EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102358/2020 (V)

Final Hearing Held by CVP on Monday and Tuesday 8 and 9 November 2021 at 10.00am

Employment Judge: Russell Bradley

Mr J Anderson	**Claimant Represented by: R Lawson - Solicitor**
Gareloch Support Services (Plant) Limited	**Respondent Represented by: N Moore - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgement of the Tribunal is that:-

1. The claim under Regulation 16 of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 is struck out by reason of the claimant's failure to pay the deposit ordered on 15 September 2021.

2. The claim under the Working Time Regulations 1998 is struck out by reason of the claimant's failure to pay the deposit ordered on 15 September 2021.

3. The claim for *"additional payments"* for pay due for December 2019 succeeds.

4. The claim relying on the other bases does not succeed and is dismissed.

REASONS

Introduction

1. This case concerns a claim for holiday pay brought by a seafarer (a deckhand). The claim is for an entitlement to holiday pay spanning the period of his employment, almost nine years. The claim was first made after the end of his contract. It ended on 18 December 2019.

2. On 30 April 2020 the ET1 was presented. In the attached statement he made various alternative bases for the claim. In it he asserts that throughout his employment he received no payment in respect of annual leave. In its ET3 and the attached grounds of resistance the respondent set out its answers to those various bases. The agreed dates of employment are from 25 January 2011 to 18 December 2019.

3. On 18 November 2020, the tribunal made six orders following a telephone case management Preliminary Hearing on 16 November. The first was that the claim should proceed to a final hearing on the discrete single issue of whether the respondent was in breach of contract in respect of the claimant's entitlement to be paid annual leave as that claim was identified in particular paragraphs of the statement of claim. That claim of breach of contract was one of the various bases on which the claim was made. The second order from 18 November was to fix 22 January 2021 as the date for that hearing. It ultimately proceeded before me on 12 February 2021 instead.

4. By email on 20 January 2021 the claimant sought to amend his claim. That (opposed) application was allowed by me on 12 February at the start of the hearing (with one exception). The effect of the permitted amendment was to clarify that the "*contract claim*" (the claim of breach of contract) was limited to the relatively short period from 23 January 2019 to 18 December 2019. The respondent was permitted time to answer the amendment.

5. On 30 March parties were sent my judgment and reasons from the hearing on 12 February. That judgement refused and dismissed the breach of contract claim for that limited period.

6. On 19 April the respondent amended its Grounds as permitted on 12 February.

7. The case next came for a hearing (telephone, preliminary) on 2 July before EJ O'Dempsey. He noted the listing for this hearing as being on liability only "and *the judge will give directions for remedies at the end of the decision on liability as necessary'* (Order 2). He also ordered for this hearing:-

1. Updated statement of agreed facts	by 18 October
2. Claimant to update the hearing bundle	by 25 October
3. Skeleton arguments	by 1 November

8. The Preliminary Hearing on 2 July also considered what its Note described as an *"inchoate application"* to strike out aspects of the claim. At the same time, the Note recorded the claimant's intention to further amend his pleadings.

9. Both the intended amendment and the strike out application (which appears to have crystallised on 9 July into an attack on all remaining claims) were considered at a Preliminary Hearing before EJ Murphy on 6 September. She refused the application to strike out *"all extant claims"* in a judgment and reasons issued on 17 September. She made deposit orders in relation to (i) a claim under Regulation 16 of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 and (ii) a claim under the Working Time Regulations 1998. She allowed the claimant's amendment, which was the one change excepted on 12 February and mentioned at paragraph 4 above.

10. Following the hearing on 6 September, EJ Murphy separately made case management orders to regulate further procedure. One of them was to list the case for a further telephone conference case management preliminary hearing. It duly took place on 12 October before EJ Campbell. He made various orders to do with preparation for this hearing. One of them was that by 3 November parties were to agree a list of issues. Another was that by the same date parties were to prepare a statement of agreed facts.

11. Both the statement of claim and the grounds of resistance have been amended twice since the claim was presented. In that time, the February 2021 final hearing disposed of the discrete breach of contract claim. Two bases of claim were not pursued following the making of the deposit orders (see paragraph 9 above). I have struck them out. Both parties' amended pleadings distinguish between (i) the contract prior to 23 January 2019 *("the 2011 contract')* and (ii) the contract after that date *("the SEA").*

12. The latest statement of claim records that it was amended on 20 January and 11 October both 2021 **(pages 29 to 32).** I noted at paragraph 75 of EJ Murphy's reasons from the Preliminary Hearing on 6 September that the claimant had been permitted to amend paragraph 16 to replace *"four weeks"* in the last two appearances of that phrase with the words *"thirty days"* That change was not replicated in the bundle version. I assume that it should have been and considered the claim on that basis.

13. The respondent's skeleton argument referred at various paragraphs to the decision of the EAT in the case of ***Smith v Pimlico Plumbers Limited*** since reported at [2021] I.C.R. 1194 and [2021] LR.L.R. 654. On 1 February 2022, judgement was handed down in that case by the Court of Appeal, [2022] EWCA Civ 70. 1therefore invited the parties to make any written submissions they considered appropriate concerning the issues and submissions in this case by 21 February in light of the judgment of the Court of Appeal. Both did, and I have considered them including the respondent's email of 3 March.

14. It is convenient to summarise the extant bases of claim from the claimant's statement of claim as they remain after the hearing on 6 September and reflecting the fact that two are struck out following the claimant's failure to pay deposits. They are:-

    1. A statutory entitlement to paid annual leave of at least four weeks from the start of his employment (25 January 2011) to 17 March 2014 (derived from Regulation 12 of the Merchant Shipping (Hours of Work) Regulations 2002)(paragraph 12 of the statement of claim)

2. A statutory entitlement to paid annual leave of 38 days from 17 March 2014 to 5 April 2018 (derived from Regulation 12. of the 2002 Regulations following amendment to it by the Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014 (also paragraph 12 of the statement of claim)

3. A statutory entitlement to paid annual leave of 38 days from 6 April 2018 to the end of his contract (18 December 2019) (derived from Regulation 15 of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 (again, paragraph 12).

4. *"Furthermore"* he says he has sustained a series of unlawful deductions from wages in terms of section 13 of the Employment Rights Act 1996. This basis is pled in paragraph 12.

5. In the period between 17 March 2014 and 23 January 2019 a claim for 10 days' paid annual leave based on the claimant's statutory entitlement. The premise behind this basis is that even assuming that the 2011 contract provided for *some* paid annual leave in that period, it provided only for 28 days, 10 days less than 38 days required by the statutory regime. This is paragraph 13 of the statement.

6. *"Further and separate!/* (paragraph 16) and on the basis that *"Every seafarer shall be entitled to paid annual leave of at least four 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 Jieu except where the employment relationship is terminated"* he asserts that; he was entitled to be paid for 30 days of his annual leave entitlement on the basis of his normal/average earnings; during periods of working time he normally received additional payments in respect of overtime and weekend work; and he did not receive a payment for 30 days of his annual leave entitlement *"which had regard to these additional payments"* That entitlement is

said (it appears) to derive from clause 16 of the European Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers. Paragraph 16 continues that the claimant has sustained a series of unlawful deductions (referring to section 13 of ERA 1996). The inference is that for 30 days of each holiday year he has a claim insofar as those *"additional payments"* were not reflected in what was paid to him for them.

