



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4112734/2018**

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**Held in Aberdeen on 19 March 2020**

**Employment Judge N M Hosie**

10 **Mr Waldemark Zak**

**Claimant  
Represented by:  
Mr P Zboina -  
Solicitor**

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**Deeside (Guernsey) Ltd**

**Respondent  
Represented by:  
Mr W Rollinson -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claim is dismissed for want of jurisdiction.

### **REASONS**

#### **Introduction**

1. This case has something of a history, the claim form having been submitted  
30 on 23 July 2018. In any event, the claimant resigned from his employment  
with the respondent Company on 24 January 2019 and claimed that he had  
been constructively and unfairly dismissed. The respondent opposed an  
application by the claimant's solicitor to amend the claim to introduce this  
complaint and applied for the existing claim to be struck out.

35 2. However, on 3 July 2019, Employment Judge Hendry issued the following  
Judgment:-

“1 The claimant’s application to amend the claim to one of unfair dismissal and arrears of standby pay is granted.

2 The application for strikeout is refused.”

### History

5 3. In the reasons for his Judgment, Employment Judge Hendry set out the history of the claim.

### Case management preliminary hearing

4. Employment Judge Hendry conducted a preliminary hearing for case management purposes on 19 August 2019. The Note which he issued following that hearing is referred to for its terms. He directed the claimant’s solicitor to, “set out his client’s full position in relation to all the outstanding claims in one document often referred to as *Better and Further Particulars*.” He allowed the respondent’s solicitor an opportunity of responding. The claimant’s solicitor submitted the further and better particulars by email on 6 September 2019. The respondent’s solicitor responded by email on 20 September 2019 and attached “revised Grounds of Resistance”. The claimant’s solicitor commented on the respondent’s revised Grounds of Resistance by way of an attachment to his email of 11 October.

5. I conducted a preliminary hearing for case management purposes on 4 December 2019. The Note which I issued following that hearing is referred to for its terms. I identified three preliminary issues:-

- (i) Territorial (sic) jurisdiction in respect of the unfair dismissal complaint;
- (ii) Jurisdiction in respect of the breach of contract complaint; and
- (iii) The implications of the personal injury claim which was settled.

25 6. It was agreed that I would endeavour to determine these preliminary issues “on the papers”: on the basis of the parties written submissions.

**Respondent's submissions on 10 January 2020**

7. The respondent's solicitor first set out the history of the case and then made the following submissions with regard to the issues raised in the revised Grounds of Resistance:-

5           *"The claimant's claim relates in part to loss of earnings as a result of him being placed on unpaid leave by the respondent with effect from 1 July 2018. The respondent placed the claimant on unpaid leave owing to a restriction in his most recent medical certificate. The medical certificate states that the claimant cannot work on fast, or light motorboats, for a period of 12 months*  
10           *from 16 February 2018 following an accident he was involved in at work in May 2014. Since 1 July 2018, the respondent has not had any work the claimant could do given the restriction noted in his medical certificate which is why he has been on unpaid leave. The claimant has already brought a personal injury claim against the respondent in the Court of Session in respect*  
15           *of the injury he claimed he sustained during the accident in May 2014 and the losses including future losses he considered he had suffered, or would in the future suffer, as a result. The claim was concluded in May 2017. Consequently, and in accordance with the principle of res judicata, the claimant's claim against the respondent should be dismissed.*

20           *The respondent is a company having its registered office in Guernsey. The respondent reserves its position as to whether the tribunal has jurisdiction to determine any claims made against it.*

*In accordance with section 199(7) of the Employment Rights Act 1996, Parts II, IV and X of Employment Rights Act 1996 only apply to employment on*  
25           *board a ship registered and the register maintained under section 8 of the Merchant Shipping Act 1995 if the three criteria set out at section 199(7)(a) – (c) of the Employment Rights Act 1996 are met. One of these criteria is that the person employed is ordinarily resident in Great Britain. As the claimant works on UK registered vessels when working for the respondent, section*  
30           *199(7) of the Employment Rights Act 1996 is engaged. However, as the claimant is not ordinarily resident in Great Britain, he cannot satisfy the*

requirements of section 199(7). The tribunal does not, therefore, have jurisdiction to hear claims from the claimant under Part II, Part V and/or Part X of the Employment Rights Act 1996 and these claims should be dismissed. The claimant's constructive unfair dismissal claim should, accordingly, be dismissed.

