EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102358/2020

Preliminary Hearing Held via Cloud Video Platform (CVP) on 6 September 2021

Employment Judge Murphy

Mr J Anderson	**Claimant represented by Mr R Lawson, Solicitor**
Gareloch Support Services (Plant) Ltd	**Respondent represented by Mr N Moore, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the respondent's application to strike out all extant claims is refused.

REASONS

Issues

1. The claimant's ET1 as amended pursuant to his amendment application dated 20 January 2021 (permitted in full by orders made at hearings on 12 February and 6 September 2021) asserts claims relating to holiday pay. The undisputed dates of employment are 25 January 2011 to 18 December 2019. The

claimant was employed by the respondent as a deckhand. He asserts he received no pay for annual leave throughout his employment. For the period from 23 January 2019 to 18 December 2019, the claimant pleaded a claim for breach of contract in respect to the asserted failure of the respondent to provide 38 days' paid annual leave.

2. A hearing was ordered to consider the issue of whether the respondent was in breach of contract in respect of the claimant's entitlement to paid annual leave in the period from 23 January 2019 to 18 December 2019. It took place on 12 February 2021, and the ensuing judgment dismissed the claim under the breach of contract jurisdiction in respect of this period and ordered that the claimant's claims under the various alternative bases should proceed.

3. Further and separately, the claimant seeks a remedy under regulation 26 of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) regulations 2018 ("the 2018 Regulations") for beaches of Regulation 15 of those Regulations (or, in the alternative, Regulation 16, if there was no breach of Regulation 15). For the period prior to the enactment of the 2018 Regulations, the claimant relies on predecessor legislation (namely the Merchant Shipping (Hours of Work) Regulations 20002 as amended by the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2014). The claim relates, it appears, to the period from 17 March 2014 until 18 December 2019. The claimant also pleads a claim of unauthorised deductions from wages under Part II of the Employment Right Act 1996 in relation to the asserted failure of the respondent to comply with the 2018 Regulations.

4. The claimant asserts, in the alternative, that if the 2018 Regulations do not engage, he relies upon the Working Time Regulations 1998 ("WTR").

5. Separately, the claimant asserts that the European Council Directive 1999/63/EC replicates the provisions of the Working Time Directive. He asserts he was entitled to be paid for 30 days of his annual leave entitlement on the basis of his "normal / average earnings". He asserts his overtime payments and payments for weekend work were not factored into the

computation of his holiday pay. He seeks a remedy under Part II of ERA in this regard (a claim for unauthorised deductions from wages).

6. A Final Hearing has been scheduled for 8 and 9 November 2021 to consider the claimant's extant statutory claims.

7. On 9 July 201, the respondent's representative set out grounds for a strike out application in relation to all extant claims on the basis that they have no reasonable prospect of success (Rule 37(1)(a)). Alternatively, the respondent seeks a deposit order or orders. The claimant's representative lodged a response resisting the applications on 13 August 2021.

8. The hearing on 9 September 2021 was convened to consider the respondent's application for strike out and / or deposit orders. A joint bundle was lodged. Mr Moore and Mr Lawson spoke to their written grounds and opposition.

Relevant Law

9. Under Rule 37(1)(a) of the 2013 Rules, a Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success. In determining such applications, the claimant's case must ordinarily be taken at its highest and, if the question of where it has reasonable prospect of success turns on disputed factual issues, it is unlikely that strike out will be appropriate (**Cox v Adecco** UKEAT/0339/19).

10. A two-stage process is required. First, the Tribunal must determine whether one of the specified grounds for striking out has been established. If so, the Tribunal then must go on to decide as a matter of discretion whether to strike out the claim, order it to be amended, or order a deposit to be paid (**HM Prison Service v Dolby** [2003] IRLR 694).

11. Under Rule 39 of the 2013 Rules, where a Tribunal considers at a preliminary hearing that a specific allegation or argument has little reasonable prospect of success, it may make an order requiring the payment of a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. When determining a deposit order application, a Tribunal may have regard to the likelihood of the party being able to establish the facts.

12. The test in Rule 39(1) of the 2013 Rules allows a Tribunal greater leeway than would be permissible under the test for strike out applications for an order to be made where the facts are in dispute (**van Rensburg v Royal Borough of Kingston-Upon-Thames & Ors** UKEAT/0095/07). However, in determining whether to make a deposit order, a "mini-trial" of the facts is generally to be avoided, just as it is to be avoided on a strike out application. A core factual conflict should properly be resolved at a full merits hearing (**Hemdan v Ishmail and anr** [2017] IRLR 228.

