THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Richard Pickard**

Respondent: **Mr David Robson**

Heard at: **North Shields Hearing Centre** **On:** **4 February 2020**
Deliberations: **3 March 2020**

Before: **Employment Judge Arullendran**

Representation:

Claimant: **Mr R Ryan (counsel)**
Respondent: **Mr B Hendley (consultant)**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the Tribunal has jurisdiction to hear the claimant's claims brought under the provisions of the Equality Act 2010.

REASONS

1. The issue to be determined by this Tribunal is whether the Tribunal has jurisdiction to hear the claimant's claims of unlawful discrimination brought under the Equality Act 2010 ("EQA") given that the claimant wholly outside Great Britain.

2. I heard witness evidence from the claimant and the respondent and I was provided with a voluminous joint bundle of consisting of 174 pages. On the morning of the hearing the respondent provided a supplementary bundle of documents with pages numbered from 175 to 206 which the parties had disclosed the week before the hearing but had not been included in the final bundle before it was delivered to the Tribunal. The claimant raised no objection to the additional documents being added to the bundle.

3. The claimant and the respondent gave their evidence by adopting their written witness statements and the findings of fact in this case have been made on the balance of probabilities. Whilst there was some evidence given to this Tribunal about the circumstances surrounding the claimant's employment and its

termination, I have restricted my findings of fact to the issue relating to jurisdiction only as another Tribunal shall hear the evidence and make appropriate findings on the relevant issues in the claims of breach of contract, holiday pay and discrimination.

4. It was agreed at the end of the evidence that both parties would make closing submissions in writing and case management orders were issued on 4 February 2020 for the exchange of closing submissions and replies to those submissions. The claimant's closing submissions run to 34 pages and three photographs and the respondent's closing submissions run to 5 pages, with the addition of 13 photographs. The claimant's reply to the respondent's submission runs to 3 pages and the respondent's reply to the claimant submission runs to 11 pages. The contents of the submissions and replies have not been reproduced in full in this Judgement but they have been considered in their entirety.

The facts

5. The claimant began working with the respondent as a 1st mate/engineer on 6 May 2019 and his contract was terminated on 29 June 2019. The respondent is a private individual and it is common ground that the claimant was employed to work on board the motor yacht Elizabeth D of Gosforth, which the respondent describes as having a home base at Alcudimar, Port of Alcudia, Mallorca, Spain.

6. It is common ground that the claimant is a British citizen, but he has spent the last 18 years living in Spain, and for approximately the last 10 years, working on UK registered flagships. He is regarded as UK non-domiciled. The claimant's uncontested evidence is that he maintains his bank account in the UK and pays income tax to the Inland Revenue in the UK on his global income. The claimant does not have a permanent residence or any property in the UK and his uncontested evidence is that he rents a property to his ex-wife in Spain, although he himself does not live there, and that he leads a nomadic life working on sea vessels. The claimant has family living in the UK and his uncontested evidence is that he visits the UK regularly, although he does not own any property here.

7. The respondent is a British citizen and it is common ground that he has a permanent home or main residence in Morpeth, Northumberland. It is common ground that the respondent is a private employer, although he does run some of his other businesses through incorporated companies and has been the director of incorporated companies in the UK and other countries.

8. The claimant and respondent entered into a contract on 6 May 2019, a copy of which can be seen at pages 55 to 56 of the bundle. It is common ground that the claimant and respondent got to know each other as neighbours whilst the claimant was working in Spain during 2018 and 2019 on another vessel; the respondent and claimant talked about the claimant working on board the Elizabeth D as the claimant's employment with his previous employer was due to end.

9. The respondent offered the claimant employment as the first mate on board the Elizabeth D in an email dated 1 April 2019, a copy of which can be seen at page

95 of the bundle. The claimant replied to the respondent later that day raising issues he wanted to negotiate further, such as the hours of work, flexitime and holidays, as set out at page 94 of the bundle. Further email correspondence was entered into both parties by way of negotiations from 2 April 2019 to mid-April 2019 and the contract was signed by the party on 6 May 2019, at pages 55 and 56 of the bundle. Whilst the initial email from the respondent was sent from Spain, the respondent accepted in cross examination that he was present in the UK for the majority of April 2019 whilst various offers and negotiations took place between the parties. The draft contract was sent to the claimant by the respondent on 5 April 2019 whilst the respondent was in the UK and the respondent returned to Spain on 25 April 2019. It is common ground that the majority of the negotiated changes to the contract were agreed between 15 to 17 April 2019 and the terms were agreed before the respondent returned to Spain, where the contract was signed on 6 May 2019.

