EMPLOYMENT TRIBUNALS

Claimant: **Mr. M. W. Bari**

Respondent: **Alten Limited**

London Central by CVP

Employment Judge Goodman **23 October 2023**

Representation:
Claimant: in person
Respondent: Yousaf Mahmoud, Peninsula Business Systems Ltd

RESERVED JUDGMENT

The claims against the respondent are dismissed because the employment tribunal lacks territorial jurisdiction to hear them.

REASONS

The Issues for the Preliminary Hearing

1.This hearing was listed by Employment Judge Davidson as an open preliminary hearing to decide whether the respondent ever employed the claimant, and to decide whether, if he was employed or worker of the respondent, an English employment tribunal had territorial jurisdiction to hear the claims of unfair dismissal for making protected disclosures, breach of contract, holiday pay and unpaid wages (brought under the Employment Rights Act 1996) or discrimination because of age, race, religion, disability, or of victimisation for making a claim, (brought under the Equality Act 2010). In the alternative the tribunal was to consider whether to require a deposit to be paid under rule 39 because there was little reasonable prospect of success in showing there was territorial jurisdiction.

Conduct of the Hearing

2. A different territorial difficulty was picked up at the start of the hearing. The claimant joined the remote hearing from Bangalore in India, where he lives. It was pointed out by the tribunal that the Indian government requires specific

permission to be given by them before a hearing can be held and evidence taken on its territory by a foreign tribunal. The claimant has not sought permission. I explained I could not continue the hearing without permission of the Indian government. I suggested to the claimant a choice of three ways forward. First, he could apply to the tribunal, which would then ask the UK government's Foreign Office to seek permission from the Indian government, and we would wait to see if it was granted and then, if it was, relist the hearing. Second, he could travel to the UK (or some other country which permits foreign courts to hold remote hearings on its territory, for example, the United States) and the hearing would be relisted, in person or by CVP. Third, the tribunal could decide the matter without a hearing, on the basis of the written representations filed by each party.

3. The claimant chose written representations. The respondent agreed, saying it would save delay and costs. The claimant confirmed he wanted the issue decided on the papers. I then ended the hearing, which had lasted 20 minutes and which I treated as a case management discussion only, and have considered the written material in order to give this judgment.

Materials Considered

4. I have read the claim form and response, both with particulars attached. I have read the case management record for 23 March 2023 and the claimant's later comments on the issues outlined there by E J Davidson. I have read the bundle of documents (84 pages) filed by the claimant and another bundle (111 pages) filed by the respondent, both filed for a hearing in August which was postponed to today. I have read a witness statement by James Barrie, an HR adviser for the respondent, Alten Limited. The claimant did not file a witness statement as ordered. It seems from what he said today that he did not understand that he was a witness in this hearing. I propose to treat what is said in the claim form and representations as containing his evidence of fact as well as his submissions.

5. The claim form identified four respondents: Aymeric Nebot, Tom Hennessy, Denis Federico and Ramakrishna Janamanchi. These claims were rejected because there were no early conciliation certificates in these names. There was a valid certificate for 'Alten UK', and that has been treated by the employment tribunal as validating a claim against Alten Ltd.

Factual Summary

6. The respondent is a company registered in England, with a registered office in Moorgate, London. There are two individual directors, both French nationals, one resident in the United Kingdom. The third director is French company. The person registered as having significant control is Alten SA.

7. Mr Barrie's evidence is that Alten Ltd, the respondent, is one of 24 subsidiary companies around the world, all separate legal entities and together forming Alten group. He states that from time to time companies within the group will provide support to other companies within the group if there is a specific skill set required for a specific project. The pleaded response is that Alten India

employees were required to ensure technical quality standards were uniformly applied globally; Mr Barrie does not deal with this. The claimant does not deal with it either.

8. Alten Ltd keeps a register of all employees of Alten group companies. The claimant has never appeared on this register as an employee of Alten Ltd, but rather as an employee of Alten Private India Ltd, a company based in Bangalore. (*Note*: although the documents show the current Indian English spelling as Bengaluru, in this decision I will use the more familiar spelling, to English eyes, Bangalore, just as we write Vienna for Wien, and The Hague for Ten Haag).

9. The claimant is a software engineer resident in Bangalore, in the Indian state of Karnataka. On the tribunal claim form he gives his address as 18th and 19th floor, 100 Bishopsgate (which is a tower block) in the City of London, but it does not appear that he has ever lived there and this is understood in fact to be the address of some serviced offices.