Discussion and Decision

13. Mr Moore and Mr Lawson were invited to make submissions on each paragraph of the paper apart to the claim which was the subject of a strike out application as this was the approach Mr Moore had taken in his grounds of application. The same structure is followed in this part of the judgment. The paragraph of the Statement of Claim which is the subject of the strike out application is set out followed, in each case, by a summary of parties' submissions. The Tribunal's reasoning and decision in relation to the relevant paragraph then follows.

Para 12 of Claim - claim under 2018 Regs and Under Part II of ERA re annual leave accrued in period from 17 March 2014 (time bar argument)

14. The first paragraph considered was paragraph 12 of the Statement of Claim (previous paragraphs being substantially concerned with the claimant's contractual claim which had been dismissed). It is in the following terms:

Further and separately, the claimant had a statutory entitlement to paid annual leave of at least four weeks from the commencement of his employment to 17 March 2014. The source of that entitlement was Regulation 12 of the Merchant Shipping (Hours of Work) Regulations 2002. Those Regulations were amended by the Merchant Shipping (Maritime Labour Convention)(Hours of Work) (Amendment) regulations 2014 with effect from 17 March 2014. From that point onwards, by virtue of those amending Regulations and subsequently by the 2018 Regulations, the claimant had a statutory entitlement to paid leave which was the same as that described in paragraph 8 hereof. That entitlement was to paid annual leave that was calculated on the basis of two and a half days for each month of employment in the lave year and pro rata for incomplete months) as well as additional paid leave of eight days in each leave year (and pro rata for incomplete years. The respondent failed to provide the claimant with paid annual leave in accordance with these Regulations or at all . The claimant brings this claim in reliance upon Regulation 26. Furthermore, the claimant has sustained a series of unlawful deductions from wages in terms of section 13 of the Employment Rights Act 1996.

Submissions on paragraph 12 (Time Bar)

15. In so far as Regulation 26 of the 2018 Regulations is concerned, Mr Moore seeks strike out on the basis that (1) the claim is time barred; and (2) under Regulation 18 of the 2018 Regs, where a seafarer is entitled to paid leave both under the 2018 Regulations and by contract, the seafarer cannot exercise both rights separately but may take advantage of which ever right is the more favourable. It is Mr Moore's position that the claimant, having exercised the right to pursue his claim for the period from 23 January to 18 December 2019 as a contract claim, cannot now pursue a statutory claim.

16. On the issue of time bar, Mr Moore says that the Employment Tribunal has found that the claimant was provided with 38 days' paid annual leave (pro rated) for the period from 23 January 2019 to 18 December 2019. He relies on the judgment of Employment Judge Bradley dated 30 March 2021. The

question of entitlement in that period is, therefore, *res judicata* in Mr Moore's submission. It follows, he submits, that the only relevant period of the claim in paragraph 12 was that which pre-dated 23 January 2019. As the claimant did not initiate the EC process with ACAS until 17 March 2020, it was time barred. ACAS notification ought to have been made by 21 April 2019.

17. Mr Moore points out that the contract entered between the parties in January 2019 was expressly a new agreement and not a variation of the previous contract. Any claim for the period governed by the previous contract ought, he says, to have been brought within three months of its termination.

18. Mr Moore separately relies upon Regulation 18 of the 2018 Regulations which is in the following terms:

Where during any period a seafarer is entitled to hours of rest or paid leave both under a provision of these Regulations or a separate provision (including a provision of the seafarer's contract), the seafarer may not exercise the two rights separately but may in taking hours of rest or paid leave during that period, take advantage of whichever right is, in any respect, the more favourable.

19. In Mr Moore's submission, the claimant, having exercised his right to pursue his claim for paid leave from 23 January 2019 as a contract claim, cannot now pursue it as a statutory claim. He points out that the contractual claim had been heard first and was pleaded first in the Statement of Claim.

20. Mr Lawson maintains that Mr Moore has failed to address the issue that Employment Judge Bradley's judgment was only determinative of and indeed concerned with the contractual issue. No finding was made that payment for annual leave had been made in accordance with any statutory obligation on the respondent during the period from 23 January to 18 December 2019.