In accordance with section 3(2) of the Employment Tribunals Act 1996, the employment tribunal can only hear a claim for damages for breach of the contract of employment if the claim is such that a court in England and Wales or Scotland would have jurisdiction to hear it. As the respondent is a company having its registered office in Guernsey, the respondent reserves its position as to whether the employment tribunal in Scotland has jurisdiction to determine a breach of contract claim against it."

### Res judicata

8. The respondent's solicitor submitted that on the basis of this principle, the tribunal does not have jurisdiction to hear the claimant's complaints of constructive unfair dismissal and/or breach of contract.

9. He provided details of the personal injury claim which the claimant raised against the respondent and which, as I understand it, was settled extrajudicially when the claimant accepted an offer of £50,000 with taxed expenses, "in full satisfaction of the Conclusions of the Summons". It was submitted this was accepted by the respondent on 25 April 2017.

10. The respondent's solicitor detailed the terms of a "Receipt, Release and Discharge":-

"I, Waldemar Piotr Zak, residing at Konikowo 79K, 76-012 Swieszyno, Poland, do hereby accept and acknowledge receipt of the payment of the sum of £50,000 (FIFTY THOUSAND POUNDS) STERLING in respect of damages, together with £12,657 (TWELVE THOUSAND, SIX HUNDRED AND FIFTY SEVEN POUNDS) STERLING paid to my solicitors in respect of my legal expenses, in full and final settlement, and in discharge and release of all claims competent to me, past, present and future, and howsoever arising,

*which arise out of or in any way connected with an incident during a fast rescue craft row from the VOS ENTERPRISE (the Vessel) in the North Sea on or around 3 May 2014 (“the Accident”) against:*

5 (1) *All parties interested in the vessel including the Owners, Demise Chartered (if any), Charterers, Managers, Operators, P&I Underwriters and Master and Crew of the vessel, and their employees, agents or associates past and present and anyone acting on their respective behalves; and without prejudice do the foregoing generality*

10 (2) *DECIDE CREWING SERVICES LIMITED, having a place of business at 4<sup>th</sup> Floor, Regent Centre, Regent Road, Aberdeen, AB11 5NS; NOMIS SHIPPING LTD, having a place of business at 4<sup>th</sup> Floor, Regent Centre, Regent Road, Aberdeen, AB11 5NS; DECIDE GURNSEY LTD, having a place of business at 4<sup>th</sup> Floor, West Wing, Trafalgar Court, Admiral Park’s, Peter Port, Guernsey, GY1 3RL, and*  
15 *VROON OFFSHORE SERVICES LIMITED, having a place of business at 4<sup>th</sup> Floor, Regent Centre, Regent Road, Aberdeen, AB11 5NS.”*

11. As I understand it, the foregoing discharge was never signed by the claimant. However, it was submitted that the claimant had waived his right to pursue  
20 any claims against the respondent which were connected with that settlement.

12. A medical certificate which was obtained by the respondent in February 2018 was to the effect that the claimant was not eligible to work on fast, light motorboats for a period of 12 months. In correspondence dated 25 January 2019, the claimant’s representative stated as follows:

25 *“On 3<sup>rd</sup> May 2014 during testing, the Fast Rescue Craft Boat, the claimant had an accident. He fell down with force onto the deck with his bottom striking first. As a result, suffered the injury of the spinal brace. He underwent the spine surgery. That incident has admittedly qualified as a labour accident. The claimant received a medical certificate that he is fit to work with the*  
30 *limitation to not work on fast, light motorboats.”*

13. The respondent's solicitor submitted, therefore, that:

5 *"This restriction is connected with the claimant's injury suffered on the vessel in May 2014. As such, the claimant is barred from pursuing any claims which arise out of or are in any way connected with this accident. The claimant's claim of constructive unfair dismissal has been advanced on the basis that the respondent chose to place him on unpaid leave. As narrated above, the claimant was only placed on unpaid leave on the basis of the restriction contained within the medical certificate. As this restriction was connected with the incident on the vessel, the claim arises out of and is connected with that incident. Applying the principle of res judicata, the Tribunal does not have jurisdiction to hear his claim.*

