EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111228/2019 (V)

Held via Cloud Video Platform (CVP) on 15 October 2020 and 7 January 2021

Employment Judge: M Sutherland

Daniel Haughey — **Claimant**
Represented by:
Mr A Webster
(Counsel instructed by Newtons Solicitor Ltd)

Prosafe Offshore Employment Company PTE Limited — **Respondent**
Represented by:
Mr A Knight
(Solicitor)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that –

1. The Tribunal does not have jurisdiction to hear the Claimant's complaint of breach of contract related to enhanced redundancy pay which is accordingly dismissed.
2. The Tribunal does have jurisdiction to hear the Claimant's complaints of unfair dismissal, statutory redundancy pay and unlawful deduction from wages.

REASONS

1. The Claimant has lodged complaints of unfair dismissal, statutory redundancy pay, breach of contract related to enhanced redundancy pay, and 'other payments' understood to be for unlawful deduction from wages. An open

2. preliminary hearing was arranged for today to determine international jurisdiction (whether the employment tribunal was the relevant forum); the applicable law (relating to his complaint for breach of contract) and territorial reach (whether the statutory complaints fell within the territorial scope of relevant statutory provisions).

3. The Claimant was represented by Mr A Webster of Counsel. The Respondent was represented by Mr A Knight, Solicitor.

4. Parties had prepared a statement of agreed facts. Donna Leslie, HR Director gave evidence on behalf of the Respondent. The Claimant gave evidence on his own behalf.

5. Parties had prepared a joint bundle of documents.

6. The parties lodged skeleton arguments and made oral legal submissions. The parties had not prepared a list of issues.

7. During submissions an issue arose with the statement of agreed facts as to whether the Claimant was working onshore in Norway rather than on a vessel in the Norwegian Sector a specified period. Following discussion, it was greed that parties would have 14 days in which to agree a variation failing which the previously agreed terms would continue to apply. No variation was agreed.

Findings of Fact

8. The Claimant is a UK national. His home address throughout his employment with the Respondent was in England. The Claimant was employed by the Respondent from 14 January 2011 until 26 June 2019 as a Maintenance Engineer.

9. During his employment with the Respondent the Claimant worked aboard accommodation vessels in the North Sea. The accommodation vessels are used by the offshore oil and gas industry to provide sleeping and other welfare facilities for those working on board drilling installations. The drilling installations were attached to either the Norwegian or UK Sector of the

continental shelf. The accommodation vessels are positioned alongside the drilling installations and are connected by means of a telescopic gangway.

Group Company structure

10. The Respondent is a company incorporated in Singapore. It has its registered address in Singapore. The Respondent is a member of the Prosafe group of companies. The Respondent is a wholly owned subsidiary of the parent company, Prosafe SE which is based in Norway.

11. The Respondent had two Directors (previously Charles Stewart, then Robin Laird and Jimmy Low) both of whom lived and worked (i.e. were based) in Singapore. No other staff employed by the Respondent were based in Singapore. The Respondent employed the crew that worked aboard a number of semi-submersible accommodation, safety and support vessels and tender support vessels which were owned and operated by other subsidiaries within the Prosafe group.

12. All of the vessels which the Claimant worked aboard during his employment were owned by Prosafe Rigs Pte. Ltd., a company incorporated in Singapore. Prosafe Rigs Pte. Ltd is part of the Prosafe Group and is a wholly owned subsidiary of the parent company, Prosafe SE. Prosafe vessels work predominantly in the North Sea.

13. The Respondent has a Support Services Agreement with Prosafe Offshore Limited ("POL"). POL is a UK incorporated company which operates out of Aberdeen. POL is a wholly owned subsidiary of Prosafe SE and falls within the Prosafe Group. POL had around 60 to 65 staff (including Donna Leslie and 5 other HR staff) who are based in Aberdeen. The agreement was to provide support services including HR, financial, operational, maintenance. POL provided support services to the Respondent pursuant to that agreement. HR services for the Prosafe Group are predominantly provided by POL.

Engagement by the Respondent

14. The Claimant liaised with Donna Leslie, then HR Manager of POL, regarding the recruitment process that led to his appointment on 12 January 2011. The Claimant's interview was conducted in Aberdeen by Donna Leslie. The Claimant's offer of employment was issued by Charles Stewart, Director who was based in Singapore.

Assignment to Safe Caledonia (2001 to 2014)

15. During the period from 14 January 2011 until 6 May 2014 (circa 3 years 4 months) the Claimant was assigned to the Safe Caledonia. The Safe Caledonia is an accommodation vessel flagged in Singapore (the state of registration). The Safe Caledonia worked under contract in the UK Sector of continental shelf in the North Sea throughout this period except for the period between 6 April 2012 and 1 March 2013 (circa 11 months) when the vessel was on her way for and had a refit in Remontowa Shipyard in Poland.

