Appeal No. UKEAT/0242/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 November 2013 & 13 December 2013
Judgment handed down on 14 January 2014

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

MR M S HASAN — APPELLANT

(1) SHELL INTERNATIONAL SHIPPING SERVICES (PTE) LTD
(2) SHELL INTERNATIONAL TRADING AND SHIPPING CO LTD
(3) SHELL SHIP MANAGEMENT LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR NICHOLAS SIDDALL (of Counsel) Instructed by: Nautilus International 1 & 2 The Shrubberies George Lane South Woodford London E18 1BD
For the Respondents	MR PHILIP MEAD (of Counsel) Instructed by: Shell International Ltd 1 Altens Farm Road Nigg Aberdeen AB12 3FY

SUMMARY

JURISDICTIONAL POINTS – Working outside the jurisdiction

At the time of his dismissal the Claimant was employed as a Second Officer on a Singapore-flagged vessel by the First Respondent, a company registered in Singapore. The First Respondent contracted out his day-to-day management to the Third Respondent, a company registered in the Isle of Man. The First Respondent also entered into a manning agreement with the Second Respondent, an English registered company whose head office is in London.

The Tribunal held that it did not have jurisdiction to consider the Claimant's claims of unfair dismissal, discrimination and breach of contract in respect of unpaid notice pay against any of the Respondents. The EAT upheld the decision of the tribunal.

The **Equality Act 2010** applies to seafarers working onboard ship in prescribed circumstances set out in the **Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011**. The Claimant did not satisfy the conditions in regulation 4(1)(a). He was not employed on a UK registered vessel with a port in Great Britain specified as the vessel's registered port of choice. Accordingly there was no jurisdiction to hear the discrimination claim.

The Tribunal did not have jurisdiction to hear the unfair dismissal claim because the First Respondent did not reside or carry on business in England and Wales as required by regulation 19(1)(a) of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**. No strained construction of that regulation can be adopted in the present case (**Pervez v MacQuarie Bank Ltd** [2011] ICR 266 considered).

The claim for breach of contract was assessed by reference to the test contained in regulation 19(1)(b), namely whether had the remedy been by way of action in the county court, the cause of action would have arisen wholly or partly in England and Wales. The breach of contract occurred outside the jurisdiction. The Tribunal therefore had no jurisdiction in respect of the contractual claim.

THE HONOURABLE MR JUSTICE SUPPERSTONE

1. Mr Hasan, the Claimant, appeals from the decision of an employment tribunal sitting at London South on 26 November 2012, promulgated through a written judgment sent to the parties on 20 December 2012, with separate written reasons sent on 18 February 2013, that the Tribunal did not have jurisdiction to consider his claims.

2. By a claim form submitted on 20 September 2012 the Claimant brought claims of unfair dismissal, discrimination and breach of contract in respect of unpaid notice pay.

3. He named three Respondents in the claim form. He was employed by the First Respondent (a company registered in Singapore) which is part of the Shell group of companies and specifically is part of Shell Shipping, a global network of Shell owned and joint venture companies. He commenced employment with the First Respondent in December 1991 and was employed by it until his dismissal on 31 July 2012. At the time of his dismissal he was a Second Officer.

4. The tribunal noted in its findings at paragraph 10 of its reasons that, as is quite usual in the maritime industry the First Respondent, although legally the employer of the Claimant, contracted out all aspects of his day to day management to the Third Respondent (a company registered in the Isle of Man), making it the First Respondent's principal crew administration contractor. The First Respondent also entered into a manning agreement with the Second Respondent (an English registered company whose head office is in London) whereby the First Respondent provides personnel for vessels owned and chartered by the Second Respondent.