15 *The claimant's claim of breach of contract has been advanced on the basis that he alleges that by placing him on unpaid leave, the respondent was in breach of his contract of his employment. As narrated above, the claimant was only placed on unpaid leave on the basis of the restriction contained within the medical certificate. As this restriction was connected to the incident on the vessel, the claim arises out of and is connected with that incident. Applying the principle of res judicata, the tribunal does not have jurisdiction to hear this claim.*

20 *Accordingly, the claimant's claims should be dismissed."*

#### **Jurisdiction - constructive unfair dismissal**

14. In the alternative, the respondent's solicitor submitted that the constructive  
25 unfair dismissal complaint should be struck out for want of jurisdiction.

15. He referred to sections 196-200 of the Employment Rights Act 1996 ("the 1996 Act"). He referred, in particular, to s.199 which deals with "Mariners". Ss. 199(7) and 199(8) provide as follows:

30 *"(7) The provisions mentioned in subsection (8) apply to employment onboard 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.*

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

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

*(8) The provisions are –*

*(a) Sections 8 to 10*

- (b) Parts II, III and V
- (c) Part VI, apart from sections 58 to 60
- (d) Parts [6A] VII, VIII and VIII[A]
- (e) Sections 92 and 93, and (F) Part X
- 5 (f) Part X”

16. The respondent’s solicitor submitted that:-

10 “The claimant was employed on board several ships during his employment with the Respondent 14 of which were registered in the register maintained under section 8 of the Merchant Shipping Act 1995. Only 2 of which were registered elsewhere (the Bahamas and Liberia) and in respect of which the claimant only spent 77 days on board in total. Section 199(7) of the Act is therefore engaged.

15 In accordance with section 199(7) and 199(8)(f), the Tribunal has jurisdiction to hear the claimant’s constructive unfair dismissal claim if and only if the conditions set out in section 199(7) of the Act, as set out above, apply.

20 The claimant is not ordinarily resident in Great Britain. The claimant was not ordinarily resident in Great Britain at any time during his employment with the respondent. As such, the claimant cannot satisfy the provisions of section 199(7) of the Act which, by virtue of the word “and” must be read together as requiring the claimant to satisfy all three parts of that section. As the claimant is unable to do so, section 199(8) and consequently, Part X of the Act, does not apply to the claimant’s employment and he is unable to pursue a claim of constructive unfair dismissal against the respondent.

25 We acknowledge that the claimant’s representative has already engaged with this preliminary issue and has referred to certain case law in support of their contention that the tribunal does have jurisdiction to hear this part of the claimant’s claim. In particular, the claimant’s representative has referred to the case of **Lawson v Serco Limited** [2006] UKHL3 in contending that the tribunal may take account of certain factors to establish the claimant has a substantial connection with Great Britain. The respondent submits that the principles borne out of this case are not applicable to the present circumstances.

35 The case referred to by the claimant’s representative can be distinguished from the claimant’s case on the basis that it dealt with individuals who work largely outside of Great Britain but who had a close connection with, or who were ordinarily resident in, Great Britain. The case was not concerned with individuals who were employed upon vessels which are registered in the UK and to whose employment the provisions of section 199(7) of the Act (and, by extension, section 199(8) of the Act) apply. In the present case, the claimant’s  
40 employment does indeed fall under the provisions of section 199(7) of the Act.

*It is clear from the language of section 199 of the Act that subsection 8 applies to such employment “if and only if” the conditions in sub-paragraphs (a) and (c) of subsections 7 are met. As they are not all met, section 8 of the Act, and therefore Part X of the Act, does not apply to the claimant’s employment.*

5 *It is submitted that by including the phrase “if and only if”, Parliament clearly intended for the provisions of Part X of the Act to apply to employment on board a ship registered in the register maintained under section 8 of the Merchant Shipping Act 1995 only in circumstances where the three requirements set out in section 199(7) of the Act are satisfied. As they are*  
10 *not all satisfied, the tribunal has no jurisdiction to hear the claimant’s constructive unfair dismissal claim.*

*As the claimant’s employment falls within the legislative provisions found in sections 199(7) and 199(8) of the Act, there is no need to engage with the principles set out in the Lawson case.”*

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#### **Jurisdiction – breach of contract**

17. The respondent’s solicitor also submitted that the claimant’s breach of contract claim should be struck out for want of jurisdiction.

