EMPLOYMENT TRIBUNAL

Claimant: Mr. James Sokolowski

Respondent: Carnival plc (t/a "*Carnival UK*")

Hearing: Public Preliminary Hearing

Heard at: Bristol ET (via video/CVP)

On: 4-5 May 2023

Before: Employment Judge Tinnion

Appearances: For Claimant: Mr. L. Bronze, Counsel
For Respondent: Mr. N. Moore, Consultant

JUDGMENT

1. Respondent Carnival plc was not the Claimant's employer at any relevant time.

2. The Claimant's last employer was non-party Fleet Maritime Services (Bermuda) Ltd. That employment terminated on 26 April 2020.

3. The Tribunal does not have jurisdiction to hear the following claims against the Respondent which the Claimant asserts based on his case that he was an employee:

    a. unfair dismissal under ss.94-98 of the Employment Rights Act 1996;

    b. unfair dismissal under s.103A of the Employment Rights Act 1996;

    c. wrongful dismissal/notice pay;

    d. 'whistleblowing' claim under s.47B of the Employment Rights Act 1996.

4. The Tribunal lacks jurisdiction to consider the claim of unfair dismissal under ss.94-98 of the Employment Rights Act 1996 against the Respondent because the Respondent did not continuously employ the Claimant for at least 2 years.

5. The Tribunal lacks jurisdiction to consider the following claims against the Respondent because they were not presented in time:

a. unfair dismissal under ss.94-98 of the Employment Rights Act 1996;

b. unfair dismissal under s.103A of Employment Rights Act 1996;

c. wrongful dismissal/notice pay.

6. Subject to para. 7 below, the claims identified at para. 3 above are struck out under Rule 37(1)(a) (no reasonable prospect of success) or dismissed on their merits.

7. Para. 6 is stayed until 4pm on 7 July 2023. If, and only if, the Claimant timely applies to amend his ET1 by that date and time, para. 6 will continue to be stayed until the earlier of the following two events/dates, at which point the stay will expire:

a. the Tribunal's determination of that amendment application;

b. 4pm on 27 October 2023.

REASONS

Statements of case

1. By an ET1 and Grounds of Claim presented on 28 February 2022 [AB/5-25], Claimant James Sokolowski presented the following claims against the Respondent:

a. unfair (constructive) dismissal under ss.94-98 of the Employment Rights Act 1996 (**ERA 1996**);

b. 'automatic' unfair (constructive) dismissal under s.103A of ERA 1996;

c. wrongful dismissal/notice pay;

d. 'whistleblowing' claim under s.47B of ERA 1996.

2. At a Case Management Hearing on 17 January 2023, the ET (EJ Heath) summarised the Claimant's case thus:

"*The Claimant claims that he was employed by the Respondent as a Finance Manager. He says he has continuous employment from 2015 to December 2021 and was rostered by the Respondent to work on cruise ships in various tours of duty. He claims that he made protected disclosure[s] which led to various detriments. These detriments he also considers as cumulative breaches of his contract of employment which led him to resign and claim constructive dismissal. He says that such dismissal is automatically unfair under section 103A [ERA 1996] and also 'ordinarily' unfair*." [AB/42, para. 4]

3. By its ET3 and Grounds of Response [AB/27-41], the Respondent denied the claims. The ET summarised its defence thus:

"*The Respondent says the Claimant was never employed by it, but that he was employed by FMSB, a company incorporated in Bermuda. It contends that*

section 199 ERA (which applies to mariners) operates such that Part V (detriments) and Part X (unfair dismissal) ERA do not apply to his employment in any event. Further, it submits that the Tribunal does not have jurisdiction to hear his claims as he has insufficient connection to Great Britain. The Respondent further and in the alternative defends the claims on their merits." [AB/43, para. 5].

Public Preliminary Hearing

4. By a Case Management Order dated 17 January 2023 [AB/44-45] (**CMO**), the ET listed a Public Preliminary Hearing (**PPH**) to determine the following issues:

    a. whether Carnival plc was the Claimant's employer (**Issue #1**);

    b. whether the Tribunal has jurisdiction to hear the Claimant's claims (**Issue #2**), in particular:

        (i) does s.19 ERA 1996 operate such that the provisions of Part V (detriments) and Part X (unfair dismissal) of ERA 1996 do not apply to the Claimant's employment;

        (ii) does the Claimant's employment have sufficient connection with Great Britain under the principles of Lawson v Serco [2006] IRLR 289?, and if not

        is jurisdiction conferred on the Tribunal by any other means?

    c. whether the Claimant's claims have been presented within relevant time limits (**Issue #3**);

    d. whether the Claimant has two years' continuous service required to bring a claim of 'ordinary' unfair dismissal under ss.94-98 of ERA 1996 (**Issue #4**).

