THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr David Martirano **v** **Peras Limited**

Heard at: London Central **On**: 25 October 2017

Before: Employment Judge Oliver Segal QC

Representation:

Claimant: Mr D Hutcheon, Counsel
Respondent: Mr G Anderson, Counsel

JUDGMENT

The Claimant's claims for (1) unfair dismissal; (2) unlawful deductions from wages; and (3) holiday pay in respect of the calendar years 2014 and 2015; are dismissed because the Tribunal has no jurisdiction to hear those claims.

REASONS

Introduction – the issues

1. I start by thanking both counsel for their skilful and helpful assistance in resolving these issues.

2. By order dated 25 July 2017, EJ Lewzey listed the present hearing to determine certain preliminary issues. Of those the following remained live at the hearing:-

   2.1. Whether the Claimant fell within the territorial scope of Parts II and X of the Employment Rights Act 1996 ("ERA"), as defined in s. 199, such that he is entitled to pursue his claims for unfair dismissal and unlawful deductions from wages.

   2.2. Whether the Claimant's claims in respect of untaken annual leave under regulation 12 of the Merchant Shipping (Hours of Work) Regulations 2002

("the 2002 Regulations") are in time and, if not, whether time should be extended.

Evidence

3. The facts were not really in dispute.

4. I heard evidence from:

   4.1. The Claimant; and

   4.2. Mr McMillan, for the Respondent.

5. There was a voluminous bundle of documents, of which I was referred to the normal 20 pages or so.

Facts

6. The Claimant was employed by the Respondent between March 2013 and September 2016 as the captain of its British-registered yacht, the Eleonora ("The Yacht"). The Yacht was most recently (re-)registered with a Certificate of British Registry in February 2015 for 5 years.

7. By reason of being a British-flagged boat, it was subject to regulatory control (including annual inspections) by UK maritime authorities.

8. The Claimant worked approximately 48 weeks per year on the Yacht, mainly in the Mediterranean, but on one occasion lasting just over 2 months at the Cowes regatta in Great Britain.

9. The Claimant's working pattern was fairly intensive during the 6 "summer" months, during which time he would regularly not take off the weekend days he was in theory entitled to do; but was less intensive during the 6 "winter months", when the Yacht was generally in one place for maintenance, etc.

10. The Claimant's contract of employment stated that it was subject to English law and to the jurisdiction of the English Courts. It provided for 20 days' holiday a year – which, as from March 2014, the parties now agree was below the minimum entitlement provided for in the 2002 Regulations.

11. The Claimant has a family home in Malta where his Maltese wife and children live.

12. The Claimant is a Canadian citizen and travels on a Canadian passport.

13. The Claimant's mother and stepfather live in the United Kingdom, with homes in Northern Ireland and London – keys to the latter of which are always available to the Claimant.

14. During his employment with the Respondent, the Claimant made only one trip to Great Britain specifically for that purpose: for 3 days in July 2014 in order to attend a friend's wedding and to visit his stepfather in London for a day.

15. The Claimant also travelled through either Gatwick or Heathrow on 3 occasions, once staying a night with his stepfather in London.

16. The Claimant says he "feels at home" in London and loves walking around London.

17. The Claimant met his wife and children in Northern Ireland for the Christmas period in 2013.

18. Finally, as indicated above, the Claimant was in Great Britain for work between 23 May and 6 August 2015 for the Cowes regatta, though spent some 10 days in total away during that period in Canada and in Malta.

19. Prior to his employment with the Respondent, he was more regularly in London or Northern Ireland.

20. Since his employment terminated, apart from for the present hearing, he has had one trip to Great Britain. He has spent most of the time between September 2016 and April 2017 (when he secured new employment as captain of another boat) doing a course at a maritime university in Holland; that course began in mid-October 2016.

21. During his employment with the Respondent, certain issues arose in respect of the terms of his contract – principally, as I understand it, raised by the UK Maritime and Coastguard Agency ("MCA"). One of those issues concerned the entitlement to only 20 days' annual leave, when from May 2014 his actual entitlement was to 38 days' annual leave. The MCA commented in a document I was shown that this *"looked a little low"* (sic).

