Neutral Citation Number: [2022] EAT 155

Case No: EA-2018-SCO-000052-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 7 October 2022

Before :

THE HONOURABLE LORD SUMMERS

- -

Between :

MR CHARLES MELVIN BATHGATE	**Appellant**
- and -	
(1) **TECHNIP UK LIMITED**	
(2) TECHNIP FMC PLC	
(3) TECHNIP SINGAPORE PTE LIMITED	**Respondents**

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Mr Dominic Bayne (instructed by Bridge McFarland LLP) for the **Appellant**
Mr Brian Napier KC (instructed by Burness Paull LLP) for the **Respondents**

Hearing date: 31 March 2022

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JUDGEMENT

SUMMARY

CONTRACT OF EMPLOYMENT

AGE DISCRIMINATION

JURISDICTIONAL/TIME POINTS

The Claimant claimed he had been discriminated against on the ground of his age when his employer decided not to pay him a pension payment because of his age. The Respondents submitted that he had settled any claim he might have for age discrimination when he had accepted a redundancy package which among other things waived his right to claim for age discrimination. The ET held that on ordinary contractual principles he had lawfully settled his claim. The Claimant appealed on the ground that s. 147 of the **Equality Act 2010** did not permit settlement of claims before they had arisen and that on a sound construction of the words "the particular complaint" the **Equality Act 2010** limited settlement to claims that were known to the parties. **Held** that s 147 of the **Equality Act** prevented settlement of claims before their existence was known and that the case law was not to the contrary effect. The Respondents cross appealed and submitted that the ET did not have jurisdiction to hear the complaint of age discrimination since under s. 81 of the **Equality Act 2010** and the Regulations made thereunder the Claimant was outside the jurisdiction of **the Act**. The Respondents submitted that the discriminatory conduct occurred after his employment ceased. His claim accordingly lay under s. 108 of the **Equality Act**. Soundly construed the Claimant's rights post-employment could be no greater than they had been during employment and since he had sailed outside UK and EEA territorial waters he was outside the scope of the Regulations. The Claimant submitted that the Regulations only applied to seafarers and since s. 81 (5) defined a seafarer as someone who worked on board a ship and since when he was made redundant he was working on shore, s. 81 had no application to the Claimant. **Held** that he was a seafarer since "on board" did not mean that he could only be a seafarer when on board a ship but he was a seafarer because the work

he did was on board a ship. Since he had worked on a ship called Deep Blue outside UK and EEA territorial waters for most of his working life he did not lose his status as seafarer merely because at the end of his career prior to redundancy he was on shore. Nor could s. 108 give him rights he did not have during employment. Since he had no right to claim for age discrimination during employment he did not acquire that right after his employment ended.

THE HONOURABLE LORD SUMMERS:

1. The Claimant lodged a claim against three Respondents under the **Equality Act 2010** ("**the Act**"). His employer was the Third Respondent. For convenience I shall avoid making any distinction between the Respondents and the diverse interests they represent and refer to them collectively as "the Respondent". The Employment Tribunal ('the ET') held that the Claimant was not permitted to seek redress from the Respondent. The ET held that on leaving the Respondent's employment he had settled his claim for age discrimination along with other claims in a settlement agreement. The agreement is dated 29 January 2017 ('the Agreement'). The Claimant appealed this decision. The Respondents cross appealed the ET's decision that it had jurisdiction to hear the claim.

2. At a Preliminary Hearing the appeal was not permitted to proceed in relation to the efficacy of the Agreement at common law. I considered that the ET was clearly correct in concluding that the Agreement was wide enough and specific enough to compromise a future claim for age discrimination (para. 78 and 79) on ordinary principles of contractual construction.

The Facts

3. The Claimant was employed for about 20 years from 8 April 1997 to 31 January 2017 when his employment was terminated by reason of redundancy. His employer was a company incorporated in Singapore. The Claimant was sixty one at the time of his dismissal and a British national living in Edinburgh. His contract of employment states that it is governed by the **Employment Rights Act 1996** (hereafter the "**ERA**") and the laws of Scotland. He was employed as a Chief Officer on a number of vessels. These vessels for the most part sailed outside UK and EEA waters. The Claimant worked on a vessel called "Deep Blue" from 19 August 2008. He ceased working on Deep Blue shortly before his redundancy and the termination of his employment. The First Respondent was the

owner of Deep Blue. The Deep Blue was registered in the Bahamas. Deep Blue operated outside UK or EEA waters, except for a short period between 3 April and 16 May 2015.

4. The Claimant's last period on Deep Blue was 29 April 2016 to 8 June 2016. Although the Claimant was told he would not be returning to Deep Blue, in the latter part of 2016 he was given to understand he would be returning to sea aboard another vessel (para. 9). In the event he worked in a variety of onshore roles until his employment came to an end.