5. Para. 15 of the CMO [AB/43] stated Issues #1-4 are those to be determined at the PPH unless the judge at that PPH decides it is in the interests of justice to leave any of those issues for determination at the final hearing.

6. The PPH was held over the course of 2 days on 4-5 May 2023. An agreed bundle [AB/__] of c.206 pages were provided plus a supplementary bundle [SB/__] of c.78 pages. Both parties were represented. The Claimant gave evidence and was cross-examined. The Respondent called one witness, Ms. Jo Milner, who gave evidence and was cross-examined. Both parties made written and oral closing submissions. The Tribunal directed both parties to state what law they submitted the Tribunal has to apply to determine whether Carnival plc was the Claimant's employer or not. Both parties complied with that request, from which it quickly became clear the parties did not agree on the applicable law. Notwithstanding that, the Tribunal thanks both parties' representatives for their assistance at the PPH.

Findings of fact

7. The Tribunal makes the following findings of fact (and any contained in the other parts of this Judgment) based on the civil balance of probabilities.

Parties

8. Respondent Carnival plc is one of two parent companies of the Carnival group of companies, which offer cruise ship services to customers worldwide (the other parent company is Carnival Corporation, a Panama company). Two of its well known UK brands are Cunard Line and P&O Cruises. Its subsidiaries include two companies incorporated in Bermuda, Fleet Maritime Services (Bermuda) Ltd. (**FMS-B**) and Fleet Maritime Services International Ltd. (**FMS-I**). Ms. Milner's evidence – which was not challenged in cross-examination and which the Tribunal accepts – was that both companies hold regular quarterly board meetings in Bermuda attended by representatives from Carnival plc. No evidence was presented to the Tribunal that these two companies were mere sham companies (the Claimant's case).

9. The Claimant had worked in the military. In 2015 he joined the Carnival group.

Pre-contract situation

10. Following the Claimant's attendance at a selection event, by letter dated 6 March 2015 [50-53] the Respondent (Gemma Nicholson, Fleet HR Services Administrator) notified the Claimant of the following (in relevant part):

> "*Carnival UK is the appointed recruitment representative for Cunard Celtic Hotel Services Limited, Fleet Maritime Services (Bermuda) Ltd. and Fleet Maritime Services International, who recruit personnel to work on board the Cunard Line and P&C Cruises.*
>
> *Following your attendance at the Carnival UK selection event, we are very pleased to advise you that we will be recommending to Fleet Maritime Services (Bermuda) Limited that you are employed by them as Hotel Auditor.*
>
> *We fully expect that Fleet Maritime Services (Bermuda) Limited will accept our recommendation to employ you and you should expect to receive their formal offer of employment, and accompanying terms and conditions of employment (which will confirm full details of your employment, including salary), within the next 5 working days.*
>
> *Any offer of employment from Fleet Maritime Services (Bermuda) Limited will be subject to the receipt of satisfactory references, satisfactory OFAC check and in the case of all Medical staff, a current and valid ALS/ACLS certificate. Your ongoing employment with Fleet Maritime Services (Bermuda) Limited will be subject to the satisfactory completion of a probationary period and where relevant subject to satisfactory completion of pre-employment training as advised by the Carnival UK Training department under separate cover … Additionally, the offer of employment will be conditional on a number of criteria established by Carnival UK for working on board our vessels …*

The Carnival UK Fleet Regulations and Sea Staff Policies and Procedures Manual govern your conduct, behaviour, performance and other key aspects of working on board one of our vessels … The key policy documents are:

- *Code of Business Conduct and Ethics*
- *Code of Conduct – Disciplinary Procedures*
- *Alcohol Policy and Regulations*
- *Shipboard Grievance Policy*
- *Dress Code, Appearance and Hygiene Policy*
- *Fleet Regulations – Guidance Document for Drugs*

Fleet Maritime Services (Bermuda) Limited will provide details of how to formally accept their offer of employment (and the deadline for response).