21. He says that the approach to leave during this period (and all periods under consideration) offended against the principles in the ECJ case of **Robinson Steele v RD Retail Services Limited** [2006] ICR 932. He refers to the prohibition in **Robinson-Steele** (concerned with the interpretation of the

Working Time Directive) of the making of payment of minimal annual leave in the form of part payments staggered over the corresponding annual period of work and paid together with remuneration for work done. Mr Moore concedes that the **Robinson Steele** principles apply similarly to the Seafarers Directive (European Council directive 1999/63/EC) as to the WTD, but disputes that Mr Anderson's case is one involving 'rolled up' holiday pay falling within the **Robinson Steele** prohibition

22. Mr Lawson argues that the claimant also claims he was entitled to be paid his 'normal remuneration' during periods of statutory annual leave. In this regard, he relies upon ECJ jurisprudence (again concerned with the Working Time Directive) which has established, in Mr Lawson's submission, that "all elements of a worker's remuneration, including payments in respect of non-guaranteed overtime must be taken into account". He refers to Merchant Shipping Notice MSN 1877 (M) Amendment 1, para 10.9 which says:

The level of pay during statutory leave should be at the seafarer's normal level of remuneration.

23. Mr Lawson argues, in effect, that if the claimant succeeds in either of these arguments in relation to the period from January to December 2019, then the time bar argument as regards the prior period is answered, as the claims for the prior period would knit together with the latter period as a continuing series of deductions from wages.

24. If these representations were not accepted, Mr Lawson would invite the Tribunal to permit the claimant to proceed in any event on the basis that it was not reasonably practicable for the claims to have been made within the applicable time limit under Regulation 26(2)(b) of the 2018 Regulations.

25. With regard to Mr Moore's suggestion that the effect of Regulation 18 and the judgment of 30 March 2021 was to render the statutory claim for the period from 23 January 2019 onwards *res judicata*, Mr Lawson disputes that anything in that provision precluded the claimant from advancing contractual and statutory claims on an alternative (not cumulative) basis. There is an

equivalent regulation in the WTR (Regulation 17) and no authority is identified in Harvey for Mr Moore's proposition in the context of Regulation 17.

Discussion and Decision

26. To be *res judicata*, the subject matter previously litigated and the points in controversy between the parties must be the same. An unsuccessful litigant has the right to raise a further action against the same party relating to the same subject matter, providing the second action is based on different grounds (e.g. **Murray v Murray** 1957 SLT 41, **Thomas v Council of the Law Society of Scotland** 2006 SLT 183). The Tribunal is not satisfied that the claimant has little or no reasonable prospect of persuading a Tribunal that the *media concludendi* in the two claims are different. The claim advanced now under paragraph 12 does not rely upon a breach of contractual entitlement but on statutory rights. The claimant asserts these statutory rights should be interpreted with heavy regard to caselaw on the Working Time legislation which, he says, has implications for how holiday pay must be calculated and paid.

27. A separate question is whether, as Mr Moore asserts, the claimant is otherwise precluded by Regulation 18 of the 2018 Regulations from taking a statutory claim for holiday pay in the period from 23 January 2020 to 18 December 2020. Having chosen to litigate this issue based on contractual right, Mr Moore says the effect of Regulation is that the claimant is precluded from taking a claim based upon his rights under the 2018 Regulations. No appellate authority was cited to the Tribunal that might provide guidance on the interpretation of Regulation 18 of the 2018 regulations or of the equivalent regulation which features in the WTR (Reg 17).

28. Mr Lawson was clear that the claimant does not assert a statutory right to 38 days' leave (pro-rated) additional to a contractual right to 38 days' leave to give a cumulative right to 76 days. Mr Lawson's position is understood to be that this was the potential harm Regulation 18 was drafted to exclude when it says, "the seafarer may not exercise the two rights separately". What is prohibited, according to Mr Lawson, is a 'doubling up' which he accepts is not

permitted. Mr Moore's position, on the other hand, is that the drafting also prevents the advancing of claims on two alternative bases as the claimant seeks to do. It having been determined that the contractual entitlement has been observed by the respondent, it is not open to the claimant to argue his statutory right to holiday in the same period has been infringed. Mr Lawson submits such an interpretation is inconsistent with the purpose and objectives of the Regulations and Directive.

29. It is not for this Tribunal to determine the correct interpretation of Regulation 18, only to consider whether the claimant's arguments have little or no reasonable prospects of succeeding. In that regard, it is relevant to acknowledge that the drafting of the regulation could be clearer. On a careful reading of Regulation 18, it seems to the Tribunal that there are arguments to be made, based on its phrasing, for and against the interpretation for which Mr Moore contends. Beyond the drafting of the Regulation itself, there are also arguments in both directions about Parliament's intention having regard to the wording and purpose of the source Directive and relevant background framework in the UK.

30. In the absence of any authoritative guidance, the Tribunal is not satisfied that the claimant has little or no reasonable prospect of persuading a Tribunal that he is not precluded from asserting a statutory claim notwithstanding that he has chosen to litigate a contractual claim in respect of the same period.