5. At some point around December 2016/January 2017, the Respondent decided there was a need for redundancies at the Claimant's grade of Chief Officer and after a redundancy scoring exercise, the claimant was advised he was at risk of redundancy (para. 31) On 13 January 2017 the Claimant was placed at risk of redundancy. By letter sent on 16 January 2017 the Claimant was advised of the redundancy terms on offer and he agreed to accept them. On 29 January 2017 the Claimant signed the Agreement. It was a voluntary redundancy agreement which among other things settled his claims against the Respondent. The Claimant had the benefit of advice from a solicitor. His employment came to an end on 31 January 2017. The Agreement provided an enhanced redundancy and notice payment, payable with his final salary and a further sum payable in June 2017 ('the Additional Payment'). The Additional Payment was to be calculated by reference a collective agreement between the National Maritime Agency and Nautilus Trade Union known as "the Summary of Agreements". It stated at clause 3 that it would only apply to officers who had not reached the age of 61. The Claimant was under the impression that he was due to receive the Additional Payment.

6. On 1 March 2017, over a month after the Agreement was executed, the Respondent took the decision that the Additional Payment need not be paid to employees who were 61 or over at the time of dismissal (paras 42, 55 and 77 of the Judgement). This was not finally communicated to the

Claimant until 26 June 2017. The ET accepted that there had been no deliberate intention on the part of the Respondent to withhold the information (para. 55).

7. The Claimant submitted that the decision not to make the Additional Payment amounted to direct and/or indirect age discrimination. The Respondent accepted that the reason the Claimant was not paid the Additional Payment was because of his age but defended his claim on jurisdictional grounds. The Respondent submitted that by signing the Agreement the Claimant had compromised his right to pursue any further claim; and in any event that **the Act** did not extend to the Claimant in his capacity as a seafarer.

Statutory Provisions

8. Part V of **the Act** applies the anti-discrimination provisions of **the Act** to work. S. 81 applies Part V to work on ships and hovercrafts and seafarers "in such circumstances as are prescribed". Below I reproduce the relevant statutory provisions.

> **S. 81 (1) This Part applies in relation to—**
> **(a) work on ships,**
> **(b) work on hovercraft, and**
> **(c) seafarers,**
> **only in such circumstances as are prescribed.**
> **(2) For the purposes of this section, it does not matter whether employment arises or work is carried out within or outside the United Kingdom.**
>
> **(5) "Seafarer" means a person employed or engaged in any capacity on board a ship or hovercraft.**
> **(6) Nothing in this section affects the application of any other provision of this Act to conduct outside England and Wales or Scotland.**

The parties were agreed that the discriminatory act took place after the Claimant's employment had ended and that s. 108(1) (a) applied to the claim.

> **S.108 (1) A person (A) must not discriminate against another (B) if—**
> **(a) the discrimination arises out of and is closely connected to a**

> **relationship which used to exist between them, and**
> **(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.**

9. **The Act** defines the jurisdiction of the ET to hear claims of age discrimination at work as follows -

> **S.120 (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—**
> **(a) a contravention of Part 5 (work);**
> **(b) a contravention of section 108, 111 or 112 that relates to Part 5.**

10. **The Act** goes on to lay down certain conditions that must be met before a claim can be settled.

> **S. 147 (2) A qualifying settlement agreement is a contract in relation to which each of the conditions in subsection (3) is met.**
> **(3) Those conditions are that—**
> **(a) the contract is in writing,**
> **(b) the contract relates to the particular complaint,**
> **(c) the complainant has, before entering into the contract, received advice from an independent adviser about its terms and effect (including, in particular, its effect on the complainant's ability to pursue the complaint before an employment tribunal),**

11. **The Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011** set out the prescribed circumstances in which s. 81 takes effect. The Regulations exclude certain persons from their scope so as to give effect to the United Nations Convention on the Laws of the Seas which prevents the UK from applying its laws to vessels flying another country's flag (see Articles 92 and 94).

> **"3. - Application of Part 5 of the Act to seafarers working wholly or partly in Great Britain and adjacent waters**
>
> (1) **Part 5 of the Act applies to a seafarer who works wholly or partly within Great Britain (including United Kingdom waters adjacent to Great Britain) if the seafarer is on- (a) a United Kingdom ship and the ship's entry in the register maintained under section 8 of the Merchant**

