Appeal No. UKEAT/0001/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 April 2016
Judgment handed down on 11 May 2016

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

WINDSTAR MANAGEMENT SERVICES LIMITED — APPELLANT

MR J HARRIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOHN CAVANAGH (One of Her Majesty's Counsel) Instructed by: Clyde and Co 4 Carden Terrace Aberdeen AB10 1US
For the Respondent	MR JESSE CROZIER (of Counsel) Instructed by: Bridge McFarland Solicitors Sibthorp House 351-355 High Street Lincoln Lincolnshire LN5 7BN

SUMMARY

JURISDICTIONAL POINTS - Working outside the jurisdiction

UNFAIR DISMISSAL - Exclusions including worker/jurisdiction

The Claimant was a master mariner who worked on cruise ships predominantly outside the UK territorial waters. The Employment Appeal Tribunal held that there was no error of law in the decision of the Employment Tribunal that it had jurisdiction to decide the Claimant's claim for unfair dismissal.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal against a decision of Employment Tribunal ("ET") sitting at London (South). It was sent to the parties on 12 November 2015. The ET consisted of Employment Judge Baron sitting alone ("the EJ"). On 5 January 2016, HHJ Eady QC ordered a Full Hearing on the paper sift. She said that Notice of Appeal raised reasonably arguable points of law. I will refer to the parties as they were below.

2. The Respondent was represented by Mr Cavanagh QC and the Claimant by Mr Crozier. I thank both counsel for their lucid oral and written submissions.

The Facts

3. The Claimant, who is British, was employed by the Respondent as the master of a cruise ship, the MSY Windsurf. The ship spent the summers cruising around Europe and the winters cruising around the Caribbean. The ship was owned by a company with a head office in Washington State. The employing company was incorporated in Jersey and had a head office in Guernsey. The Claimant lives in Kent. He would fly to the port where the ship was berthed to begin his tours of duty, from either Heathrow or Gatwick airports. The time spent in UK or Isle of Man ports was only 5.7% of the time spent on board ship. The Claimant formally reported to the owners in Seattle once a week from the ship. He was given day-to-day instructions from Seattle.

4. The Claimant was paid an annual salary, on the basis that he would spend three months on and three months off. The calculation of his days of service began from his departure from

A the UK airport, not from his arrival on board ship, and ended when he landed back in the UK. The flights were arranged by Viking (see next paragraph). At paragraph 13 of the Judgment, the EJ found that the Claimant's:

> **"13. … tours of duty started from when he arrived at London Heathrow (or occasionally London Gatwick) to fly to wherever the vessel was at the time. Similarly, his tour of duty ended when he landed back in the UK. …"**

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At paragraph 36, the EJ made clear that by "tour of duty" he meant the Claimant's working time (in the sense of the period for which he was paid), which started and ended at a UK airport. The ET said that the Claimant was not acting as a ship's master during the time he was travelling to or from a port. The Claimant's repatriation airport was defined as Heathrow.

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5. The Claimant was recruited in Dover by Viking, a company incorporated in the United Kingdom and based in Dover, to which the Respondent had contracted out some management functions. Viking advertised for, interviewed, and recommended, potential employees. The Respondent made employment decisions. Viking conducted the Claimant's disciplinary procedure on behalf of the Respondent at Dover. The Claimant was dismissed by the Respondent. The appeal against dismissal was heard by the Respondent at Gatwick.

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6. The Claimant's contract of employment and the collective agreement incorporated into it both had clauses providing that English law applied to it. The code of conduct including the disciplinary procedure which applied to the Claimant was a British collective agreement. The ET made findings about his salary, tax and NI arrangements in paragraphs 14 and 15 of the Judgment.

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The Issues

7. This case concerns the territorial scope of the right conferred by section 94(1) the **Employment Rights Act 1996** ("the 1996 Act"). I will refer to this as "the reach question". To the extent that it matters for the purposes of this appeal, both counsel agreed that:

a. this appeal raises a point of law,

b. the Claimant was what known in the cases as a "peripatetic employee", and

c. the guidance which the cases give about the reach question is that in such a case, the question for the ET is where that employee is based.

8. The precise issue in this case is whether, if such an employee is a seafarer, a special version of the base principle applies to him, or not. Mr Cavanagh submits that there is such a special version. It requires the ET to ask at which port the Claimant's voyages began and ended, and to hold that the employee's base is that port (or ports), but not some other place from which he might have travelled to that port, even if he travelled there and back on the employer's time and at the employer's expense. It will be clear that the ET did not follow such an approach, so, if Mr Cavanagh is right, it follows that the ET erred in law.