If you decide to accept the offer of employment from Fleet Maritime Services (Bermuda) Limited, we will also need you to complete and return a number of documents to work on board one of our vessels …

Please be aware that until you have received and accepted any formal offer of employment from Fleet Maritime Services (Bermuda) Limited and you have completed and returned/sent all the documents referred to in this letter we will not be able to confirm the date you will be able to join us. Whilst we will be keen to get you on one of our vessels quickly after this formality, if a position is not immediately available there may be a delay to your starting date with us … You are therefore strongly recommended not to make any firm commitments (eg resignation from your employer if you are currently working) about your future until we contact you with a start date.

If you have any queries or concerns about this letter (or the enclosed documents) please do not hesitate to contact the Fleet HR Services Team …"

Initial contractual situation

11. On 19 March 2015, the Claimant signed and accepted the first Seafarer's Employment Agreement (**SEA**) of many, on this occasion accepting an offer of employment from FMS-B [SB/16]. Part A of the SEA [SB3-5] contained the Claimant's individual terms; Part B40 dated 1 January 2015 (incorporated by reference) [SB6-15] stated standard terms and condition of his employment.

12. Of note in Part A:

    a. paras. 2.1 - Claimant's 'Employer' and 'Company' is defined as Fleet & Maritime Services (Bermuda) Ltd, Bermuda address provided;

    b. para. 3.1 - Claimant's job is Hotel Auditor;

    c. para. 3.5 - Claimant's employment is "continuous service", start date to be confirmed with joining instructions;

d. para. 3.3 - Carnival plc is defined as the "Shipowner";

e. para. 3.2 (place of work) - Claimant may be appointed to any ship owned/ operated by the Shipowner under the brands P&C Cruises, Cunard, or any other brands the Shipowner owns/operates;

f. para. 7.3 - the Company can summarily dismiss an employee at any time in case of gross misconduct;

g. para. 9.1.2(a) - Claimant's responsibility to read Shipowner and Company's policies and procedures applicable to onboard role and working at sea.

13. Of note in Part B40:

a. para. 1.3(a) - rotation flexibility is fundamental to enable the Company to be operationally efficient and deal with unplanned circumstances;

b. para. 1.3(b) - the Company, under normal circumstances, reserves the right to request the Claimant to return to sea and commence a new 'Tour of Duty' as required before the end of his planned 'Tour Leave'.

Tours of duty

14. On 22 July 2015, the Claimant signed a second SEA [AB/54] providing for permanent employee as a Finance Manager. This SEA identified the Claimant's employer as FMS-B, and incorporated by reference the standard terms in B40.

15. Between 7 August 2015 and 12 December 2015, the Claimant commenced his first tour of duty (**Tour of Duty #1**) on board MV Oriana [AB/100]. His record of sea service was stamped by FMS-B [AB/100]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he signed on 22 July 2015 identifying his employer as FMS-B. During this tour, the Claimant did not dispute FMS-B was his employer (at the time, he likely had no reason to).

16. On 19 November 2015, the Claimant signed a third SEA [AB/55] providing for permanent employment as a Finance Manager. This SEA identified the Claimant's employer as FMS-B, and incorporated by reference the standard terms in B40.

17. Between 14 December 2015 and 7 February 2016, the Claimant commenced his second tour of duty (**Tour of Duty #2**), on board HM Queen Victoria [AB/100]. His record of sea service was stamped by Carnival UK [AB/100]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he signed on 19 November 2015 identifying his employer as FMS-B. During this tour, the Claimant did not dispute FMS-B was his employer.

18. On 11 February 2016, the Claimant signed a fourth SEA [AB/56], this time providing for fixed-term employment as a Finance Manager in the period 10 March 2016 – 7 May 2016. This SEA identified the Claimant's employer as FMS-I, and incorporated by reference the standard terms in document B37 (a copy of the B37 in effect in February 2016 was not available to the Tribunal – the only B37 available to the

Tribunal was the later iteration dated 7 November 2019).

19. Between 10 March 2017 and 10 May 2016, the Claimant commenced his third tour of duty (**Tour of Duty #3**), on board HM Queen Mary 2 [AB/100]. His record of sea service was stamped by Cunard Line Ltd. [AB/100]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he signed on 11 February 2016 identifying his employer as FMS-I. During this tour, the Claimant did not dispute FMS-I was his employer.

20. On 4 May 2016, the Claimant was sent, but did not sign, a fifth SEA [AB/57] providing for fixed-term employment as a Finance Manager. This SEA identified the Claimant's employer as FMS-I, and incorporated by reference the standard terms in B37.