16. During his assignment to the Safe Caledonia, the Claimant worked an "even time rota", whereby he would spend three weeks offshore working aboard the vessel, followed by three weeks onshore on field break (generally not undertaking any work).

Assignment to Safe Scandinavia (May 2014 to April 2018)

17. From 7 May 2014 until 17 April 2018 (circa 3 years, 11 months), the Claimant was assigned to the Safe Scandinavia. The Safe Scandinavia is a vessel flagged in Singapore. The Safe Scandinavia worked under contract in the Norwegian Sector of the North Sea continental shelf throughout this period, except for the period from 9 October 2014 to 27 February 2015 (circa 4½ months) when it worked under contract in the UK sector of the North Sea.

18. During his assignment to the Safe Scandinavia the Claimant worked a "2/4 rota" whereby the Claimant would spend two weeks working on the vessel followed by four weeks on shore on field break.

Assignment to Safe Zephyrus (April 2018 to June 2019)

19. From 18 April 2018 until 26 June 2019 (circa 1 year, 2 months), the Claimant was assigned to the Safe Zephyrus. The Safe Zephyrus is a vessel flagged in Singapore. The Safe Zephyrus worked in the Norwegian Sector of the North Sea continental shelf during this period, except for the period from 11 May 2019 until 26 June 2019 (circa 1 ½ months) when it worked in the UK sector of the North Sea in fulfilment of a contract which concluded on 4 October 2019.

20. During his assignment to the Safe Zephyrus the Claimant worked a "2/4 rota" whereby the Claimant would spend two weeks working on the vessel followed by four weeks on shore on field break.

21. On 27 March 2019, during his assignment to the Safe Zephyrus**,** the Claimant received notice of dismissal which terminated his contract on 26 June 2019.

Contract of employment

22. The Claimant was employed under a written contract of employment signed by him and Charles Stewart, Respondent Director. The contract was referred to as "standard terms and conditions [which applied] irrespective of nationality, or area of operations internationally".

23. Clause 2.4 of the contract provided that "employees may be required to transfer their employment on a temporary or permanent basis to any associated or subsidiary company".

24. Clause 3.1 provided that "Employees will be required to work in any location offshore whether in the UK Continental shelf or elsewhere which the Company may direct." The Claimant advised that he was expected to work anywhere.

25. Clause 5.1 provided that he would be paid in British pounds sterling.

26. Clause 6.1 provided that travel expenses would be paid "from home to check-in of the UK offshore departure point". Alternative provisions under clause 6.2 applied where "the offshore departure point is located outside the UK." Clause 6.3 referred to employees "domiciled overseas".

27. Clause 7.14 referred to UK legislation regarding access to medical records.

28. Clause 9.1 provided for a 6% pension contribution and distinguished between UK residents and non-UK residents.

29. Clause 16 required a medical examination in accordance with UK guidelines.

30. Clause 30 provided that "Employment terms and conditions whilst serving on board vessel which are operating within the Norwegian Continental Shelf are covered by the Tariff Agreements between the Norwegian Ship Owners Association and Industri Energi" (the Norwegian Collective Agreements).

31. Clause 33.1 provided that the contract would "be governed by and constructed in accordance with the Law of Singapore." The contract did not seek to confer (i.e. prorogate) jurisdiction.

32. The Respondent issued this contract to all engineers employed by the Respondent except those who worked in Norway and Brazil. The Respondent regarded this contract as their standard international contract.

<u>Assignment to Norwegian Continental Shelf</u>

33. On 2 May 2014, and again on 20 March 2018, the Respondent wrote to the Claimant in connection with his "temporary assignment" / "secondment" to the Norwegian Sector of the North Sea Continental Shelf. At no time was he advised that this was a permanent assignment. It was considered necessary "to supplement" and make a "temporary variation" to his existing terms and conditions of employment ('the Norwegian terms') whilst the vessel to which he was assigned was in Norwegian waters on the Norwegian Continental Shelf, in order to comply with the Norwegian Collective Agreements, and Norwegian regulations. This regulated his assignment to the Safe Scandinavia and to the Safe Zephyrus and made changes to his basic pay, overtime rate and vacation allowance.

34. When assigned to the Norwegian Sector the Respondent applied and complied with Norwegian law. The temporary variation provided that: "Norwegian terms and conditions will apply from your first joining date after

the vessel has arrived onto the Norwegian Continental Shelf and will continue until the vessel departs Norwegian waters or your assignment changes".

