Employment, which the Claimant received in due course.

26. The Claimant was also sent a document entitled "International New Starter – Homeowner". This applied to the "UK relocation of anticipated duration of more than 3 years for a New employee joining the group who is a homeowner purchasing a property in the new location and selling the original property". In relation to "pre-arrival", it was provided that BP would "make the necessary arrangements to apply for a UK work permit or visa for the employee, where required, for up to a period of 5 years".

27. Under a heading "additional Services", it was provided that up to 4 hours of tax advice would be provided "at management discretion". Under a further heading "Tax" it was provided that BP would pay any UK tax on the employee's relocation expenses.

28. The Claimant was not asked whether he wished to be provided with tax advice before he decided whether to take the job. He contends that such advice should have been offered before he took the job, particularly where he had been open about his remuneration package in Japan, where he was significantly better paid than he would be at BP. He had his own tax accountant in Australia but there was no evidence that he took tax advice before deciding whether to take the job.

29. On 11 May 2012, the Claimant accepted the offer made. Following further discussions, by an email of 22 June 2012, he confirmed that he accepted the BP offer and contract of employment. He confirmed that he had read and understood and agreed to the Terms and Conditions of Employment, which were attached to his email. His start date would be 16 July 2012. The Claimant was told in the offer letter that a number of employment policies would apply to him and he would find these on the Intranet or obtain them from his HR Advisor or Line Manager.

30. The Claimant's Statement of Terms and Conditions of Employment confirmed that the Respondent was his employer. It contained the

main terms and conditions of his employment and was stated to supersede any previous agreements, arrangements and/or representations (whether written or oral) in relation to his employment. It was stated that if there were any inconsistencies between this document and any other document, the Statement would prevail.

31. The terms and conditions provided that the Claimant's employment would be based at Sunbury. There was a mobility clause providing that the Respondent could require him at any time during his employment to move from one department to another "and/or change the permanent location of [his] employment to anywhere within the UK". The mobility clause further provided that the Claimant could be required to work for any Group company "on a temporary or permanent basis, both in the UK and elsewhere in the world". After an initial one-year period, either party could terminate the contract on three months' notice.

32. In August 2012, after he had been employed for just under a month, the Claimant raised a query in relation to the Respondent's international mobility policy. On 21 August 2012, he was told that he had located to the UK and was now a regular employee in the UK. He was not on an expatriate assignment. In an email to which he was ccd, it was stated by Ms Low of Production Division HR that Mr Saxena was employed on a local UK contract. Mr Saxena did not question this at the time.

33. When recruiting employees from overseas to work in the UK, the Respondent employed some recruits on what the Respondent described as "permanent international relocation" (PIR) and some as expatriate or international assignees. There was no written policy specifically in relation to PIR employees but in practice they were employed on the same terms and conditions as local (UK) employees. Expatriate and international assignees, in contrast, were employed on a different form of contract, for a fixed period, generally to work on a particular project. The Claimant was aware that there were different types of arrangement, not least as they were referred to in the list of locations sent to the Claimant on 20 February 2012.

34. Although the words "permanent international relocation" were not used in the Claimant's contract, his terms and conditions of employment were the standard terms and conditions applied to UK employees.

35. The Claimant contended that because the International New Starter – Homeowner Policy stated that BP would make the necessary

arrangements to apply for a UK work permit or visa where required for a period of up to five years, there was an end date for his assignment, which was five years.

36. I did not accept this. Whatever the Claimant may have understood, the wording of the policy in relation to applying for a visa where required for a period of up to five years speaks for itself. It did not indicate any contractual agreement between the parties, express or implied, that the Claimant's employment in the UK would be for a period of five years only or even a maximum period of five years, after which he could be moved elsewhere. That would stretch the wording of the policy well beyond what was stated. The Claimant's visa was a Tier 2 visa, valid for three years and could then be renewed, as indeed happened, for a further three years.

The provision in relation to the visa did not impact on the duration of the Claimant's contract of employment, which was a permanent contract, terminable by either party on three months' notice. Had there come a point when the Claimant was ineligible to work in the UK, that would have impacted on his contract of employment but that did not arise in this case.

37. On 2 October 2012, the Claimant received some advice on his tax position from PwC. The initiation request form from the Respondent to

PwC was headed "4 HOURS TAX ADVICE (NOT LOCALISATION)." The same request form stated that the Claimant was "Permanent International Relocation (PIR)". The words "not localisation" were not explained by any witness and I drew no conclusions in relation to the meaning of those words.

38. PwC noted in their report, having spoken with the Claimant, that he intended to remain in the UK for at least three years and that "an open- ended contract suggests intention is more than 3 years". The Claimant, following advice from PwC, elected to be taxed on the "remittance" rather than "arising" basis. He was advised that a decision on this could be made each tax year. Under the remittance basis, his overseas income would not be subject to tax in the UK, provided it was not remitted to the UK. The Claimant was advised that he would be responsible for his own UK taxes in respect of employment income and personal income or gains. In the report which was provided to the Claimant by PwC, there was reference to the seven-year tax rule but the box which would be crossed to show that advice was given on that topic was not crossed, indicating that the seven-year tax rule was not explained to him.