> **Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice, or (b) a hovercraft registered in the United Kingdom and operated by a person whose principal place of business, or ordinary residence, is in Great Britain.**
>
> **(2) Part 5 of the Act, except in relation to the protected characteristic of marriage and civil partnership, also applies to a seafarer who works wholly or partly within Great Britain (including United Kingdom waters adjacent to Great Britain) and who is on- (a) a ship registered in or entitled to fly the flag of an EEA State other than the United Kingdom, or (b) a hovercraft registered in an EEA State other than the United Kingdom, if paragraph (3) applies.**
>
> **(3) This paragraph applies if- (a) the ship or hovercraft is in United Kingdom waters adjacent to Great Britain, (b) the seafarer is a British citizen, or a national of an EEA State other than the United Kingdom or of a designated state, and (c) the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain.**
>
> **4. - Application of Part 5 of the Act to seafarers working wholly outside Great Britain and adjacent waters**
>
> **(1) Part 5 of the Act applies to a seafarer who works wholly outside Great Britain and United Kingdom waters adjacent to Great Britain if the seafarer is on- (a) a United Kingdom ship and the ship's entry in the register maintained under section 8 of the Merchant Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice, or (b) a hovercraft registered in the United Kingdom and operated by a person whose principal place of business, or ordinary residence, is in Great Britain, and paragraph (2) applies. (2) This paragraph applies if- (a) the seafarer is a British citizen, or a national of an EEA State other than the United Kingdom or of a designated state, and (b) the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain."**

Contractual Terms

12. The Agreement states at clause 6.1 that its terms were in full and final settlement of –

> **"…the Employee's particular complaints and claims which, however unjustified they may be regarded by the Company, the Employee hereby intimates and asserts against the Company while at the same time acknowledging that they are not to be pursued further, namely, claims ('Claims'): … (j) for direct or indirect discrimination, harassment or victimisation related to: … (v) age, under section 120 of the Equality Act 2010 and/or regulation 36 of the Employment Equality (Age)**

> **Regulations 2006."**

The Agreement also included a general waiver at paragraph 6.1.2 of -

> **"…. all claims, demands, costs and expenses of whatever nature (whether past, present or future and whether under contract, statute, regulation, pursuant to European Union Law or otherwise) which the employee has or may have against the Company, its directors and employees or any of them or any other Associated Company and/or their directors and/or employees in any jurisdiction arising out of, or in any way connected with, the Employee's employment with the Company, or the holding of any office with the Company and/or the termination thereof…"**

13. The Claimant had the benefit of legal advice at the time of the Agreement was entered and a certificate was supplied stating, "I have advised Charles Melvin Bathgate (the employee) on the terms and effect of this Agreement and in particular its effect on the Employee's ability to pursue the claims specified at clause 6.1.1 of this Agreement".

Was the Agreement a Qualifying Settlement Agreement?

14. The Claimant submitted that the ET erred by omission. The ET had considered whether the Agreement was a "qualifying settlement agreement" under reference to common law principles but had omitted to consider the Claimant's submission that he could not settle a claim before the cause of action accrued. Mr Bain, on behalf of the Claimant, submitted that the Respondents could not lawfully settle a claim unless it related to "the particular complaint" as defined by s. 147(3) (b) of **the Act**. In his submission those words described a claim that had been brought or was at least capable of being brought under **the Act**.

15. It was submitted that since the Claimant had no basis for claiming discrimination until the Respondent decided not to pay the Additional Payment his right of action did not accrue until after he had left the Respondent's employment. In these circumstances any reference to a claim of age discrimination in the Agreement did not qualify as "the particular complaint". While the Claimant

was aware that the terms upon which Additional Payments were paid was the subject of discussion, he could not know the outcome of these discussions and did not know whether his employer would decide if he was eligible or not. It was submitted that any term that purported to settle his claim for age discrimination in those circumstances was void. The terms of the statute did not permit settlement of a claim that had not crystallised or whose existence was unknown at the time he left employment.

16. I was referred to an excerpt from Hansard. In it Viscount Ullswater touches on the expression "particular complaint" in what was to become s. 203 of the **ERA**. Counsel for the Claimant submitted that s. 203 paralleled s. 147(3) in **the Act**. Viscount Ullswater stated -

> **"We are proposing that these procedures should only be available in the context of an agreement which settles a particular complaint that has already arisen between the parties to that complaint."**
>
> **Hansard [House of Lords Debates] Vol 545, 6 May 1993, col 904.**

17. The Claimant submitted that I should interpret, "the particular complaint", with this statement of Parliamentary intention in mind. It refers to a complaint that had "already arisen". Since the claim in this case depended on discussions whose outcome was unknown, the parties could not settle any future complaint of age discrimination.