31. This was not a preliminary hearing on time bar but a preliminary hearing to determine a strike out applications where the respondent relies (among other matters) upon time bar arguments. To determine that the claimant had little or no prospect of succeeding due to time bar obstacles, the Tribunal would require to be satisfied that there was little or no prospect of a future tribunal finding that it was not reasonably practicable for the claimant to have brought the claim in time.

32. The claimant's representative has not yet articulated the claimant's position on the question of reasonable practicability and the facts upon which he may rely. It was not set out in the original ET1 paper apart or the amended version,

given this time bar argument was not raised by the respondent until sometime later - after the judgment of Employment Judge Bradley upon which it is largely predicated. Without the benefit of the claimant's position on this question, the Tribunal would have been reluctant to determine there is little or no reasonable prospect he could show it was not reasonably practicable to bring the claim on time. In the event, the Tribunal has found the claimant has other arguments which stand reasonable prospects on the question of *res judicata* and regulation 18 which would require to fail before the question of reasonable practicability would fall to be determined.

33. The Deduction from Wages (Limitation) Regulations 2014 amended section 23 of ERA so that since July 2015, to provide that a tribunal is not to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint (s.23(4A) ERA). Reference was made briefly to this provision, and it was not understood that Mr Lawson disputed the effect of the provision which on the face of it would preclude the claimant claiming for the period prior to 30 April 2018.

Paragraph 12 – claim for unauthorised deductions under Part II ERA (jurisdictional argument based on section 199(1))

34. Mr Moore seeks strike out of the claimant's unauthorised deductions claim on the further ground that the Employment Tribunal has no jurisdiction the claim under Part II of ERA by virtue of section 199(1)(a) of that Act. That provision is in the following terms:

199 Mariners

(1) Sections 1-7, Part II and sections 86 to 91 do not apply to a person employed as a seaman in a ship registered in the United Kingdom under a crew agreement the provisions and form of which are of a kind approved by the Secretary of State or an agreement specified

in regulations under section 32(a) of the Merchant Shipping Act 1995.

35. Part II of ERA is the part dealing with wages and unauthorised deductions.

Submissions on Section 199(1) ERA

36. Mr Moore asserts the claimant was employed as a seaman and that the contract of employment entered 23 January 2019 is an agreement specified in the regulations under section 32(a) of the MSA 1995. That the boat to which the claimant was assigned (the Lesley M) was registered in the UK is not understood to be disputed by the claimant. It was found as a fact by Employment Judge Bradley in his judgment dated 30 March 2021. It is not understood that the claimant disputes he was a seaman for the purposes of section 199(1).

37. The Regulations under section 32(a) of the MSA 1995 were the Merchant Shipping (Seaman's Wages and Accounts) regulations 1972 which were amended by the Merchant Shipping (Maritime Labour Convention) (Consequential and Minor Amendments) Regulations 2014. The latter inserted a definition of "seafarer employment agreement" ("SEA") as:

> *"… an agreement required by regulation 9 of the Merchant Shipping (Maritime Labour Convention) (Minimum requirements for Seafarers etc.) Regulations 2014(2), and a reference to a seafarer employment agreement in relation to a seafarer who works on a ship means the agreement of that description to which that seafarer is party in connection with that work"*

38. Mr Moore contends that the contract entered 23 January 2019 is an SEA, meeting the legislative requirements. Regulation 10 of the aforementioned 2014 Regulations prescribes requirements as to the content of an SEA. Regulation 10 (1) provides that an SEA must include provision about the matters in Part 1 and 2 of Schedule 1. Part 2 specifies among other matters

that provision should be included for 'the paid leave (either the amount or the formula to be used in determining it)'.

39. Mr Moore maintains that the agreement entered on 23 January 2019 meets all requirements, including this one. Mr Lawson asserts that it fails to do so. It is not possible, he says, to identify from the agreement what payment should be made for annual leave taken. Either the amount or the formula for calculating the pay should, in his submission, be specified in the agreement. Mr Lawson was invited to confirm if he relied upon any other asserted deficiencies in relation to the prescribed content in Part 2 of the Schedule. He did not identify any aspects which were challenged as deficient at the hearing.