21. The Claimant accepted that when he was working on board a ship (as he would have been on 4 May 2016) he sometimes received a SEA but was not able to sign it because he could not print it off. The Tribunal is satisfied the Claimant was sent and received every SEA he was asked to sign, and if he did not sign an SEA that was most likely because he could not print it off, not because he did not assent to its terms. The Tribunal finds that the Claimant likely received, read and consented (by performance) to the terms of any and all SEAs he was sent which he did not personally sign which were signed by a Carnival group representative. The Tribunal rejects the Claimant's case that there was an "*illegal contract alteration*" which was concealed from him – every SEA the Claimant signed or was sent on/after 16 February 2016 clearly stated on its face that it was for a fixed-term employment.

22. Between 10 May 2016 and 22 August 2016, the Claimant commenced his fourth tour of duty (**Tour of Duty #4**), on board HM Queen Victoria [AB/100]. His record of sea service was stamped by Carnival UK [AB/100]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he signed on 4 May 2016 identifying his employer as FMS-I. During this tour, the Claimant did not dispute FMS-I was his employer.

23. Before he started his next tour of duty on 27 September 2016:

    a. on around 18 August 2016, the Claimant was sent, but did not sign, a sixth SEA [AB/58] providing for fixed-term employment as a Finance Manager for the period 27 September 2016 – 4 December 2016, which identified his employer as FMS-I;

    b. on around 31 August 2016, the Claimant signed a seventh SEA [AB/59] providing for fixed-term employment as a Finance Manager for the period 27 September 2016 – 4 December 2016, which identified his employer as FMS-I;

    c. on around 12 September 2016, the Claimant was sent, but did not sign, an eighth SEA [AB/59] providing for fixed-term employment as a Finance Manager for the period 27 September 2016 – 4 December 2016, which identified his employer as FMS-I.

24. Between 27 September 2016 and 4 December 2016, the Claimant commenced his fifth tour of duty (**Tour of Duty #5**) on board HM Queen Elizabeth [AB/100]. His record of sea service was stamped by Carnival UK [AB/100]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he was sent on around 12 September 2016 identifying his employer as FMS-I. During this tour, the Claimant did not dispute FMS-B was his employer.

25. On around 7 December 2016, the Claimant was sent, but did not sign a ninth SEA [AB/61] providing for fixed-term employment as a Finance Manager for the period 9 December 2016 – 6 March 2017. This SEA identified the Claimant's employer as FMS-I, and incorporated by reference the standard terms in B37.

26. Between 9 December 2016 and 6 March 2017, the Claimant commenced his sixth tour of duty (**Tour of Duty #6**), on board HM Queen Victoria [AB/100]. His record of sea service was stamped by Carnival UK [AB/100]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he was sent on around 7 December 2016 identifying his employer as FMS-I. During this tour, the Claimant did not dispute FMS-I was his employer.

27. Before he started his next tour of duty on 22 May 2017:

    a. on around 4 April 2017, the Claimant was sent, but did not sign, a tenth SEA [AB/62] providing for fixed-term employment as a Finance Manager for the period 5 May 2017 – 6 July 2017, which identified his employer as FMS-B;

    b. under cover of an email sent on 25 April 2017 [AB63], the Claimant was sent an eleventh SEA which he signed on 26 April 2017 [AB64] providing for fixed-term employment as a Finance Manager for the period 22 May 2017 – 6 July 2017, which identified his employer as FMS-B. .

28. Between 22 May 2017 and 24 August 2017, the Claimant commenced his seventh tour of duty (**Tour of Duty #7**) on board HM Queen May 2 [AB/100]. His record of sea service was stamped by Carnival UK [AB/100]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he signed on 26 April 2017 identifying his employer as FMS-B. During this tour, the Claimant did not dispute FMS-B was his employer.

29. Between 25 August 2017 and 13 October 2017, the Claimant commenced his eighth tour of duty (**Tour of Duty #8**) on board HM Oriana [AB/100]. His record of sea service was stamped by FMS-B [AB/100]. In the apparent absence of a new SEA, The Tribunal infers the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he signed on 26 April 2017 identifying his employer as FMS-B.

30. On around 25 October 2017, the Claimant was sent, but did not sign, a twelfth SEA [SB/17] providing for fixed-term employment as a Hotel Auditor for the period 4 November 2017 – 17 December 2017. This SEA identified the Claimant's employer as FMS-B, and incorporated by reference the standard terms in B37.

31. Between 4 November 2017 and 17 December 2017, the Claimant commenced his ninth tour of duty (**Tour of Duty #9**) on board HM Queen Victoria [AB/100]. His record of sea service was stamped by Carnival UK [AB/101]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he was sent on around 25 October 2017 identifying his employer as FMS-B. During this tour, the Claimant did not dispute FMS-B was his employer.