18. I was referred to **Hilton UK Hotels Ltd v McNaughton** EATS/0059/04 a decision of the EAT. Although this case is concerned with s. 77(3) and (4A) of the Sex Discrimination Act 1977 the words "the particular complaint" that appear in s. 147(3)(b) of **the Act** appear in the 1977 Act in a similar statutory context. It was submitted that the case provided a helpful summary of the law. In her summary at paragraph 20 Lady Smith refers to **University of East London v Hinton** 2005 ICR 1260 and notes that the Court of Appeal held that the words "particular complaint" do not mean that there has to be an actual complaint before the ET. Mummery, LJ stated that settlement was permitted in relation to "anticipated proceedings in relation to a claim or complaint raised between the parties prior

to the compromise, though not the subject of any actual proceedings" (see paras. 16 and 17(6)). Lady Smith also noted that according to **Lunt v Merseyside TEC Ltd** [1999] ICR 17 blanket compromise agreements were unlawful. This is vouched at pp. 23H-24B of **Lunt**. In **Hinton** (para. 33) Smith LJ dealing with an analogous provision of the **ERA** stated, "section 203(3)(b) [of the ERA] must be construed as requiring the particular proceedings to which the agreement relates to be clearly identified. It is not sufficient to use a rolled-up expression such as "all statutory rights." Lady Smith went on however to state that although blanket agreements were prohibited, an agreement that identified "an actual or potential claim… by a generic description or a reference to the section of the statute giving rise to the claim" was lawful (para. 20). Lady Smith based her summary in this connection on **Hinton**. Lady Smith stated a fourth proposition that runs as follows –

> **"Whilst parties may agree that a compromise agreement is to cover future claims of which an employee does not and could not have knowledge, to do so effectively, the terms of their agreement must be absolutely plain and unequivocal."**

19. This is based on paragraph 9 of **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849 a decision of the EAT. In **Howard** the EAT stated -

> **"If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is they are contracting for. We can see no reason why as a matter of public policy a party should not contract out of some future cause of action."**

20. **Howard** therefore makes it clear that an employee can release his employer from a claim of which they can have no knowledge. Lady Smith went on to articulate a fifth principle at paragraph 21 but it concerns a matter that does not arise in this case.

21. The Claimant's counsel advised that he had made both written and oral submissions about the meaning of "the particular complaint" and s. 147(3) (b) at the ET. The ET's judgement does not refer to these submissions in its judgement. It was submitted that the ET had overlooked the Claimant's submission and that an error of law had occurred. It may be that the ET did not consider it needed to address the point if it considered itself bound by **Howard** and **McNaughton**.

22. The Respondents submitted that the Agreement satisfied the statutory test set out in s. 147(1)(b). They submitted that the phrase "relates to" in section 203(3) (b) indicated that there need only be a broad connection between the settlement agreement and "the particular complaint". That being so it was permissible to settle future claims of which the Claimant could not be aware. The Respondents submitted that in the present case the settlement of any age discrimination claim that might arise was not under a general waiver or a "rolled up expression" and that as a result the terms of s. 147(1) (b) were satisfied.

Reasoning and Decision on Ground 1

23. According to s. 147(1) (b) a qualifying settlement agreement is one that "relates to the particular complaint." The Courts have considered the meaning of these words in a number of cases. The most authoritative is the decision of the Court of Appeal in **Hinton**. In that case the claimant had taken a redundancy package and purported to settle any claims he had with his employer. The agreement included a general settlement clause in relation to all claims that Dr Hinton had or might have as well as a detailed clause which listed various types of claim and employment statutes. The claim that Dr Hinton had lodged was based on s. 47B of the **ERA**. This type of claim was not listed in the agreement. This was a surprising omission since Dr Hinton's advisers had referred to public interest disclosures under the **ERA** before the settlement agreement was reached (p. 1264B). The question was whether he was entitled to proceed with his claim given the terms of the agreement. The

Court of Appeal held he was because the general waiver did not satisfy the terms of s. 203 of the **ERA**, the equivalent of s. 147 of **the Act**. It held that a general waiver was not a settlement of "the particular complaint". It further held that had the agreement mentioned public interest disclosures or s. 47B of the **ERA** he would have been prevented from proceeding. Smith LJ put the matter as follows

> **In my judgment, in order to comply with section 203 the particular claims or potential claims to be covered by the agreement must be identified, as Mr Hare suggested, either by a generic description such as "unfair dismissal" or by reference to the section of the statute giving rise to the claim.**

It is necessary however to recollect that in **Hinton** the claimant was not dealing with a hypothetical claim that might or might not arise in the future. Dr Hinton had intimated his belief that he had a right of action under s. 47B of the **ERA**. The facts and circumstances he considered gave rise to his ground of action had occurred. Mummery LJ's observations have to be read with this in mind. When he explained that the words "the particular complaint" did not mean an actual complaint he was seeking to show that it was not necessary for a complaint to be before a tribunal. Provided the claimant had grounds to commence a complaint that was sufficient. **Hinton** is not authority for the proposition that the words "the particular complaint" mean a complaint that may or may not occur at some point in the future. It is authority for the proposition that a known complaint can be settled.

24. In this case the Clamant had entered an agreement that waived his right to pursue what the ET described as a "long list of claims" (para. 37). The list referred to "direct or indirect discrimination", "age" discrimination and s. 120 of **the Act**. The Respondent submitted that this meant that "the particular complaint" had been identified. I do not accept this submission.