35. During the period from 11 May 2019 until 26 June 2019 (1 month, 2 weeks) when the Safe Zephyrus worked in the UK sector of the North Sea (such that the vessel had departed Norwegian waters) the Respondent applied the terms of the temporary variation. Norwegian tax was deducted but after termination that was considered to be an error and was rebated to him.

Pay and deductions

36. During the Claimant's period of assignment to the Safe Caledonia, he was paid in pounds sterling and the Respondent made deductions for UK income tax and employee national insurance contributions via PAYE. The Respondent also paid employer's national insurance contributions during this period. Whilst assigned to the Safe Caledonia, the Claimant received employer's pension contributions from the Respondent equivalent to 6% of his salary.

37. During the period of the Claimant's assignment to the Safe Scandinavia and the Safe Zephyrus his salary was calculated and processed through the Respondent's payroll in Norwegian Kroner. This sum was then converted to Pounds Sterling before being paid into the Claimant's bank account. Taxes and social security contributions were paid by the Respondent in Norway. With the exception of the period when the Safe Scandinavia and the Safe Zephyrus worked in the UK Sector of the North Sea, no UK income tax deductions or employee national insurance contributions were required to be made by the Respondent during this period.

38. UK income tax and national insurance contributions were payable for the period when the Safe Scandinavia and the Safe Zephyrus was in the UK Sector.

Travel to and from the vessel

39. The Claimant received joining and leaving instructions for the vessel he worked aboard from the Radio Vessel Administrator ("RVA"). The RVA worked aboard the vessel. The RVA would get in touch with Respondent's travel agents with instructions regarding when travel and accommodation needed to be booked. The Respondent's travel agents were a global company called ATPI, which has an office in Aberdeen. Prior to 2017 the Respondent's used Munro's travel agents which also had an office in Aberdeen.

40. During the periods outlined above when the Respondent was working in the UK continental shelf, he joined the vessel by helicopter from the heliport in Aberdeen. When working on the Safe Scandinavia and Safe Zephyrus in Norwegian continental shelf, the Claimant flew from his local airport to Stavanger, Norway. He was flown by helicopter from the heliport in Stavanger to the vessel. His flights from his local airport to Stavanger were arranged by the RVA on board the vessel.

Line management

41. The Claimant was employed as a Maintenance Engineer. Whilst on board the Respondent's vessels he was under the control and direction of the Vessel Master who was also an employee of the Respondent and also based on board the vessel. The Claimant's immediate reporting line was to the First Engineer, an employee of the Respondent who was also based on board the vessel. The First Engineer reported to the Chief Engineer who reported to the Master and to vessel management based in Aberdeen. On occasions the Claimant was given direct instructions by vessel management based in Aberdeen.

Training

42. Training for the role was provided to the Claimant in either the UK or UK Sector of the North Sea. He undertook training about 10 to 20 days a year.

Human Resources

43. Human Resources services were provided to the Respondent and its employees by POL. Throughout his employment the Claimant had regular dealings with POL employees based in Aberdeen regarding human resource matters. He also received some limited less frequent communication in relation to human resource matters from staff who were based in Singapore but who were not employed by the Respondent. The Claimant's payslips were initially generated in Singapore by a Prosafe Group company before payroll was then outsourced in 2017. Contract changes (including pay increases) and formal correspondence would be issued by the Respondent based in Singapore.

Redundancy

44. Due to low fleet utilisation and depressed day rates for its vessels, the Directors of the Respondent made the strategic decision to make reductions to its operating costs by proposing redundancies. That decision was to be implemented with the assistance of POL who managed the redundancy process. The final selections for voluntary or compulsory redundancy were to be formally approved by the Respondent.

45. On 23 November 2018, an e-mail was sent to the Respondent's employees advising that applications were being invited for a voluntary redundancy scheme. The e-mail concluded that the Respondent reserved the right at its absolute discretion to decline requests for voluntary redundancy. The Claimant's voluntary redundancy entitlement was estimated at around £10,500. The e-mail was sent by Duncan Palmer, a senior employee of POL, pursuant to the Support Services Agreement. The Claimant does not believe that he received that email.

46. On 20 December 2018 the Claimant submitted an application for voluntary redundancy. The Claimant's application was submitted following a number of e-mail and telephone discussions with Donna Leslie (DL, HR, POL) in December 2018. Donna Leslie is employed by POL and was, at the relevant time, a Human Resources Manager. DL, HR (POL) is based in POL's offices in Aberdeen. On 21 February 2020 DL, HR (POL) advised the Claimant that

the entire voluntary redundancy process was in breach of their Norwegian Collective Agreement and could not therefore be progressed.