5. The First Respondent entered into a collective agreement with and recognised Nautilus International, the union for maritime professionals. That agreement included a jurisdiction clause stating its governing law as English law and set certain terms and conditions for employees, including the Claimant, that were then incorporated into the relevant contract of employment. One term so incorporated was that that contract should be enforceable under English law. Other terms were that officers are responsible for their own income tax liabilities and national insurance contributions and no deductions would be made in those respects by the First Respondent. Further there was a term that the First Respondent would repatriate the employee after each period of service on a vessel to that employee's place of residence or as otherwise agreed between them and that earned leave would commence on the arrival of an employee back at their normal home town airport.

6. At paragraph 13-16 of its reasons the Tribunal made the following findings of fact:

> **"13. The Claimant's normal place of residence was in Kent, England, and he has lived in this country since 1986. He is a British National with a British passport. He ordinarily spent his leave in this country and was paid by the First Respondent in pounds sterling direct into his UK bank account.**
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> **14. The usual arrangement for informing the Claimant of his duties was that towards the end of each period of leave he would be telephoned by somebody from the Isle of Man and informed where his next assignment was to be and travel details. Typically the Claimant was out of this country on such duties for six and a half to seven months per year. The vessel he was working on would vary from time to time as would its country of registration and therefore its flag.**
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> **15. At the time of his dismissal the Claimant was in service on a vessel under a Singaporean flag. He was informed of his dismissal by letter dated 22 June 2012 written by Captain Mellor from an address on the Isle of Man. Captain Mellor also wrote to the Claimant again from the Isle of Man on 10 July 2012 confirming that that decision to dismiss stood.**
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> **16. The Claimant was subject to this country's tax regime but due to him being out of the country for as long as he was in each of the years of his employment with the First Respondent, in practice he did not pay any tax although he did pay Class 2 National Insurance Contributions on a voluntary basis."**

7. Mr Nicholas Siddall, for the Claimant, submits that the Tribunal wrongly considered itself not to have jurisdiction to consider the Claimant's claims of unfair dismissal, discrimination and breach of contract. I shall consider the appeal in relation to each of these claims in the order they were taken by the Tribunal.

Discrimination Claim

8. Section 81 of the **Equality Act 2010** ("the 2010 Act") sets out the test to be applied in relation to the territorial scope of the 2010 Act as applied to seafarers working on board ship. Section 81(1) states that this part of the Act applies in relation to work on ships "only in such circumstances as are prescribed". The prescribed circumstances are set out in the relevant Regulations made under the Act, namely the **Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011** ("the Ships Regulations"). Regulation 3 relates to seafarers working wholly or partly in Great Britain and adjacent waters; Regulation 4 relates to seafarers working wholly outside Great Britain and adjacent waters. In order for the Claimant to qualify as being protected under the Act, whether by applying Regulations 3(1) or Regulation 4(1) (which is the material regulation in the present case) it is necessary for the Claimant to be employed on a UK registered vessel with a port in Great Britain specified as the vessel's registered port of choice.

9. At paragraph 19 of its decision the Tribunal stated:

> **"… due to the combined effect of section 81 of the 2010 Act and the supporting regulations, in order for the Tribunal to have jurisdiction the Claimant must have worked wholly or partly in Great Britain or, if he was wholly outside Great Britain, he must have been working on a UK ship. On these facts at the time of his dismissal and at the time of the alleged discriminatory act, the Claimant did not meet these criteria and therefore the Tribunal cannot have jurisdiction. Therefore the claims of discrimination must fail against all three Respondents."**

10. Mr Siddall submits that the Tribunal erred by addressing the position under the Regulations solely at the point of the alleged act of discrimination. He submits that the whole period of the employment relationship, not just the limited period during which the discrimination is alleged to have occurred, is the yardstick by which it is determined whether, at the time of the alleged discrimination, the employee wholly or mainly did his work outside Great Britain (see **Saggar v MoD** [2005] ICR 618, per Mummery LJ at para 27).

11. The Tribunal made findings at paragraph 14 that the Claimant worked aboard a variety of vessels under a variety of flags (this was on the basis of a log which showed the Claimant working on UK flag vessels for a period of 19 months during his employment).