25. First, it is contrary to the statement of Parliamentary intention referred to above. Viscount Ullswater said that the agreement must be one "…which settles a particular complaint that has already arisen between the parties to that complaint". The words "already arisen" indicate that a right of action has emerged. These words indicate that possible future causes of action were not in view. Second, it is a construction that is contrary to the broad purpose of the section. In **Hinton** Mummery, LJ stated in connection with the parallel provision of the **ERA** -

> **"On general principles of statutory interpretation the conditions should be construed, so far as is possible, to promote the purpose for which they are imposed, that is to protect employees when agreeing to relinquish the right to bring proceedings under the 1996 Act in the employment tribunal (para 17(4)).**"

In the same case Smith LJ stated -

> **"…the purpose of section 203 is clear. It is to protect claimants from the danger of signing away their rights without a proper understanding of what they are doing.**"

In this case the Claimant signed away his right to sue for age discrimination before he knew whether he had a claim or not. While that may be possible at common law, **the Act** restricts parties' ability to do so. Third, it would appear to me that the inclusion of a claim in a compromise agreement defined merely by reference to its legal character or its section number does not satisfy the language of s. 147. The words "the particular complaint" suggest that Parliament anticipated the existence of an actual complaint or circumstances where the grounds for a complaint existed. I do not consider that the words "the particular complaint" are apt to describe a potential future complaint. I accept that language can be used loosely and that ordinarily a complaint might include a potential complaint. But in my opinion the precision of the statutory language excludes this possibility. **The Act** uses the

definite article in combination with the words "particular complaint". I consider this does not permit clauses that list a series of types of complaint by reference to their nature or section number. It does not seem to me that there is any difference in principle between a "rolled up" waiver and a waiver which lists a variety of possible claims by reference to their nature or section number. Both are general waivers. All that distinguishes them is the particularity with which they have been drafted. I do not consider that one provides any more protection than the other. I consider that both approaches fall foul of the guidance given by Mummery LJ and Smith LJ in **Hinton**.

26. I was also directed to a number of EAT cases. Particular emphasis was laid on **McNaughton**. It is useful because it contains a summary of the legal principles derived from the cases. Of the five mentioned by Lady Smith only the third and fourth are of relevance to this case. The third principle stated by Lady Smith was that blanket settlements will not do. In support of this principle she cites **Lunt**. This is uncontroversial. She goes on however to say that "potential" claims may be settled by agreement provided the nature of the claim or the section relied on is stated. This is based on **Hinton**. As I have explained **Hinton** addresses a different situation. Mummery LJ's observations about potential claims must be read in the context of the case. A potential claim is one that although known to the parties has not been brought to the tribunal (p. 1267B-C). Thus understood this principle is also uncontroversial. The fourth principle stated by Lady Smith is that claims may be settled even if they are ones of which the employee does not and could not have knowledge (paragraph 20). This appears to apply to the facts of this case. However on closer inspection I do not consider that this is so. Her principle is based on **Howard**. **Howard** however does not discuss the statutory restrictions imposed by s. 147 or its equivalents. No submission was made to it in relation to the meaning of the words "the particular complaint". **Howard** was concerned with the law of contract. The excerpt from the judgement of the EAT judge JR Reid QC refers to "public policy". Public policy has no role to play in the interpretation of s. 147. Public policy in that connection is a matter for Parliament. That

being so I do not consider that the fourth principle in **McNaughton** has any bearing on this case. **McNaughton** was concerned with s. 77(4A)(c) of the **Sex Discrimination Act 1975** as opposed to s. 77(4A)(b) the subsection containing the words under scrutiny on this case and with various issues of contractual construction.

27. I accept that this conclusion may be inconvenient where there is a mutual desire to avoid future claims and a wish to end the employment relationship permanently. Nevertheless it seems to me that Parliament did not consider that a settlement of the sort seen in this case was desirable and legislated to prevent them.

28. I do not consider that the limits Parliament places on settlement can be elided by contract. Thus even though the Agreement uses the words "intimates" and "asserts" in relation to possible future claims, this terminology does not convert a claim that cannot be intimated or asserted into a claim covered by **the Act**. Equally, describing these future and unknown claims as "the particular complaint" is futile. The statute's words have an autonomous meaning.

29. In **Lunt v Merseyside TEC Ltd** [1999] ICR 17 Morison J sitting in the EAT was asked to consider a compromise agreement that purported to settle a variety of claims. These claims had been the subject of correspondence and a settlement agreement prior to tribunal proceedings being commenced. Morison, J considered s. 203(3)(b) of the **ERA96** which like s. 147 of **the Act** stated that a compromise agreement "must relate to the particular complaint". Morison, J commented as follows

> **"A compromise agreement cannot, therefore, seek to exclude potential complaints that have not yet arisen on the off-chance that they might be raised; it cannot, in other words, be used to sign away all the employee's tribunal rights, as can be done in the case of a negotiated settlement drawn up with the assistance of a conciliation officer."**

30. These remarks relate to the wording of the **ERA96** s. 203(3) (b) and support the interpretation of s. 147 set out above. While the prospect of a future age discrimination complaint was more than an "off chance", to use the language of Morison, J it was insufficiently certain to come within the ambit of a qualifying legal settlement.