10. On 20 May 2022 he was offered employment as a project management officer. The "offer letter cum appointment letter" is addressed to him at a private address in Austin Town, BDA complex, Bangalore South. It is from Alten India Private Limited, registered office IBC knowledge Park in Bangalore. The job title is 'engineer – PMO'. The "place of posting" is Bangalore. The start date is 27 June 2022. His annual salary is INR 680004, that is, 680,000 Indian rupees. Employee benefits include personal accident coverage, medical insurance, and term insurance, all expressed in Indian rupees. He is entitled to statutory benefit by reference to what the tribunal understands to be Indian statutes, namely the Employees' State Insurance Corporation Act, Employees' Provident Funds and Miscellaneous Provisions Act 1952, and Payment of Gratuity Act 1972. By clause 4 the contract is subject to a six month probation period. Clause 6 provides that the company can depute him to work into any of its offices in India or abroad after being given notice. Clause 14 provides that an employee who absconds from employment, that is does not appear for work and is untraceable, for more than seven days, is treated as having voluntarily abandoned his employment and his name is removed from the payroll register. Clause 19 provides: "this letter shall be governed by and construed in accordance with the laws of India, and you agree to submit to the exclusive jurisdiction of the courts of law of Bangalore in India". A salary breakdown at the end of the letter shows statutory deductions in rupees, which appear to be Indian deductions, as they do not correspond to any UK statutory employment deductions. There is pay slip showing monthly payment of salary by Alten India Private Ltd in rupees and subject to Indian statutory deductions.

11. The claimant said that he was interviewed for the job by Aymeric Nebot who, he says, is based in Derby in the UK. It is not known whether this was an online interview or took place in person. Mr Nebot's email address is alten.co.uk. Mr Nebot's job title on his email is "Alten UK and India project director".

12. The claimant started work on 27 June 2022, and after a period of induction

was set to work on project system design SSE, working with François-Xavier Battesta and Abdulghani Khalique Tibaria. These people have both Alten.co.uk and Alten-India.com email addresses. The claimant has an Alten-India.com address.

13. As shown in his email of 22 September 2022 reporting an incident there, the claimant worked in the Bangalore office. Mr Nebot was then arranging to meet him in person in Bangalore.

14. The claimant explains that he was providing assistance for work Alten were doing for Rolls-Royce in Derby. He adds that Alten Ltd - and other global subsidiaries – would contract for work and then arrange for much of the work to be done by the Indian subsidiary. An organization chart shows him as one of seven people on the SSE project. The claimant and one other have Indian flags against their names. Five others have a Union flag against their names. The claimant is one of this mixed group reporting to Tom Hennessey, who is in the UK. The flags suggest employment by Alten India and Alten Ltd respectively, though they might also indicate the place of work.

15. The Respondent says that on 19 August 2022 the claimant was given feedback about his performance and thereafter was followed up weekly. On 22 September 2022 there was a performance review meeting with Tom Henessey. In time, this followed some confrontation with a local manager in Bangalore on 21 September, though exactly what occurred at that incident or whether it was connected with the performance management process is not clear from the claimant's documents or contemporary emails. An email of 26 September from Mr Nebot shows that the claimant's performance as a senior PMO after 3 months on the project was not at the expected level. There was to be another review on 14 October.

16. We know that soon after that email the claimant suffered a period of illness (which was said by him at the time to be viral; the documents show this may be related to kidney stones). He did some work on an MS project at the end of September. On 12 October, he was asked either to come to the office or to book sick leave, and not to work on projects for which his assistance was not requested. He then asked to work from home, but this was refused. Later that day,12 October, the claimant was taken off the SSE support work. Mr Nebot informed him that this was because of his lack of performance and lack of improvement in performance. It was also said it was because he was not coming into the office when required, not seeking permission from his manager to be absent, and not informing the project leaders of his absence. A Teams meeting was arranged for 18 October to discuss it. It is not clear whether that went ahead or what happened next.

17. The claimant presented a claim form to the employment tribunal online on 10 November 2022.

18. On 12 December 2022 Alten Private India Ltd wrote terminating his

employment for the following reasons: (1) performance issues, identified as lack of productivity, communication, time management, prioritising tasks, active listening skills, and transparency; (2) he was not responding to feedback from the project team project requirements, such that the team was hesitant to assign tasks to him due to a lack of trust and (3) he had been asked to work from the office to avoid the IT network and connectivity challenges which occurred while he was working from home, but he did not comply, despite multiple requests.