9. Mr Crozier submits that

a. in such a case, the ET can take into account a number of factors in deciding where the base is,

b. the port issue is not therefore decisive,

c. the ET was entitled to make the findings it did in paragraphs 13 and 36 of its decision about where the Claimant's tours of duty began and ended, and

d. there is no error of law in its decision that the Claimant was protected by section 94 of the **1996 Act**.

10. Mr Cavanagh had a back-up submission. That was that the ET misdirected itself in paragraphs 13 and 36 of its decision in holding that the Claimant's tours of duty all started and ended in the United Kingdom. Even if the place at which tours of duty started and ended was not decisive, and other factors were relevant to the ET's task, this error vitiated the ET's reasoning and it could not stand. That submission is a weaker version of the first submission. Its force depends on the correctness of the proposition (which is part of the first submission), that a seafarer's duty begins and ends in the port from which he sails and to which he returns. It requires me to decide, if Mr Cavanagh fails in his first argument, both whether that proposition is right, and whether the EJ made an error of law in his approach to the narrower question which is where, in this case, the Claimant's tour of duty, or duty, began and ended.

11. In order to put the submissions in a legal context, I need to say something about the cases in which the reach question has been considered.

Some of the Relevant Cases

12. Section 94(1) of the **1996 Act** provides that an employee has a right not to be unfairly dismissed by his employer. Historically, the territorial scope of that right was limited. Section 196(3) of the **1996 Act**, which was repealed by the **Employment Relations Act 1999** ("the 1999 Act"), provided that Part X of the **1996 Act** (which contains section 94) did not apply to "an employment where under the employee's contract of employment he ordinarily works outside Great Britain".

13. By the time of the decision of the House of Lords in **Lawson v Serco** [2006] ICR 260, the legislation no longer put any explicit territorial limit on the right not to be unfairly dismissed. The House was considering three appeals in that case. As Lord Hoffmann

observed, read literally, the right conferred by section 94 applies to anyone who works under a contract of employment anywhere in the world. The parties agreed that that could not be Parliament's intention. The question for the House of Lords was what limit on the territorial scope of that right could properly be implied. This was a question of construction, and the question was "Who is the person with respect to whom Parliament is presumed to be legislating?" (see paragraph 6).

14. Lord Hoffmann, with whom the other members of the House agreed, said that the repealed legislation was relevant in three ways. First, it showed that Parliament thought that where the employee worked was important, not, for example, where his employer was based. The repeal of section 196 meant that the courts were no longer confined by a rigid test; but the place of work was still of some persuasive force. Second, the views expressed in the earlier cases, applying that repealed test, were of interest. Third, part of the legitimate background was an EU Directive on the posting of workers. The repeal was intended to expand reach of section 94 so as to include posted workers who were protected by that Directive.

15. In paragraph 21, Lord Hoffmann referred to two descriptions of employees. Those descriptions came from the types of cases exemplified by the three appeals. The descriptions were "expatriate employees" (who were working abroad in circumstances where their work had strong connections with Great Britain), and "peripatetic employees" (whose work constantly took them to different places). He considered the rival tests which the parties had suggested for answers to the reach question in detail.

16. He concluded, at paragraph 23, that the question in each case was whether section 94(1) applied to the particular case, notwithstanding the foreign elements. He said that it was wrong

A to try to formulate ancillary rules such as that formerly provided by section 196, which must then be interpreted and applied. At paragraph 24 he said that this was not an exercise of discretion. It was a question of law but involved a judgment in the application of the law to the facts. He returned to his point in paragraph 34. The question of jurisdiction was a question of law. A decision on it could generate a right of appeal. But it was a question of degree on which the decision of primary fact finder was entitled to considerable respect.

17. The standard case, he said, is a person who works in Great Britain (paragraph 25). The question where a person worked was to be determined on the facts at the time of dismissal, not by the provisions of the contract of employment (paragraph 27).