32. On around 1 December 2017, the Claimant was sent, but did not sign, a thirteenth SEA [SB18] providing for fixed-term employment as a Hotel Auditor for the 6-month period 2 January 2018 – 3 July 2018. This SEA identified the Claimant's employer as FMS-B, and incorporated by reference the standard terms in B37.

33. Between 2 January 2018 and 13 July 2018, the Claimant commenced his tenth tour of duty (**Tour of Duty #10**) on board HM Queen Elizabeth [AB/101]. His record of sea service was stamped by FMS-B [AB/101]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he was sent on around 1 December 2017 identifying his employer as FMS-B. During this tour, the Claimant did not dispute FMS-B was his employer.

34. On around 4 July 2018, the Claimant was sent, but did not sign, a fourteenth SEA [SB/19] providing for fixed-term employment as a Finance Manager for the period 21 August 2018 – 15 February 2019. This SEA identified the Claimant's employer as FMS-B, and incorporated by reference the standard terms in B37.

35. Between 21 August 2018 and 5 November 2018, the Claimant commenced his eleventh tour of duty (**Tour of Duty #11**) on board MC Oceana [AB/101]. His record of sea service was stamped by FMS-B [AB/101]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he was sent on around 4 July 2018 identifying his employer as FMS-B. During this tour, the Claimant did not dispute FMS-B was his employer.

36. Between 7 November 2018 and 1 December 2018, the Claimant commenced his twelfth tour of duty (**Tour of Duty #12**) on board MV Britannia [AB/101]. His record of sea service was stamped by FMS-B, and notes this was an 'Early Medical Disembarkation [AB/101]. It is not in dispute that in November 2018, the Claimant was undergoing mental health difficulties which meant he was not fit to continue with this tour of duty [AB/69-70]. The Tribunal finds the Claimant also effected this period of service pursuant to, and governed by the terms of, the SEA he was sent on around 4 July 2018 identifying his employer as FMS-B. During this tour, the Claimant did not dispute FMS-B was his employer.

37. Between December 2018 and October 2019 (just under a year), the Claimant did not complete any tours of duty, and did no work for any Carnival group entity. During this period, the Claimant took time to update his driving skills, obtaining HGV driving certificates [AB/202-205]

38. By November 2019, the Claimant felt fit enough to return to work. On 5 November 2019, the Claimant notified L Draper (Carnival UK Rotations Manager) he was fit to return [AB/109-110]. By email on 8 November 2019, after stating she was glad to

hear he was back to full health, Ms. Draper stated all crews were now brand-specific.

39. On 9 December 2019, the Claimant signed a fifteenth SEA [SB/20] providing for fixed-term employment as a Finance Manager for the period 6 January 2020 – 26 April 2020. This SEA identified the Claimant's employer as FMS-B, and incorporated by reference the standard terms in B37, a copy of which (dated 7 November 2019) was provided to the Tribunal [AB/71-82]. Of note in this B37:

    a. para. 1.1(a) – the Company (ie, FMS-B, not Carnival plc) requires the Claimant to provide services onboard a ship for a fixed period of time [AB/71];

    b. para. 1.1(c) – the start date and end date of the Claimant's employment under the fixed-term agreement is specified in Part A of the Claimant's employment agreement [AB/71];

    c. para. 1.8(a) – "*You are employed by the Company named in Part A*" [AB/72];

    d. para. 1.8(b) – the Company is contracted to provide crew to work for the Shipowner, Carnival plc [AB/72];

    e. para. 1.8(c) – the Claimant may be appointed to any ship owned or operated by the Shipowner [Carnival plc] under the P&O Cruises brand, the Cunard brand, or any other Carnival group brand [AB/72];

    f. para. 1.9.2(b) – "*Where your appointment is for a fixed term it will always expire at the end of that fixed term*." [AB/72];

    g. para. 18.2 – the Company can dismiss the Claimant at any time in cases of gross misconduct [AB/82];

    h. para. 18.3 – the Shipowner (Carnival plc) has clearly defined policies and procedures which are applicable to its fleet [AB/82].

40. Between 7 January 2020 and 26 April 2020, the Claimant commenced his thirteenth and final tour of duty (**Tour of Duty #13**) on board HM Queen Victoria [AB/101]. His record of sea service was stamped by FMS-B [AB/101]. The Tribunal finds the Claimant effected this period of service pursuant to, and governed by the terms of, the SEA he signed on 9 December 2019 identifying his employer as FMS-B. During this tour, the Claimant did not dispute FMS-B was his employer.