The issues for this hearing

15. By the start of the second day of this hearing (9 November), Mr Lawson was able to say that the list of (13) issues presented by Mr Moore on 8 November was agreed. I set them out *verbatim,* albeit they include a degree of repetition. They are:-

1. Did the Respondent fail to provide the Claimant with annual leave for a minimum of 2.5 calendar days per month of employment and pro rata for incomplete months, plus 8 additional days and pro rata for incomplete years, as required by Regulation 12 of the Merchant Shipping (Hours of Work) Regulations 2002, as amended by the Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014, and with effect from 6 April 2018, as required by Regulation 15(1) of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018, in relation to the period up to the date of implementation of the SEA dated 23 January 2019?

2. Did the Respondent fail to provide the Claimant with annual leave for a minimum of 2.5 calendar days per month of employment and pro rata for incomplete months, as required by Council Directive 1999/63/EC, as amended by Council Directive 2009/13/EC, in relation to the period up to the date of implementation of the SEA dated 23 January 2019?

3. Did the Respondent fail to pay the Claimant for his annual leave entitlement calculated on the basis of a minimum of 2.5 calendar days per month of employment and pro rata for incomplete months, derived from Regulation 12(1) of the Merchant Shipping (Hours of Work) Regulations 2002, as amended by the Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014, and with effect from 6 April 2018, from Regulation 15(1)(a) of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 in relation to the period (i) up to the date of implementation of the SEA dated 23 January 2019, and (ii) from the date of implementation of that SEA to the termination of the Claimant's employment on 18 December 2019?

4. Did the Respondent fail to pay the Claimant for his entitlement to additional paid annual leave of eight days in each leave year and pro rata for incomplete years, derived from Regulation 12(2) of the Merchant Shipping (Hours of Work) Regulations 2002, as amended by the Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014, and with effect from 6 April 2018, from Regulation 15(1)(b) of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 in relation to the period (i) up to the date of implementation of the SEA dated 23 January 2019, and (ii) from the date of implementation of that SEA to the termination of the Claimant's employment on 18 December 2019?

5. Did the Respondent fail to pay the Claimant for his annual leave entitlement calculated on the basis of a minimum of 2.5 calendar days per month of employment and pro rata for incomplete months, derived from Council Directive 1999/63/EC, as amended by Council Directive 2009/13/EC, in relation to the period (i) up to the date of implementation of the SEA dated 23 January 2019, and (ii) from the date of implementation of that SEA to the termination of the Claimant's employment on 18 December 2019?

6. During his employment, did the Claimant receive his normal remuneration during the periods of annual leave to which he was entitled by virtue of Council Directive 1999/63/EC, as amended by Council Directive 2009/1 3/EC, and by domestic legislation?

7. Is the Claimant precluded by virtue of Regulation 18 of the 2018 Regulations from bringing a complaint under those Regulations due to having brought a claim under contract?

8. Is the Respondent's assertion that claims for the holiday year 2018 and any previous years cannot be maintained due to clause 9.2 of the 201 1 Contract well founded?

9. Is any claim in respect of the period 1 January 2019 to 22 January 2019 time-barred?

10. If so, should the Tribunal exercise its discretion under Regulation 26(2)(b) of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 and under section 23(4) of the Employment Rights Act 1996 on the grounds that it was not reasonably practicable for the complaints to have been brought within the relevant period.

11. Is any claim in respect of the period 23 January 2019 to 18 December 2019 time-barred?

12. If so, should the Tribunal exercise its discretion under Regulation 26(2)(b) of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 and under section 23(4) of the Employment Rights Act 1996 on the grounds that it was not reasonably practicable for the complaints to have been brought within the relevant period.

13. Is the Claimant precluded by virtue of section 199(1) Employment Rights Act 1996 from relying on Part II (Protection of Wages) of that

Act in bringing any claims in respect of the period 23 January 2019 to 18 December 2019?

Evidence

16. By 5 November 2021 parties had signed an agreed statement of facts. It contained 29 paragraphs. Much of it replicated the agreed statement of facts from the February hearing.

17. There was a jointly prepared bundle of documents of 232 pages.

18. I heard evidence from the claimant, from Anthony Drake, the respondent's marine operations manager, and from Timothy Springett, policy director at the UK Chamber of Shipping. Mr Springett spoke to a signed witness statement dated 1 November 2021. All were cross-examined.

Findings in fact

19. To the extent relevant for the issues, I repeat findings from the agreed statement of facts dated 5 November. To the same extent, I repeat findings from the hearing on 12 February. Page references in bold are to the bundle for this hearing. I found the following facts agreed, admitted or proved based on the agreed statements, the pleadings and the evidence from the three witnesses.

20. The Claimant was employed by the Respondent as a Deckhand **(page 115).** His employment commenced on 25 January 201**1 (pages 98 and 115).** The Claimant principally worked on the Respondent's workboat *Lesley M.*

21. A written contact (the 2011 contract) **(pages 98 to 104)** was issued to the claimant at the outset of his employment. It bears to have been signed on 28 April 2011. It provided (paragraph 6) for a basic rate of pay of £8.50 per hour, paid weekly in arrears.

22. From 26 February 2015 until 18 December 2019, he worked exclusively on the Respondent's workboat *Lesley M.*

23. *Lesley M* is British-registered as belonging to the port of Glasgow **(page 132).** She is licensed to operate up to 60 nautical miles from a safe haven **(page 136).**

24. A Maritime Labour Certificate and a declaration of Maritime Labour Compliance confirming that the vessel met the standards of the International Labour Organization Maritime Labour Convention 2006 was issued by the Society of Consulting Marine Engineers and Ship Surveyors, the certifying authority authorised by the Maritime and Coastguard Agency **(pages 136-143).** The Maritime and Coastguard Agency is an executive agency of the United Kingdom sponsored by the Department for Transport. It produces legislation and guidance on maritime matters and provides certification to seafarers.

25. The Claimant ordinarily worked a regular roster of equal Time On/Time Off.

26. From the commencement of employment on 25 January 2011 until 23 January 2019 the 2011 contract was not specific as to the number of days he was to work per year **(page 99).** He worked equal time on/time off for the majority of that time, on either a 3 weeks on/3 weeks off or a 4 weeks on/4 weeks off cycle.

27. Clause 9 of the 2011 contract provided for Holidays and Holiday Pay **(page 101).** It set out that the claimant's *pro rata* entitlement based on the number of hours he worked was a maximum of 28 days holiday in each year. The holiday year was said to be the calendar year. Given the claimant's working pattern, clause 9 required him to take his leave when he was not on board the ship. The claimant understood from it that because he worked for 6 months of the year and had the other 6 months off, he had the latter period in which to take holidays. He also understood that the reference to a maximum of 28 days paid holiday in each year was so that everything was "above *board',* meaning that the respondent was trying to keep the contract *"legitimate"* In the first two or three years of his employment the claimant did not make written requests for holidays. His understanding was that he was not required to do so. If he intended to go on holiday abroad then as a matter of courtesy he

advised the respondent of the dates. He did so in order to ensure that the respondent was in agreement that he could be abroad on those occasions and would not therefore be available to cover for colleagues or to attend training.

28. In February 2015 the claimant emailed Tracey Beman the respondent's travel and manning co-ordinator **(pages 105 and 106).** He did so requesting that he go on holiday from 28 February for two weeks. In the emails he noted that the intended period fell within a leave period. He did so because Ms Beman dealt with travel, rotas and crew changes for the respondent.

29. On **4** January 2016 the claimant again emailed Ms Beman **(page 108).** In that email he advised that he had booked his *"holidays away"* for the year. The emailed specified the periods as being (i) 27 March to 18 April and (ii) 21 May to 4 June. In the email the claimant advised that *"all times"* were during his leave. He advised her that despite that fact, she might want to know them anyway.

