EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106015/19

Held on 30 October and 1 November 2019

Employment Judge J M Hendry

Mr M R Gilman	**Claimant In Person**
Swire Pacific Ship Management Limited	**1st Respondent Represented by Mr E Kemp, Counsel**
Swire Pacific Offshore Operations (Pte) Ltd	**2nd Respondent Represented by Mr E Kemp, Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claims made by the claimant for (1) unfair dismissal, (2) age discrimination under s.13 of the Equality Act 2010, (3) for a failure to allow the claimant to be accompanied under s.10 of Employment Relations Act 1999 and (4) for less favourable treatment in terms of Regulation 3 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 are all dismissed as the Tribunal has no jurisdiction to hear them are dismissed.

E.T. Z4 (WR)

1. The claimant in his ET1 sought a finding that he had been unfairly dismissed from his employment as a Crane Operator, that he had also suffered age discrimination (s.13 of the Equality Act 2010), that he had not been allowed to be accompanied at a disciplinary hearing contrary to s.10 of Employment Relations Act 1999 and suffered less favourable treatment in terms of Regulation 3 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

2. The respondents denied the claims. Their position was that the First Respondent was the correct employer and that in any event the Tribunal did not have jurisdiction to entertain the claim.

3. A Preliminary Hearing was arranged at which the issue of territorial jurisdiction would be considered.

Evidence

4. The claimant lodged a witness statement which had been prepared prior to his solicitors resigning from acting for him. The respondents prepared a statement from Mr Nicholas Hall, General Manager of Marine Manning of the second respondents who is also a Director of the first respondents. A Joint Index of Documents was lodged. The respondents lodged a written skeleton argument as did the claimant.

Issues

5. The issue for the Tribunal was whether or not the Tribunal had territorial jurisdiction in respect of the four separate claims being made by the claimant.

6. The claimant gave evidence by speaking to his witness statement and referring to documents. Mr Hall did the same.

Facts

7. The Tribunal made the following findings in fact.

8. The claimant is a Crane Operator. He worked in that capacity for the first respondents ("SPSM") from 15 December 2012 until he was dismissed on 11 December 2018.

9. The First Respondent is a Singaporean company which in turn is owned by a company based in Hong Kong.

10. The Second Respondent, ("SPO") is a separate company within the same group of companies as the first respondent.

11. The claimant's terms of employment are set out in a Seafarer's Employment Agreement ("SEA") which expressly incorporated the terms of SPSM supporting staff service conditions ("FSSC") and the Collective Agreement between them and two recognised trade unions ("the Collective Agreement").

12. During his employment the claimant served on board a wind farm installation vessel the "*Pacific Orca*". Various 'wind farms' have been built over the past fifteen or so years in the North Sea both in UK waters, in Danish and Dutch waters.

13. The claimant was employed under a series of fixed term contracts in accordance with the provisions of the FSSC. The FSSC terms were available to be read on board the vessel. Those conditions were incorporated into the employment contract between the First Respondent and the claimant.

14. The Collective Agreement provided for tours of duty in Clause 5. It states:

> "*On completion of a tour of duty, seafarers will be repatriated to their home ports or take earned leave.*"

15. Clause 5.1 indicated that home leave will be earned at the rate of one day for every one day of continuous service or pro rata thereof.

16. The Collective Agreement was revised in 2017 (JBp.89-97). The figures related to tours of duty remained the same.

17. SPSM issue staff service conditions (JBp.98-131 and JBp. 132-167). The claimant was aware of and accepted these conditions.

18. The FSSC provided that continuous service would be based on each tour of duty performed by a seafarer starting from the time the seafarer reports for duty on the vessel to the time the seafarer completes his assignment and leaves the vessel (Clause 1.2.1).

19. Following the end of the completion of a tour of duty the seafarer will be repatriated to his home port or such other place as may be specified in his SEA (Clause 2.2.2) (JBp.136).

20. It provides that home leave is earned at the rate of 60 days for every 60 days of continuous service (Clause 5.1.1).

21. A seafarer had various responsibilities when on home leave (Clause 5.2).

22. The seafarers would be paid for travelling to and leaving a vessel.

23. The claimant received a Seafarers Employment Agreement ("SEA"). The contract was updated in 2018 and the claimant acknowledged the agreement and worked under its terms (JBp.164-167).

24. The SEA identifies the claimant as British and having a home port of Belfast. The first respondent's business was given as an address in Singapore.