22. There was some small dispute about the extent to which the Claimant pressed that point and the extent to which the Respondent was aggressively dismissive of it. In so far as is relevant, I find that the Claimant raised it more than once, along with other matters, but not in a particularly energetic or forceful way; and the that the ship's owner, Mr Zak, took the approach that he was only prepared to amend the terms of the contract in so far as was required by law – which, in this respect, he was (wrongly) informed at the time did not require amendment. The Claimant did not expressly seek to rely on the provisions of the 2002 Regulations during his employment. He may have been concerned (as he said) that if he pressed the point too far, his employment would have been in jeopardy; but no express or implicit threat was made to him that if he asserted a legal right his employer would react in that way.

23. The Claimant sought early conciliation through ACAS of his claims on or about 13 December 2016.

The Law

24. Section 199(7) ERA provides as follows:

[Part II (Protection of Wages) and Part X (Unfair Dismissal)] apply to employment on board a ship registered in the register maintained under section 8 of the Merchant Shipping Act 1995 if and only if:

(a) The ship's entry in the register specifies a port in Great Britain as the port to which the vessel is to be treated as belonging;

(b) under his contract of employment the person does not work wholly outside Great Britain, and

(c) the person employed is ordinarily resident in Great Britain.

25. The 2002 Regulations apply to *'a sea-going United Kingdom Ship wherever it may be'* (reg. 3).

26. Reg. 12 provides:

(3) Leave to which a seafarer is entitled under this regulation –

(a) …

(b) may not be replaced by a payment in lieu, except where the seafarer's employment is terminated."

27. Reg. 22 provides:

(1) An employed seafarer may present a complaint to an employment tribunal that the seafarer's employer –

(a) …

(b) has failed to pay the seafarer the whole or any part of any amount due to the seafarer under regulation 12(1) or (2).

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a period of annual leave or additional leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

28. As to the requirement under s. 199(7)(b) that an employee does not work "wholly outside Great Britain" under his contract of employment:-

28.1. The Claimant relies on **Saggar v Ministry of Defence [2005] IRLR 618**, per Mummery LJ at [27], for the proposition that the tribunal must look at *"the whole period of employment"*; the Respondent accepted that.

28.2. The Respondent relies on **BA v Mak UKEAT/0055/99**, for the proposition that the tribunal should ignore an amount of work which is *de minimis* (see at [24-25]); the Claimant did not dispute that.

29. As to the requirement under s. 199(7)(c) that an employee must be *"ordinarily resident in Great Britain"*, the parties agreed that the relevant test(s) – established by reference to the same or similar wording in other statutes – had been set out in a series of cases reviewed and applied in the context of disability and age discrimination in employment by the EAT in **Neary v Service Children's Education [2010] IRLR 1030**; being in summary that the place or places where a person is ordinarily resident are those which s/he has **adopted voluntarily and for settled purposes, as part of the regular order of his life**, whether of short or long duration. Moreover:-

29.1. A person can be ordinarily resident in more than one place.

29.2. The "settled purpose" may include *"education, business or profession, employment, health, family or merely love of the place"* .

29.3. In considering whether a person's presence amounts to residence one must consider the amount of time spent in the place, the nature of their presence there and their connection with the place.

30. The parties agree that a British-flagged ship is not strictly part of Great Britain, but the Claimant – in support of the proposition that whilst he was on board the Yacht he should be treated as being ordinarily resident in Great Britain – noted that ships are *""regarded for many purposes as a floating part of the territory whose flags they fly"*: **Wood v Cunard Line [1990] IRLR 281** at [11]; and noted also that, whilst on the High Seas, persons aboard ships are, for some purposes, by international law subject to the jurisdiction of the country whose flag they sail under.

31. If, the Claimant argued, s. 199(7)(c) was not to be construed that way (as he contended it should be) as a matter of domestic law – then, he argued, such a construction was necessary and appropriate having regard to article 6 ECHR (that in the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing), pursuant to s. 3(1) Human Rights Act 1998. The parties agreed (or at least took it as read) that the right to a fair hearing included the right of access to the courts to have a dispute determined under the substantive law of the Member State (though not to create substantive law which does not exist). The parties also (correctly) agreed that such a right is not absolute; that restrictions to it are justified if they pursue a legitimate objective by proportionate means.