*“Section 3(2) of the Employment Tribunals Act 1996 (the “ETA”) applies to:*

- 20 (a) *a claim for damages for breach of contract of employment or other contract connected with employment;*
- (b) *a claim for a sum due under such a contract; and*
- (c) *a claim for the recovery of a sum in pursuance of any enactment relating to the terms of performance of such a contract*

25 *If the claim is such that a court in England and Wales or Scotland would under the law for the time being enforce a jurisdiction to hear and determine an action in respect of the claim.*

30 18. The respondent’s solicitor submitted that the tribunal does not have jurisdiction to hear the breach of contract complaint for the following reasons:

- (i) *“the employer is a company registered in Guernsey;*
- (ii) *the contract governing the claimant’s employment was entered into in Guernsey; and*
- 35 (iii) *the claimant is ordinarily resident in Poland and was ordinarily resident in Poland during his employment with the respondent. As such, the*



*respondent has the right to be sued in the jurisdiction where they are registered (i.e. Guernsey)”.*

### **Claimant’s submissions**

5 19. The claimant’s solicitor made written submissions by email on 8 January 2020.

### **Jurisdiction – constructive unfair dismissal**

10 20. The claimant’s solicitor accepted that the claimant was not ordinarily resident in Great Britain. He submitted, however, that the claimant has “*a strong relationship with Great Britain:-*

15 *“ It has to be stressed that the vessels on which the claimant was working under his contract of employment had the flag of the United Kingdom. What is important, his employment with the respondent was lasting nearly 15 years. Mr Waldemar Zak was paid in pounds sterling and he paid UK tax and National Insurance Contributions. He was retained under the UK pay and pension structure which applied to other UK based employees. The claimant’s employment contract was subject to UK law. The respondent has repeatedly emphasised the fact that the employment relationship is governed by British law.”*

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21. In support of his submissions, the claimant’s solicitor referred to **Lawson v Serco Ltd [2006] UKHL3** in which the House of Lords suggested that employment tribunals may have jurisdiction to hear unfair dismissal cases in respect of employees who have a “*strong connection*” with Great Britain.

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22. He also referred to **Ravat v Halliburton Manufacturing and Services Ltd [2012] UKSC1**. He submitted that case, “*held that one generic question should be asked – is the connection with Great Britain ‘sufficiently strong’ to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to hear the claim.*”

30

23. He also submitted that, “*where rights derive from EU law, the EAT has held that a worker based outside Great Britain but within an EU Member State was*

*able to pursue a claim in a UK Employment Tribunal on the basis that UK courts and tribunals have to give effect to “directly effective” EU rights, where UK law applied to the contract.”*

24. So far as the present case was concerned, the claimant’s solicitor “stressed that even though the employer is a Company seated in Guernsey, the employing entity – Deeside Crewing Services Ltd – is located in Aberdeen, United Kingdom. The company provides services to the respondent, Deeside (Guernsey) Ltd, in support of crewing vessels for Vroon Offshore Services Ltd. Vroon Offshore Services Ltd is also located in Aberdeen. It cannot be denied that the indicated entities are strongly connected.

*The Employment Tribunal may take all the mentioned factors into account to establish that Mr Waldemar Zak had a substantial connection with Great Britain in comparison to any other jurisdiction and therefore was entitled to claim unfair dismissal before the Tribunal in Aberdeen.”*

25. The claimant’s solicitor also submitted that, “grounds for unfair dismissal claims may also not be refused.” I took that to mean that the was alleging that the claim has merit. It was alleged that the termination of the claimant’s employment, “resulted from the harmful action of the Company to place him on unpaid leave without his will, which resulted in the loss of wages and loss of future wages. The decision to resign from work (which lasted nearly 15 years) requires a lot of time and sacrifices..... Without any doubt, the behaviour of the employer was a breach of contractual obligations of the employment agreement. Therefore, Mr Waldemar Zak has been constructively dismissed....