30. On 9 January 2017 Ms Beman emailed the claimant **(page 109).** Its subject heading is ***"RE: John Anderson holiday form".*** It says *"Approved John, thank you".* It is a reply to the claimant who had emailed her earlier that day saying, ***"……I am sorting out holidays today, the dates are all during my leave is this ok to book flights?"*** Those emails bear to exchange a completed pro forma holiday request form **(page 111).** The form bears to show that Ms Berman approved a period of 15 days holiday in the period 16 to 30 June 2017. The claimant understood that the purpose of the form was to alert the respondent to periods of time that its employees were going to be out of the country. He believed that the purpose in doing so was to let the respondent ~~know for purpose~~ **of** ~~mar~~ **ging** ~~cover~~ **for** ~~absent: and for ar~~ **ainging** training.

31. Any training undertaken by the claimant was usually done, on occasional days, while on leave. Every five years he was required to re-validate certification under Standards of Training, Certification, and Watchkeeping (STCW) scheme. Time spent doing so was in time off.

32. On 16 February 2018 the claimant emailed to Ms Berman a request for holidays **(page 112).** He did so by sending a form **(page 114)** which sought 21 days holiday in the period from Friday 23 March to 13 April 2018. On 16 February there was a two email exchange between the claimant and a colleague, Pamela. In it, she said that she had spoken to Ms Berman who was happy for him to go ahead and book that holiday **(page 112).** The claimant' payslip dated 29 March **(page 174)** shows that he was paid for 48 hours of basic pay, for 8 hours on leave and for 3 hours *"stay onboard".* His payslips dated 6, 13 and 20 April each show that he was paid as being on leave for 40 hours in each of those weeks **(pages 172 and 174).**

33. On the various occasions of email communications with Ms Berman about holidays, the claimant was going on holiday abroad.

34. On 22 June 2018 Stuart Gladwell signed a declaration to do with the *Lesley M* following an inspection on 31 May that year **(page 136).** The declaration is to the effect that he has reviewed certain measures and determined that they met the purposes set out in the Maritime Labour Convention 2006 Standard A5.1.3 paragraph 1.

35. A related document **(pages 137 to 142)** bears to record that Mr Gladwell is the CEO of the Society of Consulting Marine Engineers and Ship Surveyors (SCMS). It is a *"Document of Compliance"* for the *Lesley M.* It bears a declaration signed by M Lankford, the Inspector of the ship. It also bears a declaration signed by Mr Gladwell. The document sets out a number of Mandatory Inspection Items (numbered 3.1 to 3.15) Guidance to each item is provided in italics. In general they cover various matters to do with the seafarers on board the vessel. They all require answers to various questions, those answers being indicated *"yes", "no"* or *"N/A".* It has an appendix **(page 143).** It also bears Mr Lankford's signature.

36. Item 3.4 of the Document of Compliance is headed *"Seafarers' Employment Agreements"* Item 3.4.1 *"The SEA complies with the minimum standards"* Item 3.4.2 says *"The company has a system for ensuring all seafarers it employs have an SEA"* 3.4.3 says *"Occasional staff have a contract of*

employment." The document records the answer *"yes"* to each of those sub-items.

37. The Guidance to 3.4.1 says, *"Shipowners and all seafarers working on vessel must have a signed original SEA (Seafarer Employment Agreement) meeting the minimum requirements in MHN 477 (M) on Seafarer Employment Agreements. MCA have posted a model format of a SEA on their website at http://www. gov, uk/guidance/mic-2006-titles- 1-to-5-regulations-guiance-and- information The SEA and any document forming part of the SEA, if they are not in English should be available onboard with an English translation. Seafarers shall be given a document in English containing a record of their employment on the ship. The SEA must specify arrangements for termination, which must provide for at least 7 days' notice by the shipowner and the seafarer; the shipowner must be required to give as much notice as the seafarer. Seafarers must be given a minimum of 2.5 days per month paid leave and a further 8 days in lieu of UK holidays. Seafarers are to be granted shore leave to benefit their health and well-being consistent with the operational requirements of their positions."* The Appendix states, *"An Approved SCMS surveyor has attended the vessel and confirms compliance to the following under the Maritime Labour Convention Regulations".* One of those items is *"Seafarer Employment Agreements."*

38. At the time of the inspection and declaration there was no signed SEA between the claimant and the respondent.

39. The payslips produced for the period up to 28 September 2018 were weekly (reading backwards **pages 185 to 161).** They disclosed basic pay at a rate per hour along with the number of hours worked at that rate. In the period after **28** September 2018 the payslips produced were monthly **(pages 101 to 154).**

40. The wage slip dated 13 July 2018 while on board ship **(page 167)** shows payments of basic pay and payments for working on a Saturday, a Sunday and Onboard abroad. The wage slips dated 3 and 10 August 2018 **(page 165)**

shows a payment of each for "On *leave".* Net pay while on board is significant more than on leave net pay.

41. With effect from 23 January 2019, the Claimant's terms and conditions of employment were set out in a Seafarer Employment Agreement (the SEA) **(pages 115-118)** and in Standard Terms and Conditions of Contract for Seafarers **(pages 119 — 131).**

42. On 19 January 2019 the SEA was signed by the claimant He signed it while at home, in Helensburgh. On 23 January it was signed by a Jean Marshall for the respondent.

43. With effect from 23 January 2019, the claimant's annual salary (leaving aside any additional payments for weekday overtime or weekend working) was £26,650.

44. In the period from 31 October 2018 to 29 November 2019 the claimant's payslips represented that his basic pay per month was £2220.83, one twelfth of that annual salary.

45. With effect from 23 January 2019, his contractual obligation was to work at least 182.5 days per year **(page 118).**

46. During his last year of employment his working routine was generally 4 weeks on/4 weeks off. In the latter years of the Claimant's employment, the normal crew changeover day was a Wednesday.

47. However in September to December 2019 **(page 151):**

    1. he worked 3 weeks on - joining on Wednesday 4 September, leaving on Wednesday 25 September;

    2. he joined again on Saturday 19 October, leaving on Wednesday 13 November

    3. he was not on-board a vessel from then until his effective date of termination of employment on Wednesday 18 December.

48. The 2011 Contract did not meet the standards prescribed by Regulation 9 of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014.

49. The Standard Terms as given to the Claimant with the SEA in January 2019 remained unaltered until the termination of his employment. No variations were issued to him.

50. The claimant took holidays in October 2019. They were taken at a time when he was on shore, that is, not in a period of *"Time On"* board the vessel.

51. On 20 November 2019, whilst on Time Off, the Claimant tendered his resignation. The Claimant e-mailed Mr Tony Drake, Operations manager of the Respondent: *"Subject: Notice period Hi Tony, I hope this finds you well. I am planning on submitting my resignation time for a change, something ashore and less hours. What notice period would you be requiring from me?"* Mr Drake replied: *"Hi John That's really sad news, you will need to provide 4 weeks' notice, please feel free to pop in and discuss as I am in the office in Rosneath today that's if you feel we can do something to persuade you not to leave and worth a chat..."* The Claimant replied: *"Hi Tony, Please accept this as my resignation. I will give 4 weeks' notice as of today. I have put a lot of thought into this decision and it has not come easily, my time with GSS is some of the happiest and enjoyable times I have experienced and will always be appreciated. I would like to thank you personally for all you have done for me during my time with GSS and hope there are no hard feelings over my decision. But it's time for a change and I need to be spending more time at home and working less hours and have been offered an opportunity that allows that."*

52. The Claimant's last day of work on board ship was 13 November 2019 **(page 151).** That was the last day of a 25 day continuous period of Time On. The effective date of termination of the Claimant's employment was 18 December 2019.