10. It is common ground that the contract of employment provides that "*The two parties agree this contract and agree to be bound by the laws of England*", as set out at page 55 of the bundle, and that this was a clause inserted by the respondent. It is also common ground that there is no entire agreement clause in the contract of employment. The respondent's evidence is that the terms of the contract were not concluded until 6 May 2019 and that this was done in Spain. However, I prefer the evidence of the claimant that the terms had all been agreed by the parties before the respondent returned to Spain and that the only event on 6 May 2019 was the placing of the signatures on the documents as this is entirely consistent with the evidence of earlier negotiations in early to mid-April 2019 and there is no evidence in front of me that the parties entered into any negotiations on 6 May 2019 before signing that day. No evidence of any negotiations after 17 April 2019 has been adduced at this hearing.

11. The work carried out by the claimant consisted of carrying out repairs as the 1st mate/engineer to the Elizabeth D in Barcelona and, when the vessel was ready, to go to sea with the rest of the crew in that capacity. The vessel was repaired and the crew went to sea prior to the claimant's contract terminating on 29 June 2019.

12. It is common ground that the Elizabeth D was out of the water and in a dry dock at during the time repairs were being carried out and that the claimant slept on board the ship 5 out of 7 days per week, as agreed between the parties.

13. The respondent's vessel, Elizabeth D, is a UK ship and its port of choice is London, as set out on the certificate issued under the Merchant Shipping Act 1995 on 30 August 2017, which can be seen at page 35 of the claimant's submission. The respondent has stated at paragraph 4 of his witness statement that the vessel's home port was Alcudimar, but he accepted in cross examination that the vessel is UK registered with London as its registered port. The respondent draws a distinction between home port and registered port.

14. The claimant's contract of employment provides for a salary to be paid in the sum of €7000 per calendar month. The claimant's uncontested evidence is that he received two salary payments, both in the sum of £640, on 3 June and 3 July

2019, respectively, as set out at page 137 of the bundle. The claimant's evidence is that, as both salary payments were identical and because his bank statement does not show that the payment was received in euros, he believes that he was paid by the respondent in pounds sterling. The respondent's evidence is that he made the first salary payment in euros from an account in Spain, but the second payment was complicated and was paid from a sterling account in Spain. I prefer the evidence of the claimant as it is entirely consistent with the bank statement produced by the claimant at page 137 of the bundle, which shows that the claimant received the sum of £640 from the respondent on both occasions and there is no mention on the statements that the payment was received in euros and then converted to sterling. Further, I found the respondent's evidence to be vague, particularly as he did not give any details about why the second payment was complicated, and I found his evidence on this issue to be evasive. The respondent had the opportunity to produce his own bank statements which would have shown the currency in which the claimant's salary was paid, but he chose not to disclose those documents or include them in the bundle.

Submissions

15. The claimant submits that he meets the definition under Regulation 4 of the EAWSH Regulations in that he was employed as a seafarer on a United Kingdom ship with a port in Great Britain as the ship's port of choice, that he is a British citizen and the legal relationship of his employment is located within Great Britain. In the alternative, the claimant submits that the legal relationship retained a sufficiently close link with Great Britain. In the alternative, if the claimant does not meet the requirements of Regulation 4, he submits that the test set out in Lawson v Serco, which is the "sufficient connection" test, is satisfied in this case.

16. The claimant's reply to the respondent's submissions notes that the respondent has failed to make the distinction between the test under Regulation 4 and the test under Lawson v Serco, and has failed to address the key issues under Regulation 4. Further, the reply from the claimant seeks to adduce new evidence, such as the language spoken on board the ship, which was never put to the claimant in cross examination or adduced as evidence by the respondent during the hearing.