19. The respondent responded to the claim asserting that the claimant had never been employed by 'Alten UK'. They also disputed that a UK employment tribunal had jurisdiction to hear the claims. They said the claimant worked on a project based in England but was not seconded to work in the UK or provide his services "as part of Alten UK". He never worked in the UK.

20. These are the available facts relevant to jurisdiction. What happened at work, how that amounted to less favourable treatment, why that related to any protected characteristic, what the claimant said that was a protected disclosure, and how his employment ended, is not clear and if there is jurisdiction will have to be clarified in further information or case management discussion.

21. The claimant said this morning that he had also brought a claim in the Bangalore Labour Court, and that that claim is stayed until the UK claim has been decided, as he has been told the claim cannot be decided on the same facts in both jurisdictions.

Relevant Law
Territorial Jurisdictioin

22. From 1999, section 94(1) of the Employment Rights Act 1996, providing the right not to be unfairly dismissed, has been silent as to whether it applies to work outside Great Britain. Other provisions of the Act have always been silent on the point. So too is the Equality Act 2010 on discrimination and victimisation.

23. There is now a body of authority on what Parliament intended to be the territorial scope of the unfair dismissal right. In **Lawson v Serco (2006) ICR 250**, two groups were identified who might be included, peripatetic employees, and expatriate employees. Lord Hoffman said: "the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation. I think that there are some who do". He identified two cases that might apply to an expatriate employee, one posted abroad to work for business conducted in Britain, and one working in a political or social British enclave abroad, but he did not say that might not be others, just that he could not think of any at the time. Discussing particular factors, he dismissed the relevance of any comparison of which legal system was more beneficial for the employee; the employee's nationality or place of recruitment was not of itself sufficient. Something more might be provided by the fact that he was working abroad "for the purposes of the business carried on in Great Britain", rather than the business conducted in a foreign country which belongs to British owners or as a branch of British business, but as representative of the business conducted at home. He gave the example of sales executive working for the Financial Times

in London, but based in San Francisco. A foreign correspondent for the newspaper would be working for the London business, but a sales executive selling advertising space for local edition would not. Another such example appears in **Lodge v Dignity in Dying (2015) IRLR 184**, where although the claimant had relocated to Australia for family reasons and worked from home, all her work was "for the benefit of her employer's London operations". The facts of that case are that the claimant Finance Director was employed in the UK and worked there from February to December, but then relocated to Australia where her mother was ill, and thereafter worked remotely, returning to London for short periods each year. Her salary was taxed in Australia after relocation.

24. In **Ravat v Halliburton Manufacturing and Services Ltd (2012) ICR 389**, a case where all the work was done outside the UK, the starting point was identified as: "the employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not absolute. The open-ended language of section 94 (1) leaves room for some exceptions whether connection with Great Britain is sufficiently strong so this can be justified", and where someone works and is based abroad: "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 Great Britain and British employment law before an exception can be made for them". On the point whether the law governing the contract was the determining feature, that was relevant, but not determinative, as it was not open to the parties to contract in to employment tribunal jurisdiction. "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 British and working for British employer – will be subject to employment law of the country where he or she works rather than the laws of Great Britain". It is a question of fact and degree: "factors such as any assurance that the employer may have given to the employee and the way the contract has been handled in practice must play a part in the assessment."

25. In **British Council v Jeffrey and Jonathan Green v SIG Trading Ltd (2018**) **EWCA Civ 2253**, seven propositions were set out, pulling together the existing cases. The "territorial pull of the place of work" could, exceptionally, be displaced where there were "factors connecting the employment in Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction". In the case of a worker who is truly expatriate, living and working abroad, rather than a "commuting expatriate", the factors connecting the employment of Great Britain and British employment law "will have to be especially strong" to overcome the territorial pull of the place of work. Such an exception was shown for the British employees at government and EU funded international schools, considered in **Duncombe v the Secretary of State for Children Schools and Families.** Another exception case was **Hexagon SA v Hepburn UKEATS/0018/19 SS,** where a Scot worked on a vessel permanently moored in Equatorial Guinea for a foreign company, part of a multinational group, under a contract of employment which provided for claims to be brought under Scots law. It was held that in the absence of evidence as to employment rights in Equatorial

Guinea, the clause was evidence of a sufficient connection with UK courts to allow for the jurisdiction of a UK employment tribunal.