12. Mr Philip Mead, for the Respondents, points to the finding of the Tribunal that at the time of his dismissal the Claimant had been employed on the Singapore flagged vessel (para 15). Further the only acts about which the Claimant makes complaint concern his employment on board the Galea, which at no time entered UK waters. Mr Mead further observes that in any event during the currency of the 2010 Act the Claimant only worked on vessels flagged in either Singapore or the Isle of Man.

13. In my judgment the Tribunal correctly found that the Claimant did not satisfy the conditions in Regulation 4(1)(a). At no material time was the Claimant employed on a UK registered vessel with a port in Great Britain specified as the vessel's registered port of choice. That being so it is not necessary to consider Regulation 4(2) which applies inter alia if the seafarer is (a) a British citizen and (b) the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain.

14. On the findings made by the Tribunal I reject Mr Siddall's submission that the Second and Third Respondents could be liable as agents of the First Respondent or, as Mr Siddall suggested in his oral submissions, by virtue of s.41 of the 2010 Act (Contract Workers).

15. In the alternative Mr Siddall submits that the Tribunal erred in failing to disapply the requirements of the Ships Regulations in reliance on the **Bleuse** principle. The decision in **Bleuse v MBT Transport Ltd** [2008] ICR 488 essentially, he submits, provides that when a claimant seeks to enforce directly enforceable EU derived rights in the presence of a contract

where the proper law of the same is that of England and Wales that any territorial limitation ought to be relaxed to allow the Claimant an effective means of exercising such rights.

16. Mr Siddall referred to the decision in **Dhunna v Creditsights** [2013] UKEAT/0246/12. In that case the claimant (who worked in Dubai) sought to bring a claim under the working time regulations. Mr Siddall says that it is not clear from the reading of **Dhunna** if Slade J intended to state that the **Bleuse** principle did not apply to employment outside the territory of the EU. He submits that in the circumstances this is an appropriate point for a reference to the Court of Justice of the European Union.

17. Mr Mead opposes this alternative submission on two grounds. First it raises a new point of law. I accept Mr Mead's submission that no exceptional circumstances exist which warrant the advancement of this new point of law before this Tribunal. It was not taken before the employment tribunal where the Claimant was represented at the hearing by an official of his trade union, one of the parties to the collective agreement. In any event, as Mr Mead submits, the critical distinction between **Bleuse** and the present case is that **Bleuse** was concerned with an employee working in the European Union. Mr Siddall referred me to observations of Lady Hale in **Duncombe v Secretary of State for Children, Schools and Family** [2011] ICR 495 at para 31; Elias LJ in **Ministry of Defence v Wallis** [2011] ICR 617 at paras 51 and 53; and Underhill J in **Pervez** at para 23. In addition I have considered the observations of Elias LJ in **Bates van Winkelhof v Clyde & Co** [2013] ICR 883 at para 102. However there is no authority to which I have been referred where the **Bleuse** principle has been held to apply when the acts complained of occurred outside the European Union. I do not understand Slade J in **Dhunna** to express a view to the contrary. At para 60 Slade J noted that no provision had been identified that indicated that the Working Time Directive 2003 applied to employees working outside the European Union. In the present case Council Directive 2000/43/EC implementing

the principle of equal treatment between persons irrespective of racial or ethnic origin expressly refers in Article 3(1) to the Directive applying "within the limits of the powers conferred upon the Community".

18. I accept Mr Mead's submission that Member States are not entitled to treat third state vessels as if they are vessels of a Member State because of the nationality of their crew. Further, vessels on the high seas flying the flag of a third state are governed only by the law of its flag. (See **Anklagemyndigheden v Poulsen** (Case C-286/90, judgment of 24 November 1992, especially at paras 22 and 28); and **Air Transport Association of America v Secretary of State for Energy and Climate Change** (Case C-366/10, judgment of 21 December 2011, at paras 101-106).