47. On 21 February 2019 DL, HR (POL) sent an e-mail to the Claimant advising that the contract being undertaken by the Safe Zephyrus in Norway was to terminate on 5 May 2019 and that its next contract was on the UK Sector. The e-mail explained that there was a need to reduce the manning level on the Safe Zephyrus from three full crews to two full crews (because of the change from a 2 week on/4 weeks off rota to a 3 weeks on/3 weeks off rota). The email explained that notice of dismissals would be issued to certain members of the crew (including the Claimant) based on seniority (length of service in the Norwegian Sector). The email advised that the Claimant had a right to attend a consultation meeting in accordance with the Norwegian Working Environment Act. The Respondent through POL sought to conduct the redundancy process in compliance with the Norwegian Collective Agreement and with Norwegian law.

48. The Claimant participated in a consultation meeting on 6 March 2019. The meeting took place by telephone. Present at the meeting were: DL, HR (POL), who dialled in from POL's Aberdeen office; Mike Young, Vessel Manager for the Safe Zephyrus, who dialled in from POL's Aberdeen office; the Claimant, who dialled in from his home; and Fraser Knox, a representative of Industri Energy, who is based near Aberdeen (the Claimant was a member of the Norwegian union). The notes describe the place of the meeting as "Prosafe Office, Aberdeen" and attendance via Skype.

49. On 27 March 2019, the Respondent issued letter giving notice of dismissal to the Claimant. The letter was issued by the Master on behalf of the Respondent. The letter advised that following a review there was to be a substantial reduction in the maintenance crew, that Norwegian seniority (length of service principle) was applied to identified the remaining crew, that he had been provisionally selected and that there were no suitable alternative positions. He was advised that any claim for unlawful termination would proceed under the Norwegian Working Environment Act and it set out

timescales and details for submitting a demand for negotiations and for instituting legal proceedings under that Act.

50. On 17 April 2019, the Claimant participated in a further consultation meeting. The format of the meeting was the same as that held on 27 March 2019.

51. The Claimant did not receive payment under the voluntary redundancy scheme. The Respondent advised the Claimant that because he was working under the Norwegian Terms he was not entitled to redundancy pay.

Observations on the evidence

52. There was no dispute on the material facts. Both witnesses were largely measured and reasonable in their testimony which was consistent with the documentary evidence and they were therefore considered to be credible and reliable witnesses.

The Law

Breach of contract

International jurisdiction (relevant forum)

53. By virtue of Section 3 of the Employment Tribunals Act 1996 and Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 an employment tribunal has jurisdiction to hear a claim for damages for breach of a contract of employment or other contract connected with employment. The claim must arise or be outstanding on termination of the employment. The claim must also be one which a court in Scotland would have jurisdiction to hear and determine.

54. The Recast Brussels I Regulation 1215/2012/EU regulates jurisdiction over contracts of employment where: a.) the employer is domiciled in a member state; b.) the employee habitually carries out his work in a member state; c.) the business which engaged the employee is situated in a member state or

d.) the dispute arises out of operations of a branch, agency or establishment situated in a member state.

55. Recast Brussels I has direct effect and also applies to the UK by virtue of the Civil Jurisdiction and Judgements Act 1981.

56. Recast Brussels I provides:

Article 20

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 21

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

…

Article 23

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen; or

(2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

57. It was accepted by the parties that any entitlement to enhanced redundancy pay arose from an alleged agreement regarding voluntary redundancy and was therefore a matter related to his contract of employment such that Article 20 applied.

a. Domiciled in a member state

58. Recast Brussels I provides:

Article 63

"1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat;

(b) central administration; or

(c) principal place of business."

59. The Claimant accepted that the Respondent was not domiciled in a member state and was instead domiciled in Singapore.

b. The place where the employee habitually carries out his work

60. Article 21 provides that an employer not who domiciled in a Member State may be sued: "(b) in another Member State: (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so."

61. It was accepted by the parties that work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a contracting state, in the context of the prospecting and/or

exploitation of its natural resources, is to be regarded as work carried out in the territory of that state for the purposes of determining jurisdiction.