53. The Claimant was on Time Off continuously for 35 days and on continuous pay from his last day of work on board ship (13 November 2019) up until the effective date of termination of employment.

54. During his final calendar year/Leave Year of employment (from 1 January 2019 up to and including 18 December 2019) the Claimant worked a total of **1**58 days of Time On and had **1**94 days of Time Off **(page 151).**

55. Sometime in the summer of 2019 the claimant joined UNITE, the union. He did so around the time that he started looking for a job different from his employment with the respondent.

56. Prior to September 2019, the Claimant did not make a request to take paid annual leave during a period of Time On.

57. At no time during his employment with the Respondent did the Claimant: (a) raise any grievance asserting an entitlement to paid annual leave and more specifically asserting an entitlement to take time off as paid annual leave outside of and/or in addition to Time Off, either under the Onboard Complaints Procedure or under the Respondent's Grievance Procedure; (b) raise informally with the Respondent's management either orally or in writing the issue of an entitlement to paid annual leave and more specifically an entitlement to take time off as paid annual leave outside of and/or in addition to Time Off; or (c) raise by way of formal complaint or grievance or assert informally any claim for any payment or additional payment in respect of paid annual leave.

58. **Pages 154 to 185** are the claimant's payslips in respect of pay from the respondent for the period 3 November 2017 to 31 December 2019. Certain of them (for example **page 170)** show payment for *"Stay Onboard".* They were paid as hardship payments for being on board ship in domestic waters. Others of them (for example **page 163)** show payment for *"Onboard abroad'.* They were paid as hardship payments for being on board ship outside domestic waters. After 28 September 2018 when payslips produced were monthly the claimant understood that those payments were included in his salary.

59. **Pages 144 to 151** are indexed in the joint bundle as the claimant's record of work and leave. It bears to cover the period January 2012 to December 2019. Prior to this hearing, the claimant had not seen it before.

60. Following the end of his contract, and in a conversation sometime in January or February 2020 with an ex-navy friend about his future, the claimant was asked if he had sorted out with the respondent the question of holiday pay. Prior to that conversation he was not aware of the possibility of a claim for holiday pay. His understanding had been that he did not get holiday pay. He then spoke with his trade union about three weeks or a month later. The union explained that there was reason to look into the issue. That discussion resulted in the bringing of these proceedings.

61. On 17 March 2020 ACAS received notification of early conciliation. That date is three months (less one day) from the claimant's effective date of termination. The certificate was issued on 1 April 2020.

62. On 30 April 2020 the ET1 was presented.

Comment on the evidence

63. The agreed statement of facts did not materially differ from the version agreed in February 2021.

64. The evidence of Mr Springett was largely explanatory of the background to some aspects of the legislation. He gave some opinion evidence on a document of compliance pertaining to the vessel dated 22 June 2018 **(pages 137 to 142).**

Submissions

65. Written skeletons were lodged and exchanged in time for the start of the hearing on 9 November. Both parties spoke to their respective skeletons. I consider what is said in them below in answering the issues.

66. In summary, the claimant first outlined the relevant legislation and relevant caselaw, proposed 9 findings in fact; set out the relevance of the Working

Time Directive to the Seafarers Directive then suggested how each of the 13 issues should be answered.

67. The respondent also suggested answers to each of the issues. It prefaced those suggestions with an attack on the whole claim which comprised three parts. That attack sought to compartmentalise the claim into three time periods which together spanned its whole period. First, the effect of my judgment in February 2021 is to preclude the claimant from maintaining a statutory claim (relying on Regulation 18 of the 2018 Regulations) for the period 23 January to 18 December 2019. This is in effect a replica of issue 7. Second, all statutory claims for the period prior to that date are time barred (on one or other of two arguments). Issues 9 to 12 address the question of time bar. It seems to me that this second attack reaches further than the periods of time covered by them. Third, the *"only claims"* then left are for any underpayment in the December 2019 salary payment (31 December 2019, **page 154)** which is (it is said) is subject to (i) the first attack and (ii) an argument that the claimant was overpaid salary and thus liable to a deduction from that last wage.

Law

68. The parties lodged a joint indexed list of legislation. I repeat it here. I had regard to all of it, although some parts were more relevant than others.

1. Council Directive 1999/63/EC concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST).

2. Council Directive 2003/88/EC concerning certain aspects of the organisation of working time.

3. Council Directive 2009/1 3/EC implementing the Agreement Concluded by the European Community Shipowners' Association (ECSA) and the European Transport Workers' Federation (ETF) on

the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC (excluding appendices).

4. The Merchant Shipping (Seamen's Wages and Accounts) Regulations 1972 - sections 1-8.

5. Merchant Shipping Act 1995 - section 85,

6. Employment Rights Act 1996 - sections 13, 23, 26, 199, 23.

7. Employment Rights Act 1996 [sections 196 to 201] as originally enacted.

8. Working Time Regulations 1998 - regs. 2, 13, 13A, 16, 17, 18, 30.

9. Merchant Shipping (Maritime Labour Convention) (Minimum Requirement for Seafarers etc) Regulations 2014- regs. 10 and part 2 of Schedule 1.

10. The Merchant Shipping (Maritime Labour Convention) (Consequential and Minor Amendments) Regulations 2014 - regs. 2 and 5.

11. Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 - regs. 15, 16, 18, 26.

12. MGN 477(M).

13. MSN 1877 (M) Amendment 1 - summary and para.10.

69. The claimant produced an indexed list of 10 authorities all of which I considered in the context of his skeleton and submission. It contained :-

1. *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 436.

2. *Smith v A J Morrisroes & Sons Ltd* [2006] IRLR 72.

3. *Robinson-Steele v R D Retail Services Ltd* [2006] IRLR 386.

4. *British Airways pic v Williams* [2012] ICR 847.

5. *Lock v British Gas Trading Ltd* [2014] ICR 813.

6. *King v Sash Window Workshop* [2018] ICR 693.

7. *Hayford & Biddle v P&O Ferries Ltd* UKEAT/0027/20/AT (now reported at [2022] ICR 49).

8. *Revenue and Customs Commissioners v Stringer* 2009 ICR 485 HL.

9. *Ekwelem v Excel Passenger Service Ltd* UKEAT/0438/1 2/GE.

10. *Wall's Meat Co Ltd v Khan* [1979] ICR 52.

70. The respondent produced copies of and referred to ***Smith v Pimlico Plumbers Limited*** [2021] EAT UKEAT/021 1/19/DA.UKEAT/0003/20/DA UKEAT/0040/20/DA (now reported at [2021] ICR 1194 and [2021] IRLR 654) and ***Somerville v Medical Probationers Tribunal Service*** [202 1] EATUKEAT/0257/20/RN(V).

Discussion and decision

71. In light of the various bases of claim, it is convenient to decide them by answering the agreed issues. Given the respondent's approach in its oral and written submission, I take them out of order.

72. Before doing so, and as the claimant recognised in his written submission, seafarers are excluded from the Working Time Directive and the Working Time Regulations. Instead, the Directive which applies to them is Directive 1999/63/EC (as amended by Directive 2009/1 3/EC (the *"Seafarers Directive").* The domestic regulations are the Merchant Shipping (Maritime Labour Convention) (Minimum Requirement for Seafarers etc) Regulations 2014 and the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018.

Issue 7 - Is the Claimant precluded by virtue of Regulation 18 of the 2018 Regulations from bringing a complaint under those Regulations due to having brought a claim under contract?