19. In his oral submissions Mr Siddall suggested that the words "or in accordance with the application of the implied territorial scope of this Act" should be added to Article 81 after the words "only in such circumstances as are prescribed". I reject this submission. The Ships Regulations contain prescribed circumstances. The express terms cannot be dis-applied by reference to any implied territorial scope of the Act.

20. In my judgment the appeal against the decision of the Tribunal on the discrimination claim fails.

Unfair Dismissal Claim

21. The Tribunal found that the Claimant's employer was the First Respondent and therefore this claim could only be made against it and accordingly any claim of unfair dismissal against the Second and Third Respondents must fail.

22. The Tribunal's reason for rejecting the unfair dismissal claim is set out at paragraph 21 of its decision:

> **"The First Respondent is a Singaporean company and on the facts before the tribunal it does not carry on business in England and Wales. It has sub-contracted some of its activities and its responsibilities in connection with its employees to the Third Respondent which is based on the Isle of Man and therefore again is not part of England and Wales. The Third Respondent has through convenience conducted some of its activities in relation to the employees of the First Respondent in England and Wales but the tribunal does not conclude that that amounts to the First Respondent (which is the significant one for these purposes) carrying on business in England and Wales. Therefore the claim of unfair dismissal against the First Respondent must also fail as the tribunal does not have jurisdiction to hear it."**

23. At paragraph 22 the Tribunal said that if it was wrong about that and in fact the First Respondent did carry on business in England and Wales, then considering the **Lawson v Serco** analysis as applied to seafarers in **Diggins v Condor** (and the question where does the Claimant's work begin and end) it would conclude that there was just enough to establish that the Claimant had a base in this country and therefore the Tribunal would have jurisdiction. The Tribunal added:

> **"If it is helpful the tribunal's indication is that on these facts it would conclude that there was just enough to establish that he had a base in this country and therefore would meet that test. That indication however is only of theoretical interest."**

24. It is clear from the words used by the Tribunal in paragraph 21 that it was applying the test set out in Regulation 19 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**. At paragraph 4 of the decision which starts with the words "Employment Tribunal jurisdiction" the Tribunal set out the terms of regulation 19(1) which provide that:

> **"An employment tribunal in England and Wales shall only have jurisdiction to deal with proceedings where—**
>
> **(a) the respondents or one of the respondents resides or carries on business in England and Wales."**

25. Mr Siddall submits that the Tribunal erred in viewing Regulation 19 as limiting the legislative grasp of the **Employment Rights Act 1996**, section 94. Section 94(1) provides: "An employee has the right not to be unfairly dismissed by his employer". In support of this

submission Mr Siddall refers to the judgment of Underhill J (P) (as he then was) in **Pervez v MacQuarie Bank Ltd** [2011] ICR 266 in which when considering Regulation 19(1) he stated that the Regulations cannot properly be used to gloss or limit the terms of the primary legislation.

26. Mr Mead submits that a distinction should be drawn between the territorial scope of a domestic statute and the place (forum) where a case is determined (see **Simpson v Intralinks Ltd** [2012] ICR 1343 per Langstaff J (P) at paras 5-15). In **Lawson** all three respondents carried on business in the UK and so the effect of regulation 19 was not in play in that case.

27. The claimant in **Pervez** was a bond dealer specialising in convertible bonds. His employer was a company incorporated and based in Hong Kong. The claimant's home and working base was in Hong Kong and his contract was expressly governed by Hong Kong law. He was seconded to work for an associated company of his employer in London for one year.