18. Under the heading "peripatetic employees", he considered the appeal of Mr Crofts, a pilot. Lord Hoffmann said that the **1996 Act** continued to make special provision for mariners, but no inferences could be drawn from that about what Parliament must have intended for other peripatetic employees like pilots, international management consultants, salesmen, and so on. It is convenient here to mention the later decision of the Court of Appeal in **Diggins v Condor Limited** [2009] EWCA Civ 1133; [2010] ICR 213. The Court of Appeal held that that special provision is not relevant to the reach issue as it affects seafarers to whom that special provision does not apply. These include Mr Diggins, and the Claimant in this case.

19. Mr Croft was a pilot, whose base airport was in Great Britain, but who flew all around the world. Lord Hoffmann said that the solution under the old law was to ask where such employees were based. He cited, with apparent approval, an extract from the decision of the Court of Appeal in **Wilson v Maynard Shipbuilding Consultants Limited** [1978] ICR 376. Mr Wilson was an international management consultant. In that case, Megaw LJ referred to a

range of signifiers in the contract of employment which were relevant to deciding where an employee's base was; any express definition of his headquarters, or which indicated where the travels involved in his employment begin and end, where his private residence, his home, is expected to be, where and perhaps in what currency he is expected to be paid, and whether he is to pay national insurance contributions in Great Britain. These were examples of factors, which, among others which might be found in individual cases, might be relevant in deciding where he is employed to work.

20. Lord Hoffmann qualified this approach by saying, in paragraphs 29 and 30, that the courts are more concerned now with how the contract was in fact being operated at the time of the dismissal than with the terms of the original contract. "But the common sense of treating the base of a peripatetic employee as, for the purposes of the statute, his place of employment, remains valid". He referred to Lord Denning's views on this in **Todd v British Midland Airways Limited** [1978] ICR 959 as "the most helpful guidance". He repeated this point at paragraph 31. He said:

> **"Unless, like Lord Phillips of Worth Matravers MR, one regards airline pilots as the flying Dutchmen of labour law, condemned to fly without any jurisdiction in which they can seek redress, I think there is no sensible alternative to asking where they are based. And the same is true of other peripatetic employees."**

Lord Phillips had dissented in the Court of Appeal.

21. Lord Hoffmann noted in Mr Croft's case that the employer was based abroad and there were other foreign factors. He nonetheless decided that pilots were based in the United Kingdom. He set out ET's findings of fact at paragraph 32. The most significant was the employer's new basing policy under which employees could be allocated a home base from which their flying cycles would start and end.

22. Under heading "Expatriate employees", he considered the two other appeals. Those were more difficult. He said that the concept of a base, which is useful to locate workplace of peripatetic employees, provides no help. The circumstances would have to be unusual for an employee who is based abroad to be within scope of section 94. He hesitated to describe these as an exception to a general rule, because that suggested "a definition more precise than can be imposed upon the many possible combinations of factors, some of which may be unforeseen". He then tried to identify the factors which such cases might commonly have at paragraphs 37 to 40.

23. The base principle was applied in **Diggins** to an employee who lived in England. He was employed by a Guernsey-registered company on a ferry registered in the Bahamas which plied daily between Portsmouth and the Channel Islands. The Court of Appeal upheld the decision of EAT to allow the appeal from ET, which had held it had no jurisdiction. The Court rejected the argument that the special provision for mariners in the **1996 Act** was relevant to its decision in the case in hand. Elias LJ, giving the judgment of the Court, rejected as unrealistic an argument that a mariner was an expatriate employee (paragraph 26). At paragraph 29, he said that question is not where the employer, but where the employee, is based. In **Crofts** the fact that the pilot spent his hours of duty flying round the world did not exclude jurisdiction because those tours of duty began and ended in the United Kingdom. He said that there could only be one sensible answer to question where Mr Croft's base was. That was "where his tours of duty began and ended". In paragraph 31 he said, "… if one asks where this employee's base is, there could only be one sensible answer; it is where his duty begins and where it ends".

24. The reach question was considered by the Supreme Court in **Duncombe v Secretary of State for Children Families and Schools** [2011] UKSC 36; [2011] ICR 1312. It was common

ground that the principles in **Lawson** applied, but that the facts did not fall in either of the descriptions of case given by Lord Hoffmann in **Lawson**. So the issue was whether there were other types of cases in which employees whose employment had a significant foreign element were protected by section 94(1). The claim had failed on the jurisdiction point at all levels, but the Supreme Court allowed the appeal.