40. Mr Moore argues that the requirement in the Schedule is indeed met. He referred to the Maritime and Coastguard Agency Guidance MGN 477 (M) which deals with Seafarers' employment agreements and links to a suggested model format. The clause dealing with annual leave within the model format is in the following terms:

> ***Paid Leave***
>
> *You are entitled to take ……..(insert number) (see Note 6) working days as paid leave in each year of employment. [You will be paid your normal basic wages during such leave.]*
>
> *If your employment commenced or terminates part way through the holiday year, your entitlement to paid annual leave will be assessed on a pro rata basis. Deductions from final salary due to you on termination of employment will be made in respect of any paid annual leave taken in excess of your entitlement.*
>
> *You will be entitled to payment in lieu of paid leave accrued but not taken at the date of termination of employment.*

41. The contract was produced to the Tribunal. It is the respondent's position that the terms contained in Schedule A and those in Part B of the Standard Terms

and Conditions of Contract for Seafarers (para 26) relating to paid annual leave suffice to meet the requirements stipulated in Regulation 10 and Part 2 of the Schedule to the 2014 Regs. Paragraph 26.2 of the contract provides that entitlement to "paid annual leave" is as stated in Appendix A of the agreement. As a matter of detail, there is not strictly an 'Appendix A' but there is a Schedule A to the agreement. It includes the following clause:

Annual Paid leave

30 days or in accordance with the flag state legislation governing the ship to which the Seafarer is for the time being attached (if superior)

42. The entitlement under flag state legislation (i.e. the 2018 Regulations) is indeed superior. Regulation 15 confers an entitlement to 2.5 days for each month of employment (po rata for incomplete months) and an additional eight days each leave year (pro rata), totaling, therefore, 38 days per annum.

43. The requirement in Reg 10(1) of the 2014 Regulations is that the SEA must contain "provision about the matters in Part 1 and Part 2 of Schedule 1".

44. Further and separately, Mr Lawson argues that Regulation 26 of the 2018 offers an unsatisfactory remedy. Requiring a seafarer to bring a claim in respect of accrued annual leave within the period of three months of the date of accrual of the leave offends, in his submission, against the principle of equivalence. This EU derived principle requires that a limitation period in respect of an action on a claim arising out of European law must not be less favourable than for similar actions based on domestic law. The limitation period in section 23 of ERA was he said, more advantageous than the limitation in Regulation 26 of the 2018 Regulations. According to Mr Lawson, the Tribunal should give a purposive interpretation to ERA, including section 199(1), as permitting the claimant to bring a claim under Part II for a series of unauthorised deductions in relation to annual leave as can be done for rights deriving from the WTR.

Discussion and Decision

45. Mr Lawson's suggestion that Regulation 10(1) and the Schedule Part 2 of the 2014 Regulations require an agreement to specify the amount of payment for leave or the formula for calculating payment was not considered particularly persuasive. What is required is "provision about the paid leave". It appears reasonably clear that the requirement for an "amount or formula" refers to quantifying the leave, not the pay. That would seem to accord with the view taken by the Maritime and Coastguard Agency's in the model format where comment on the approach to payment is square bracketed, giving the impression it is intended to be optional.

46. There appears, however, to be greater force in the argument that the agreement does not adequately specify the amount of leave (or the formula for its calculation) by merely signposting legislation which itself is not specifically named. The contractual terms do not refer expressly to the 2018 Regulations by name. The contract instead refers to the "flag state legislation governing the ship… (if superior")." Regulation 10(2) of the 2014 Regulations provides that provision may be achieved by way of reference to another document which includes provision about those matters. However, the Tribunal accepts there is a stateable argument that Schedule A does not refer with sufficient precision to another document where the amount of the leave entitlement is quantified in referring to "the flag state legislation governing the ship.."

47. The Tribunal is not, therefore, satisfied that the claimant has little or no reasonable prospect of persuading a Tribunal that the terms of the 23 January 2019 agreement do not satisfy the requirements for an SEA set out in Regulation 10 and Part 2 of the 2014 Regulations in the approach to the contractual provision on paid leave.

Para 13 of the Statement of Claim (Time Bar Argument)

48. Mr Moore argues that paragraph 13 of the claimant's Statement of Claim should be struck out. It is in the following terms:

Esto the respondent discharged its obligations in terms of the Regulations to provide full paid annual leave by virtue of the 2011 Contract and the SEA, throughout the period from 17 March 2014 to 23 January 2019 the claimant had a statutory entitlement to 38 days of paid annual leave. During that period, the claimant's contract of employment provided for only 28 days of paid annual leave. Accordingly, the respondent failed to comply with its statutory obligations during that period.

Submissions on Paragraph 13 (Time Bar Argument)

49. Mr Moore asserts this claim is time barred. The claim is specifically brought in respect of the period ending 22 January 2019. ACAS was not notified until 17 March 2020 when it should have been notified by 21 April 2019.

