# THE EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondents** |
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| **Mr M Anderson** | **v** | **(1) Swire Pacific Ship Management Limited**<br>**(2) Swire Blue Ocean A/S**<br>**(3) John Swire & Sons Limited**<br>**(4) Swire Pacific Offshore Operations PTE Limited**<br>**(5) Brian Langdon**<br>**(6) Swire Pacific Offshore**<br>**(7) Swire Pacific Offshore PTE Limited** |

**Heard at**: London Central **On**: 2 June 2017

**Before:** Employment Judge Glennie

**Representation:**

**Claimant:** Mr J Boyd, Counsel
**Respondent:** Mr E Kemp, Counsel

# JUDGMENT ON PRELIMINARY HEARING

**The judgment of the Tribunal is that it does not have jurisdiction to hear the complaints of unfair dismissal and breach of contract. The complaints are therefore struck out.**

# REASONS

1. By his claim to the Tribunal the Claimant makes complaints of breach of contract and unfair dismissal. The Respondents by their response dispute those complaints.

2. This Preliminary Hearing was listed to determine the question whether the Tribunal has territorial jurisdiction in respect of either or both of the complaints of unfair dismissal and breach of contract. A further issue was identified as to the correct Respondent or Respondents, but in the event it has not been necessary for me to decide this.

3. I heard evidence from the Claimant on his own behalf. Evidence was given on behalf of the Respondents by Mr Nicholas Hall, General Manager and Ms Ann Dibben, Company Secretary. There was an agreed bundle of documents and page numbers that follow in these reasons refer to that bundle.

4. The factual background to the jurisdictional issue is as follows. The Claimant, who is a British National, was engaged as a Steward on board ships that were registered in Cyprus and sailed mainly in non UK waters, facilitating work on wind farms.

5. The Claimant was engaged by the Respondents under a series of employment agreements. In dealing with these I shall refer to the Respondents generically as meaning the company for the time being whose name appeared on the agreement. This varied over the years, but nothing turns on that as regards the point that I have to decide.

6. At pages 143-146, there was an employment agreement providing for employment commencing on 4 July 2013. This contained the following relevant provisions:-

   6.1 At Clause 4, place of work, “The seafarer’s place of work will be on any vessel owned, managed, bare boat chartered or operated by [the Respondents].

   6.2 At Clause 5, the Seafarer’s wages would be 4,300 Euros per month.

   6.3 At Clause 6, entitlement to leave, “The Seafarer is entitled to one day of paid annual leave for every day worked on board. The Seafarer will be paid normal basic remuneration during such leave.”

   6.4 Clause 10, repatriation, “The agreed place of repatriation is Manchester, United Kingdom.” There then followed a statement of the occasions on which the Seafarer would be entitled to repatriation at the Company’s expense, which included on termination of the agreement; in the event of illness etc; if the ship was proceeding to a war zone etc; in the event of shipwreck; and in the event of the ship owner not being able to continue to fulfil its legal or contractual obligations.

   6.5 At Clause 13, additional provisions, “Further to the conditions set out in this agreement, the full details of the Seafarer’s employment conditions are laid out in the Floating Staff Service Conditions for Wind Farm Installation Vessels (WIV). These have been made available to the Seafarer prior to signing this agreement. These will also be available on board the vessel and can be reviewed by the Seafarer at all times.”

   6.6 The Claimant then signed the following declaration, “I confirm that I have freely entered this agreement with a sufficient understanding of my rights and responsibilities under this agreement the Floating Staff Service Conditions For Wind Farm Installation Vessels (WIV) and I have been

given an opportunity to review and seek advice on the agreement before signing." Alongside the Claimant's signature, the place of signing was stated to be Singapore and the date 3/9/2013.

6.7 Then on behalf of the Company, the agreement was signed by Percy Hee in the following terms: "I confirm that the Seafarer has been informed of all his/her rights and duties under this agreement and the Floating Staff Service Conditions for Wind Farm Installation Vessels (WIV) prior to signing this agreement". The place of signing was given as Singapore and the date as 4 July 2013.

7. The Claimant's evidence, which I accepted, was that he did not sign the terms in Singapore but in Denmark, and that he wrote Singapore as the place of signing because that was what he was told to do. It was not in fact suggested to him that he had signed in Singapore.

8. There was a second employment agreement at pages 147 – 150. This provided for employment from 30 December 2013 and contained the same terms as the previous agreement. Again, the Claimant's signature was recorded as being placed on the document in Singapore, on 21 February 2014, and again his evidence was that he in fact signed in Denmark (which I again accepted).