25. The contract provided:

"***2. Capacity in which seafarers to be employed***

You shall be employed as a Crane Operator with effect from ***date of departure from home port***."

26. The contract provided that the claimant would be paid in Euros as follows:

"*Your salary shall be Eur.157.00 per day, which is in accordance with the scales published in the FSSC. Your salary will be paid to your designated bank account. Please provide us with the details of your designated bank accounts as soon as possible. Section 8 of the NFSSC does not apply.*"

27. There is reference to collective agreements in the SEA.

28. The contract also provides as follows:

"***10. Governing law in jurisdiction***

This Letter of Offer is governed by construed in accordance with the laws of Singapore. Any dispute arising out of or in connection with this Letter of Offer shall be determined by the Courts of Singapore to the exclusion of any other Court.

If you understand and accept this offer and all the terms and conditions of your employment as set out in the SEA please sign in the space indicated below and return the original signed duplicate of this Letter to us as soon as possible."

29. The collective agreement provides as follows (JBp.96):

"***15: ARBITRATION***

The Danish Industrial Tribunal at (LOV OM ARBAJDSRATTEN) shall also apply to industrial disputes.
Thus, CF Section 33 of the Danish Industrial Tribunal Act, all disputes pertaining to this Agreement shall be resolved subject to the standard rules for handling industrial disputes in Denmark.
Industrial arbitration will in all cases be determined by reference to the collective bargain in terms agreed to the exclusion of and all domestic employment laws and regulations in the home country, any union or seafarer and/or any seafarer's place of employment and/or place of repatriation and/or port of embarkation or disembarkation."

30. The claimant worked in accordance with the SEA, FSSC and collective agreements. He was notified that he had to join his ship and leave Belfast and travel to the port to join the ship. Occasionally he joined the ship in Belfast.

31. The ship the *Pacific Orca* is registered in Cyprus (JBp.184). Records of the Ports visited by the vessel in 2014 onwards are given in Appendix E (JBp.187, 188, 189, 190, 191). The vessel details and vessel sailings are correctly recorded in the Lloyds List Intelligence Report for the *Pacific Orca* (JBp.192-202).

32. During the claimant's period of employment the vessel he was attached to mainly operated out of Denmark or the Netherlands (two thirds of the time) and on other occasions called in at UK ports or worked in UK waters.

33. SPSM directly employs individuals supplied to work on the vessel and was the claimant's employer.

34. In the course of the claimant's employment he attended various training courses held outside the UK.

Witnesses

35. I accepted that Mr Gilman gave credible and reliable evidence in relation to these matters. He was clearly an honest witness and generally credible and reliable although he did not accept initially that on a day when leaving to embark on a tour that this counted towards continuous service but he later accepted that position after it had been explained to him by Mr Kemp, that the contractual documentation indicated that this was in fact the position provided for.

36. Mr Halls evidence was clear and essentially uncontentious. I found him to be a credible and reliable witness to fact.

Submissions

Claimant's Submissions

37. Mr Gilman prepared written submissions. His position was that because his vessel worked in UK territorial waters for a period and was in such waters when he was dismissed that the Tribunal should have jurisdiction. He accepted the contractual and factual position but did not accept he should be deprived of his rights as a British citizen. The company have an office(s) in the UK and had believed that his duty started when he set off from Northern Ireland to join the ship and this was when he was still in the UK.

Respondent's Submissions

38. Mr Kemp examined the jurisdictional issues in respect to the claims for unfair dismissal under Section 94(1) of the ERA, direct age discrimination under The Equality Act, failure to be accompanied at a disciplinary hearing under Section 10 of the Employment Relations Act and less favourable treatment under Regulation 3 of the Fixed-Term Employee's Regulations.

39. The starting point, he suggested, was the contractual documentation which he submitted reflected the reality of how the claimant's employment contract operated. In practice it was clear, he submitted, that the first respondents were the employers and the second a separate company that was part of a group structure. He reminded the Tribunal that it was only in exceptional circumstances to warrant the piercing of the corporate veil. The way in which the various operations were arranged were clearly *bona fide* and legal.