73. Regulation 18 provides, *"Where during any period a seafarer is entitled to hours of rest or paid leave both under a provision of these Regulations and under 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 particular respect, the more favourable"* In summary the respondent argues that by electing to enforce his rights to *"leave"* and payment for it by insisting on the *"breach of contract'* claim decided here in February the natural reading of regulation 18 now precludes him from maintaining his *"statutory [1]* right to leave and pay for the same period, 23 January 2019 to 18 December 2019. The claimant's answer is to; rely on text and caselaw under the similar provision (regulation 17) of the Working Time Regulations; argue that their wording does not support the respondent; and to note that no authority supports it. I agree with the claimant. In my view regulation 18 clearly anticipates contemporaneous exercise of the rights, by which I mean while the relationship is ongoing. That seems to me to be clear from the expressions, *"during any period a seafarer is entitled to hours of rest or paid leave"* and *"in taking hours of rest or paid leave during that period'.* Separately, it appears to me that the purpose of the regulation is to clarify that a seafarer cannot seek to *"double"* his entitlement by relying on the regulations and, separately, his contract

Issue 13 - Is the Claimant precluded by virtue of section 199(1) Employment Rights Act 1996 from relying on Part II (Protection of Wages) of that Act in bringing any claims in respect of the period 23 January 2019 to 18 December 2019?

74. Section 199(1) of the 1996 Act (which came into force on 13 April 2018) provides that *"Sections 1 to 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"* In this case the question becomes; in that period, was the claimant employed under an

agreement specified in regulations under section 32(a)? And based on the respective positions it narrowed to be whether the claimant's SEA met the requirement (from paragraph 4 of Part 2 to Schedule 1 of the regulations) to provide for "... *paid leave (either the amount or the formula to be used in determining it)".* The claimant argued that there is no such reference in the SEA (either directly or by reference to another document) and in particular the reference in it to *"flag state legislation"* does not satisfy the requirement; and further, the word *"formula"* suggests a need to identify both the amount of leave and how payment for it is to be calculated. The respondent says in answer that (i) there is no need to specify how paid annual leave is to be calculated, the focus is on the amount of that leave and (ii) reference to flag state entitlement does so *"with precision".* In February 2021 I decided that *"Clause 26 (in Part B)* [of the SEA] *makes express provision for Paid Annual Leave. 26.2 expressly provides that entitlement to "paid annual leave [1]" is as stated in Appendix A of the SEA. It in turn provides for 30 days or in accordance with the flag state legislation. It was agreed that in this case the flag state provided 38 days"* In my view, the word *"formula"* in this context provides an alternative method (to the actual amount) of paid leave to which a seafarer is entitled. Further, reference to the flag state legislation is sufficient to be the formula. Paragraph 2.2 of Part A of the SEA says, *"Unless the context otherwise requires, references in these terms and conditions of engagement to 'Flag State' are to nationality of the state whose flag the vessel to which the Seafarer is the time being assigned is entitled to fly (Flag State)"* The formula is therefore the nationality of the state whose flag is flown by the vessel to which the seafarer is assigned. The Claimant is therefore precluded by virtue of section 199(1) of the 1996 Act from relying on Part II of that Act in bringing any claims in respect of the period 23 January 2019 to 18 December 2019.

Issue 1 - Did the Respondent fail to provide the Claimant with annual leave for a minimum of 2.5 calendar days per month of employment and pro rata for incomplete months, plus 8 additional days and pro rata for incomplete years,

- **as required by Regulation 12 of the Merchant Shipping (Hours of Work) Regulations 2002, as amended by the Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014, and**

- **with effect from 6 April 2018, as required by Regulation 15(1) of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018, in relation to the period up to the date of implementation of the SEA dated 23 January 2019?**

75. This question is about the provision of leave in the period prior to 23 January 2019 in contrast with pay for it (see the contrast in issue 3). In the period of the claimant's employment up to 16 March 2014, Regulation 12 of the 2002 Regulations provided that *"(1) A seafarer is entitled to paid annual leave of at least four weeks, or a proportion of four weeks in respect of a period of employment of less than one year. (2) Leave to which a seafarer is entitled under this regulation —(a) may be taken in instalments; (b) may not be replaced by a payment in lieu, except where the seafarer's employment is terminated."* Between 17 March 2014 and 5 April 2018 those amended 2002 Regulations entitled him to paid annual leave calculated on the basis of two and a half days for each month of employment in the leave year and pro rata for incomplete months and an additional paid leave of eight days in each leave year and pro rata. From 6 April 2018, Regulation 15(1) of the 2018 Regulations replicated that entitlement. The claimant's submission was that "*The 2011 Contract provided for 28 days of annual leave (J101). From 17 March 2014 the claimant was entitled to 38 days of annual leave. Thus, in the period from that date to 23 January 2019, the respondent failed to allow the claimant to take an additional* 10 *days of annual leave per annum."* The inferences from his submission are (i) in the period from the start of his employment to 17 March 2014 the statutory annual leave entitlement was met by the 2011 contract and (ii) in the period between 17 March 2014 and 23 January 2019 the statutory annual leave entitlement was met by that contract to the extent of 28 of the 38 days. The respondent's short reply is that the claimant's work pattern provided substantially more days of leave that was

required by the Regulations. In ***Hayford,*** the claimants were seafarers who worked on a ferry sailing between Dover and Calais. In any given year, they each had a certain number of weeks during which they were rostered to work on the vessel, and a certain number of weeks during which they were on shore. Their claim was brought under the same Regulations as relied on by the claimant in this case. The employment tribunal found that (referring to the decision of the Supreme Court in ***Russell v Transocean International Resources Ltd*** [2012] ICR 185) by analogy with ***Russell,*** P&O Ferries provided entitlement for annual leave during periods when the claimants were not rostered to work (paragraph 34 of the EAT report). The EAT in ***Hayford*** considered the issue at paragraph 94. It records a question as being, 'Were *the claimants afforded (at feast) the 38 days' leave in each year that they had accrued?"* As to that question the EAT said "… *there was an issue before the tribunal as to whether weeks when the claimants were not rostered on the vessel could be counted towards the statutory leave entitlement. As we have seen, in light of Russell the tribunal concluded that the shore days could generally all be counted as leave days. While, as I was shown, only some of these days were designated as leave days (up to the maximum contractual leave entitlement in each case) the tribunal concluded that all shore days could in fact be treated as leave days, in the Russell sense, as the claimants were able to rest from work on them. Those conclusions were not challenged on appeal, and, in my judgment, were plainly right."* Earlier in ***Hayford*** (paragraph 21) the EAT noted that in Russe/Z the claimants' " …*work patterns typically involved alternating two or three weeks on the installation with two or three weeks' shore leave. The issue was whether they could be required to take the paid annual leave to which they were entitled under the* [Working Time Regulations 1998] *during periods when they were on shore. The Supreme Court (Lord Hope of Craighead DPSC, the other justices agreeing) held that a rest period did not have to meet any qualitative requirement over and above that it not be working time (para 21); the contractual relationship persisted throughout the year and the working pattern was a product of it (para 34); a period when the claimants were onshore therefore counted as a rest period (para 36); and the employer was therefore entitled to insist that they*

take their leave during onshore breaks (para 38)" That analysis appears to me to be the short point made by the respondent in this case. In my view and considering both ***Russell*** and ***Hayford,*** the respondent did not fail to provide the Claimant with annual leave in accordance with his entitlement as per the various regulations in the period identified in issue 1.

Issue 2 - Did the Respondent fail to provide the Claimant with annual leave for a minimum of 2.5 calendar days per month of employment and pro rata for incomplete months, as required by Council Directive 1999/63/EC, as amended by Council Directive 2009/1 3/EC, in relation to the period up to the date of implementation of the SEA dated 23 January 2019?