62. The EJC in *Weber v Universal Ogden Services Ltd Case C-37/00* considered the habitual place of work of an employee who did not have an office that could constitute the effective centre of his working activities but performed the obligations arising under his contract of employment in several contracting states. The EJC held that the employee's habitual place of work "was the place where or from which the employee principally discharged his obligations towards his employer"; "in principle, the place where he spends most of his working time engaged on his employer's business" - "It would only be if, taking account of the facts of the present case, the subject matter of the dispute were more closely connected with a different place of work that the principle … would fail to apply"; "it is necessary, in principle, to take account of the whole of the duration of the employment relationship in order to identify the place where the employee habitually works;" and "Failing other criteria, that will be the place where the employee has worked the longest. It will only be otherwise if, in light of the facts of the case, the subject matter of the dispute is more closely connected with a different place of work."

63. The tribunal must determine whether an employee habitually works "in any one country" (Article 21). The EJC in *Weber* recognised that the tribunal may be unable to determine the habitual place of work "because there are two or more places of work of equal importance or because none of the various places where the employee carries on his work activity has a sufficiently permanent and close connection with the work done to be regarded as the main link for the purposes of determining the courts with jurisdiction".

c. <u>Where the business which engaged the employee was situated</u>

64. Article 21 provides that an employer who not domiciled in a Member State may be sued in a Member State: "if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated."

65. The Claimant accepts that the business which engaged him is not situated in a Member state and was situated in Singapore.

d. Dispute arises out of operations of the branch, agency or establishment in a member state

66. Article 20 provides where an employer "has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State".

67. The Claimant accepts that his dispute does not arise out of the operations of a branch, agency or establishment of the Respondent in a Member State.

Applicable law

68. The Rome I Regulation 593/2008/EU regulates applicable law for contracts of employment. Recast Rome I has direct effect and also applies to the UK by virtue of the Contracts (Applicable Law) Act 1990.

69. Rome I provides:

Article 3
Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

Article 8

Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement

under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Statutory claims

International jurisdiction (relevant forum)

70. The Claimant seeks to make complaints under the Employment Rights Act 1996 for unfair dismissal, statutory redundancy pay and 'other payments' understood to be a claim for unlawful deduction from wages.

71. The Employment Rights Act 1996 confers jurisdiction on the employment tribunal to hear complaints for unfair dismissal, redundancy pay and for unlawful deduction from wages. Section 204 provides that it is immaterial whether the law which govern any person's employment is the law of the United Kingdom or not.

72. Rule 8(3)(d) of the Tribunal Rules provides that a claim may be presented in Scotland if "the tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with Scotland".

73. The Respondent accepted that the employment tribunal had international jurisdiction i.e. was the relevant forum to hear the statutory complaints.

74. In any event, where Brussels II Regulation is not engaged Rule 8 may apply.

Territorial reach

75. The Claimant seeks to make complaints under the Employment Rights Act 1996. The 1996 Act does not specify its territorial scope.

76. The House of Lords in *Lawson v Serco Ltd [2006] UKHL 3* determined how the question of the territorial effect of the 1996 Act should be approached. It found that the question of territorial effect is one of statutory construction. The statue is intended to apply to employment in Great Britain. The standard, normal or paradigm case of application is the employee who was working in Great Britain at the time of the dismissal or other relevant act: "The terms of the contract and the prior history of the contractual relationship may be relevant to whether the employee is really working in Great Britain or whether he is merely on a casual visit (for example, in the course of peripatetic duties based elsewhere) but ordinarily the question should simply be whether he is working in Great Britain at the time when he is dismissed" *(Lawson*, para 27*).*

77. For peripatetic employees whose work entails travel from place to place (e.g. mariners, airline crew, international management consultants, etc) the question is where was the employee based as a matter of fact at time of the relevant act ("where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas" (*Lawson*, para 29).

78. For expatriate employee living and working abroad, "The circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation" (*Lawson*). The employment relationship must have a stronger or at least equally strong connection with Great Britain than with the foreign country where the employee works which might arise where "the employee posted abroad to work for a business

conducted in Britain and the employee working in a political or social British enclave abroad" (*Lawson*).

79. The categories articulated in Lawson "are merely examples of the application of the general principle" (*Duncombe v Secretary of State for Children, Schools and Families (No.2) 2011 ICR 1312, SC)*. The Supreme Court in *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1 held that the requirement of exceptionality did not apply where the employee was not truly expatriate, because they were living in Great Britain and working abroad ('the partial expatriate employee'): "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" (paras 28-29).