25. Baroness Hale, giving the judgment of the Court, extracted this principle from **Lawson**:

> **"It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law. There is no hard and fast rule and it is a mistake to try and torture the circumstances of one employment to make it fit one of the examples given, for they are merely examples of the application of the general principle." (paragraph 8)**

26. At paragraph 16 she said, "… these cases do form another example of an exceptional case where the employment has such an overwhelmingly closer connection with Britain and with British employment law than with any other system of law that it is right to conclude that Parliament must have intended that the employees should enjoy protection from unfair dismissal. This depends upon a combination of factors …" which she then described. In such a case, she said, it was a sine qua non that the employer was based in Great Britain. She also referred to the fact that, in that case, the contract of employment was governed by English law. That factor was not mentioned in **Lawson**, but must be relevant to expectations of parties as to the protection which an employee would enjoy, as the statutory right not to be unfairly dismissed had been designed by Parliament to fill a well-known gap in contractual protection.

27. The reach question was considered again by the Supreme Court in **Ravat v Halliburton Manufacturing and Services Limited** [2012] UKSC 1; [2012] ICR 289. The Claimant lived in the United Kingdom and travelled to and from his employment in Libya, where he worked, for 28 days at a time, for a British company based near Aberdeen. His employer paid his

commuting costs. He was paid in £ sterling and paid UK income tax and National Insurance. He had been assured by his employer that he was protected by UK employment law. He was dismissed by a manager in Cairo. The grievance procedure, the hearing, the redundancy consultation and appeal against dismissal all took place in Aberdeen. ET held that it had jurisdiction.

28. At paragraph 13 of the judgment of the Court, Lord Hope said that it was difficult to fit the Claimant's case into either of the categories considered in **Lawson**. He repeated what Baroness Hale said at paragraphs 8 and 16 of **Duncombe**.

29. He said this, at paragraphs 26 to 29:

> **"26. The question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements. Parliament cannot be taken to have intended to confer rights on employees having no connection with Great Britain at all. The paradigm case for the application of the subsection is, of course, the employee who was working in Great Britain. But there is some scope for a wider interpretation, as the language of section 94(1) does not confine its application to employment in Great Britain. The constraints imposed by the previous legislation, by which it was declared that the right not to be unfairly dismissed did not apply to any employment where under his contract of employment the employee ordinarily worked outside Great Britain, have been removed. It is not for the courts to lay down a series of fixed rules where Parliament has decided, when consolidating with amendments the previous legislation, not to do so. They have a different task. It is to give effect to what Parliament may reasonably be taken to have intended by identifying, and applying, the relevant principles.**
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> **27. Mr Cavanagh drew attention to Lord Hoffmann's comment in *Lawson v Serco Ltd* [2006] ICR 250, para 37, that the fact that the relationship was "rooted and forged" in Great Britain because the employee happened to be British and he was recruited in Great Britain by a British company ought not to be sufficient in itself to take the case out of the general rule. Those factors will never be unimportant, but I agree that the starting point needs to be more precisely identified. It is that 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 an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified. The case of the peripatetic employee who was based in Great Britain is one example. The expatriate employee, all of whose services were performed abroad but who had nevertheless very close connections with Great Britain because of the nature and circumstances of employment, is another.**
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> **28. The reason why an exception can be made in those cases is that the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that section 94(1) should apply to them. The expatriate cases that Lord Hoffmann identified as falling within its scope were referred to by him as exceptional cases: para 36. This was because, as he said in para 36, 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. It will always be a question of fact and degree as to whether the connection is sufficiently strong to overcome the general rule that the place of employment is decisive. The case of those who are truly expatriate because they not only work but also live outside Great Britain requires an**

especially strong connection with Great Britain and British employment law before an exception can be made for them.

29. But it does not follow that the connection that must be shown in the case of those who are not truly expatriate, because they were not both working and living overseas, must achieve the high standard that would enable one to say that their case was exceptional. The question whether, on given facts, a case falls within the scope of section 94(1) is a question of law, but it is also a question of degree. The fact that the commuter has his home in Great Britain, with all the consequences that flow from this for the terms and conditions of his employment, makes the burden in his case of showing that there was a sufficient connection less onerous. Mr Cavanagh said that a rigorous standard should be applied, but I would not express the test in those terms. The question of law is whether section 94(1) applies to this particular employment. The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain."