28. At paragraph 15 Underhill J made two background points about regulation 19(1) (the first of which is relevant in the present context):

> **"The heading to the regulation suggests that its purpose was simply to regulate the distribution of jurisdiction between tribunals in England and Wales on the one hand and Scotland on the other; and indeed for that reason in two cases prior to the decision of the House of Lords in *Lawson v Serco Ltd* [2006] ICR 250 this tribunal held that it (or, strictly, its identically worded predecessor) could not be regarded as having been intended to define the legislative grasp of the 1996 Act: see *Jackson v Ghost Ltd* [2003] IRLR 824, paras 72-83, and *Financial Times Ltd v Bishop* (unreported) 25 November 2003, paras 46-52. Accordingly it may also be that neither the draftsman of the 2004 regulations nor the draftsman of the various substantive statutes conferring jurisdiction on the employment tribunal had in mind the potential impact of the wording of regulation 19(1) on cases with a 'non-GB' element. But the fact remains that that wording does on its face have such an effect and Mr Berkley [for the claimant] did not argue that regulation 19 could simply be ignored because it was not concerned with the situation which arises in this case."**

29. At paragraph 21 Underhill J continued:

> **"…It is in my judgment wrong in principle that a group of employees, however limited, should notionally enjoy protection which they cannot in fact enforce; and I do not believe that an intention to produce that result should be imputed to the Secretary of State, as the maker of the Regulations, unless it is inescapable. The authorities referred to at para 15(1) above are**

> **relevant here: in both *Financial Times Ltd v Bishop* 25 November 2003 and *Jackson v Ghost Ltd* [2003] IRLR 824, though the point under consideration is not the same, Judge Burke QC and Judge Peter Clark emphasised that the Regulations could not properly be used to gloss or limit the terms of the primary legislation. In order to avoid such a result it is necessary to hold that in the particular context of regulation 19 a company can 'carry on business' in England and Wales by seconding an employee to work at an establishment here, even if the supply of workers to third parties is not part of its ordinary business. That is, I accept, a strange construction; but it is not an impossible one, and I believe it is necessary in order to give effect to the rule-maker's intentions."**

30. I agree with Mr Mead that, in the present case, there is no strained construction that can be adopted. The Claimant did not work at an establishment in the UK or aboard a UK registered vessel with a port in GB specified as the vessel's registered port of choice. He worked wholly outside Great Britain and adjacent waters. He was employed by a Singaporean company which did not reside or carry on business in England and Wales. I accept Mr Mead's submission that it follows that the test under Regulation 19(1)(a) is not made out. There are in my view no grounds for challenging the findings of fact made by the Tribunal at paragraph 21 of its decision.

31. Mr Siddall made two alternative submissions. First he submitted that because one of the Respondents (who is not the employer) resides or carries on business in England and Wales the Tribunal had jurisdiction. I reject this suggestion. As Mr Mead observes such an argument would permit a tribunal to have jurisdiction to determine a claim against a non-resident employer in respect of whom no claim would lie if proceedings had properly been brought only against the foreign employer. The reference to "the respondent or one of the respondents" in the Regulation applies where there is an arguable claim against more than one respondent in respect of the same acts or omissions or in respect of joint and several liability where it is necessary and proper for joinder of more than one respondent.

32. Second Mr Siddall submits that Regulation 19(1)(b) gives the Tribunal jurisdiction. Mr Siddall accepts that this is a new point of law that was not put forward before the Tribunal but submits, by reference to well known authorities, (helpfully summarised by HHJ McMullen QC

in **Secretary of State for Health v Rance** [2007] IRLR 667), that this Tribunal ought to entertain the point for a number of reasons: it relates to a pure point of law; and it is well arguable that the point shows the Tribunal judgment to be a nullity.

33. Mr Mead opposes this application.

34. In my view there are no exceptional circumstances that warrant the advancement of this new point of law before this Tribunal. As Mr Mead observes the terms of regulation 19(1)(b) were known to the Claimant's representatives, and they advanced a submission based on it in respect of the contractual claim (see below), but not in relation to the unfair dismissal claim. Further, determination of this point will involve further factual enquiry.