26. There was no such exception in **Ravisy v Simmons and Simmons LLP UKEAT/0085/18**, where a Paris based French lawyer's claims against an international employer based in London failed to displace the French territorial jurisdiction on the basis, among other things, that the Paris business, though not independent had some autonomy, and she was only able to practice in France. She was subject to regulation in both countries. Nor was there in **Fuller v United Healthcare |Services Inc 2014 WL 4355124 (2014)**. There it was held that where an American company employed an American who was later assigned to work in the UK for about half the year, there was a stronger connection with the US, and the UK tribunal did not have jurisdiction.

27. A "commuting expatriate" would be someone like the claimant in **Bates van Winkelhof v Clyde and Co LLP (2013) ICR 883**, who by contract spent half the year in London.

28. Both in **Serco** and in **Dhunna v Creditsights Ltd (2015) ICR 105,** it was made clear that what matters is the position when dismissal occurs, not what was contemplated when the contract was made.

29. It was settled in **Hottak v Secretary of State for Foreign and Commonwealth Affairs (2016) ICR 975** that the same tests apply for jurisdiction in discrimination claims under the Equality Act as for unfair dismissal.

Relevant Law – Employment Status

30. An *employee* is defined by section 230 of the Employment Rights Act as an individual who has entered into or worked under a contract of employment. Only employees can claim unfair dismissal.

31.A *worker* can claim for unauthorised deductions from wages, which can by sections 23 and 27 include pay, and holiday pay, and also for detriment for making a protected disclosure. A worker is defined as someone who works under: "any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual." There is now a large body of case law on whether individuals are workers or self-employed.

32. The Equality Act at section 83 has a wider definition of employee which includes both employees and workers as defined by the Employment Rights Act. The Equality Act also prohibits discrimination against a contract worker, defined in section 41 as follows:

> (5) A "principal" is a person who makes work available for an individual who is—
>
> (a) employed by another person, and
>
> (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) “Contract work” is work such as is mentioned in subsection (5).

(7) A “contract worker” is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

33. The claimant could also involve Alten Ltd under the provisions of the Equality Act setting out the liability of employers and principals and employees and agents under sections 109 and 110, or of instructing, causing or inducing contraventions under section 111. It is of course unclear at this stage what exactly happened that is complained of as discriminatory or victimising conduct, or who was responsible for that. It seems to be implied that his employment terminated at the behest of Alten Ltd, although it is also set by the respondent that the claimant resigned. The claimant has not said anything about how or why his employment terminated. It is not clear that he performed any work after 12 October 2022.

Discussion and Conclusion - Status

34. The claimant worked under a contract of employment with Alten India Private Ltd. He argues he worked for Alten Ltd on the work being done for Rolls Royce in Derby. His contract allows for him to deputed to another place of work but does not mention working for another employer. In fact he always had the same place of work, in Bangalore.

35. Nothing suggests the contract with Alten India Private was a sham. He worked at their premises, with their employees, and was paid by them. He was not an employee of Alten Ltd, the respondent. I have considered whether he might be Alten UK’s worker, but he had no contract with them, express or implied, to do personal work, whether as a worker or as a self-employed person. His contract with Alten India explicitly forbade working for another employer at the same time. He worked on the Derby project of Alten Ltd at the direction of Alten India’s managers, at Alten India’s premises, using Alten India equipment, though as part of a team most of whose workers were Alten Ltd employees, and with day to day supervision from Alten UK employees. It is possible that he met the definition of contract worker in section 41(5) and (6) of the Equality Act, that is, supplied by Alten India to work for the respondent, assuming a contract between the two companies, as seems likely on the respondent’s description of the working arrangement.

36. To claim as an employee, the claimant would have to amend the claim to bring it against Alten India Private Ltd, his employer. He could also apply to amend his claim to plead that Alten Limited is liable for acts of Alten India, or instructed Alten India to discriminate. These have not been proposed by the claimant who appears not to have considered the detail of the statute.

Discussion and Conclusion – Territorial Jurisdiction

37. Whether as employee or worker claiming against Alten India Private Ltd, under the Employment Rights Act or Equality Act, or as contract worker for Alten Ltd under the Equality Act, the claimant must show a sufficient connection with the UK to bring a claim in the UK employment tribunal.