76. Like issue 1, this concerns *"leave"* as distinct from *"pa/.* The respondent simply and shortly relied on its answer to issue 1. Mr Lawson accepted that this issue arose only if he did not succeed on issue 1. In his written submission, the claimant asserts that Clause 16 of the Seafarers Directive, as amended, entitled the claimant to 2.5 days of leave per month - i.e. 30 days of annual leave. Council Directive 2009/1 3/EC entered into force on the date of entry into force of the Maritime Labour Convention 2006, on 7 August 2014. Thus, in the period from that date to 23 January 2019, the respondent failed to allow the claimant to take an additional 2 days of annual leave per annum. The issue is therefore concerned with an allegation of a failure to provided 2 additional days leave per annum in the period 7 August 2014 to 23 January 2019. It appears to rely on the European Directive for the right to them. Article 2 of the later Directive provides, *"The Annex to Council Directive 1999/63/EC is amended as follows",* then sets out a number of amendments. One of them (Clause 5) sets out amendments to Clause 16 to the Annex. Article 1 of the 1999 Directive provides that its purpose is to put into effect the Agreement on the organisation of working time of seafarers concluded on 30 September 1998 between the organisations representing management and labour in the maritime sector (ECSA and FST) as set out in the Annex. Article 3 of the 1999 Directive provides that *"Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive".* Clause 16 of the Annex (referred to by the claimant) provides,

"Every seafarer shall be entitled to paid annual leave. The annual leave with pay entitlement shall be calculated on the basis of a minimum of 2,5 calendar days per month of employment and pro rata for incomplete months. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated" Strictly speaking Clause 16 is of the Annex, not the Directive. The Seafarers Directives are implemented by the domestic Regulations. That all said, the respondent did not fail to provide the Claimant with annual leave in accordance with this entitlement for the reasons set out in answer to issue 1.

Issue 3 is set out in full at paragraph 15 above.

77. Leaving aside its repetition of the various regulations, the question is; did the respondent fail to pay the claimant for his annual leave entitlement of 2.5 days per month (and pro rata) in two distinct periods of time, albeit they are consecutive and cover the whole period of his employment. The focus on 2.5 days distinguishes this issue from issue 4. As I read his written submission, the claimant makes four points. First, from 17 March 2014 he was entitled to 30 days leave, he was not given the opportunity to take 10 of them and was not paid for the other 20 *"ostensibly provided for in the 2011 contract."* Second, he was not paid his *"normal remuneration",* examples left out of account being payments for working on Saturdays or Sundays. Third, "As *a matter of fact, all leave taken by the claimant was taken during"* periods when he was not rostered to be on the vessel. Fourth (and separately); the facts require to be categorised as per the categorisation set out in ***Marshalls Clay Products Ltd v Caulfield*** [2004] ICR 436; this is a *"category 3* ***case"*** *or* even if a category 4 case it *"falls foul"* of the regulations. The respondent's written position is that there was no failure to pay because he was being paid throughout, and the question of the amount of pay is properly dealt with in issue 6. Mr Moore's oral submission was that this is not a ***Marshalls Clay*** case.

78. In my view the focus of this issue is on an allegation of a complete failure to pay for the claimant's annual leave entitlement as per the formula referred to

in the whole of his employment. I agree that the question of whether *the amount* of that pay was correct is better addressed at issue 6. The claimant does not appear to squarely address the question in issue 3. I note however that he accepts that the leave that he took occurred in periods off the vessel. It does not appear to be disputed that the claimant was, throughout his employment, in receipt of pay. While not clearly expressed in clause 9, the 201 1 contract suggests that time taken as holiday (expressly stipulated as to be taken while not on board) is paid. Under the SEA, I decided in February that the claimant is paid for Leave as part of his Salary, which is paid equally throughout the year. Separately, the decision of the EAT in ***Marshalls Clay*** does not assist in answering this question. I did note however that at paragraph 15 the EAT says, *"The normal contractual arrangements, whereby employees are paid, for example, monthly, and then make arrangements to take their annual leave and continue to be paid during it, are obviously category 5 contracts"* On my analysis to answer this issue I did not require to decide if the circumstances of this case fell into any category. However, it seems to me that if categorisation was necessary this case is also in category 5. I therefore do not agree with the claimant's assertion that neither contract here is category 5. While he is correct that they do not allocate holiday pay to specific periods, they do provide payment during holidays. In my view therefore the answer to issue 3 is "no".

Issue 4 is also set out in full at paragraph 15 above.

79. Leaving aside again its repetition of the various regulations, this question is; did the respondent fail to pay the claimant for his entitlement to additional paid annual leave of eight days in each leave year (and pro rata) in the same two distinct but consecutive periods of time. The focus on the 8 additional days distinguishes this issue from issue 3. But like issue 3, in my view the focus is on an allegation of a complete failure to pay. As set out above, the entitlement to additional paid leave of eight days was introduced on 17 March 2014. Prior to that date there was no such statutory right. The thrust of the claimant's submission concerns the rate of pay for those days. It does not support a conclusion that there was a complete failure to pay for them. The

respondent relies on its answer to issue 3, but again referred to issue 6 as to the appropriate rate. It is correct to say that between 17 March 2014 and 23 January 2019 (the date of the SEA) the claimant's contractual entitlement was 28 days paid holiday in each holiday (calendar) year. It is also correct to say that since 17 March 2014 his statutory entitlement was 2.5 days per month (30 days) plus 8 additional days. But on my analysis and conclusion on issue 1 considering both ***Russell*** and ***Hayford,*** the respondent did not fail to provide the Claimant with *paid* annual leave in accordance with his entitlement as per the various regulations. On that basis, the respondent did not fail to pay the claimant for his entitlement to that additional annual leave of eight days.

Issue 5 is at paragraph 15

80. This is a mirror of issue 3 (and on my view is based on an allegation of complete failure to pay) but relies on Council Directive 1999/63/EC in its original and amended form as distinct from the various domestic regulations. On my reading of the claimant's submission he makes three points. First, as per issue 3 *"excluding those authorities based on domestic law."* I take this to mean he relies only on ***Robinson-Steele*** (a decision of the ECJ). Second, By virtue of the amendment to Regulation 12(1) of the 2002 Regulations (effective from 17 March 2014) the claimant was entitled to 30 days (2.5 days for each of the 12 months of employment in a leave year) but in contrast his 201 1 contract provided for only 28 and thus he was *"at the very least'* entitled to a payment for the two days. Third, the introduction of the SEA without an increase in remuneration was a breach of the Directives as pay was *"essentially reduced."* The respondent's answer is very brief. First, there was no failure to pay. Second, on amount, see issue 6. Consistent with my view on issue 3, the focus here is on an allegation of a complete failure to pay for the claimant's annual leave entitlement as per the formula, albeit the source of that entitlement is the Directive. As set out above on issue 2, The Seafarers Directives are implemented by the domestic Regulations. The Directives are not enforceable against the respondent. For completeness, the decision in ***Robinson-Steele*** does not assist in answering this issue.

Issue 6 - During his employment, did the Claimant receive his normal remuneration during the periods of annual leave to which he was entitled by virtue of Council Directive 1999/63/EC, as amended by Council Directive 2009/1 3/EC, and by domestic legislation?