2020 email exchange re: employment status

41. While still serving on Tour of Duty #13, the Claimant engaged in an email exchange regarding his employment status. By email on 27 February 2020 [AB/127], the Claimant complained he had been "*de facto*" fired from Cunard [AB/127].

42. By email on 5 March 2020 at 15:57 [AB/123], Y Smith (Carnival plc HR manager) forwarded a response from their Employee Relations Department stating (in relevant part) "*you have not been dismissed from either brand, or by your employer, Fleet Maritime Services Bermuda Limited*", and reminding the Claimant of the wording of

clause 1.8(c) of his SEA permitting his appointment to any ship owned or operated by the Shipowner (Carnival plc).

43. The Claimant received the above email, and replied to it within 20 minutes [AB/118]. His reply did not dispute Y Smith's unambiguous assertion that FMS-B was his employer.

44. In March 2020, the Covid-19 pandemic (and measures to address it) began to take effect worldwide. Social distancing requirements mandated worldwide had a serious effect on all businesses whose customers were unable to effect social distancing.

45. As one would expect, the Covid-19 pandemic had a very damaging effect on the Carnival group's cruise business. By letter (on FMS-B letterhead) to the Claimant dated 1 April 2020 [AB/131], Allen Hodges (for and on behalf of FMS-B) served 1 month's notice to end the Claimant's current tour contract (Tour of Duty #13). The Claimant did not reply to that letter disputing FMS-B's right to terminate his tour of duty. The Tribunal finds that at the time, the Claimant accepted it had that right.

27 April 2020 – 12 December 2021

46. Between 27 April 2020 (day after Tour of Duty #13 ended) and 12 December 2021 (date of purported resignation),the Claimant did no further work for any Carnival group entity (this fact is not in dispute) and was not paid by any Carnival group entity for work done (or not done, as the case may be) during this period (this fact is also not in dispute).

Reference

47. On about 27 August 2020, FMS-B provided a signed employment reference for the Claimant (to whom is not clear). The reference is stated to be: "*Loss of Employment due to Covid 19 (FMSB*)." [AB135].

December 2020: Claimant chases new contract

48. By email on 24 December 2020, the Claimant requested "*an update on my next contract. I know some of my colleagues who left contracts after me, are now being scheduled back onto ships in the Auditor/Finance roles and I was wondering when my next join date will be*" [AB137].

49. The Claimant was, unsurprisingly, not satisfied with the reply he received that day stating "*Should we require you to join, I will be in touch to discuss*" [AB/136], and sent a further email that day stating *"I've now encountered the whole of 2019 and 2020 without a contract, with the exception of 4-months prior to my disembarkation during the Op pause. Based on the fact that I've served only 4-months out of 24-months onboard any vessel, I do believe I have legitimacy to my request for a contract, especially as I've noticed which peers have been returning during the Op Pause*." [AB/136].

April 2021: Claimant rejects employment contract he had already accepted

50. By email on 22 January 2021 [AB/141], S Raybould (P&O) offered the Claimant a position in May 2021 on board the Aurora.

51. By email on 24 January 2021 [AB/141], the Claimant accepted that offer, and requested the contract dates.

52. By email on 25 January 2021 [AB/140], Ms. Raybould told the Claimant the dates would be 6 May – 2 September 2021.

53. By email on 8 April 2021 [AB/143], the Claimant asked Ms. Raybould whether he was still scheduled for the Aurora on 6 May.

54. By email on 9 April 2021 [AB/142], Ms. S Parker (P&O) advised the Claimant that he was still planned to join the Aurora on 6 May.

55. By email on 14 April 2021 [AB/142], the Claimant notified Ms. Parker he was not able to join in May and asked her to reschedule someone else for this contract position.

56. Ms. Parker did not dispute the Claimant's right to withdraw from this contract. The Claimant did not do a tour of duty on board the Aurora in the period May – September 2021. Even though he had previously accepted it, the Claimant suffered no adverse consequences as a result of his rejection of this contract. On the contrary, as noted below, the Claimant continued to be offered new employment opportunities.

July 2021: Claimant rejects offer of new employment contract

57. By email on 21 July 2021 [AB/158], Ms. R. Mann notified the Claimant there was an immediate vacancy onboard "VE" for a Finance Manager, and asked what his availability was. It was her intent to offer the Claimant this post if he was available.