40. Mr Kemp then moved to consider the claim under the Employment Rights Act 1996. He pointed to the particular provisions for mariners provided in s.199 of the Employment Rights Act. The vessel the claimant worked on (*Pacific Orca*) is registered with a Cyprus ship registry and accordingly the claimant is unable to meet the first requirement of s.199(7) ERA. On non-flag UK vessels

the relevant test is, he suggested, whether the employee's employment is based in Great Britain and this was determined by establishing where the employee's duty begins and ends (**Diggins v. Condor Marine Crewing Services Ltd** [2010] ICR 213). Mr Kemp then moved to consider the case of **Lawson v. Serco** [2006] IRLR 289 and the various tests outlined by Lord Hoffmann there. In that case the court explicitly endorsed "as most helpful guidance" (at paragraph 30) Lord Denning's opinion in the case of **Todd v. British Midland Airways Ltd** [1978] ICR 959 that "*a man's base is the place where he should be regarded as ordinarily working even though he may spend days, weeks or months working overseas…….*"

41. The territorial reach of the ERA was he submitted not to be determined by the serendipity of whether the mariner was in the UK when the dismissal was being communicated to him or of certain periods of duty in the period leading up to the dismissal being in UK waters. His position in essence was that the fact the vessel worked in UK waters on occasions must to be looked at in the round and the vessel spent most of its time during the six year period in Danish or Dutch waters.

42. Mr Kemp continued that the contractual position remains a relevant consideration to determine the claimant's base (Clause 5.1 of the FSSC) which is expressly incorporated into the claimant's employment contract confirms the claimant's tours of duties at the start of the time he reports for duty on the vessel to the time he completes his assignment and leaves the vessel. Home leave is explicitly stated to accrue only during time spent actually on the vessel (Clause 5.1 of the collective agreement). Clause 5.1 of the FSSC accordingly the tour of duty begins and ends at the Port and not elsewhere (**Windstar Management Services Ltd v. Harris** [2016] ICR 847).

43. Turning to the Log book for the vessel Counsel pointed to the fact that it showed the days of each tour of duty. The claimant's record of sea service demonstrated that most of his tours of duty began and ended in ports outside the UK. Accordingly, the Employment Tribunal does not have jurisdiction to

hear the claimant's claim under the Employment Rights Act 1996 and that claim should be dismissed.

44. Counsel then considered the claims under the EReIA and FTWR. Both of these Regulations are silent as to territorial scope. The Employment Tribunal therefore need to apply the base test in **Lawson v Serco** as clarified for mariners in **Diggins** in order to determine the claimant's ordinarily place of work as most of the claimant's tours of duty began and ended outside the UK the claims fall out with the territorial reach of the Act and Regulations and should be dismissed.

45. In relation to the Equality Act s.81(1) of the Equality Act provides that Part 5 (Work) only applies, as is material, to work on ships and to seafarers in such circumstances as are prescribed Regulation 3(2)- (3) of the Equality Act 2010 (Work on Ships and Hovercraft) Regulations ("the Regulations") which prescribe such circumstances to seafarers like the claimant working wholly or partly in Great Britain and adjacent waters. Regulation 2(2)(b) defines sufficiently close link in the interpretation section. Mr Kemp submitted that the word sufficiently has to be understood as sufficient to displace that which otherwise would be the position that Part 5 of the Equality Act will have no application to seafarers (**Powell v. OMV Exploration and Production Ltd** [2014] ICR 63 at 51). The respondent's position was that only the factors listed in Regulation 2(2)(b) that the claimant can establish in favour of Great Britain is that he pays taxes here. The First Respondent is a Singapore branch of a Hong Kong Company which is wholly owned by a Hong Kong registered Company. The vessel is registered in Cyprus. The weighty factor was in his view the reference to the legal system chosen by parties to govern and regulate disputes (**Dunn v. Secretary of State for Schools** [2011] ICR 1312 per Lady Hale. The jurisdiction chosen in the SEA is the Singaporean Courts and for the collective agreement it is Denmark. The claimant was paid in Euros. The only connection he has with the UK is that he pays tax here.

46. In the claimant's period of employment 23 out of 37 tours of duty began and ended outside UK waters. Training took place at various locations including Denmark in relation to the claimant's employment retained insufficient close link in with Great Britain for the Employment Tribunal to have jurisdiction.

47. As a fall-back position Mr Kemp made reference to the recast Brussels 1 Regulations and indicated that if the Tribunal rejected his submissions it would have to look at these Regulations and there could be no international jurisdiction because the claimant's employer is not domiciled in the UK, the claimant's original place of work was not in the UK and the business which engaged the claimant was not situated in the UK and finally, the dispute did not arise out of operations, by branch, agency or establishment of the respondents in the UK. There accordingly can be no deemed domicile in terms of Article 21 and finally, the claims can be dismissed on the common law grounds of *forum non-conveniens* in respect that the Singaporean Courts and on the day the Industrial Tribunal are better placed to hear the claims (**Spiliada v. Maritime Corp Cansulex** [1987] AC 460HL.