- Bearing in mind all arguments cited by our side in the subject case, the claimant’s claim about being unfairly dismissed by the respondent is, in our honest opinion, justified. The test of the territorial extent of unfair dismissal protection shall be assessed separately for each case. Therefore, the case of Mr Waldemar Zak must be carefully considered by the Tribunal. In our opinion, the “strong connection” of Mr Waldemar Zak with Great Britain

*justifies the jurisdiction of the Employment Tribunal in Aberdeen to hear the claimant's claim for unfair dismissal."*

#### **Jurisdiction - breach of contract**

26. The claimant's solicitor submitted that, *"the link between the employer and Aberdeen, presented in respect of the unfair dismissal complaint, affects the legitimacy of the jurisdiction of the employment tribunal in Scotland in respect of the breach of contract complaint."*

27. The claimant's solicitor referred to s.3(2) and s.3(4) of the Employment Tribunals Act 1996. He submitted:-

*"The respondent did breach the Claimant's Seafarer Employment Agreement. Such breach was fundamental and was in effect the cause of the claimant's resignation. The respondent's contention that the claimant affirmed the contract following the breach in that he delayed too long in treating such breach as repudiating his contract by resigning and therefore accepted the breach was contradictory and unacceptable to us. During the period of unpaid leave, the claimant filed claims with the Tribunal and at the later stage, he asked us for legal assistance and granted a power of attorney. The employment terminated on 7 February 2019 subject to the notice period specified in the contract.*

*The Grievance Procedure states that employee complaints should be made via the Crewing Department, seated in Aberdeen. In my honest opinion, reporting a breach of an employer by way of complaint would not be sufficient in this case. It has to be pointed out that the claimant was similarly treated by the employer 3 times. As a result of several decisions which placed the claimant on unpaid leave, the employer has violated the terms of the contract more than once.*

*Therefore, the jurisdiction of the Tribunal in Aberdeen in respect of the breach of contract complaint is justified."*

#### **Implications of the personal injury claim which was settled**

28. The claimant's solicitor made the following submissions:-

*"According to section 3(3) of the Employment Tribunals Act 1996, this part of the act does not apply to a claim for damages, or for a sum due, in respect of personal injury. It has to be stressed that the claimant's claims do not apply to the personal injury claim which was settled in 2017. The reference of the respondent to this matter in the subject case is in our opinion unfounded.*

5        *The claimant has brought a personal injury claim against the respondent in the Court of Session in respect of the injury sustained during the accident in May 2014. It is worth mentioning that according to the content of the summons, the claimant's loss, injury and the damage was caused by the*  
10        *defender's breach of duties at common law and under regulations 5, 7 and 12 of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997. In May 2017, the Lord Ordinary of the Court of Session decerned against the respondent and Vroon Offshore Services Ltd for payment to the claimant the compensation and the expenses of the process. It should be noted that only after the payment of the agreed sum of compensation, the claimant received a drab document "Receipt, Release, and Discharge", which, however, was not signed by either party.*

15        *The personal injury claim which was settled in May 2017, should not apply to the subject case. The subject of pending proceedings is the claim of unfair dismissal and arrears of standby pay from July 1<sup>st</sup> 2018 until the end of the contract – referral of the claimant for unpaid leave constituted the breach of contract. Given the previous proceedings related to the claimant's accident, the respondent's breach of contract is particularly acute. The respondent had full knowledge of the claimant's health restrictions and yet made the*  
20        *described infringements.*

*Bearing in mind the above, I hereby kindly ask to consider the claimant's case where the interests of justice must do so, according to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.*

25        *I hereby maintain the application submitted in the claimant's further and better particulars and schedule of loss."*

### **Respondent's response**

29.        The respondent's solicitor responded to the claimant's submissions by way of  
30        email on 24 January 2020 with attachments.

### **Jurisdiction - unfair dismissal**

30.        The respondent's solicitor noted that the claimant accepts that the respondent is not ordinarily resident in Great Britain and that the vessels on which the claimant was working had the flag of the United Kingdom.

35        31.        It was accepted that the claimant was paid in pounds sterling and that he had paid UK income tax and national insurance contributions; he was also a member of the respondent's "Scottish Widows Pension Scheme", but it was

submitted that contributions for members of the scheme, whether UK residents or not, were calculated in the same way.