Respondent's Submissions

80. The Respondent's submissions were in summary as follows –

Contractual jurisdiction

a. Brussels II continues to apply to proceedings instituted before the end of the transition period (European Union (Withdrawal) Act 2018).

b. Jurisdiction arises in the place from where the employee habitually carried out his work or the last place where he habitually carried out his work. "Habitually worked" means "the place where or from which the employee principally discharged his obligations towards his employer" (*Powell v OMV Exploration & Production Ltd UKEAT/0131/13/DM)*.

c. The Claimant spent the majority of his working time in Norway. The place from where the employee habitually carried out his work was Norway and not Scotland.

d. Alternatively, if the Claimant did not habitually carry out his work in Norway, he did not habitually carry hour his work in any one country and accordingly the place where the business which engaged him was situated has jurisdiction, namely Singapore.

e. Rome I continues to apply to proceedings instituted before the end of the transition period (European Union (Withdrawal) Act 2018).

f. A governing law clause applied to his contract of employment and was not amended by the Norwegian Terms.

g. The breach of contract claim arose out of circumstances which were closely related to the Claimant's contract of employment. The chosen law of that contract prevails and the applicable law is that of Singapore, not Scotland.

81. Statutory jurisdiction

a. the Claimant must demonstrate that there was a sufficiently strong connection between his employment and Great Britain for him to come within the territorial scope of the 1996 Act.

b. when the Respondent gave notice to terminate the Claimant's contract of employment on 27 March 2019, the Claimant had worked exclusively in Norwegian waters i.e. outside of Great Britain since 28 February 2015 (circa 3 years 1 month). He had benefitted from enhanced Norwegian terms during that time.

c. The decision to terminate his employment arose because of the expiry of a Norwegian contract and following application of the Norwegian collective agreement and Norwegian law.

d. The notice of dismissal advised the Claimant of the remedies which were available under Norwegian law should he take issue with the decision to terminate his employment.

e. This is not a paradigm case under *Lawson.* He is not a peripatetic employee – he did not travel from place to place for relatively short periods. He was a partial ex-patriate employee.

f. In ex-patriate cases there requires to be an overwhelmingly closer connection with Britain and British employment law. Important factors include that the employer is based in the UK; they were employed on contracts under English law (or a combination); they were employed in international enclaves (*Duncombe*).

Claimant's Submissions

82. The Claimant's submissions were in summary as follows –

Contractual jurisdiction

a. Jurisdiction arises in the place from where the employee habitually carried out his work or the last place where he carried out his work whether or not habitually.

b. The claim is for breach of a collateral agreement to pay enhanced redundancy pay and it not a claim for breach of the employment contract per se. The collateral contract does not have a governing law clause and the governing law clause in the employment contract applying the law of Singapore is immaterial. In any event, even if the governing law clause applies, that does not go to jurisdiction.

c. the contract was more closely connected with the UK than any other country.

Statutory jurisdiction

a. Section 196 of the ERA 1996 (which applied a territorial restriction) was repealed.

b. Section 199 (Mariners) does apply because it was accepted by the parties that the relevant vessels were not registered in the UK within the meaning of Section 8 of the Merchant Shipping Act 1995.

c. Whilst *Lawson* concerned unfair dismissal, it has since been held that its principles apply to all ERA 1996 claims (*Green v SIG Trading Ltd* [2018] EWCA Civ 2253).

d. The location of the ship's registration is not determinative of the base of a mariner for the purposes of territorial jurisdiction (*Diggins v Condor Marine Crewing Services Ltd* [2009] EWCA Civ 1133).

e. In the case of partial expatriates, it is not necessary to conduct a comparative exercise to determine the relative connection as between the employee and GB and the employee and the foreign country as one would do in the case of a true expatriate (*Bates van Winkelhof v Clyde & Co LLP* [2012] EWCA Civ 1207 at para 98).

f. The applicable law provided for in the contract will be of some, but limited, relevance in determining territorial jurisdiction (*Bamieh v Foreign and Commonwealth Office* [2019] EWCA Civ 803 at para 74).

g. Employment Tribunals must be circumspect when taking into account the corporate structure of the employer given that corporate entities may use companies registered in particular countries for tax or other strategic reasons (*Ravat* at para 30: "The vehicles which a multinational corporation uses to conduct its business across international boundaries depend on a variety of factors which may deflect attention from the reality of the situation in which the employee finds himself").

h. The Respondent has only two employees based in Singapore and they were engaged in a rubber stamping exercise in respect of decisions which in reality were taken in Aberdeen.

i. The Norwegian terms and the assignment to Norway was only "temporary".

j. At the time that C's employment ended he was working in the UK and, accordingly, UK terms and conditions ought to have applied.

k. The Claimant was working in Great Britain at the time of his dismissal and this was not a mere casual visit. It was his previous assignment to Norway which had been temporary. The standard or paradigm Lawson category applied.

l. Alternatively, he was a partial expatriate employee who lived in the UK but worked abroad and the connection with the UK was sufficiently strong.

m. Alternatively, he was a peripatetic employee who was based in the UK.