Parties’ Submissions on Territorial Jurisdiction

38. The claimant submits that Alten Ltd was the parent company, and he was contracted to do work which was "delegated, subcontracted, performed executed and delivered by Altan India". He argues that he was interviewed and selected by Altan Ltd's employee, and received instructions planning control by Altan managers, and that the UK operation benefited by payment for his work. He states that Altan India was established in 2010 as an offshore delivery centre for global customers. He states the parent company Alten Ltd, although in another paragraph he states that the parent company is Alten group. The parent company, he says can appoint or remove subsidiaries' employees and make major decisions about how the subsidiary operates. He says Alten India employees are appointed and removed based on feedback and instructions from Alten Ltd. From this he argues the tribunal should find a strong connection between his employment and the UK. In his submission he relies particularly on **Lodge**, where the employee worked mainly in a foreign country, and also refers to a Scottish EAT case, which is probably **Hexagon SA.**

39. There are subsidiary arguments to the effect that the UK is the forum of choice for defamation actions, and that Alten has defamed him. He also submits that Alten Ltd has attempted prematurely "to quash the case instead contesting and proving" it. As to the first argument, it should be noted that the employment tribunal has no jurisdiction in defamation cases. Of the second argument, jurisdictions is a matter for the tribunal, not for any party; it is proper that a party should seek to raise it and it is for the tribunal to determine whether it has jurisdiction to decide a case before it proceeds to decide it.

40. The respondent argues that the claimant does not fit into any of the Lawson categories. He was recruited by an Indian company, based in India, to perform work in India. **Lodge** is distinguished by the fact that the claimant there was employed by British company. The claimant never travelled to Britain. His contract provides for Bangalore law. In respect of **Hexagon**, the tribunal is referred to **Duncombe**, indicating that the system of law that applies is a relevant factor if the terms create an expectation that a dispute will be resolved in the UK, provided there are other relevant connections to the UK. If there is no other connection to the UK that would be forum shopping.

Discussion and Conclusion

41. The territorial connection with India is especially strong in this case. The claimant was employed by an Indian company, in India, paid and taxed in India, with a contract of employment providing for exclusive jurisdiction by the Indian courts. As far as is known, he has never travelled to Britain, certainly not in the course of this employment. He was a true expatriate. What is the countervailing pull of Great Britain, the question identified in **British Council v Jeffrey**? The only such pull is that the claimant was part of a team contributing to a project Alten Ltd was carrying out for Rolls Royce in Derby. This is not enough to make it an exceptional case. The claimant's case is not on all fours with **Lodge**, because Ms Lodge was initially hired - and working - in Great Britain, unlike the claimant, all and only relocated to Australia for personal reasons. Her only work was performed for a British company and she continued to travel to Great Britain for short periods on a regular basis. As for **Hexagon**, the countervailing pull there was provided by a contractual provision for Scots law to determine disputes. Here, the claimant worked entirely abroad, as the claimant did in **Hexagon**, but

the contract provides for the law of Bangalore to be applied, not UK law. He has brought a claim in the Bangalore Labour Court. There is no reason to hold that court does not have territorial jurisdiction when the Indian resident claimant was employed there to work there by an Indian company under a contract providing for Indian law.

42. If the claimant's argument that working in India providing a service for British company entitles him to bring a claim in Britain were applied in reverse, then employees of British companies living and working in Britain, but supplying services abroad- engineering contractors or architects for example - would be bringing claims in the other countries where they worked when in their cases UK law would apply to their employment. In this case, the claimant's *only* connection with Britain is his contribution to the work of the British-based team. It might be presumed that when that work ended, he could be redeployed to assist on another project for any of the company's 23 other subsidiaries. The evidence does not show the claimant's employment having been ended because he was no longer required on the SSE project. The scant evidence available is also compatible with the claimant's employment ending because he failed to attend work for health reasons, or his performance being unsatisfactory despite attempts at performance management. This is not to say that those were the reasons for his termination, only that the claimant is not able to show that he was employed solely for the purpose of work on the SSE contract. Even if he was only employed to work on a project for a British company contracting with Alten Ltd, that would not displace the territorial pull of India.

Employment Judge Goodman
23 October 2023

JUDGMENT AND REASONS SENT to the PARTIES ON

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. 24/10/2023

FOR THE TRIBUNAL OFFICE