32. The respondent's solicitor did not accept that the claimant's employment contract was governed by UK law. He explained that, *"the contract does not contain a jurisdiction clause but states that the contract was entered into in Guernsey."* The respondent was unclear as to the claimant's position that, *"the respondent has repeatedly emphasised the fact that the employment relationship is governed by British law."*
33. The respondent's solicitor submitted that **Lawson** was not applicable, *"in light of the strict interpretation of sections 199(7) and 199(8) of the Employment Rights Act 1996."*
34. He also submitted that **Ravat**, *"could be distinguished."*
35. In any event, he submitted that, *"the question of jurisdiction surrounding the claimant's employment cannot be answered by the principles of either of the cases referred to by the claimant and must be decided by reference to the clear intention of Parliament in the drafting of sections 199 (7) and 199 (8) of the Act. Furthermore, in the case of Ravat, it was clearly acknowledged that the task of the court "is to give effect to what Parliament may reasonably have been taken to have intended..." The statutory language in section 199 of the Employment Rights Act 1996 is quite plain. An employee can only pursue a claim of unfair dismissal "if and only if" all three provisions of section 199 (7) are met. In the present case, they are not. As such, there is no requirement to engage in an assessment of what parliament intended in this scenario. In light of the above, any principles from either the Lawson case or the Ravat case do not apply in the present scenario. Even if they were to apply, the respondent submits that the claimant's employment does not have a sufficiently strong connection to Great Britain as he was not employed by a British company and he is not ordinarily resident in Great Britain."*

36. The respondent's solicitor then went on to address the remaining comments made in the claimant's submissions regarding the Tribunal's jurisdiction in respect of the constructive unfair dismissal complaint. He said this:

5           *"The claimant has stated that, 'where rights derive from EU law, the EAT has held that a worker based outside Great Britain but within a EU Member State was able to pursue a claim in a UK Employment Tribunal on the basis that UK courts and tribunals have to give effect to directly effective EU rights, where UK law apply to the contract.' Whilst no case name or reference has been provided, the respondent observes that unfair dismissal (and constructive unfair dismissal) is not a right derived from EU law, let alone any directly effective EU rights. It is a right of statutory creation within the UK. As such, the claimant's commentary here does not mean that he can pursue a constructive unfair dismissal claim. Particularly in circumstances where the UK Parliament has clearly sought to exclude the application of section X of the Employment Rights Act 1996 in certain circumstances such as the present circumstances. In addition, we repeat that that the claimant's contract of employment did not stipulate that it was governed by UK law."*

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37. The respondent's solicitor also submitted that the claimant's employer was the respondent, "Deeside Guernsey Limited" in terms of the Seafarer Agreement entered into with the claimant in 2016. He was not employed by "Deeside Crewing Services Limited". He was not employed by a "UK entity".

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38. The respondent's solicitor then commented on the observation by the claimant's solicitor that, *"the choice of Tribunal in Aberdeen was made by the Tribunal in Glasgow.... the Tribunal in Glasgow was, whereas designated by the Tribunal in Guernsey."*

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39. The respondent's solicitor was not aware of any claim being submitted to any tribunal in Guernsey. In any event, he submitted, that any such administrative decision is irrelevant to the question of jurisdiction. *"The tribunal has to decide whether it has jurisdiction to hear the claim and this can happen at any time after the claim has been submitted and acknowledged."*

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40. So far as the merits of the constructive unfair dismissal complaint were concerned, the claimant's solicitor submitted that as these were evidential matters they were not relevant to the question of jurisdiction. The

respondent's solicitor maintained his position that the Tribunal does not have jurisdiction to hear the claimant's constructive unfair dismissal complaint.

#### **Jurisdiction - breach of contract**

5 41. The respondent's solicitor submitted that the issue of jurisdiction in respect of the claimant's constructive unfair dismissal claim had no bearing on the issue of whether the Tribunal has jurisdiction to hear the breach of contract complaint. For the reasons set out in his submissions of 10 January 2020, the respondent's solicitor submitted that the tribunal does not have jurisdiction  
10 to hear this complaint and that it should be dismissed.

42. So far as the remaining comments under this section by the claimant's solicitor were concerned, the respondent's solicitor submitted that these were evidential matters, and were not relevant to the preliminary issue of jurisdiction.