31. I therefore conclude that the Agreement could not settle the Claimant's claim of age discrimination.

Jurisdiction

32. The Respondent cross appealed the ET's conclusion that it had jurisdiction to hear the claim. They submit that although the ET was correct to treat the claim as a post-employment claim under s. 108 of **the Act**, the ET misinterpreted the relevant statutory provisions.

33. The ET's conclusions in this connection are expressed as follows (para. 72) -

> **"It appears to me that it would have been entirely possible for Section 81 to have been framed in such a way that it covered claims under Section 108 as well as claims under Part 5.**
>
> **I note that section 120 which confers jurisdiction on the employment tribunal refers separately to part 5 and to sections 108, 111 and 112. I do not believe it is possible to read the legislation as somehow showing that a claim under Section 108 arising out of an employment relationship somehow becomes a claim under Part 5. I can also see that there may be arguments for treating such claims differently.**
>
> **It therefore appears to me that Section 81 has no application in the present case. I am therefore required to look at the issue of territorial scope on the basis that there is no specific provision in the Equality Act in respect of the territorial scope of claims made under Section 108. I would agree with the claimant's representative that in those circumstances it is appropriate for me to approach matters in the same way as the higher courts have approached the matter of the territorial scope of the unfair dismissal provisions contained in the Employment Rights Act 1996 which contains no specific provisions relating to territorial scope. I also note the concession made by the Respondents' representative that the outcome of such an approach is that the claim is within the territorial scope of the Equality Act. On that basis I consider**

> **that the claim made by the claimant in this case is one which is within the territorial scope of the Equality Act and the tribunal has jurisdiction to hear it."**

34. In summary the ET concluded that s. 81 determined whether a person had a right to claim during the course of employment but had no application where employment had ceased. The regime established by s. 81 and the Regulations made thereunder had no application in relation to claims under s. 108.

Reasoning and Decision on Ground 2

35. Mr Napier KC for the Respondents advised me that the Respondents had submitted that on a proper construction of ss. 81, 108 and 120 **the Act** did not permit those who had worked outside UK and EEA territorial waters to bring claims under s. 108 after their employment was over. He advised that the Respondents also addressed the possibility that ss. 81, 108 and 120 did not address the position of persons such as the Claimant and whether in those circumstances the principles in **Ravat** were applicable. The Respondent accepted the ET's conclusion in relation to **Ravat**. But the Respondent submitted that it had erred in rejecting the submission that the terms of **the Act** excluded the Claimant's claim.

36. S. 81 extends the ambit of Part 5 of **the Act** to "(a) work on ships, (b) work on hovercraft, and (c) seafarers". S. 81(5) defines a seafarer as "a person employed or engaged in any capacity on board a ship or hovercraft". The parties appeared to accept that s. 81(1) (a) and (b) did not apply to the Claimant at cessation but were in disagreement as to whether he was a seafarer under paragraph (c). The Claimant submitted that he had ceased to be a seafarer. The Respondents submitted that he was a seafarer and was covered by s. 81 and the Regulations made thereunder. The ET's Findings in Fact disclose that for the last 6 months of his employment he was not sailing on the Deep Blue but was ashore. The Respondent submitted that in this time his status remained the same. While he could not

be said to be working on a ship, he remained a seafarer until the termination of his employment since this expression referred to his status as opposed to the work he was performing at termination.

37. Mr Bain for the Claimant submitted that once he ceased to sail on the Deep Blue and took up a shore job with the Respondents he ceased to be a "seafarer" within the meaning of s. 81. There a seafarer is defined as "a person employed or engaged in any capacity on board a ship or hovercraft". The Claimant submitted that since he was not "on board a ship" when dismissed he fell outside s. 81.

38. The problem with this approach to interpretation is that it results in absurdity. A person employed on a boat, particularly when it is tied up, might embark and disembark many times a day. It could not have been Parliament's intention that he should gain rights when he disembarked only to lose them again on embarking.

39. The Claimant pointed out that there was nothing absurd about an employee gaining or losing rights according to his or her location. Mr Bain submitted that the rights of those employed aboard an EEA ship change when they move in or out of UK waters. He submitted that the rights of those who work on a UK registered ship change when they move to a non-UK registered ship. I accept that ship movement can lead to changes in legal regimes. I also accept that the registration of the ship has legal consequences for those that work on her. But it does not seem to me that this undermines the Respondents' argument. Changes of that nature are predictable and certain. But the approach the Claimant urges on me would mean that if the Claimant was on a boat when the discriminatory conduct occurred he would be protected by **the Act**. That is a variable and unpredictable state of affairs. I am not attracted to the idea that Parliament intended to provide protection to a seafarer provided he or she could show that at the material time he or she was physically on board a ship.