30. This reasoning expressly adverts to the base principle, and does not disapprove it. What it does, instead, is to describe an underlying rationale for the Court's construction of section 94 in a range of different cases. That is, that section 94 enables some employees in very different circumstances, whose employments, in various different ways, have foreign elements, nonetheless to claim its protection. This reasoning casts a retrospective light on the decisions on the appeals in **Lawson**. **Duncombe** and **Ravat** also show that "peripatetic" and "expatriate" employees are not the only possible exceptions to the general rule (that it is employees who work in Great Britain who are protected by section 94). They also show that in each case, the ET would do well to bear in mind and apply the rationale described by Lord Hope in **Ravat**, and that they should take care not to be too mechanical in their approach by "torturing the facts" into categories. **Ravat** also shows that an employee who lives in Great Britain but does not satisfy the base principle, and who works wholly abroad, may nonetheless, if his links to British employment law are sufficiently strong, claim the protection of section 94.

31. There is a second strand in the cases, and Mr Cavanagh relied heavily on it. This strand, he says, supports his submission about the special rule which, he submits, an ET must apply when considering where a seafarer is based for the purposes of section 94. **Diggins**, to which I have already referred, is one of those cases. I consider it further below. The first case is **Wood**

v Cunard Line [1991] ICR 13. The applicant lived in the United Kingdom. He was employed as a merchant seaman on a ship registered in Great Britain and owned by his employers. The ship cruised in the Caribbean only and never entered United Kingdom waters. His fare from Southampton to Puerto Rico, where the ship was berthed, was paid by his employers. The question in his case was whether the right not to be unfairly dismissed was expressly excluded.

32. Section 141(1) of the **Employment Protection (Consolidation) Act 1978** ("the EPCA") provided that that right did not apply during any period when the employee was engaged to work wholly or mainly outside Great Britain "unless the employee ordinarily works in Great Britain and the work outside Great Britain is for the same employer". Section 141(5) made an exception from section 141(1), which applied to ships registered in the United Kingdom. "A person employed to work on board" such a ship was to be treated as a person who under his contract ordinarily worked in Great Britain, unless the employment was wholly outside Great Britain. The applicant argued that section 141(5) applied to the time when the applicant was travelling to the ship and when he was on leave. The Court of Appeal rejected that submission. Lord Donaldson MR said this:

> **"But, in my judgment, that is not correct. This section has to be construed by asking oneself what is meant by the words "the employment" in this context. I think that what is meant is that employment, namely, the employment to which reference has just been made in the same sentence, where it is said: "a person employed to work on board a ship registered in the United Kingdom." So what one looks at is whether the employment to work on board a ship is wholly outside Great Britain. But Sir Godfray, nothing daunted, says that, even if that is right, the employment to work on board the ship began at Southampton, which was in Great Britain, and that, of course, is right. But in this context I think that the true view must be that Parliament was intending to refer to the part of his employment which relates to working on board the ship. This subsection is, after all, dealing with seamen and the exception has been introduced to deal with their special position. There is nothing special about the position of a seaman when he is travelling to join the ship. The same is equally true of somebody who is travelling to the Middle East in order to reach the site where he is to create a pipeline. I therefore think that "the employment" means that employment, namely, the employment in relation to working on board a ship, and on that view, if it is right, there can be no doubt on the facts that Mr. Wood was employed wholly outside Great Britain."**

33. I return to **Diggins**. It is interesting although **Wood** (see above) was referred to in **Diggins**, it was only referred to in passing, in relation to the construction of the "deeming"

provision in section 141(5) of the **EPCA**. Elias LJ did not refer to **Wood** at all in deciding that the base principle applied to Mr Diggins' employment, and I do not, therefore, consider that **Wood** plays any part in the formulation of the base principle which the Court of Appeal applied in **Diggins**. Elias LJ explicitly derived the base principle, instead, from Lord Hoffmann's reasoning in **Lawson**. This is significant, because **Diggins** is the only case to which I was referred in which the Court of Appeal has considered the position of a seafarer since the repeal of the statutory territorial limitation.

34. Mr Cavanagh relied heavily on a decision of Leggatt J in **R (Fleet Maritime Services (Bermuda) Limited) v Pensions Regulator** [2015] EWHC (Admin) 3744; [2016] IRLR 199. That was a decision on an application for judicial review. It concerned the territorial extent of the jurisdiction of the Defendant. The relevant provision, section 1(1)(a) of the **Pensions Act 2008** ("the 2008 Act"), defined "jobholder" as a worker who "is working or who ordinarily works in Great Britain under the worker's contract". That test is similar but not identical to the test in the now repealed section 196. Because the case was an application for judicial review, there was no live evidence. At paragraphs 6 to 8 of the judgment, the Judge outlined some generic facts about where the employees lived, which currency they were paid in, and the general arrangements about tax and national insurance.