39. The Claimant did not know with any certainty in 2012 for how long he would remain in the UK. He moved to the UK and his wife joined

him. His son (who very sadly passed away in 2014) was studying at the time in the UK at university. The Claimant saw good opportunities with BP.

40. In May 2013, the Claimant took his own tax advice from Moore Stephens LLP. At this point, the seven-year tax rule was explained to him. He was advised that if he stayed in the UK for seven years, he would have to pay a £30,000 remittance basis charge. It was stated in the report from Moore Stephens that this should not be relevant as (presumably on the basis of information from the Claimant) he and his wife only intended to be resident in the UK for five years. The Claimant knew at that time, at the latest, that the annual tax remittance charge would become payable if he stayed in the UK for seven years. He did not at that point suggest to the Respondent that he should have been given this advice sooner or that any failure to provide him with such advice constituted a breach of contract nor did he change his basis of taxation from the remittance basis at that time or later.

41. The Claimant's Tier 2 three-year visa was renewed in 2015 and 2018. As it could not be renewed for a further three years, the Claimant could only remain in the UK if he obtained indefinite leave to remain. The Respondent was prepared to support an application for indefinite leave to remain and the Claimant took no issue in evidence with the fact that the Respondent submitted his application for indefinite leave, although he said that it was wrong to say that he intended to make the UK his permanent home, as was stated in the letter.

42. On 16 December 2018, the Claimant, in submitting comments for his annual appraisal, asked the Respondent to allow him to work from its offices in Perth, Australia. He said that he wanted to return to Perth and it was his intention to retire there.

43. On 6 February 2019, the Claimant sent an email to his Line manager, Mr Gamblin. He reminded Mr Gamblin of his request to work and provide technical support out of Perth, Australia. He also stated that on 9 July 2018, his seven years in the UK as a non-domiciled UK taxpayer on a remittance basis would be complete. He said that, from that point, he and his wife would have to pay the annual tax remittance charge of £30,000 each. He said that this was on the basis of information on the HMRC website. The Claimant had forgotten, at this point, the advice that he had earlier been given by Moore Stephens. He said that as BP had hired him from Australia and brought him and his wife to the UK, he would expect BP to bear this cost that may arise due to UK Government tax laws.

44. On 7 February 2019, Mr Gamblin confirmed that the Claimant's request to work in Australia was not granted. The request was refused because of the impact the time zone differences would have on the Claimant's work and because there was little demand on the team for such work to be undertaken in Australia. The Claimant did not take issue with this reasoning at the time nor when he cross-examined Mr Gamblin.

45. On 14 March 2019, Mr Gamblin told the Claimant that the Respondent would not bear the costs of the tax remittance charge liability as the Claimant was on a UK contract and this was the Claimant's own responsibility. The Claimant stated that BP was liable for this additional tax and that BP should either pay the tax liability or change his working arrangements, by which he meant relocating him to Australia. He explained that he would otherwise have to resign.

46. Mr Gamblin gave the Claimant an opportunity to provide any documentation which supported his contention that the Respondent should meet his tax liability. The Claimant explained his position again by reference to the circumstances at the time of his hiring and his expectations but the Respondent was not persuaded.

47. On 28 March 2019, Mr Gamblin confirmed that the Respondent would not bear the tax charge.

48. On 1 April 2019, the Claimant wrote his letter of resignation. He explained that he was resigning because it was not possible for him to bear the remittance charge. His employment came to an end on 1 July 2019 and he moved back to Australia, thus avoiding the need to pay the remittance charge, which he could not afford.

49. Following his resignation, the Claimant submitted a grievance relating to the Respondent's refusal to meet his tax liability, which Mr Aitken considered, with the assistance of an investigation by Ms Louw. The grievance was not upheld. The Claimant was given the opportunity to appeal but elected not to do so.

50. As the submission of the grievance post-dated the resignation, complaints about the conduct of the grievance could not be relevant to the key issues in the case, namely whether the Respondent was in repudiatory breach of the contract of employment and, if so, whether the Claimant resigned in response.

Law and Conclusions

51. The law applying to constructive dismissal claims was not in dispute. I have set out s95(1)(c) of the ERA above. A breach of the term of mutual trust and confidence will be made out where an employee can show that the employer, without reasonable or proper cause, acted in a manner likely to destroy the relationship of trust and confidence between employer and employee. Any breach of the term of mutual trust and confidence is repudiatory in nature and the employee may elect to bring the contract to an end by resigning in response.

52. The Claimant was clear in his evidence that he resigned because the Respondent would not pay the tax remittance charges or allow him to work from Australia. I had first to consider and determine whether the Respondent's decisions amounted to a breach of the term of mutual trust and confidence.