17. The respondent submits that the claimant was not a seafarer because he was working on Spanish soil and the definition of seafarer is that of a person who is employed to work on a ship at sea. The respondent also submits that the claimant was paid in euros, that his contract was negotiated in Spain and that he lived and worked permanently in Spain. The respondent submits that the claimant should have paid tax in Spain because he spent more than 183 days there. The respondent suggests that the claimant is asking the Tribunal to confer jurisdiction in the UK so that he does not have to explain why he has not paid tax to the Spanish authorities. The respondent submits that the home port of the vessel is in Spain and the claimant was never going to work in the UK under the provisions of his contract, nor was he recruited in the UK. The respondent submits that the relevant question is whether or not the claimant was working in Great Britain at the time of his dismissal and, as he was not, the Tribunal does not have jurisdiction to hear the Equality Act claims.

18. In the respondent's response to the claimant's submission, the respondent has sought to expand its submissions beyond the scope of the original submissions dated 24 February 2020, rather than replying to issues of law. I note that the language used in the response to the claimant submissions, dated 2 March to 2020, is rather intemperate in places, making suggestions that the claimant is trying to defame the respondent or trying to "twist things". Indeed, the style of the submissions and reply from the respondent differ so much that I am not sure whether they were both written by Mr Hendley.

The Law

19. I refer to section 81 of the Equality Act 2010 which provides the definition of working on a ship and "seafarer". In particular, section 81(5) provides "Seafarer means a person employed or engaged in any capacity on board a ship or hovercraft."

20. I refer to the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 (EAWSH Regulations) and, in particular, to Regulation 4 which sets out the provisions of seafarers working wholly outside Great Britain and adjacent waters. Sub paragraph (2) of Regulation 4 provides "this paragraph applies if –
    (a) the seafarer is a British citizen, or a national of EEA state other than the United Kingdom or of a designated state, and
    (b) the legal relationship of the seafarer's employment is located within Great Britain or retained a sufficiently close link with Great Britain."

21. Regulation 2 of the EAWSH Regulations provides an interpretation section. Sub paragraph 2 provides "for the purposes of Regulation 3(3)(c) and 4(2)(b) –
    (a) the legal relationship of the seafarer's employment is located within Great Britain if the contract under which the seafarer is employed (i) was entered into in Great Britain; or (ii) takes effect in Great Britain.
    (b) Whether the legal relationship of the seafarer's employment retains a sufficiently close link with Great Britain is to be determined by reference to all relevant factors including (i) where the seafarer is subject to tax; (ii) where the employer or principle is incorporated; (iii) where the employer or principle is established; (iv) where the ship or hovercraft on which the seafarer work is registered."

22. The respondent refers to the case of Bleuse v MBT Transport Ltd & another [2008] IRLR 264 where the contract of employment identified English law as the proper law of the contract, but the claimant had not been working in the United Kingdom and, so, his unfair dismissal claim failed. However, the claimant's claim under the Working Time regulations proceeded as he had been working in the EU and it was held that only where work is performed outside Europe are EU derived rights not directly applicable. The Bleuse principle was applied in the case of Ministry of Defence v Wallace & Grocott [2011] EWCA Civ 231 where the claimant worked exclusively in Belgium, but that was a case where the court was applying the test of working wholly or partly Great Britain and is not directly relevant to this case, which is concerned with the test for claims of discrimination.

23. Both parties refer to the case of Lawson v Serco [2006] UKHL 3 which sets out the "sufficiently strong connection" test, however I note that Lawson was a claim of unfair dismissal. The Equality and Human Rights Commission's Code of Practice on Employment advises, at paragraph 10.71, that where an employee works partly or wholly outside Great Britain, in deciding whether a "sufficiently close" link exists a Tribunal may consider such matters as where the employee lives and works, where the employer is established, what laws govern the employment relationship in other respects, where taxes paid, and other matters it considers appropriate. I have also taken into account the decision in Duncombe v Secretary of state for Children, School and Families (No.2) [2011] ICR 1312, SC, in which held that a jurisdiction clause in a contract is relevant, although not decisive, in the sufficiently close connection test.