40. It seems to me more likely that "on board" is a colloquialism. In ordinary speech if someone is said to work on board a ship all that is meant is that the person habitually works on board a ship -

not that he works on a ship all the time. Thus if the seafarer was habitually employed on a boat but was ashore for a month to recuperate from an illness or attend a training course, he would remain a seafarer. As the Respondents pointed out if the construction contended for by the Claimant is correct s. 81(1)(a) and (b) are unnecessary. S 81(1) states that "This Part applies in relation to (a) work on ships, (b) work on hovercraft, and (c) seafarers". If it is necessary to be on a ship or hovercraft in order to be a seafarer, s. 81(1)(c) adds nothing to s. 81(1)(a) and (b). I consider that in interpreting the statute I should lean towards a construction that gives purpose to the all the words used and avoids surplusage.

41. In deciding whether the Claimant was a seafarer at termination I consider it is appropriate to take account of the fact that he had worked on a ship for most of his working life. Although he came ashore for the last 6 months, this was a small fraction of his career with the Respondents. In that time his job description remained the same. To begin with it was anticipated that he would be reassigned to another ship. That did not materialise. The latter part of the period was occupied by the redundancy process. For the reasons given above I consider that a person whose life was spent working on ships does not cease to be a seafarer just because at the end of his career he was not aboard a vessel. If the definition of a "seafarer" does not depend on being on board a ship, it may be that this designation could be lost if the person ceased to be eligible to sail on a ship or hovercraft. But Mr Bain did not submit that the Claimant lost the status of seafarer at some point in the six months he was working on shore. It is not necessary therefore to address that possibility. In any event the Findings in Fact do not address the question of when after he came ashore he lost the status of "seafarer".

42. I was directed to **Walker v Wallem Shipmanagement Ltd** [2020] ICR 1103. It deals with a person who applied for employment on a ship that was flagged overseas and operated outside UK and EEA waters. The employer discriminated against her on the grounds of sex. The EAT held that **the Act** had no application to her case. Kerr J. in the EAT accepted that the exclusion of Part 5 brought

about by section 81(1) was not restricted to persons actually employed on ships, but also extended to those recruited to do such work. (para. 35). The EAT rejected a submission that because the prospective employee was not at the time of discrimination an employee or working on a ship, the Regulations did not apply. Although the question of statutory interpretation raised in **Wallem** does not arise in this case (para. 27) I consider that the view I have formed is consistent with **Wallem**.

43. The next issue concerned the interaction of s. 81, s. 108 and s. 120. It was common ground that the purpose of s. 81 was to define the application of **the Act** to those who were not subject to the territorial jurisdiction of the UK because they worked on ship or hovercraft. Reading matters short it was accepted that **the Act** extended its jurisdiction to those who worked in UK or EEA waters and who worked on ships registered in the UK. The Claimant as I have noted was not subject to **the Act**'s jurisdiction because he worked outside UK and EEA waters and on a Bahamas registered ship. It was also common ground that the purpose of s. 108 was to define the circumstances in which a person could bring a claim after employment had ceased. In order to explain the purpose of s. 108 I was referred to **Coote v Granada Hospitality Ltd** 1999 ICR 100 and to **Butterworth v Police and Crime Commissioner's Office** [2016] ICR 456 to show how it has been interpreted and applied. Finally the purpose of s. 120 was to define the jurisdiction of employment tribunals in relation to the rights conferred by **the Act**. It confers jurisdiction on ETs over claims under Part 5 of **the Act** and claims arising from other sections such as s. 108.

44. It seems to me that the question of whether a person who would not have had the right to bring a claim of age discrimination under s. 81 can acquire the right to do so after employment is over depends on the role of s. 108. As the ET pointed out s. 81 was does not address post cessation rights. But that is because post cessation rights are not dealt with in Part 5. In Part 5 **the Act** is dealing with rights arising during employment. The silence of s. 81 in this connection is not significant. It does appear to me however that the wording of s. 108(1)(b) makes the measure of a person's post cessation

rights dependent on his employment rights. It permits a former employee to bring a claim if the former employer engages in conduct that would be discriminatory "if it occurred during the relationship". This is a deeming provision. Thus if the Respondent had made a decision that discriminated against the Claimant prior to cessation, his ability to bring a claim would depend on whether the decision was lawful discrimination. In this case such a decision would have been lawful because **the Act** had no application to persons such as the Claimant. Parliament's intention was that the lawfulness of conduct after employment should be measured by its lawfulness prior to termination. Thus if it would not be lawful to withhold an employment reference, or restrict gym membership or withhold a payment during employment, it would not be lawful after termination. In this case the Claimant did not have the right he now relies upon before his employment was terminated. That being so he cannot have such a right after termination. The claim is excluded by the express words of the statute. It is not possible to make a distinction between claims that are unlawful because they do not fall within the anti-discrimination provisions of **the Act** and those that are unlawful because they fall outside the jurisdiction of **the Act**.