32. As to the distinction between substantive legal entitlement and "procedural" bars to the exercise of such an entitlement, the Claimant relied on the decision of the Supreme Court in **Benkharbouche [2017] UKSC 62**, for the proposition that, so far as ECHR jurisprudence was concerned, "procedural rules" are those which *"whether technically procedural or substantive in character, ha(ve) the effect of barring a claim for reasons which do not go to its legal merits"* (see at [16]).

33. Both parties also made submissions in the Human Rights context by reference to the case of **Mark v Mark**, both in the Court of Appeal (**[2004] EWCA Civ 168; [2005] Fam. 267**) and, at my suggestion, the House of Lords (**[2005] UKHL 32, [2006] 1 AC 98**). In that case the courts had to address whether the claimant petitioner for divorce was "habitually resident" in England and Wales and whether for that purpose a rule of public policy that such residence had to be lawful should be applied.

34. The facts strongly argued against the application of such a rule in that case, for which reason Thorpe LJ (with whom the other members of the Court agreed) held as follows (at [40], my emphasis):

> *In all those circumstances, I conclude that the wife's article 6 rights are engaged. The right of access to the courts is not expressly guaranteed by article 6(1) of the European Convention but, unsurprisingly, decisions of the Strasbourg court have made it plain that denial of access to the national courts may amount to a breach of article 6.* ***Mr Howard, and indeed Mr Nicholls, emphasised the right of the state to impose conditions and limitations on the right of access. But here we consider not a statutory restriction of obvious legitimacy but a rule of public policy*** *which, absolutely applied, would deny the wife access to the divorce court with which she has the closest connection, and after the rejection of a stay application, in the course of which considerations of fairness and convenience were fully canvassed. This case has many unusual features which make it most unsuitable for the formulation of any general principle or rule. But in circumstances where: (a) the husband invited the wife to petition in London; (b) the husband in his pleadings prior to March 2002 admitted the court's jurisdiction; (c) there have been extensive proceedings under Part IV of the Family Law Act 1996, in which the husband has established his right to the continuing use of the formal matrimonial home; (d) the ancillary relief proceedings are well under way with evidence not only from the parties but also from the trustees of the relevant foreign trusts,* ***a rule of public policy that terminated proceedings so far advanced would not only be perverse but incompatible with the wife's rights under article 6(1).***

35. In the House of Lords, it was not felt necessary to engage with article 6, since the same result was reached as a matter of domestic law. Giving the leading speech, Baroness Hale noted ([33]) that habitual residence and ordinary residence are interchangeable concepts and approached the question purely as one of domestic statutory construction; holding that whereas for purposes of immigration statues it was right to imply "lawfully" into the concept, there was no ground for doing so in the present context, any more than for the purposes of income tax liability (where it was established law that the illegality of residence was immaterial) and therefore the Human Rights Act did not apply: see at [30-37].

36. I was referred to a number of other cases by both parties. I have taken them into account, but have not felt it necessary to make reference to them in these Reasons.

Discussion

(1) s. 199

Did the Claimant work wholly outside Great Britain?

37. The parties agree this is factual question, taking account of the entire period of the Claimant's employment and bearing particularly in mind the two months of so spent in Cowes.

38. Given that the contract itself is silent on the place(s) of work, I agree.

39. I have little hesitation in deciding that the Claimant did not work wholly outside Great Britain; the period spent working in Cowes was substantial and not *de minimis*.

Was the Claimant ordinarily resident in Great Britain when not on the Yacht?

40. I address the question first based on the time spent in Great Britain (ignoring the time spent on the Yacht).

41. On this point too, I have little hesitation in deciding the issue. The Claimant was, on the facts, not ordinarily resident in Great Britain by virtue of visiting for 3 days in 3 years and spending the odd day here whilst in transit, and/or by virtue of his mother and stepfather living here and his considering London and Northern Ireland as family homes.

42. I have taken into account the amount of time spent by the Claimant in Great Britain, the nature of his presence here during that time and his connection with Great Britain. In my view, the Claimant had no settled purpose in residing in Great Britain during the material period and no purpose at all *"as part of the regular order of his life"* during that time.