Discussion and decision

83. It was accepted by the parties that work carried out by the Claimant on a vessel positioned above part of the continental shelf adjacent to a contracting state, is to be regarded as work carried out in the territory of that state for the purposes of determining jurisdiction. Accordingly work in carried out in the UK Sector is regarded as work in the UK and shall be referred to as such. Likewise work carried out in the Norwegian Sector is regarded as work in Norway.

Breach of contract

<u>International jurisdiction (relevant forum)</u>

84. It was accepted by the parties that the Respondent was domiciled in Singapore but that the Employment Tribunal in Scotland would have jurisdiction if "the place where or from where the employee habitually carries out his work or … the last place where he did so" was Scotland (Article 21 (b)(i) Recast Brussels I).

85. The Claimant submitted that in the last place he worked he required only to have undertaken work there but not habitual work. This interpretation is contrary to use of the phrase "where he did so" and further runs counter to the exception in Article 21 (b)(ii) which applies "if the employee does not or did not habitually carry out his work in any one country."

86. Habitual place of work is the place where an employee spends most of his working time taking into account the whole duration of the working relationship (*Weber*). It will be where the employee has worked for the longest unless the subject matter of the dispute indicates a closer connected with a different place of work (*Weber*).

87. From January 2011 until May 2014 the Claimant was assigned to a vessel in the UK (c.40 months) apart from c.11 months in Poland. Applying the even time rota, the Claimant had c.14.5 months working time in the UK and c.5.5 months working time in Poland.

88. From May 2014 until April 2018 the Claimant was assigned to a vessel in Norway (c.47 months), apart from c.4.5 months in the UK. Applying the 2/4 rota, the Claimant had c.14 months working time in Norway and c.1.5 months working time in the UK.

89. From April 2018 until June 2019 the Claimant was assigned to a vessel in Norway (c14 months), apart from c1.5 months in the UK. Applying the 2/4 rota, the Claimant had c4 months working time in Norway and c.1/2 month working time in the UK.

90. Accordingly, the Claimant over the whole duration of his employment had approximately 18 months working time in Norway, 16.5 months working time in the UK, and 5.5 months in Poland. The longest period of his working time was spent in Norway but this was not an overall majority of his time. His working time spent in the UK was a close second. Given the relatively even split it is relevant to consider the subject matter of the dispute. It was for breach of an alleged voluntary redundancy agreement to terminate his contract of employment on payment of enhanced redundancy pay. The

intention of the parties under his contract of employment was that the Claimant could be required to work in any location offshore location. The continuing reality reflected that contractual intention given that he was regularly required to work in the main in either Norway or the UK.

91. Accordingly, there were two places of equal importance such that the Claimant did not have a habitual place of work in any one country. The Employment Tribunal in Scotland does not therefore have jurisdiction to hear his claim for breach of contract which is accordingly dismissed.

Statutory claims

International jurisdiction (relevant forum)

92. The Respondent accepted that the Employment Tribunal in Scotland had international jurisdiction i.e. was the relevant forum to hear the statutory complaints.

Territorial reach

93. The Claimant is a UK national who lived in the UK throughout his employment with the Respondent. The Respondent was incorporated in Singapore and its two Directors were based there. The Respondent is a wholly owned subsidiary of the parent company Prosafe SE based in Norway. All employees of the Respondent (bar the two Directors) were based upon vessels that worked predominantly in the North Sea. These vessels were registered in Singapore and owned by another group company incorporated in Singapore.

94. The Claimant was employed under a contract that required him to work in any location offshore whether in the UK Continental shelf or elsewhere. Under his contract he was paid in British pounds sterling and was paid travel expenses from his home to a UK offshore departure point. Although this was described as their standard international contract it distinguished between UK and non-UK resident employees with a UK resident employee being the norm. The

contract was expressly subject to the Law of Singapore but made some limited referrals to UK legislation and guidelines.

95. The Claimant was employed as a Maintenance Engineer. He worked on board accommodation vessels in the North Sea which were attached to drilling installations which were in turn attached to the continental shelf. For the first 3½ years of his employment the Claimant worked predominantly in the UK. For the last 5 years of his employment he worked predominantly in Norway. The Claimant worked an even time rota when assigned to a vessel in the UK (equal working and relief time) and a rota of 2 weeks on/ 4 weeks relief when assigned to a vessel in Norway. Accordingly, over the whole of his contract his total working time in Norway was about 1 ½ months more than his working time in the UK.