9. The third relevant agreement was at pages 151 – 154 and provided for employment from 1st October 2014. The only two material differences from the earlier agreements were the wages which were now 4,561 Euros per month and the place of repatriation which was recorded as Liverpool rather than Manchester. The Claimant signed the same declaration. On this occasion the date was 27 February 2015 and the place of signing was given as Esbjerg in Denmark, which the Claimant stated was in fact the correct venue, being the port from which the voyages concerned commenced.

10. With regard to the Floating Staff Service Conditions (FSSC), the Claimant's evidence was that he was not provided with these, in spite of the declaration on the employment agreements, nor were they explained to him at any point. He did not ask to see them on any occasion, he was simply required to sign the employment agreement and this was carried out on a quick turnaround that did not allow for any questions or explanations.

11. In his evidence, Mr Hall said that he was not present on the occasions concerned and could not say what happened regarding the Claimant's signing of the employment agreements, but he said that what the Claimant described was not the Respondents' procedure. He said that the FSSC terms were intended to be incorporated into the contract and that they were available on the vessel. He said that he was sent a copy of them when he joined the Respondents and that it would be a matter of concern to the Respondents if the Claimant had signed the employment agreements without being shown the FSSC.

12. In the event, I accepted the Claimant's evidence about what occurred when

he signed the employment agreements on each occasion. Mr Hall was able to give evidence about what should have happened, but as he himself accepted, he could not say what actually happened in the Claimant's case. In the absence of any evidence about enforcement of the proper practice, I find it plausible that a seafarer in the Claimant's situation might be invited to sign the standard employment agreement without further explanation or enquiry, and ultimately I find no reason to doubt the Claimant's evidence on that point.

13. Equally, however, I accept Mr Hall's evidence that there would have been a copy of the FSSC on board the vessel. It would be logical for this to be so given the Respondents' intention they should be incorporated into the contract and the specific reference to them in the employment agreement. Furthermore, when the Claimant was cross-examined, he said that on other ships on which he had served, there were manuals available to be consulted on the bridge. The location of the manuals and similar items such as the FSSC, might, it seemed to me, vary from one ship to another, but the Claimant's evidence confirmed the usual practice was for documents of that nature to be available on board the vessel somewhere. I found as a matter of probability that the FSSC were available on board the ships on which the Claimant served.

14. The FSSC were themselves at pages 156 – 216 including appendices. I found the following provisions to be material. At Clause 1.1 "tours of duty", standard tours of duty were said to be of 60 days and that "upon completion of a tour of duty, Seafarers will be repatriated to their home ports to take earned leave."

15. Clause 3.1 on page 162, provided as follows:-

    "Home leave entitlement accrues during periods of continuous service on each tour of duty by a Seafarer from the time the Seafarer reports for duty on the vessel to the time the Seafarer completes his assignment and leaves the vessel (all such periods are referred to in this section and elsewhere in these service conditions as "continuous service") and where:-

    (iii) Transit time to and from a vessel, including time utilised for processing visas, both before and at the end of each period of continuous service, shall neither count towards continuous service nor as part of the Seafarer's annual leave".

    Sub paragraph 3, Clause 17.1 at page 185 provided:-

    "This contract of employment shall be governed by and construed in accordance with the laws of Singapore. In the event of any dispute arising between the company and the Seafarer, such disputes shall be determined by the Courts of Singapore to the exclusion of any other Court."

16. In the course of his oral evidence, the Claimant agreed with the proposition that his annual leave entitlement depended on the days that he worked on

board ship. He also agreed that his tour of duty started and ended when the ship left and arrived at port and that travel to the home airport was not part of his tour of duty, although he added in re-examination that he was paid for travelling to and from the vessel. It did not seem to me that this last point was particularly significant, as it might also be said that the Claimant was paid while on annual leave, which could not on any view be regarded as part of his tour of duty.

17. There was at page 250 a log showing the ports of embarkation and disembarkation in respect of each tour of duty carried out by the Claimant during the years 2013 to 2016. There were 20 in all, of which 11 of the embarkation ports were in Denmark, 6 in the Netherlands, 2 in the United Kingdom and one in Germany. Of the disembarkation ports, 13 were in Denmark, 5 in the Netherlands, one in the United Kingdom and one in Germany.

18. The Claimant was at all material times resident to the United Kingdom (in the Liverpool and St Helens area) and paid UK taxes. In the absence of evidence to the contrary, I take the latter as including paying National Insurance contributions.