Was the Claimant ordinarily resident in Great Britain by virtue of the time spent on the Yacht, as a matter of domestic statutory construction?

43. On this point too, I consider the answer is obvious.

44. It seems to me clear that Parliament was intending, by adding (7)(c) to the requirements of (7)(a) and (b), to limit the relevant employment rights to those who not only worked on board British registered vessels, and some of the time in Great Britain, but who additionally were resident (in the normal sense of that word) to some extent in Great Britain. I accept the Claimant's submission that the ERA should, in the most general sense, be construed bearing in mind its purpose to provide employees with rights (**Gisda Cyf v Barratt [2010] 1073** at [41, 43]); but that does not seem to me to assist in construing a clear limitation to the type of person whom Parliament intended should enjoy those rights.

45. The Claimant's proposed construction comes perilously close to rendering (7)(c) redundant. When I put that to Mr Hutcheon, he suggested that it might still have force in circumstances where the employee worked only for a small minority of his time, or perhaps on a short one-off contract, on a British-registered vessel, and the rest of the time on vessels of other countries; in that case ordinary residence would not be established by his working

circumstances but would have to be established additionally by his physical presence to some extent in Great Britain. I am not sure that those hypothetical examples work, for more than one reason. First, for the purposes of fulfilling a short one-off contract the employee would presumably not be physically present in Great Britain at all (save on board his vessel) and would therefore not meet the requirement of (7)(b). Secondly, in neither variant of would the employee be likely to have continuity of employment sufficient to ground a claim under Part X of ERA (though I acknowledge other parts of the Act are subject to s. 199 also). Finally, if a person was employed regularly on different vessels, by turns, of different nationalities, it seems not unlikely (on the Claimant's construction) that he would be ordinarily resident in the various countries under whose flags those vessels sailed – again rendering (7)(c) redundant.

46. I tested the Claimant's construction by reference to a hypothetical example at the other extreme (but perhaps more factually likely): a Philippine crew member working on a British registered trawler vessel mainly operating out of the Falkland Islands in the South Atlantic, under a contract not governed by English law and that person had never been to Great Britain. Mr Hutcheon accepted that such a person would, on his construction, satisfy the test of ordinary residence (though the vessel would have to fish off the coast of Great Britain at some point to satisfy (7)(b) also).

47. That is neither the natural nor the rational construction of the statutory language. I say so particularly given the relative ease in satisfying (7)(b) and (7)(c): any work in Great Britain that is not *de minimis*; and any level of residence in Britain for any settled purpose as part of the regular order of a person's life, even if that person is more obviously ordinarily resident elsewhere as well. I hold that the Claimant's construction of (7)(c) is, as a matter of domestic law, wrong.

Was the Claimant ordinarily resident in Great Britain by virtue of the time spent on the Yacht, taking into account article 6?

48. This question seems to me less obvious; and Mr Hutcheon's submissions were impressive in support of the Claimant's argument on this issue.

49. I accept the Claimant's submission that (7)(c) is, for ECHR purposes, a "procedural rule", restricting the entitlement of those serving on British registered vessels to certain substantive employment rights they would otherwise enjoy – and which Parliament has legislated for those whose employment has a sufficient connection with England and Wales generally to enjoy.

50. The next question, if I am right about that, is whether it is possible (even if not – as I have found – the natural construction) to construe (7)(c) as including time spent on board such a vessel outside of British waters as time during which an employee is ordinarily resident in Great Britain. Can (7)(c) be read compatibly with what the Claimant urges the Human Rights Act requires?

51. I do not believe so.

52. It is one thing to contend (as the Claimant did) that "in Great Britain" could, by analogy with certain other domestic or international legal contexts, include "on board a British flagged boat"; I accept that, though that it is not the normal situation, it is the applicable situation in those certain contexts. However, the words "in Great Britain" must be read as part of the phrase "ordinarily resident in Great Britain". In none of those other contexts is residence the issue. "Residence in" a country, to my mind, must connote something rather more than being "subject to the laws and/or jurisdiction" of that country; in particular, it connotes a period of (though not necessarily continuous) physical presence in that country.

53. I do not accept that s. 199(7) can be construed as the Claimant seeks – even were article 6 to point in that direction.