81. The claimant's position is that he did not. Combining from his written and oral submission he made three points. First, the claimant did not receive his normal remuneration when not on board. He gave examples such as payments while on board for Saturday and Sunday working. Second, the Seafarers Directive should be interpreted in the same manner as the Working Time Directive. Third, he relies on what was said in ***Williams*** at paragraphs 22, 23 and 31 and what is said about them in ***Lock.*** The respondent's written answer responds to two possible asserted claims. On the first (2.5 days per month sourced from the Maritime Labour Convention and EU Directive) the claimant must identify which days in each year were taken as those statutory holidays *"because it is only those days for which he can maintain a claim for any additional payment, based on Lock* .." On the second (8 additional days provided by the UK regulations) *"any such claim should fail as Lock ... only applies to the entitlements derived from EU Directive."* Mr Moore's oral position was that there was the potential for liability in relation to those holidays to which reference had been made on **pages 105 to 114** in the bundle, being the claimant's exchanges with Tracey Beman.

82. It appears to me that this question is more fundamental than the approach taken by the respondent. At a basic level, it relates to the whole of the period of employment while the respondent's response by implication is limited to the period after 17 March 2014 (when the 2.5 days plus 8 day entitlement was first introduced). The respondent does not appear to dispute (as the claimant argues) that throughout his employment the claimant's pay was less while on shore than when on board. Some examples are payments for Saturday and Sunday working. I am however not persuaded that the Seafarers Directive should be interpreted in the same manner as the Working Time Directive. In particular I note that ***Hayford*** held that *"while the Working Time Directive and the Seafarers Directive were animated by the same broad objectives, at the*

level of implementation it was significant that a separate Directive, itself deriving from a distinct Convention and social partners' agreement, applied to seafarers and had self-evidently been framed with seafarers' peculiar working environment, and work patterns, in mind; that, therefore, as a matter of EU law, it was not appropriate to interpret the Seafarers Directive in conformity with the principle applicable to the Working Time Directive". In his written submission, Mr Lawson adopted the argument advanced by the respondent in ***Hayford*** for his conclusion that as the Seafarers' Directive springs from the same sources as the Working Time Directive, that case-law (on the Working Time Directive) reads across. But as I read it, ***Hayford*** decided against that conclusion.

83. I had regard to **IDS Employment Law Handbooks, Volume 15 - Working Time, Chapter 6 - Exclusions and derogations, Excluded sectors,** and in particular what is said there on Sea transport at paragraph 6.10. *"The Seafarers Regulations do not specify a method of calculating holiday pay. It is relevant to note that the Civil Aviation (Working Time) Regulations 2004 SI 2004/756 similarly grant an entitlement to paid annual leave without setting out how that pay is to be calculated. In* ***British Airways pic v Williams and ors*** *2012 ICR 847, ECJ, the European Court of Justice (ECJ) held that airline pilots' holiday pay should, in principle, be equivalent to their normal remuneration. Accordingly, it was not confined to basic pay but included supplementary payments for time spent flying, as well as allowances linked to the pilots' professional and personal status. When the case returned to the Supreme Court, it was held that the Civil Aviation Regulations could be interpreted to achieve that result, and that pilots' holiday pay should be calculated by assessing average payments made over a representative reference period — **British Airways pic v Williams and ors** 2012 ICR 1375, SC. It is arguable that similar reasoning would apply in the context of the Seafarers Regulations, although this has not yet been tested. Lord Mance, giving the Supreme Court's Judgment in the **Williams** case, noted that an employer's failure to afford paid annual leave gave rise to criminal liability under the Merchant Shipping (Hours of Work) Regulations, but only civil liability under the Civil Aviation Regulations. With regard to the former, he*

considered that the likelihood of a criminal prosecution was remote, provided the employer acted in good faith when choosing a reference period for calculating holiday pay. Nevertheless, in light of the different enforcement regime, he did not rule out the possibility that the Merchant Shipping (Hours of Work) Regulations might require a different approach to the Civil Aviation Regulations." It seems to me from what was said in ***Williams*** (and the absence of authority cited in this case) that there is no authority to suggest that the Seafarers Regulations should be interpreted in a way similar or for that matter different from the Civil Aviation (Working Time) Regulations 2004 in ***Williams.*** While the question in this issue is ambiguous, I read *"entitled"* as referring to the periods of leave, not *"normal remuneration".* On that reading, and based on the arguments on both sides, the claimant did not receive his normal remuneration in those periods. I see no reason in principle why what was said in the ECJ in *Williams* should not equally apply in this case (see paragraphs 22 to 24). *"However, where the remuneration received by the worker is composed of several components, the determination of that normal remuneration and, consequently, of the amount to which that worker is entitled during his annual leave requires a specific analysis. Such is the case with regard to the remuneration of an airline pilot as a member of the flight crew of an airline, that remuneration being composed of a fixed annual sum and of variable supplementary payments which are linked to the time spent flying and to the time spent away from base. In that regard, although the structure of the ordinary remuneration of a worker is determined, as such, by the provisions and practice governed by the law of the member states, that structure cannot aspect the worker's right, referred to in para 19 of the present Judgment, to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment. Accordingly, any inconvenient aspect which is linked intrinsically to the performance of the tasks which the worker is required to carry out under his contract of employment and in respect of which a monetary amount is provided which is included in the calculation of the worker's total remuneration, such as, in the case of airline pilots, the time spent flying, must necessarily be taken into account for the purposes of the amount to which the*

worker is entitled during his annual leave. " In my view, therefore the Claimant did not receive his normal remuneration during the periods of annual leave referred to in the question.

Issue 8 - Is the Respondent's assertion that claims for the holiday year 2018 and any previous years cannot be maintained due to clause 9.2 of the 2011 Contract well founded?

84. It is convenient to consider the respondent's submission first. Clause 9.2 is, as the respondent says, a *"use it or lose if* provision. It should operate here. The thrust of the respondent's position (including its reference to MSN 1877 (M) Amendment 1, number 13 on the agreed legislation list) relates to *"leave"* as distinct from the pay to which a seafarer is entitled during it. The claimant's short answer is that both the 2002 and the 2018 regulations contain provisions which render void any attempt to exclude or limit their operation. Given my conclusions on the earlier issues, this question is academic because its answer has no bearing on the amount of remuneration to which the claimant might be entitled for the leave that he took.

Issue 9 - Is any claim in respect of the period 1 January 2019 to 22 January 2019 time-barred?

85. It is again convenient to consider the respondent's submission first. The premise behind its approach to the question is that in the holiday year which began on 1 January 2019 the first 22 days are governed by the 2011 contract, the balance by the SEA. The proportion of holidays which accrued to that point was, says the respondent, 2.3 days. It posits two approaches. First, the SEA is a new contract starting on 23 January; the 2011 contract ended on 22 January; "so *that these 2.3 days should have been paid in lieu with January 2019 salary;* that being so the claimant should have made any claim for holiday pay within the time limit from date of payment of his January salary which he did not and is thus now time-barred. Second, the entitlement which accrued to 22 January (2.3 days) was carried forward but then *"taken"* as holiday in the first period of leave (which it says was in February into March). The claimant says in answer that *"the basis on which it is said that this aspect*

of the claim is time-barred are not clear" But he goes on to argue that if there have been unlawful deductions they form part of a series (irrespective of the answer to issue 13) which series continued to a point whereby early conciliation began in time and thus the claim is not time barred.