50. Mr Lawson says there was a continuing series of deductions which continued beyond January 2019, and that the claim was brought within three months of the last of these.

Discussion and Decision

51. The paragraph 13 claim is framed as an *esto* claim, proceeding on the premise that the respondent's statutory obligations on annual leave have been found to have been discharged by virtue of the contractual terms for the period from and after 23 January 2019.

52. Mr Lawson's submissions on the paragraph 12 time bar argument did not appear to the Tribunal to readily carry over insofar as those submissions were based on the premise that legitimate statutory claims are competent to be litigated in respect of the period from 23 January 2019 to the EDT. The paragraph 13 claim is premised on an acceptance that statutory obligations in the latter period have been discharged.

53. The Tribunal considered, however, that there was potential support for the position taken by Mr Lawson in the EAT decision in **Ekwelem v Excel Passenger Service Ltd** UKEAT/0438/12/GE, unreported. The case was not cited during the hearing. It is not concerned with holiday pay. It concerns an

unauthorized deduction from wages claim where it was said that deductions during a period when the employee was suspended were unlawful. Judge Hand accepted the employee's barrister's submission that where the complaint was made in respect of a series of deductions or payments, even if the later deductions were held to have been lawful, that could not disqualify the claimant from relying on the earlier payments which should have been found to be unlawful. Judge Hand agreed (see paragraphs 20 and 31).

54. There will be arguments for another day about the applicability of **Ekwelem** to the circumstances here and its effect. For present purposes, the Tribunal was not satisfied the claimant falls below the low bar of having little or no reasonable prospects in arguing that the pre-January 2019 period knits together with the post 2019 period to form a series timeously complained of, even in the scenario that the latter alleged deductions are found by a Tribunal to have been lawful on statutory as well as contractual arguments.

55. Separately, there remains the concern that the claimant has not articulated his position on whether he says it was not reasonably practicable to bring the complaint within the normal time limit and, if not, why not. At the hearing, Mr Lawson undertook to do so but later expressed a preference that all case management issues be dealt with at a future preliminary hearing on case management. Given the potential significance of the matter, it is considered preferable that the position is set out at an early stage. This is addressed in a separate case management order.

Paragraph 13 (Argument re Regulation 26 of the 2018 Regulations)

56. Further, in relation to paragraph 13, Mr Moore made submissions which were not foreshadowed in his written Grounds of Application based on the wording of Regulation 26 of the 2018 Regulations. Regulation 26 provides that an employed seafarer may present a complaint to a Tribunal that his employer (a) has refused to permit the exercise of any right … under Regulation 15 (1)(a) or (b) (entitlement to annual leave, etc.); or (b) has failed to pay the seafarer the whole or any part of any amount due to the seafarer under Reg 15 (1)(a) or (b).

Submissions on Para 13 (Regulation 26 Argument)

57. Mr Moore argues that there is no averment that the claimant at any point requested and was refused the opportunity to take leave nor that he asserted at the time (or within 3 months of 22 January 2019) that he was not paid or underpaid for leave taken. He says there is no reasonable prospect of the claim under the 'old contract' succeeding. He acknowledged that the WTR have been given a purposive interpretation where an individual is sick and precluded from taking leave or debarred from taking leave during the leave year, but, he says, neither of these scenarios applies here.

58. Mr Lawson accepts as a matter of fact that the claimant did not ask to take the leave or ask for payment for it at the material time. He submits that this would is not an impediment under the 2018 Regulations.

Discussion and decision

59. As Mr Moore acknowledged, Regulation 30(1) of the WTR is in similar terms to Regulation 26(1) of the 2018 Regulations. It too envisages complaints based on employer's refusal to permit the exercise of the rights in Regulation 13(1) (entitlement to leave). As he also acknowledged, Regulation 30(1) of WTR has been interpreted with a degree of flexibility including, for example in relation to employees who are on long term sick leave.

60. The claimant had not had prior notice of this particular ground of strike out. The caselaw of the ECJ on the interpretation of the equivalent provision in the WTR was not cited and the Tribunal did not hear detailed argument about its applicability and effect beyond Mr Moore's denial of its relevance to the facts here. The Tribunal did not consider, based on the material and submissions before it, that it was able to determine that the claimant has little or no prospects of arguing successfully that Regulation 26 should be interpreted as permitting his complaints in circumstances where Mr Lawson had not had an opportunity of considering in any detail the body of ECJ jurisprudence on the equivalent WTR provision.