35. "The essential issue", the Judge said, was "whether or when a seafarer engaged by the Employer to work on a ship which spends all or most of its time outside Great Britain ordinarily works in Great Britain under the worker's contract within the meaning of section 1(1)(a)" (judgment, paragraph 18). At paragraph 21, he said that the decision of the Defendant had been made at a reasonably high level of generality. The Defendant had not made a decision about any individual. The Defendant had defined three classes of employee, and had decided if he

had jurisdiction over each class. The material on which that was based was sample contracts of employment which had been sent by the employer to the Defendant (paragraph 5 of the judgment).

36. Leggatt J described the legal history. The Defendant's submission (judgment, paragraph 35) was that **Lawson** provided definitive guidance in relation to a "peripatetic" worker such as a seafarer. The question was where the worker's base was. That was decided by where his tours of duty begin and end. The Judge held that the base principle was the appropriate test (judgment, paragraph 44). In paragraph 46, he said that he had to apply a particular statutory test, and, unlike the House in **Lawson**, was not free to apply general principles. Nonetheless, it was appropriate to look at what happens in practice, not just the terms of the contract (judgment, paragraph 50).

37. He rejected the Claimant's submission that the employees' base was the ship on which they worked. He held that the base, rather, was the place from which they set off to work and to which they returned (judgment, paragraph 60). He had to identify a port or other fixed place in Great Britain as the seafarer's base. He referred to the statement in paragraph 30 of **Diggins** that the employee's base is where his duty begins and ends. It appears from the Judge's language in paragraphs 65 and 66 that he treated the phrase "tour of duty" as equivalent to "duty". He held that if a seafarer did not start and finish from a particular port, he had no "base" for the purposes of the Defendant's jurisdiction, because there was no place where he "ordinarily works".

38. In paragraph 68 of his judgment Leggatt J acknowledged that different policy considerations were relevant to the **2008 Act** and the scope of unfair dismissal. These militated

in favour of a finding that there was a country in the territory of which an employee works or ordinarily works "if the alternative is would be to hold that there is no jurisdiction in which the employee is entitled to claim of being unfairly dismissed". There was no reason to suppose Parliament considered that seafarers should have the benefit of tax exemptions and of automatic enrolment. It was not necessary to strain the statutory language (i.e. of the **2008 Act**) in order to hold that every peripatetic worker must have a base.

39. At paragraph 71, Leggatt J considered whether the Defendant had been right to decide that seafarers who lived in the United Kingdom, and began and ended their tour of duty outside the United Kingdom, were within his jurisdiction. The Judge said that the key question "in determining whether a peripatetic worker is based and hence can be regarded as ordinarily working in Great Britain is where their tours of duty begin and end". The Defendant had relied on evidence about the seafarers' arrangements to support his view that their work began and ended in the United Kingdom. Travelling days were treated as days of work for the purposes of entitlement to pay and leave. The sample contracts he had seen made it clear, in his view, that the tour of duty began when the seafarer joined his ship and ended when left the ship (judgment, paragraph 72). Such a worker, he held, was not in the jurisdiction of the Defendant. He considered that fact the seafarer was paid for travel days and that they did not count as leave did not mean that the employee working on those days. Rather, he was commuting to and from his place of work. The Defendant had been wrong to treat travel time in the way he had and so concluding that "the seafarer should be regarded as beginning and ending their work in the UK and hence as a worker who ordinarily works in the United Kingdom".

40. Mr Cavanagh referred to **Dhunna v CreditSights Limited** [2014] EWCA Civ 1248; [2015] ICR, a decision which the EJ mentioned in paragraph 27 of his judgment, and which, he

said, he did not find of very much assistance because the employee was based in another place. In **Dhunna** the employee was initially employed in England and his contract of employment was governed by the law of England and Wales. He then moved permanently or semi-permanently to an office in Dubai. Shortly after his move he told a colleague that he was glad to be out of the United Kingdom and hoped never to have to return. The ET held that he could not claim the right not to be unfairly dismissed. The EAT overturned that decision, holding that in order to answer the question posed by Baroness Hale in **Duncombe**, the ET had expressly to compare the strength of any connections an employee had with different legal systems, and that it had erred in law by not doing so.