86. I do not accept the respondent's primary submission. While it relies on clause 10 of the SEA *"This SEA is a new contract, not a variation of an existing contract. It replaces all previous contractual arrangements (if any) between the Seafarer and the Employer",* there was no dismissal by the respondent which brought the 2011 contract to an end. On its own case, the respondent says that the 2.3 days should have been paid in lieu with January 2019 salary but it did not do so (see payslip for January 2019 **page 159).** That payslip does not show any payment in respect of accrued and untaken holidays to 22 January. Separately, clause 3 of the SEA makes express reference to prior service; *"Service from 25/01/2011 under previous contracts counts towards any service-based entitlements"* On the respondent's case annual leave accrues evenly through the year and is taken automatically during Time Off (see Grounds of Resistance **page 34).** In my view, paid leave is a service-based entitlement. The claimant's right to paid leave is based on accruing it *"evenly through the Leave Year."* In my view, any claim for this 22 day period is not time barred based on the respondent's primary argument. However, I note from page 151 (the record of work and leave for 2019) that the claimant was off in the period 1 to 22 January. In my view even if the claimant accrued a right to paid leave in this period, it *"rolled"* into the period in which his employment was governed by the SEA. That leave was used in the first period of time off after 23 January. That period **(page 151)** was 21 February to 19 March 2019.

Issue 10 - If so, should the Tribunal exercise its discretion under Regulation 26(2)(b) of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 and under section 23(4) of the Employment Rights Act 1996 on the grounds that it was not reasonably practicable for the complaints to have been brought within the relevant period.

87. Standing my view on question 9, I do not require to exercise discretion.

Issue 11 - Is any claim in respect of the period 23 January 2019 to 18 December 2019 time-barred?

88. A summary of the respondent's position is; after the SEA was entered into the claimant can no longer rely on Part II of the 1996 Act, and in particular its reference (in section 23(3)(a)) to *"a series of deductions"* ; any claim in this tribunal for this period is brought under regulation 26 of the 2018 Regulations; the tribunal must not consider such a complaint unless it is presented ***"before*** *the end of the complaint period'* (or relying on the discretionary extension provision); in a claim for a failure to pay a seafarer the whole or any part of any amount due, the *"complaint period'* is the period of three months beginning with the date on which the payment should have been made (regulation 26(6) read short); *"reinterpretation"* as that concept is discussed in ***Smith v Pimlico Plumbers Limited*** applies only when leave is not taken (as opposed to leave taken where the claimant is unpaid or paid less than their entitlement); the claimant argued that; the statutory/regulatory entitlement to paid annual leave applies irrespective of any agreement between the parties; my earlier judgment contained no finding that payment for annual leave had been made to the claimant in accordance with any statutory obligation on the respondent; there was a failure to pay holiday pay in terms of the 2002 and 2018 Regulations and the Seafarers Directive; and reference was made to ***Ekwelem v Excel Passenger Service Ltd*** UKEAT/0438/12/GE.

89. In ***Ekwelem*** the claim (under Part II of the 1996 Act) related to a series of deductions, running up to a dismissal. It decided that even if later deductions were found to have been lawful, that could not *"disqualify* the claimant from relying upon the alleged unlawfulness of earlier deductions. In my view, it does not assist the claimant here. The claim in this period is governed only by the 2018 Regulations. It seems to me that Regulation 26(6) is key. It provides that *"The "complaint period" is the period of three months beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a period of annual leave or additional leave*

extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made." On my analysis of leave accruing, then being used as 2019 passed, each period onshore was a period of leave and a distinct and discrete complaint period. The last of them ended on 18 December 2019. Bar what might be due to reflect *"normal remuneration"* (see issue 6) the claimant was paid for that period on 31 December 2019. Insofar as the claimant was not paid his normal remuneration, the claim for that single distinct period is made in time (as per early conciliation). For all earlier discrete *"complaint periods"* in the timeframe covered by this issue they are out of time.

Issue 12; If so, should the Tribunal exercise its discretion under Regulation 26(2)(b) of the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 and under section 23(4) of the Employment Rights Act 1996 on the grounds that it was not reasonably practicable for the complaints to have been brought within the relevant period.

90. I agree with the respondent that section 23(4) of the 1996 Act does not apply to the period. The claimant relies on what is said as his answer to issue 10. In summary he argues that the relevant questions are (i) whether, in light of the evidence about the claimant's ignorance or mistake, was it reasonably feasible for the litigant to have presented the complaint to the employment tribunal within the relevant primary period and (ii) whether the litigant's mistake or ignorance was reasonable. As he recognised by reference to the decision of the Court of Appeal in *Wall's Meat Co Ltd v Khan* [1979] ICR 52 ignorance of, or mistaken belief with regard to, essential matters can only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if they are themselves reasonable. He goes on to say that his own explanation as to why the claim was brought when it was is clear and understandable. That may be so, but the question is whether that explanation supports a conclusion that his ignorance of his right to claim for holiday pay was reasonable. On my findings, the claimant believed that he did not get holiday pay and he was not aware of a claim for holiday pay until after his contract ended. The difficulty is that on

the claimant's own case (submission paragraph 26) all annual leave taken by the claimant was taken during periods when he was not rostered to be on a vessel. On his own case, he thus took annual leave. Further, his evidence was that he took various holidays having notified the respondent in advance (see for example his requests for holidays in March and April 2018 pages 112 **to 114).** His payslips for that period show that he got paid while on holiday. His averment (statement of claim paragraph 2, on **page 29)** that throughout his employment he received no payment in respect of annual leave is patently incorrect. In my view the claimant's belief that he did not get holiday pay is not a reasonable one. It is clear that in periods when he was on holiday, he knew he had been paid. Looking specifically at the period in question and noting that on his own case the claimant took leave when not on board, he knew by reference to the various payslips for those periods that he had been paid. He offers to prove that it was reasonable for him to believe that he did not get holiday pay at all and thus it was reasonable for him to be unaware of the right of claim until after December 2019. If as I have found he knew that he had been paid for periods of leave (holiday) then his belief is not a reasonable one. I do not exercise my discretion so as to extend time because in my view the claimant has not discharged the burden on him.

Summary and conclusion

91. It is necessary to consider briefly the bases of claim in light of my conclusions on the various issues. On my analysis, bases 1 to 5 do not succeed. However, given my conclusion on issue 6, the claim succeeds (subject to a question of time bar) in that the claimant was not paid his full pay reflecting the additional payments.

92. Applying my conclusion on issue 12 to the *"additional payment'* basis (which extends back to the time before 23 January 2019) it is necessary to distinguish between the periods covered by the two contracts. The respondent accepts that section 23(3) of the 1996 Act is relevant in relation to pay paid up to and including the January 2019 salary payment (31 January 2019, see **page 159).** I agree with the respondent's submission (paragraph

4d) that any claims for underpayments whilst the 2011 contract was in force are now out of time. This includes claims for any additional payment The question then becomes; should the Tribunal exercise its discretion on the grounds that it was not reasonably practicable for those complaints to have been brought within the relevant period? In my view the answer is "no". I am conscious that the particular question was not addressed in the claimant's evidence. As I have decided above, the claimant's belief that he did not get any holiday pay is not a reasonable one. It is clear that in periods when he was on holiday, he knew he had been paid. There was no evidence on his state of knowledge about any *"additional pay'* that may have been due to him. As I found, The wage slips dated 3 and 10 August 2018 (page 165) shows a payment of each for "On *leave".* The claimant was aware of what those wage slips said at the time. I have no evidence to support a conclusion that it was reasonable for him to be unaware that any pay for his leave periods ought to have reflected those additional elements. There is no basis to say that it was not reasonably practicable for a claim for additional payments for the period up to 31 January 2019 to have been brought in time.

93. In my view, the same approach is relevant to any claim for *"additional payments"* in the remaining period in 2019 up to but excluding that for December 2019.

94. The judgment reflects my conclusions on the issues and on the claims as they stood on 8 November 2021 .

95. In the circumstances a short (1 hour) telephone conference case management Preliminary Hearing should be fixed to discuss issues for a remedy hearing.

Employment Judge: **R Bradley**
Date of Judgment: **08 March 2022**
Entered in register: **18 March 2022**
and copied to parties