24. The claimant refers to the case of Hexagon Sociedad Anonima v Hepburn EATS 0018/19 in which it was held that it was permissible for a Tribunal to take into account a contractual clause which provided the exclusive jurisdiction of the Scottish courts, even though the claimant worked in Equatorial Guinea. It is noted that, following Duncombe, if the terms of the contract create an "expectation" that a dispute will be resolved under English or Scottish law because of the employee protections available, that is a connection to the UK and a relevant factor to be considered with regard to jurisdiction. This will be so, provided that the expectation is consistent with other relevant connections to the UK. In the EAT's view, a jurisdiction clause is more than a simple choice of forum and it demonstrates that the parties consider that there is a strong connection.

Conclusions

25. I note that several parts of the respondent's reply to the claimant submission are worded in an emotional manner, using intemperate language, which is inappropriate in the Employment Tribunal in general, and in closing submission more specifically, as the submissions should set out the legal provisions and the main evidence which has already been adduced and tested at the hearing which each side rely on as satisfying the legal tests, as applicable. I have ignored the intemperate remarks when making my decision today and focused on the facts and the applicable law, but I have given little or no weight to the new evidence the respondent has tried to introduce in its reply to the claimant's closing submission.

26. I am satisfied that the appropriate legislation which is applicable in this case is contained in section 81 of the Equality Act 2010 and regulation 4 of the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 (EAWSH Regulations) because the EQA makes specific provision for those who work on board ships and the prescribes circumstances in which the legislation applies is that set out in the EAWSH Regulations. Regulation 4 specifically applies to seafarer's who work outside Great Britain and its adjacent waters, as the claimant did in this case and, therefore, this is the appropriate Regulation to apply in this case. I note that the respondent has made little or no reference to either pieces of legislation in his closing submissions or reply to the claimant's closing submission, but has chosen to make submissions on the sufficiently close link test.

27. Applying the law to the facts I find that there was a contractual relationship between the claimant and respondent for the claimant to work on board the vessel, Elizabeth D of Goforth, which is a British flag vessel with London as its port of choice. There is no doubt that the parties intended to enter into such a contractual relationship or that it was intended to have legal effect and create legal relations.

28. I do not accept the respondent's submission that the claimant was not a seafarer because he has not provided any reasonable arguments why I should not apply the definition as set out at S.81(5) EQA 2010, which is "*a person employed or engaged in any capacity on board a ship*". This is precisely what the claimant was engaged by the respondent to do as the 1st mate/engineer at all times. No reasons have been given by the respondent why this Tribunal should not apply the definition as set out in S.81(5) EQA. Further, no reference has been provided as to where the definition of seafarer in the respondent's reply to the claimant's submission has been derived from, apart from mentioning the Oxford dictionary and HMRC: "persons who have been employed by a shipowner, to do ship services on board a ship at sea". I concluded from reading the respondent's reply that it may be a definition used by the Inland Revenue for tax purposes. In any event, this Tribunal does not routinely adopt definitions which are specific to other jurisdictions, such as the Inland Revenue, particularly where we already have a specific definition set out in the EQA 2010 which is directly applicable in this case as the claimant has brought claims under the provisions of the EQA. However, even if I am wrong, there is no doubt that the vessel on which the claimant was working was no longer in dry dock and it was in the sea at the time the claimant's contract with the respondent was terminated. I also accept the claimant's submission that it cannot be right that a different definition, and thereby different legislative provisions, would apply depending on whether the worker was at sea or had disembarked on land as this may allow unscrupulous employers to take advantage of the change in circumstances to effect a termination on land. In all the circumstances, I find that the claimant was a seafarer, as defined by the EQA 2010.

29. As the claimant was a seafarer working on board a UK registered ship, I find that the requirements of Regulation 4(1)(a) of the EAWSH Regulations are satisfied in this case.

30. I am then required to examine the provisions of sub-paragraph (2) of Regulation 4 before I can decide whether the Tribunal has jurisdiction to hear the discrimination claims. As there is no dispute between the parties that the claimant is a British citizen, I find that the requirements of Regulation 4(2)(a) are satisfied in this case.