54. In case I am wrong about that, I must go on to consider whether – if such a construction of (7)(c) were possible – it would right to adopt it, in order to give effect to article 6. That involves consideration, *ex hypothesi*, of whether the intention and effect of (7)(c) in domestic law (as I have found it clearly to be) constitutes the pursuit of a legitimate aim by proportionate means.

55. The aim in question is limiting access to tribunals in respect of the material employment rights of persons employed on British registered vessels, to those who both work for some of their time in Great Britain and are resident for some of their time for some settled purpose in Great Britain. That seems to me an obviously legitimate aim: I note in that regard one of the parts of Thorpe LJ's judgment to which I added emphasis, cited above: *Mr Howard, and indeed Mr Nicholls, emphasised the right of the state to impose conditions and limitations on the right of access. But here we consider not a statutory restriction of obvious legitimacy but a rule of public policy*. A state has the right to impose limitations, by statutory restriction, on the right of access to its courts, excluding those who do not have a sufficiently close connection with that state; and, in general at least, such limitations are of obvious legitimacy.

56. I turn then to the question of proportionate means. I accept one could take different views on this point. The example I gave above of the Philippine crew member on a British registered trawler working mainly in the South Atlantic seems to me to be one where (7)(c) works proportionately. However, the Claimant argues that his case is somewhat materially different; in particular, he relies on the fact that he worked under a contract subject to the law and jurisdiction of England and its courts. I acknowledge that difference as potentially relevant. Parliament could have made the restriction at (7)(c) more sophisticated, so as to exclude the first hypothetical employee, but to include the Claimant. Has Parliament used disproportionate means in not doing so?

57. I have hesitated over that question; although this is certainly not such as case as that of Mrs Mark, where the factual circumstances cried out for the jurisdiction of the English courts to be upheld. In the end, I decide that the enactment of (7)(c) was not to use disproportionate means to pursue the legitimate aim I have identified. In that regard, I bear in mind that the rights under the ERA which are the subject of s. 199 are statutory and not contractual; their exercise would not have been prejudiced had the Claimant's

contract not specified English law or jurisdiction, or even had it specified another country's law and/or jurisdiction; I was given no evidence about any equivalent statutory rights enjoyed (or not) by citizens of Malta, for instance, who work on board vessels sailing in the Mediterranean. It seems to be wrong, therefore, to place very much weight on the terms of the Claimant's contract relied on by him. Once one ignores those, then the only difference of principle between him and the hypothetical Philippine crew member is that the Claimant has some family living in Britain and has in the past spent significant time in Britain. Neither of those facts affects whether his time on board the Yacht should count as ordinary residence in Great Britain during his employment with the Respondent.

58. Again, I note that the requirement of ordinary residence is not as exacting as a layperson might imagine: any regular presence for any settled purpose will suffice.

(2) The 2002 Regulations

59. The Claimant's case on this point is, I fear, hopeless. I was not referred by either party to the well-known authorities on "reasonable practicability"; but the law is clear.

60. The Claimant had some 18 months during his employment to bring a claim under the 2002 Regulations (which his evidence suggested he was aware he could pursue – or at the very least explore with a view to pursuing it); and only did not do so he said because of fear of losing his job. That fear is likely to be a factor in most cases where the prospective claimant is still employed; it has never been regarded as rendering the commencement of a claim other than reasonably practicable. I have, in any event, found as a fact that such fear was not based on anything approaching the "duress" Mr Hutcheon suggested I find.

61. Even if I had any doubt on that primary issue, I would still have found that the delay between 16 September 2016 and mid-December 2016 was not such as to mean that the claim was presented within such further period as was reasonable. I acknowledge that the Claimant was in Holland for most, perhaps all, of the time between mid-October and mid-December. However, there was a month after his dismissal before then; and he was able to instruct lawyers to intimate and them pursue the claim during his university course.

Conclusion

62. I therefore hold that the Claimant's claims of unfair dismissal, unlawful deductions of wages and for holiday pay are dismissed.

63. Other claims, for breach of contract, will proceed and the parties should apply to the tribunal for a hearing date and other directions expeditiously to allow those claims to be determined.

Employment Judge Segal on 8 November 2017