96. When the Respondent was working in the UK, he joined the vessel by helicopter from Aberdeen. When working in Norway, the Claimant by plane to Stavanger and then by helicopter to the vessel.

97. When he was working in Norway the Claimant's contract was subject to a temporary variation to the Respondent's Norwegian Terms which made change to his pay (expressed in Norwegian Kroner) and benefits (including changing his rota from even time working/relief time to 2 weeks working/4 weeks relief time). These assignments were expressly temporary and did not change the overarching contractual right to assign him anywhere. When he was working in the UK, the Claimant paid UK taxes and national insurance. When he was working in Norway he paid Norwegian taxes and social security contributions.

98. The Claimant's immediate reporting line was to the First Engineer but was under the control and direction of the Vessel Master both of whom were employed by the Respondent and based on board the vessel. On occasions the Claimant was given direct instructions by vessel management based in

Aberdeen. Major strategic decisions regarding the Respondent were taken by the two Directors of the Respondent based in Singapore. The Claimant submitted that the Directors were engaged in a rubber stamping exercise in respect of decisions which were in reality taken in Aberdeen but there was no evidence that they simply approved the decisions of others automatically without proper consideration.

99. The Respondent has a Support Services Agreement with Prosafe Offshore Limited ("POL"). POL is a UK incorporated company which operates out of Aberdeen. POL is a wholly owned subsidiary of Prosafe SE and falls within the Prosafe Group. POL provided support services (including HR and operations) to the Respondent. The Claimant's principal point of contact for HR matters was with POL in Aberdeen. His contract of employment (including any variations) and his letters of assignment to each vessel were issued by or on behalf of a Director of the Respondent based in Singapore.

100. The Directors based in Singapore took the strategic decision to reduce operating costs by proposing redundancies. That decision was implemented by POL who managed the redundancy process. On 21 February 2019 DL, HR (POL) advised the Claimant that his contract would be terminated by reason of redundancy following loss of a contract in Norway and the absence of alternative positions elsewhere. The Respondent through POL sought to conduct the redundancy process in compliance with the Norwegian Collective Agreement and with Norwegian law. The Claimant participated in redundancy consultation meetings with POL employees and a representative of the Norwegian union.

101. On 27 March 2019, the Clamant was given notice of dismissal by the Master of his vessel on behalf of the Respondent. The Claimant was working in Norway at the time notice of dismissal was served. Following the loss of the

contract in Norway in May 2019 the vessel sailed to the UK in furtherance of contract which concluded in October 2019. The Claimant remained assigned to that vessel during his notice period. The Claimant was working in the UK by the time his notice of dismissal took effect on 26 June 2019.

102. The Claimant undertook only a few weeks work in the UK whilst under notice of termination. If considered in isolation this was arguably a casual visit and his circumstances were not that of paradigm case (*Lawson*).

103. The Claimant was not a peripatetic employee – his work did not entail travel from place to place (*Lawson*). It is not therefore relevant or meaningful to consider where he ordinarily worker (i.e. his base).

104. The Claimant was not an expatriate employee living and working abroad. There is therefore no requirement for the employment relationship to have a *stronger* connection with Great Britain than with the foreign country where the employee works (*Lawson*). Where the employee is a partial expatriate (living in Great Britain and working aboard) the employment relationship must have a sufficiently strong connection with Great Britain (*Ravat*).

105. However, these categories are merely examples of the general principle (*Duncombe*). The Claimant's employment relationship does not neatly fit into those categories. For significant periods of time he was a partial expatriate living in Great Britain and working in Norway. However, for almost equally significant periods he wasn't an expatriate at all, instead he was the paradigm case of an employee both living and working in Great Britain.

106. The applicable law of his contract of employment was the Law of Singapore but it made some limited referrals to UK legislation and guidelines. Although this was described as their standard international contract it distinguished between UK and non-UK resident employees with a UK resident employee

being the norm. The Claimant spent significant periods of time working in the UK and paying UK taxes and social security.

107. At the time notice of dismissal was served the Claimant had not worked in the UK for over 3 years. For the first 3 years of his contract the Claimant had worked predominantly in the UK. The contractual intention of the parties was that he could be required to work anywhere. The continuing reality was that he was mainly required to work in either Norway or the UK. If considered in context, his work in the UK during his notice period was not a casual visit but reflected the contractual intention and continuing reality that he was regularly required to work in the UK. In these circumstances the Claimant had a sufficiently close connection with Great Britain and British employment law to come within the territorial reach of the Employment Rights Act 1996.

Employment Judge	**Judge M Sutherland**
Date	**2nd of February 2021**
Date sent to parties	**3rd of February 2021**