#### **15 Implications of the personal injury claim which was settled**

43. The respondent's solicitor referred again to the claimant's pleadings in the Court of Session action which was settled extra-judicially. He attached to his email a copy of the Record in the Court of Session action.

20 44. He went on in his submissions to say this:-

*"In his valuation of claim lodged in the action, the claimant claimed for and quantified past and future loss of earnings and disadvantage on the labour market. Payment of the agreed compensation was made to the claimant pursuant to the court's interlocutor of 2 May 2017. The claimant accepted these sums in full settlement of the conclusions of the summons, including  
25 any future losses he may suffer as a result of that injury. The final interlocutor in the action, dated 2 May 2017, pronounced decree "in full satisfaction of the conclusions of the summons". In light of this, and the fact that the claimant's breach of contract claim seeks to recover alleged losses that arise from the  
30 accident and were included in his claim in the action concluded by decree of the Court in 2017, the respondent submits that this aspect of the claimant's claim cannot be pursued in accordance with the principle of res judicata. In light of the above, it is submitted that it is irrelevant whether or not the claimant signed the Receipt, Release and Discharge.*

### **Conclusion**

*The respondent submits that the claimant's claims should be dismissed as the Tribunal does not have jurisdiction to hear them."*

#### 5 **Claimant's response**

45. The claimant's solicitor responded by email on 23 January 2020. By and large, he reiterated his previous submissions.

#### **Res judicata**

10 46. He submitted that this, *"did not reflect the preliminary issue indicated originally in the correspondence from the tribunal received on December 4<sup>th</sup>, 2019. In the claimant's assessment, this principle should not be invoked in context of the personal injury claim concluded in May 2017."*

15 47. He further submitted that, *"from 1<sup>st</sup> July 2019, the claimant was placed on unpaid leave, without his will, against the provisions of the employment agreement. The harmful decision of the Company resulted in the loss of wages and loss of future wages."*

48. He submitted that the respondent was in breach of the "Seafarer Employment Agreement" as they placed the claimant on unpaid leave.

49. He submitted that: -

20 *"The principle of res judicata should not apply, because the issue of constructive unfair dismissal in breach of contractual terms has not already been determined – they could not have been dealt with in earlier proceedings."* He submitted that *"the current claims are not linked to a claim for personal injury as a result of an accident at work"*. He reiterated his  
25 submission that the claimant, *"has an equally strong connection with Great Britain."*



### Claimant's further submissions

50. On 6 February 2020, the claimant's solicitor sent an email to the Tribunal, copied to the claimant's solicitor, with a number of documents attached.

## 5 Discussion and decision

### Jurisdiction – constructive unfair dismissal

51. Employment Tribunals, being "creatures of statute", have a narrowly defined jurisdiction which covers most of the employment rights established by modern employment legislation.

10 52. The rules governing the right of Mariners to bring unfair dismissal claims are contained in s.199 of the Employment Rights Act 1996 ("the 1996 Act"). The issue, therefore, is one of jurisdiction, in terms thereof.

53. In terms of ss.199 (7) and (8), Mariners, such as the claimant in the present case, who are employed on board a ship registered in the UK can only bring  
15 a claim if:

- **the ship is registered as belonging to a port in Great Britain**
- **under his or her contract of employment, the person employed does not work wholly outside Great Britain, and**
- **he or she is ordinarily resident in Great Britain (Great Britain means England, Scotland and Wales; the UK means Great Britain and Northern Ireland. Neither expression includes the Channel Islands or the Isle of Man).**

20 54. The claimant is not "*ordinarily resident in Great Britain*". He never has been. He is ordinarily resident in Poland.

25 55. As the respondent's solicitor drew to my attention, the terms of s.199 (7) are clear: an Employment Tribunal has jurisdiction to hear an unfair dismissal complaint "**if and only if**" all three conditions detailed above are satisfied.

56. The claimant has not satisfied all three conditions.

57. The employment tribunal does not have jurisdiction, therefore, to consider the claimant's unfair dismissal complaint.

58. The submissions by the claimant's solicitor, with reference to **Lawson** and  
5 **Ravat**, that the claimant had a "sufficiently strong connection" with Great Britain, add nothing to the point. They are irrelevant given the clear terms of ss. 199 (7) and (8) of the 1996 Act.