58. By email on 21 July 2021 [AB/158], the Claimant rejected this offer of employment: "*Sorry Rachel, I won't be returning to sea for the foreseeable future. Thank you for the consideration though*".

59. By email on 22 July 2021 [AB/157], Ms. Mann thanked the Claimant for getting back to her, and stated she would take his email as his resignation and would update the system to reflect that.

60. By email on 22 July 2021 [AB/157], the Claimant replied asking whether he was still employed by "*Cunard*". After Ms. Mann replied no as he was part of the P&O fleet [AB/156], the Claimant replied his employment contract said otherwise. The Tribunal notes not a single one of the SEAs the Claimant was signed or was sent stated he was allocated to the Cunard line and could not be required to work on the P&O line.

61. Ms. Mann did not dispute the Claimant's right to reject the contract she offered him. The Claimant did not do a tour of duty on board the VE. The Claimant suffered no adverse consequences as a result of his rejection of this contract. The reason Ms. Mann stated she would take his email as his resignation and would update the

system was a consequence not of the Claimant's rejection of the offer of employment but an entirely understandable reaction to the Claimant's statement that he would not be returning to the sea for the foreseeable future.

Grievance

62. On 22 July 2021, the Claimant submitted a grievance via email [AB/160-161], which was rejected by letter dated 12 October 2021 [AB/164-166] following a telephone grievance hearing on 12 August 2021. The outcome letter noted: "*Your employer has discretion whether to accept or reject my recommendation*". By letter dated 15 October 2021 [AB/167], FMS-B notified the Claimant it accepted Carnival plc's recommendation not to uphold the Claimant's grievance.

63. By email on 10 November 2021 [AB/168-169], the Claimant appealed against the rejection of his grievance. By email on 13 December 2021 [AB/172-173], while his appeal was still pending, the Claimant resigned ("*I intend to resign from employment with Carnival Corporation on the legal grounds of constructive unfair dismissal*.").

Payslips

64. The Tribunal was provided with payslips for the Claimant [AB/175-201]. Of note:

    a. 2015 payslips expressly identified FMS-B as his employer [AB/175-179];

    b. certain 2016 payslips referred to FMS-B explicitly [AB/180-181];

    c. certain payslips identified the payroll name as "*Fleet Maritime Services*" [AB/182-201];

    d. no payslips identified Carnival plc as the Claimant's employer [AB/175-201].

ET proceedings

65. On 19 December 2021, the Claimant contacted ACAS and 2 days after ACAS issued its EC Certificate [AB/4]. On 28 February 2022, the ET1 was presented [AB/5].

Relevant law

66. Burden of proof. The initial burden of proof on Issues #1-4 rests on the Claimant.

67. Identity of employer. Per Choudhury P in Clark v Harney Westwood & Riegels [2020] UKEAT/0018/20 (para. 44), the question 'who is the employer?' is in most cases capable of being answered without difficulty. Where the corporate structure of the 'employer' comprises more than one entity and where potentially relevant corporate entities are in different jurisdictions, however, the answer may not be straightforward.

68. In determining whether person A is employed by person B or person C, the following principles apply (paras. 52-53):

a. where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law;

b. where there is a mixture of documents and facts to consider (likely to be the case in most disputes), the question is a mixed question of law and fact, requiring a consideration of all the relevant evidence;

c. any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question – the Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties;

d. if a written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer requires consideration of whether there was a change from B to C at any point, and if so how – for example, was there a novation of the agreement resulting in C (or C and B) becoming the employer?

e. in determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed;

f. documents created separately from the written agreement without A's knowledge which purport to show that B rather than C is the employer should be viewed with caution, as the primacy of the agreement entered into by the parties would be seriously undermined if hidden or undisclosed material can readily be regarded as evidence of a different intention than that reflected in the written agreement.

Issue #1 (Identity of Employer): Discussion/Conclusions

69. Issue #1 requires the Tribunal to determine the identity of the Claimant's employer. It is important to state, and indeed emphasise, at the outset that both parties agreed the Claimant was someone's employee, not a worker or independent contractor, the dispute being simply the identity of that employer.

70. The ET's conclusion on this issue is that Carnival plc was not the Claimant's employer at any relevant time. The ET's reasons for that conclusion are as follows:

71. First, between 6 March 2015 and 12 December 2021, Carnival plc did not make a verbal or written offer to the Claimant offering him employment by Carnival plc. No other Carnival group entity did so on its behalf. On the contrary, the Respondent's letter dated 6 March 2015 [50-53] made it clear from the outset that it was not the Respondent's intention to enter into a direct employment contract with the Claimant.