41. The Court of Appeal held that that approach was wrong. The relative merits of different systems of law play no part in the inquiry (per Rimer LJ at paragraph 40). Rimer LJ said that the fact that the contract of employment was governed by the law of England and Wales and the employer was an English company were not compelling, as what counted was whether "the employee was working in Great Britain at the time of his dismissal, rather than what was contemplated when his employment contract was made …". The EJ had "in substance … carried out a sufficient comparative exercise" (judgment, paragraph 43).

The ET's Analysis of the law

42. The EJ summarised the law and the submissions in paragraphs 9 to 33 of the Judgment. He referred to **Lawson**, **Duncombe** and **Ravat**. He acknowledged in paragraph 24 the appositeness of Lord Hoffmann's observation in **Lawson** about the Flying Dutchman and that there was no alternative to the base test. He quoted paragraph 8 of Baroness Hale's judgment in **Duncombe**. He cited the long passage from Lord Hope's judgment in **Ravat** which I quoted

above. In paragraph 28 he referred to **Diggins**. The relevant question was where the employee, not the employer, was based.

43. He summarised the rival submissions in paragraph 29 of his Judgment. The Claimant submitted that he was based in Great Britain as that was his point of departure and return. The other relevant factors showed he was based in the United Kingdom. The Respondent's representative submitted that the ET had to balance all the relevant factors. He pointed to the different jurisdictions in which the ship was registered and its owner was based, and the employer was incorporated and had its head office. The Claimant did not join the ship at any UK ports. The ship spent minimal time in UK territorial waters. All employment decisions were taken outside the UK. The question was where, as a peripatetic employee, the Claimant was based. Flying to and from London was a function of where he lived. He was truly peripatetic and his base was where the ship happened to be at any time.

44. The EJ's conclusions were as follows:

> **"34. Each case depends on its own facts, but the principles are now clear. It is my conclusion that the Claimant did not have any close connection through his employment with either of the Channel Islands mentioned, nor the Bahamas nor Seattle. As far as any connection with Seattle is concerned it is true that he reported there and had visited once, but there the connection ends. In any event it was made clear in *Diggins* the relevant question is not where the employer was based, but where the employee was based. This is not a case where there are competing jurisdictions, and so there is no necessity for, nor indeed is there the possibility of, carrying out a comparative exercise.**
>
> **35. The simple question is whether the connections with the United Kingdom were sufficiently strong that Parliament must be taken to have intended that the right not to be unfairly dismissed should extend to this employment. I find that the connections were sufficiently strong, and that the Tribunal has jurisdiction. My reasons are set out below.**
>
> **36. The Claimant's tours of duty all started and ended in the UK because his working time started and ended at Heathrow. I accept that that was a function of the place of residence of the Claimant, but as pointed out by Elias LJ in *Diggins* the base of the employee is relevant. The Claimant was not of course acting as a ship's Master during the time he was travelling to the port of embarkation but I do not consider that to be relevant because the tour of duty started at the airport. In that respect he was similar to the aircrew in *Croft*.**
>
> **37. The Claimant was engaged following an interview by Viking in Dover and the disciplinary interview was held on behalf on the Respondent by Viking in Dover. Viking had been contracted by the Respondent to provide personnel services and that company is a UK registered company and based in Dover. I place less weight on the fact that the appeal hearing was at Gatwick as that could simply be a function of the place of residence of the Claimant.**

38. The contract of employment was governed by English law. The Code of Conduct had domestic connections. It was clearly anticipated that salary payments were to be made within the UK because of the provision that the costs of any payments elsewhere were to be borne by the employee."

Discussion

45. Mr Cavanagh made a number of criticisms of the ET. One is that the ET was obliged to find that the Claimant was a peripatetic employee and that it failed to do so, and thus erred in law. That is not a valid criticism. It is true that there is no express finding that the Claimant was a peripatetic employee, but read as whole, that is the tenor the ET's decision. Paragraph 24 of the judgment is clear illustration of this approach.

46. The EJ also appreciated, as is clear from his citations from **Duncombe** and **Ravat**, what general principle underlies the question of jurisdiction in relation to a peripatetic employee. The EJ referred to **Diggins** in paragraph 28 of his Judgment. He correctly drew two relevant principles from **Diggins**: the place where the ship is registered is not determinative and the relevant question is where the employee is based, not the employer.