Paragraph 14 of the Statement of Claim –reliance on Reg 16 of the 2018 Regs if Reg 15 is inapplicable

61. Mr Moore argues that paragraph 14 of the claimant's Statement of Claim should be struck out. It is in the following terms:

> *Esto the respondent did not breach Regulation 15 of the 2018 Regulations, it breached Regulation 16 of those Regulations by failing to ensure that the claimant was given paid annual leave in accordance with Regulation 2.4 of the Maritime Labour Convention.*

Submission on Para 14 (Regulation 16's applicability)

62. Mr Moore says Regulation 16 has no application. By virtue of Regulation 3(2)(e) of the 2018 Regulations, Regulation 16 only applies to MLC ships which the Lesley M is not. MLC ships are defined in Regulation 2 as follows:

> *A sea-going ship which is not a United Kingdom ship if –*
>
> *(a) The Maritime Labour Convention has come into force for the State whose flag the ship is entitled to fly; and*
>
> *(b) The ship carried –*
>
> *(i) a maritime Labour Certificate to which a Declaration of Maritime Labour Compliance is attached; or*
>
> *(ii) an interim Maritime Labour Certificate.*

63. Mr Lawson explained that the claimant's primary case is that Regulation 15 applies rather than Regulation 16. Regulation 16 is pleaded only as an alternative position if for some unforeseen reason it is found that Regulation 15 is inapplicable. He observed that the respondent had not confirmed in their statement of grounds whether the conditions observed in subparagraphs (a) and (b) of the definition apply.

64. In the respondent's (re-amended) Grounds of Resistance, it is expressly acknowledged that the claimant's entitlement to annual leave is governed by

the 2018 regulations, though regulation 15's application is not expressly accepted.

65. It has been found as a fact by Employment Judge Bradley that the Lesley M is registered in the UK, and the claimant is not understood to dispute this.

66. The Tribunal considers that the definition leaves little scope for argument that an MLC ship can in any circumstances be a United Kingdom ship. It appears that limbs (a) and (b) will determine whether a ship which is not a United Kingdom ship meets the requirements upon them to be caught by the definition and by Regulation 16. This is not a matter in relation to which there is a core conflict on the facts. Though the Tribunal does not exclude any reasonable prospect that a future Tribunal could find otherwise, the Tribunal considers there is little reasonable prospect that it will do so.

67. In the circumstances, the Tribunal has discretion to order the claimant to pay a deposit as a condition of continuing to advance the argument in paragraph 14. A deposit order has been issued of even date.

Paragraph 15 of the Statement of Claim – Reliance on the WTR if the 2018 Regs don't engage

68. Mr Moore argues that paragraph 14 of the claimant's Statement of Claim should be struck out. It is in the following terms:

> *Esto the 2018 Regulations do not engage, the claimant relies upon the Working Time Regulations 1998*

Submissions on para 14 (applicability of the WTR)

69. Mr Moore says the WTR do not apply. Regulation 18(1) of the WTR excludes workers to whom the 2018 Regulations apply. Regulation 3(1) of the 2018 Regulations applies Regulation 15 (on annual leave entitlement) to a 'sea-going United Kingdom ship wherever it may be'. Lesley M has been found to be a UK registered ship. Mr Moore advised it was sea going, being licensed

to operate up to 60 nautical miles from a safe haven (i.e. outside category A, B, C and D waters as specified in the Merchant Shipping Notice 1837 (M)).

70. Mr Moore referred the Tribunal to certain evidential material including the MLC 2006 Small Vessel Document of Compliance for the Lesley M dated 26 June 2018 and the MSN 1837 (M) Amendment 2 Categorisation of Waters dated July 2017. It is not understood that the claimant disputes the evidence or indeed the application of the 2018 Regulations. The Respondent expressly accepts the application of the 2018 Regulations in the Grounds of Resistance.

Discussion and decision

71. It is fair to acknowledge that the evidence to support the proposition that the Lesley M is (a) a United Kingdom ship; and (b) that it is seagoing for the purposes of the Maritime and Coastguard Agency's Merchant Shipping Notice on the categorisation of waters is and has been substantially in the domain of the respondent. At the time of drafting the Statement of Claim and indeed the amendment thereof, Mr Lawson may not have been privy to some or all the evidential material to which the Tribunal was referred at the preliminary hearing.

72. Based on a summary assessment of the material put forward by Mr Moore, the Tribunal was not satisfied that it could exclude *any* reasonable prospect of a Tribunal finding at a full hearing that the Lesley M met the relevant definitions at all material times. It is a complex and densely regulated area. The Tribunal is satisfied, however, on the material before it that there is little reasonable prospect that it will be found at a final hearing that the Lesley M was not a sea-going ship as defined.