**The Applicable Law and Conclusions**

19. In the event it was not necessary for me to decide the point as regards breach of contract. Mr Boyd conceded that Mr Kemp's argument that this was governed by the question whether the proceedings could be served out of the jurisdiction was correct. He conceded that they could not be so served, and therefore that the Tribunal did not have jurisdiction in respect of the breach of contract claim.

20. Turning to the question of jurisdiction in respect of the unfair dismissal complaint, Counsel were agreed that the test to be applied was the "base" test (which I will address in greater detail in due course). As stated by Lord Hoffman in **Lawson v Serco Limited** **[2006] ICR 250** (paragraph 28), where an employee's base is under the contract will depend on an examination of all relevant contractual terms. In the present case, there was a dispute as to the what were the relevant contractual terms, in that Mr Boyd submitted that the FSSC had not been incorporated into the contract of employment, while Mr Kemp submitted that they had (while also maintaining that it would make little practical difference if they were not).

21. I concluded that the FSCC had been incorporated into the contract. Clause 13 of each of the employment agreements stated that the full details of the employment conditions were set out in the FSCC: on its face, the meaning of this statement is to incorporate the FSCC into the contract. Mr Boyd submitted that compliance with clause 13 was a condition precedent to the incorporation of the FSCC, and that it had not been complied with because the Claimant had not seen them. On this point, I found that:

    21.1 Clause 13 should not be read as creating a condition precedent in his

way. It did not state that the FSSC terms would only be incorporated if they had been shown to the employee, but rather declared that they had been made available to him.

21.2 As I have found, the FSSC terms were available on board the vessels. The Claimant could have asked to see them, but did not do so.

21.3 By signing the declaration set out in paragraph 6.6 above, the Claimant was confirming his acceptance of the FSSC terms, whether or not he had actually seen them.

22. I therefore found that the FSSC terms formed part of the contract. In the event, however, I agreed with Mr Kemp's submission that (save for the point about the law applicable to the contract, referred to below) it would make little difference if they were not, as the Claimant's evidence was that how the contract operated in practice was essentially the same as the provisions of clause 3.1 of the FSSC.

23. In **Lawson v Serco** Lord Hoffman identified three categories of case. In **Duncombe v Secretary of State for Schools [2011] ICR 1312** Baroness Hale (giving the judgment of the Supreme Court) stated at paragraph 8 of that judgment that:

*"The principle appears to be that the employment must have 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."*

24. That said, in the present case both counsel were agreed that I had to apply the "base" test identified by Lord Hoffman in **Lawson v Serco** as being applicable to peripatetic employees. (Lord Hoffman identified mariners as an example of peripatetic employees.) In paragraph 28 of his speech Lord Hoffman said this:

*"Where his base, under the contract, is to be will depend on the examination of all the relevant contractual terms. These will be likely to include any such terms as expressly define his headquarters, or which indicate where the travels involved in his employment begin and end; where his private residence – his home – is, or is expected to be; where, and perhaps in what currency, he is to be paid; whether he is to be subject to pay national insurance contributions in Great Britain. These are merely examples of factors which, among many others that may be found to exist in individual cases, may be relevant in deciding where the employee's base is……."*

25. In **Diggins v Condor Marine Crewing Services Limited [2010] ICR 213**, a case involving a seafarer, the Court of Appeal emphasised (at paragraph 29 of the judgment given by Elias LJ) that the question is not where the

employer is based, but where the employee is based. In that case, the employer was a company registered in Guernsey; the employee lived in England; he worked on a ferry (registered in the Bahamas) plying between Portsmouth and the Channel Islands; and each tour of duty began and ended at Portsmouth. At paragraph 30 of the judgment, Elias LJ held as follows:

*"…..if one asks where this employee's base is, there can only be one sensible answer: it is where his duty begins and where it ends. The employer may have been based in Guernsey but [the employee] had no real connection with that place and he had even less with the Bahamas, where the ship is registered. I do not accept that the considerations of where the employer operates or where the ship is registered are likely to have any significant influence on the question where a particular employee was based."*

26. In **Ravat v Halliburton Manufacturing and Services Limited [2012] ICR 389** the Supreme Court, in a judgment given by Lord Hope, essentially reiterated the test identified by Lady Hale in **Duncombe** in the following terms:

    *"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."*

27. Finally, in **Windstar Management Services Limited v Harris [2016] ICR 847**, the Employment Appeal Tribunal considered a case where the employee would fly from Heathrow or Gatwick airport to the port where the ship was berthed: the calculation of his days of service began with his departure from the UK airport and ended when he landed back in the UK. The employee lived in England and was employed on a cruise ship that operated in Europe and the Caribbean. The findings of fact made by the Employment Tribunal included that the employee's tours of duty (in the sense of the period for which he was paid) began and ended at the relevant UK airport. The contract of employment and the collective agreement incorporated into it both contained a clause providing that English law applied.