47. The last sentence of paragraph 28 shows that the EJ appreciated that he had to apply the base principle. I also consider that, if the decision is read as a whole, it is clear that the ET did apply the base principle to this case. The factors which the ET expressly took into account, and summarised in paragraphs 34 to 38, were factors which were capable of showing that the Claimant's base was Great Britain.

48. The ET took into account a factor not referred to in **Lawson**, which is the choice of law in the contract of employment. The fact that that factor was not mentioned in **Lawson** does not make it irrelevant. Baroness Hale expressly referred to this factor in **Duncombe**. The

employee in **Duncombe** was not a peripatetic worker. Nonetheless, I do not consider that that prevents a choice of law clause from being a relevant factor in a peripatetic case. Nor does **Dhunna** show that it is irrelevant. **Dhunna** shows that it is relevant, but that it was entitled to little weight on the facts **Dhunna**. Those facts, as the EJ realised in this case, were very different. Such a clause, for the reasons given by Baroness Hale, creates a strong connection with the employment law of Great Britain. It may well, in combination with other factors, in my judgment, show that, for that purposes of section 94 of the **1996 Act**, an employee's base is Great Britain.

49. I should deal with the **Fleet Maritime** case. The EJ cannot be criticised for not referring to it as it was decided after the ET's decision. It is distinguishable on the following main grounds:

a. Leggatt J was applying an express statutory test. There is no such test in section 94(1). He acknowledged that different policy considerations applied in the legislative context he was considering, and in section 94(1). The force of this point is not reduced by the fact that this acknowledgement was made in the context of the "Flying Dutchman" issue.

b. The legal and factual contexts in the two cases are different. Leggatt J was considering decisions which had been made a high level of generality. The Defendant's decisions did not relate to any individual and were based on generic facts and sample contracts.

c. The Defendant did not rely on the underlying principle identified in **Duncombe** and **Ravat** (see paragraph 35 of the judgment where the Defendant's arguments are summarised).

d. Leggatt J did not apparently hear any argument about, or consider, the significance of a choice of law clause.

50. These points of distinction, suggestive as they are, do not mean that I can avoid confronting the question whether the **Maritime Services** case decides that there is a special version of the base principle in the case of seafarers, which I should treat as persuasive in the context of section 94 of the **1996 Act**. My starting point is that I would be disinclined to, because of the warnings given both by Lord Hoffmann and by Baroness Hale that, Parliament having repealed an express territorial limit, the courts should not invent, to replace it, their own detailed structure of rules and sub-rules.

51. Two specific factors lead me to conclude that **Maritime Services** is not the source of such a rule for section 94(1). First, Leggatt J's conclusion seems to me to have been influenced by the decision of the Court of Appeal in the **Cunard** case. The reasoning in that case is closely linked to the terms of the express statutory test which applied then, and to the Court's view that the "employment" which was being referred to in that test was "employment on board a ship". The considerations which produced that view no longer apply.

52. Second, **Diggins** is in point. It is a decision about the reach question. It post-dates **Lawson** and I am bound by it. It does not advert to the reasoning in **Cunard** about jurisdiction. The narrow disputed issue in this case was not decided by the court in **Diggins**, as it did not arise on the facts of **Diggins**. Instead, the Court of Appeal refers both to employee's "duty", and to his tour of duty in a way that (a) does not suggest that what is meant is only time on board ship and (b) therefore, does not dictate to an ET, on the facts of the case before it, where and when an employee's duty begins and ends. The employee's duty under his contract of

employment (or, if different, under the practical arrangements obtaining when he is dismissed) may well include all the periods for which he is paid, and doing what his contract of employment requires him to do is his "duty". It follows that it is open to an ET to find on appropriate facts as the ET did in this case that an employee's duty begins and ends elsewhere than at a port.

53. So I do not consider that I should follow the approach of Leggatt J the **Maritime Services** case in this different statutory context. I should make clear that I do not suggest that that case was wrongly decided in its statutory context (the **2008 Act**). It follows also that I reject Mr Cavanagh's primary submission, and his back-up submission. The EJ did not err in law in holding that, for the purposes of the base principle, the Claimant's duty began and ended in Great Britain. Nor was that decision vitiated by the other factors which the ET expressly took into account, as they were not capable of displacing the conclusion that the Claimant was based in Great Britain. There is no error of law in the ET's decision that the Claimant could therefore rely on the right not to be unfairly dismissed.

Conclusion

54. For those reasons, I dismiss this appeal.