Discussion and Decision

48. The issues surrounding jurisdiction are not easy for lay people to understand and what complicates matters is that different claims have different rules relating to jurisdiction. As Mr Kemp correctly pointed out the starting point here must be a consideration of the contractual relationship between the claimant and the respondents. The claimant seemed to accept that it was the First Respondent that was his employer and no issue was raised that the contractual documentation, and I use the term widely to include the FSCC which I found to be incorporated in the contract, was either disputed or a sham.

49. I then turned to consider the legal position in which I was assisted by the detailed submissions prepared by Mr Kemp and his citation of appropriate authority.

50. The law in relation to jurisdiction has developed over the years but the case of **Lawson v Serco Limited** [2006] ICR 250 and the Judgment of Lord Hoffman at paragraph 28 is a suitable place to begin. He suggested that where the employee's base is stated to be under the contract will depend on an examination of the relevant contractual terms.

51. 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."*

52. In the present case the "base" test identified by Lord Hoffman in Lawson v Serco is applicable to the claimant as a peripatetic worker. (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……..."*

53. In the case of **Diggins v Condor Marine Crewing Services Limited** [2010] ICR 213, a case also involving a seafarer, the Court of Appeal emphasised (at paragraph 29 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 but the employee lived in England working on a ferry (registered in the Bahamas) sailing out of 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."*

54. In the leading case on jurisdiction **Ravat v Halliburton Manufacturing and Services Limited** [2012] ICR 389 the Supreme Court, in a judgment given by Lord Hope, reiterated with approval 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."*

55. Applying the base test here although the claimant travels from the UK to join the ship it is clear that the base is not the UK. It cannot be his home although this can be a relevant factor. If it was conclusive then Tribunals would have to look no further than a claimant's address. The First Respondent's domicile is not in the UK but Singapore. The claimant ordinarily works outside UK waters. The FSSC is clear that his tour starts when he joins the ship and reports for duty. The majority of the time the tours started and ended in Danish or Dutch waters. Weighing the preponderance of factors here (including the Collective Agreement submitting disputes to the Danish Industrial Tribunal and contractual disputes to the courts of Singapore) this all points away from the proposition that there was a sufficiently strong connection between the circumstances of the employment, and the jurisdiction the UK Employment

Tribunal. The Tribunal does not have jurisdiction to hear the claim for unfair dismissed and it is accordingly dismissed.

56. I now turn to consider the remaining claims. As Mr Kemp observed EReIA and FTWR are silent as to territorial scope. The Employment Tribunal therefore needs to apply the base test as discussed earlier. In these circumstances and for the same reasons as I have recorded above the claims fall outwith the territorial reach of the Tribunal and are dismissed.

57. Finally, the Equality Act 2010 has in s.81(1) provides rules relating to those working aboard Ships and Hovercraft that Part 5 (Work) only applies, as is material, to work on ships and to seafarers in such circumstances as are prescribed in Regulation 3(2)- (3) of the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2010. These sections prescribe circumstances where seafarers like the claimant are working wholly or partly in Great Britain and adjacent waters. Regulation 2(2)(b) of the Interpretation section of the Regulations sets out the factors that help define what is a '*sufficiently close link'*. I accept the submission that the word sufficiently has to be understood as sufficient to displace or oust that which otherwise would be the position namely that Part 5 of the Equality Act will have no application to seafarers (**Powell v. OMV Exploration and Production Ltd** [2014] ICR 63 at 51).

58. The only factor listed in Regulation 2(2)(b) that the claimant can found upon was that he pays taxes here. As found the First Respondent is a Singapore branch of a Hong Kong Company which in turn is wholly owned by a Hong Kong registered Company. The vessel is registered in Cyprus. The legal system chosen by parties to govern and regulate disputes is not the UK (**Dunn v. Secretary of State for Schools** [2011] ICR 1312 per Lady Hale). The jurisdiction chosen in the SEA is the Singaporean Courts and for the collective agreement it is Denmark. As the evidence showed in the claimant's period of employment 23 out of 37 tours of duty began and ended outside UK waters. Training took place at various locations including Denmark. There is

insufficiently close link with the UK for the Employment Tribunal to have jurisdiction and accordingly this claim is also dismissed for want of jurisdiction.

Employment Judge:	**James Hendry**
Date of Judgment:	**21 November 2019**
Date Sent to Parties:	**22 November 2019**

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