31. In terms of where the contract was entered into, I find that the respondent offered the terms to the claimant in his email of 5 April 2019, which set out the terms and conditions in the draft contract, and this was done whilst the respondent was in the UK. There was a period of negotiation between 15 to 17 April 2019, at which point the claimant accepted the terms offered by the respondent, whilst the respondent was still in the UK, and the respondent received the acceptance from

the offeree in the UK. The fact that the contract was not signed until 6 May 2019 when both parties were in Spain is immaterial as this just amounts to the formal signing of the agreement which had been agreed the previous month. In all the circumstances, I find that the contract was entered into in Great Britain and that the requirements of Regulation 4(2)(b) EAWSH Regulations are satisfied as the legal relationship of the seafarer's employment is located within Great Britain.

32. Alternatively, I find that, even if the contract was not entered into in the UK, it took effect in Great Britain, particularly as the parties agreed to be bound by English Law in the terms of the contractual document, with the respondent being based in and operating his business from the UK.

33. However, even if I am wrong about the legal relationship of the claimant's employment being located in GB, and in the alternative, applying the test in Regulation 2(2)(b) EAWSH Regulations, I find that the seafarer's employment retains sufficiently close link with Great Britain. In particular, I find that the claimant was paying his taxes in Great Britain, as set out at pages 195 to 198 of the Tribunal bundle. Therefore, the claimant was subject to tax in Great Britain. I do not accept the respondent's argument that the claimant was subject to tax in Spain because he has clearly been paying his taxes in the United Kingdom. Any arguments about the claimant's failure to pay taxes to the relevant authority would have to be investigated by that authority but would not prevent the claimant from pursuing his claims in the Employment Tribunal: Patel v Mirza [2016] 3 WLR 399 (as applied in Tracey Robinson v His Highness Sheikh Khalid Bin Sagr Al Qasimi UKEAT/0106/19) in which the Supreme Court held that it is the criminal court which is responsible for the punishment of criminal wrongdoing and that the civil courts are generally concerned with determining private rights and obligations and they should neither undermine the effectiveness of the criminal law, nor impose additional penalties disproportionate to the nature and seriousness of any wrongdoing.

34. With regard to the remaining elements of Regulation 2(2)(b) EAWSH, I find that, whilst the respondent is not an incorporated body, he does conduct his business from the UK, providing his address in the UK for the contract he entered into with the claimant and also for the registration of the vessel on board which the claimant worked. I find that the respondent is based in Great Britain and the respondent accepted in cross-examination that he is based in Great Britain. Furthermore, he also accepted in cross examination that the vessel on which the claimant worked is registered in Great Britain. In all the circumstances, I find that, the legal relationship of the seafarer's employment retains a sufficiently close link with Great Britain and, therefore, I find that the requirements of Regulation 4(2)(b) EAWSH Regulations 2011 are satisfied.

35. In the alternative, if I am wrong and the provisions of the EAWSH Regulations 2011 are not satisfied in their entirety, then applying the principles outlined and Lawson v Serco and Duncombe I find that the claimant satisfies the "sufficient connection" test for all the reasons set out above. In particular, the respondent is based in the UK, the claimant was paying his taxes in the UK, the vessel on which he worked was registered in the UK, all benefits of the work carried out by the claimant were enjoyed by the respondent who is a British citizen, the claimant

is a British citizen and the parties had specifically agreed to have their contractual relationship bound by the laws of England: Duncombe and Hexagon applied. Furthermore, the claimant received his wages into a UK bank account and he was paid in sterling, the respondent provided medical insurance from a company called Pantaenius which operates in the UK, the accident insurance is also provided through Pantaenius and, although the respondent has argued it also operates in Switzerland, no evidence has been adduced that the respondent sourced the services through Pantaenius from a Swiss office rather than the office in Plymouth. Finally, the claimant's contract claims are to be heard in the UK and there is close connection with that existing litigation and the facts relating to the discrimination claims. I do not accept the respondent's argument that the vessel on board which the claimant worked never sailed in UK waters as a relevant factor, given the specific provisions of Regulation 4 of EAWSH. Further, I not accept that the fact the respondent is obliged to comply with local legislation when in Spain, or indeed elsewhere, mitigates against the fact that the claimant's employment retains a sufficient connection with the UK, as outlined above.

36. In all the circumstances, and for the reasons set out above, I find that the Employment Tribunal has jurisdiction to hear the claims brought by the claimant under the Equality Act 2010.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....4 March 2020….....