59. Nor is the fact that the complaint may have merit, as the claimant's solicitor submitted, relevant. Jurisdiction is a fundamental matter and a tribunal must  
10 first be satisfied that it has jurisdiction before it can proceed to consider the merits of a case.

60. Finally, so far as the claimant's submissions are concerned, the fact that apparently the claimant submitted a claim form to "the Employment and Discrimination Tribunal" in Guernsey and that Tribunal "designated the  
15 Tribunal in Glasgow to consider the claim" is nothing to the point.

61. That was an administrative decision. It has no bearing on the fundamental right of the jurisdiction of a tribunal to hear a claim.

62. The complaint of constructive unfair dismissal is dismissed, therefore, for want of jurisdiction.

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### **Jurisdiction – breach of contract**

63. I do not accept the contention by the claimant's solicitor that: "*the link between the employer and Aberdeen, presented in respect to the unfair dismissal complaint*", affects the legitimacy of the jurisdiction of the employment tribunal  
25 in Scotland in respect of the breach of contract complaint. The statutory basis for each complaint is quite different. The two complaints are not connected so far as the issue of the tribunal's jurisdiction is concerned. That means that although I decided that the tribunal does not have jurisdiction to consider the

complaint of unfair dismissal, it does not follow that the tribunal does not have jurisdiction to consider the breach of contract complaint.

64. The contractual jurisdiction of employment tribunals is governed by s.3 of the Employment Tribunals Act 1996 (“ETA”) together with the Employment  
5 Tribunals Extension of Jurisdiction (Scotland) Order 1994 (“the Order”).
65. Under s.3 (2) of the ETA and Article 3 of the Order, for a tribunal to be able to hear a contractual claim brought by an employee, that claim must arise or be outstanding on the termination of the employee’s employment and must seek one of the following:
- 10 (i) damages for breach of the contract of employment or other contract connected with the employment;
- (ii) a claim for a sum due under such a contract; or
- (iii) the claim for a recovery or a sum in pursuance of any enactment relating to the terms of or performance of such a contract.
- 15 66. However, it is necessary that any claim could fall within the jurisdiction of the Civil Courts in Scotland. There is no such jurisdiction in the present case for the reasons detailed by the respondent’s solicitor in his initial submissions:-
- 20 “(1) *the employer is a Company registered in Guernsey;*
- (2) *the contract governing the claimant’s employment was entered into in Guernsey; and*
- (3) *the claimant is ordinarily resident in Poland and was ordinarily resident in Poland during his employment with the respondent.”*
67. The merits or otherwise of the breach of contract complaint are once again irrelevant for the same reason as they were irrelevant in relation to the unfair  
25 dismissal complaint: jurisdiction is a fundamental right and a tribunal must first be satisfied that it has jurisdiction before it can proceed to consider the merits of a claim.
68. I was satisfied, therefore, that the respondent’s submissions in this regard are well founded. Accordingly, the breach of contract claim is dismissed for want  
30 of jurisdiction.

69.

### Res judicata

70. Although I have decided to dismiss the claim in its entirety, for the sake of completeness, I record my views on this issue.

5 71. The issue is also a fundamental one as it relates to the tribunal's jurisdiction. It must, therefore, be determined as a preliminary matter.

72. The principle prevents a party reopening an issue that has been decided in earlier proceedings. However, *res judicata* only applies to issues that are the same as those already determined.

10 73. The claimant raised a personal injuries damages claim in the Court of Session in respect of an accident at work. The issues in the employment tribunal case are not the same as the issues which were determined in the civil action in the Court of Session. *Res judicata* does not apply, therefore, to the employment tribunal claim.

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74. However, the sum which the claimant received by way of damages reflected the claimant's financial loss. Had I decided, therefore, that the tribunal had jurisdiction to consider his claim and if he had succeeded, the tribunal would take account of the damages he had received in the civil action when  
20 assessing what would be a "just and equitable" compensatory award in respect of the unfair dismissal claim; and so far as the breach of contract claim is concerned, whether the claimant had sustained any financial loss as a consequence of the breach, and if so, the appropriate award of damages.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Nicol Hosie**  
**16 April 2020**  
**17 April 2020**