73. In the circumstances, the Tribunal has discretion to determine whether to order the claimant to pay a deposit as a condition of continuing to advance the argument in paragraph 15. A deposit order has been issued of even date.

Paragraph 16 - entitlement to 30 days' leave based on 'normal / average earnings'

74. Mr Moore argues that paragraph 16 of the claimant's Statement of Claim should be struck out. It is in the following terms:

> *Further and separately, clause 16 of the European Council Directive 1996/63/EC of 21 June 1999 concerning the Agreement on the organization of working time for seafarers states: "Every seafarer shall be entitled to paid annual leave of at least 4 weeks, or a proportion thereof for periods of employment of less than one year, in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and or practice. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated". The provision largely replicates the provisions of the Working Time Directive. It is averred that the claimant was entitled to be paid for four weeks of his annual leave entitlement on the basis of his normal / average earnings. During periods of working time the claimant normally received additional payments in respect of overtime and weekend work. The claimant did not receive a payment for four weeks of his annual leave entitlement which had regard to these additional payments. The claimant has sustained a series of unlawful deductions from wages in terms of section 13 of the Employment Rights Act 1996.*

75. The claimant was permitted to amend this paragraph during the preliminary hearing to replace the reference to "four weeks" in the last two appearances of that phrase in paragraph 16 with the words "thirty days".

Submissions on Para 16 (30 days at 'normal / average earnings')

76. Mr Moore's first ground of objection to this paragraph by Mr Moore is that Directive 1999/63/EC is not directly enforceable by the claimant. Mr Lawson clarified that the claimant does not assert he can directly enforce the Directive against the respondent. Instead, he argues that the Tribunal requires to interpret the 2018 Regulations in a way that renders it compatible with the Directive. He

says the principles of the ECJ in **Robinson Steele** and other caselaw interpreting the WTD and WTR are applicable.

77. With regard to the jurisdiction under Part II of ERA (dealing with wages and unauthorised deductions), Mr Moore relied upon his earlier submissions in relation to the effect of section 199(1) (a) of ERA, considered above. He also relied upon earlier arguments that the claims are precluded by the doctrine of *res judicata* and / or Regulation 18. He similarly took the time bar point also advanced in relation to paragraph 12, predicated on the finding contended for that the statutory claim for the period from and after 23 January 2020 is incompetent.

78. Further and separately, Mr Moore argues that insofar as a claim for the period from 23 January 2021 to the EDT is concerned, that claim too is out of time. This was premised on the assertion that any leave entitlement under the Directive (i.e. to the first 30 days) would be taken before any 'additional' entitlement which did not derive from the Directive but from UK 'gold-plating'. According to Mr Moore, the Directive entitlement accrued in the first 269 calendar days of the leave year. On that basis, given the claimant's particular pattern of Time Off and Time On, any relevant deduction would have been made in the claimant's pay on 31 October 2019. The three-month limitation period runs from that date, in his submission.

79. Mr Lawson observed that Mr Moore had offered no authority for the assertion that the EU derived 'basic' leave entitlement accrues first in the leave year. He submits no binding authority exists for this proposition.

80. It was acknowledged by parties that the issue has arisen in the context of the WTR and WTD and that the position is not settled. **Bear Scotland v Fulton** [2015] IRLR 15 Langstaff LJ gave obiter comments relevant to the issue, but the issue has not been the subject of a definitive ruling at this time.

81. Mr Lawson in any event relied upon a point of contrast between the 2018 Regulations and the WTR. Whereas the WTD refers to paid annual leave of "at least four weeks", Council Directive 2009/13/EC refers to a "minimum of

2.5 calendar days per month of employment". This phrasing, in his submission, militates against Mr Moore's proposition that the 'basic 30 days' leave accrues first, before the additional 8 days' 'gold plated' leave.

Discussion and decision

82. The respondent's strike out grounds based on the effect of Regulation / *res judicata* and time bar on the premise that the statutory claim from and after 23 January is incompetent have been considered. So too has the argument based on section 199(1) of ERA. It has been found that the claimant does not have little or no prospect of succeeding in his contrary arguments on these issues.

83. In relation to the time bar argument based on the asserted 'basic leave first' model, the Tribunal is not satisfied that the claimant has little or no reasonable prospect of persuading a Tribunal at a final hearing that the approach is flawed for the reasons given by Mr Lawson in his submissions. The matter has not been definitively determined in the working time context and there are material differences in the phrasing of the source Directives.

Employment Judge: Lesley Murphy
Date of Judgment: 15 September 2021
Entered in register: 17 September 2021
and copied to parties