53. The Claimant's seniority, experience and satisfactory performance in role were not in doubt. The matters for me to consider were of a contractual nature and related, first, to whether there was any repudiatory breach of contract by the Respondent. The Claimant did not contend that there was any express term of his contract that the Respondent should be liable to pay his personal tax liabilities. The question was whether its refusal to do so and its refusal to allow him to move to work in Australia, thus legitimately avoiding any liability for the remittance charge, was in breach of the term of mutual trust and confidence in the Claimant's contract of employment.

54. In looking at the contract of employment, I first considered its terms objectively. The Claimant, I find, was employed on UK terms. While certain terms were specific to the Claimant, such as in relation to pay, benefits and start date, this was an ordinary UK contract of employment and the terms were standard for UK employees. Considering objectively both the words of his statement of terms and conditions and the surrounding circumstances, the Claimant was plainly not employed as an International Assignee. The fact that the Statement referred to the terms and conditions as the "main" terms on which the Claimant was employed, did not assist the Claimant unless he could prove that other provisions (a) bore the meaning he attributed to them; and (b) were incorporated in his contract of employment.

55. The Claimant relied in particular on the reference to the Respondent making the necessary arrangements to apply for a UK visa where required for up to five years in its International New Starter – Homeowner policy. He alleged that this meant that the Respondent would employ him for a fixed period of five years in the UK or for a maximum period of five years, with the opportunity of moving him elsewhere. I rejected this submission. The words spoke for themselves. The words related only to the application for visas and not to duration of employment. At the time the

Claimant entered into the contract, he did not consider the period for which he was to be employed. But even if he did, the contract could not reasonably be interpreted in the way contended for. The provision relating to the Respondent applying for a visa had to be read in the context of the Claimant's terms and conditions of employment which were for a permanent contract terminable by notice on either side. The Claimant did not suggest at the end of five years that he should be moved elsewhere.

56. The Claimant was employed on an ordinary UK contract of employment and there was no need for the words "permanent international relocation" to be used in order for the meaning of the contract to be clear.
The mobility clause in his contract of employment was a fairly standard mobility clause and did not suggest that he was on an international assignment. He was provided with full details of his expected income, benefits and deductions before his employment commenced and knew that he would be responsible for any personal tax obligations, other than those obligations for which the Respondent was statutorily liable.

57. In relation to tax advice, there was no express contractual obligation on the Respondent to provide the Claimant with tax advice in relation to his personal tax affairs either before or after the commencement of his employment. Tax advice could be provided at the Respondent's discretion and it was provided to the Claimant at this request. The fact that the Claimant disclosed his remuneration package in Japan did not mean that the Respondent was contractually obliged to provide him with personal tax advice either before or after his employment commenced. The Claimant alleged that his disclosure give rise to an obligation of *uberrimae fidei* but I rejected that submission which was not supported by legal authority. The rights and responsibilities of employers and employees in relation to acting in good faith are defined rather by the obligation of mutual trust and confidence. There was no basis for finding any lack of good faith in relation to either the fact of providing tax advice to the Claimant or the content of that advice.

58. I accepted that PWC did not advise the Claimant about the remittance charge. I could not say whether that was because the adviser did not understand that the Claimant would remain in the UK beyond seven years (which is possible given that the Claimant later indicated to Moore Stephens that he would not be staying longer than five years) or because such advice was overlooked. In either event, the seven-year rule was mentioned in the PwC report and the Respondent could not be held liable for that omission. In order to succeed in his submission that this omission constituted or contributed to a breach of contract by the Respondent, the Claimant would have to show some adverse conduct by the Respondent and none is made out.

59. In any event, the omission was immaterial as the Claimant learned from Moore Stephens' advice in May 2013 that he would be liable for the tax remittance charge if he remained in the UK for seven years or more. He did not at that time resign from his employment (on the basis that the earlier omission to provide this advice constituted a repudiatory breach). Nor did he ask the Respondent at that time whether it would meet any potential tax liability if he remained in the Respondent's employment in the UK for seven years.

60. The Respondent's decision not to pay the Claimant's personal tax liability did not fall outside the Respondent's contractual obligations. The Claimant knew that he would be responsible for his tax liabilities, other than those directly connected with his employment or any liabilities incurred on relocation. The Respondent's decision to refuse his request to work from Australia was for reasonable and proper cause as explained to him.

61. The Claimant referred to tax equalisation provisions relating to other employees working overseas in complaining that he was treated differently. However, those other employees were on international assignment and he was not.

62. As should be clear from the above but I confirm for the avoidance of doubt, I found no evidence in the documents provided to me or in the oral evidence I heard that indicated that there was any deception or fraudulent conduct by the Respondent.

63. For the above reasons, I do not consider that the Respondent acted in repudiatory breach of contract in refusing to agree to pay the Claimant's tax remittance charges or in refusing to let him work from Australia (the reasons why he resigned) and his claim must therefore be dismissed. The second, third and fourth issues did not fall to be decided.

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Employment Judge McNeill QC

Dated: 2 November 2020

Sent to the parties on: 4 November 2020
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For the Tribunal