45. The UK's Convention obligations explain why Parliament drew a distinction between those who sail outside UK or EEA waters and those who sail within those waters. It does not strike me as strange that a person who would not have been able to claim during his or her employment because their work was outside UK and EEA waters and on board a foreign flagged ship should be unable to claim for an act of discrimination that would not have been justiciable during employment. On the contrary it would be a consistent approach. Whether Parliament would consider it a desirable state of affairs is another matter. To give the Claimant a right after employment he did not have during employment would require a rewording of the statute.

46. I acknowledge that it may seem strange that it is lawful to discriminate against the Claimant given that he is resident in the UK. In this connection however it is necessary to notice that s. 108 is

designed to deal with all forms of post-employment claims. While some retire and settle in the UK others may take up employment on another ship which may also be flagged overseas and sail outside UK and EEA waters. It would not appear to me that the location or status of the employee post-employment is a relevant consideration. The right to make a claim under s. 108 derives from the fact that the person was formerly employed or a worker. If the ET was influenced by the fact that the Claimant was no longer a seafarer and therefore not subject to the regime established in Part 5 and the considerations that led to the enactment of s. 81, I consider it misled itself.

47. I can detect no absurdity in the construction I prefer. I think that where an employee has accrued pension rights during employment and where the employer makes a decision post-employment as to how these rights are to be operated it would be understandable if Parliament intended the lawfulness of the decision to withhold certain benefits to be subject to the regime that applied during employment.

48. Turning to the ET's reasoning I accept that it would have been possible to draft s. 81 so as to make it plain that it applied to claims under s. 108. As I have indicated however I consider that the reason why s. 81 makes no reference to post-employment claims is because it is addressed to claims made during employment under part 5. It is not addressing post-employment claims. That explains the silence. It does not follow however that **the Act** is silent on the issue of jurisdiction.

49. The ET also notices that s. 120(1) (b) draws a distinction between part 5 claims and those under s. 108. Nothing follows from this. As I have indicated the distinction is simply a consequence of the scheme of **the Act**. I consider s. 108 "relates to" Part 5 because any right under s. 108(1) (a) "arises out of or is closely connected to" from the employee's employment under Part 5. The words "relates to" acknowledge that post-employment claims have a relationship with rights enjoyed during employment.

50. The ET states that there "may be arguments for treating such claims differently". Those arguments are not explained. It may be that the ET thought that since the Claimant was now retired and based in the UK, he should not be subject to a regime designed for seafarers. It may have thought that since promoting equality and avoiding age discrimination was a valuable social objective it should if possible read **the Act** so as to secure that objective. Since I consider that the meaning of **the Act** is clear I do not consider that I should have recourse to the **Marleasing** doctrine ***(*Marleasing SA v. LA Comercial de Alimentación SA** ([1990] ECR I-4135) and seek to produce a construction of s. 81(1) that limits the exclusion of Part 5. See the Equality Directive 2000/78, which requires the UK to implement the principle of equal treatment on the grounds of age; and **Wittenberg v Sunset Personnel Services** [2017] ICR 1012 at para 64. I note that in **Waller** the EAT took a similar view of this matter (para. 35).

51. I also accept the Respondent's submission that s. 108 was designed to prevent the mischief identified in **Butterworth v The Police and Crime Commissioner's Office for Greater Manchester & Anor** [2016] ICR 456, per Langstaff P at para. 19. It was not designed to create a new ground of jurisdiction nor should it be taken by default to qualify the rules on tribunal jurisdiction found in s. 81.

52. It follows from the above that it is not necessary to consider whether the ET had jurisdiction in terms of **Ravat v Halliburton** [2012] ICR 389 and **Lawson v Serco** [2006] ICR 250.

Conclusion

53. In these circumstances I shall allow the Claimant's appeal in relation to Ground 1 and hold that the ET erred in law in that the Agreement was void in that it did not comply with s. 147 of the **Equality Act 2010**. In relation to Ground 2 I further hold that the ET erred in law in holding that it had jurisdiction to hear the claim on **Ravat** principles and hold that the claim was excluded by the

terms of section 81 of the **Equality Act 2010**. The cross-appeal is accordingly allowed and the claim dismissed.

54. I should also record my appreciation for the skilful and thorough presentation of the appeal by Mr. Napier KC and Mr. Bain.