35. The second background point that Underhill J made at para 15 of **Pervez** about regulation 19(1) was specifically in relation to paragraph 19(1)(b) he observed as follows:

> **"Although, as will appear, no point arises directly on head (b), its broad effect is that the employment tribunal will have jurisdiction in respect of a particular claim if the acts or omissions which it is necessary to establish in order to constitute a cause of action, or any part of them, are alleged to have occurred in England or Wales. Why it was thought necessary to consider that inquiry on the hypothetical basis of an action in the county court is unclear: the answer must lie somewhere deep in the legislative history, but this was not explored before me."**

36. At paragraph 16 of his judgment Underhill J considered the application of regulation 19(1)(b) to an unfair dismissal claim, and stated:

> **"Although the notice of appeal contained a challenge to the judge's conclusion as regards limb (b) of regulation 19, Mr Berkley abandoned that ground: that is, he accepted that if the claimant's remedy had been by way of action in the county court the causes of action in respect of which he claimed would have arises wholly outside England and Wales. I did not question the concession at the time, but in the course of writing this judgment I have come to doubt whether it is correct. I understand it to be based, at least so far as the discrimination and unfair dismissal claims are concerned, on the fact that the assignment letter, including the resignation term, and the dismissal letter were both written from Hong Kong. (I am not clear about the claim for unlawful deduction of wages). As regards the unfair dismissal claim, I should have thought that it was strongly arguable that the dismissal occurred where it was communicated: that was the view of this tribunal, Judge Peter Clark presiding in *Crofts v Veta Ltd* [2004] ICR 1733: see para 59(ii). …"**

37. Mr Siddall submits that the letter of dismissal dated 22 June 2012 was written from an address on the Isle of Man but received by the Claimant in England and therefore the Tribunal had jurisdiction to hear the unfair dismissal claim. However, the position is not as clear as Mr Siddall suggests. At paragraph 15 of the decision the Tribunal state that "At the time of his dismissal the Claimant was in service on a vessel under a Singaporean flag". The next sentence in the letter states that the Claimant "was informed of his dismissal by letter dated 22 June 2012". However the letter itself states: "We have reviewed all the actions on board and regrettably **confirm** (emphasis added) that as the result of your poor performance we have no alternative but to **confirm** (emphasis added) your dismissal from Company Service". The Tribunal did not consider regulation 19(1)(b) and was not concerned to make a finding as to precisely how, when and where the Claimant was dismissed. I accept Mr Mead's submission that in order to determine these issues and whether the Tribunal has jurisdiction under regulation 19(1)(b) in relation to the unfair dismissal claim requires further factual enquiry.

Contractual Claim

38. The claim for breach of contract for wrongful dismissal was assessed by reference to the test contained in regulation 19(1)(b), namely whether had the remedy been by way of action in the county court, the cause of action would have arisen wholly or partly in England and Wales.

39. At paragraph 23 of its decision the Tribunal set out its finding:

> **"… The letter of dismissal written to the Claimant which it is alleged was in breach of his contract of employment was written in and sent from the Isle of Man i.e. outside England and Wales. The tribunal therefore has to conclude that it does not have jurisdiction to hear the notice pay claim and accordingly that it also dismissed."**

40. Mr Siddall referred to the **Employment Tribunals (Extension of Jurisdiction) Order 1994** made under the predecessor to what is now section 3 of the **Employment Tribunals Act**

1996. Paragraph 3(a) requires the claim to be one which "the courts of England and Wales… have jurisdiction to hear and determine". However the 1994 Order does not assist the Claimant as it does not regulate the international jurisdiction of the Tribunal.

41. Mr Siddall accepted that the breach of contract occurred outside the jurisdiction because the letter was written on the Isle of Man, albeit it was received in the UK.

42. Mr Siddall accepts that his alternative grounds of appeal (that the Respondents submitted to the jurisdiction of the Tribunal and as to the effect of the choice of law and jurisdiction clauses in the Claimant's contract of employment) were not raised before the Tribunal. They are wholly new points of law which, at least in part, are likely to require further findings of fact for their determination. In my view there is no proper basis for allowing these new points of law to be argued before this Tribunal.

43. The decision of the Tribunal in respect of the contractual claim was, in my view, plainly correct.

Conclusion

44. In my judgment, for the reasons that I have given all three claims fail.