28. In paragraphs 29 and 30 of her judgment, Elisabeth Laing J referred to the reasoning of the Supreme Court as expressed by Lord Hope in **Ravat**, pointed out that this expressly adverted to and did not disapprove the base principle, and stated that this reasoning described the underlying rationale for the decisions on the point in a range of different cases. Elisabeth Laing J advised Tribunals to apply the rationale given in **Ravat**.

29. I have kept that advice in mind when approaching Counsel's agreement in the present case that I should apply the "base" test. This has to be considered in the light of the underlying principle stated by the Supreme Court in **Duncombe** and **Ravat**. In particular, I consider that it would be a

mistake to take the dictum of Elias LJ in **Diggins** that there was only "one sensible answer" to the question, namely where did the employee's duty begin and end, as laying down a principle that is applicable to seafarers generally. Elias LJ was expressly addressing the question where this employee's base was, on the facts of the particular case. Indeed, as Mr Boyd submitted, in paragraphs 8 and 52 of her judgment in **Windstar**, Elisabeth Laing J found that **Diggins** did not have that effect.

30. I have therefore considered the question of where the Claimant's base was with reference to all the facts of the case, and have not restricted myself to the question of where his duty began and ended.

31. I also concluded that the "base" I have to consider is the Claimant's base in terms of his employment. Although where the employee has his main residence may be a relevant factor, the base test cannot mean where the Claimant's home "base" is located: if that were so, the issue as to territorial jurisdiction would be determined entirely by where the employee's home is located, which is clearly not the case.

32. There are factors in the present case that tend to show a connection with Great Britain. The Claimant's home was in England and he paid UK tax and National Insurance (both factors cited by Lord Hoffman in paragraph 28 of his speech in **Lawson v Serco**).

33. Other factors, however, pointed away from the proposition that there was a sufficiently strong connection between the circumstances of the employment, and Great Britain and British employment law, and therefore away from a finding that the Claimant's base was in Great Britain. These were as follows:

    32.1 The Claimant's understanding, as stated in his evidence, was that his tours of duty started and ended when he joined and left the ship at the port. This reflected clauses 3.1 and 1.1 of the FSSC. Clause 3.1 provided that the seafarer's "working time" for the purposes of calculating his leave entitlement was the period beginning with when he joined the vessel and ending with when he left it. It did not include the time taken travelling to and from the vessel. In this respect, the contractual provision differed from that in **Windstar**. Consistent with this, clause 1.1 provided that repatriation would take place "upon completion" of a tour of duty: the tour of duty did not include the repatriation.

    32.2 Of the 20 tours of duty involved, 18 began and ended at ports outside the UK. One began and ended at ports in the UK and one began in the UK but ended in a non-UK port. In this respect, the facts differed from those in **Diggins**, where each tour of duty began and ended at a UK port.

    32.3 The Claimant was paid in Euros (see paragraph 28 of Lord Hoffman's speech in **Lawson v Serco**).

32.4 The FSSC provided that the law of the contract would be that of Singapore and that the courts of Singapore would have exclusive jurisdiction. In this respect, the contractual provision again differed from that in **Windstar**.

34. I did not consider that any one point was conclusive as to the base test in the present case. However, taking an overall view of the factors that I have identified above as tending to point one way or the other, I concluded that it was not the case that 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.

35. Finally, I should say that in the course of his submissions Mr Boyd asked rhetorically where the Claimant's base was if it was not in the United Kingdom. Having considered this point, I concluded that it was not necessary for me to make a positive determination of where else the Claimant's base might have been for the purposes of his employment. As I have indicated, I considered that I should determine the base test in the light of the underlying principle expressed by the Supreme Court, and that in doing so it is not necessary for me to make a positive finding as to where, if anywhere, the Claimant's base was if it was not in the UK.

36. I therefore find that the Tribunal does not have jurisdiction over the complaints of unfair dismissal or breach of contract, and that the complaints should therefore be struck out.

Employment Judge Glennie
15 September 2017