72. Second between 6 March 2015 and 12 December 2021, the Claimant did not accept or purport to accept any verbal or written offer to be employed by Carnival plc, whether made by Carnival plc or by any other Carnival group entity, nor did he make any offer to Carnival plc to that effect which was accepted at any time.

73. Third, no contemporaneous documentary evidence shows that during the period 7 August 2015 – 26 April 2020 (when the Claimant was working on board cruise ships) (a) the Claimant was employed under a contract of employment with Carnival plc (b) Carnival plc considered the Claimant to be one of its employees.

74. Fourth, in the period 7 August 2015 – 26 April 2020, when the Claimant was performing the following tours of duty, the contemporaneous documentary evidence suggests the Claimant was requested to be and/or explicitly agreed to be an employee of the following companies, not Carnival plc:

    a. Tour of Duty #1 (7 Aug 2015 – 12 Dec 2015) – the Claimant's employer was FMS-B pursuant to the SEA the Claimant signed on 22 July 2015 [AB/54];

    b. Tour of Duty #2 (14 Dec 2015 – 7 Feb 2016) – the Claimant's employer was FMS-B pursuant to the SEA he signed on 19 November 2015 [AB/55];

    c. Tour of Duty #3 (10 March 2016 – 10 May 2016) – the Claimant's employer was FMS-B pursuant to the SEA he signed on 11 February 2016 [AB/56];

    d. Tour of Duty #4 (10 May 2016 – 22 Aug 2016) – the Claimant's employer was FMS-I pursuant to the SEA the Claimant was sent but did not sign, signed by FMS-I's signatory L Reed on 4 May 2016 [AB/57];

    e. Tour of Duty #5 (27 Sept 2016 – 4 Dec 2016) – the Claimant's employer was FMS-I pursuant to the SEA the Claimant was sent but did not sign, signed by FMS-I's signatory L Reed on 12 September 2016 [AB/61];

    f. Tour of Duty #6 (9 Dec 2016 – 6 March 2017) – the Claimant's employer was FMS-I pursuant to the SEA the Claimant was sent but did not sign, signed by FMS-I's signatory C Le Page on 7 December 2017 [AB/61];

    g. Tour of Duty #7 (22 May 2017 – 24 August 2017) – the Claimant's employer was FMS-B pursuant to the SEA he signed on 26 April 2017 [AB/64];

    h. Tour of Duty #8 (25 Aug 2017 – 13 Oct 2017) – the Claimant's employer was likely still FMS-B, this tour following immediately on from Tour of Duty #7;

    i. Tour of Duty #9 (4 Nov 2017 – 17 Dec 2017) – the Claimant's employer was FMS-B pursuant to the SEA the Claimant was sent but did not sign, signed by FMS-B's signatory C Le Page on 25 October 2017 [SB/17];

    j. Tour of Duty #10 (2 Jan 2018 – 13 July 2018) – the Claimant's employer was FMS-B pursuant to the SEA the Claimant was sent but did not sign, signed by FMS-B's signatory C Le Page on 19 December 2017 [SB/18];

    k. Tour of Duty #11 (21 Aug 2018 – 1 Dec 2018) – the Claimant's employer was FMS-B pursuant to the SEA the Claimant was sent but did not sign, signed by FMS-B's signatory C Le Page on 4 July 2018 [SB/19];

l. Tour of Duty #12 (21 Aug 2018 – 1 Dec 2018) – the Claimant's employer was FMS-B pursuant to the SEA the Claimant was sent but did not sign, signed by FMS-B's signatory A Hodges on 4 July 2018 [SB/20];

m. Tour of Duty #13 (7 Jan 2020 – 26 April 2020) – the Claimant's employer was FMS-B pursuant to the SEA he signed on 9 December 2019 [SB/21].

75. The Tribunal is satisfied the SEAs referred to above truly reflected the parties' intentions at the time.

76. Fifth, the Claimant accepts he did not sign or consent to the terms any of the aforementioned SEAs under duress, by mistake, or as a result of any misrepresentation made to him. The Tribunal finds that when the Claimant signed SEAs, he did so knowing and agreeing to be employed by the Carnival group entity the relevant SEA identified as his employer, and he was so employed during the relevant tour of duty covered by that contract.

77. Sixth, in the period 26 April 2020 to 13 December 2021 – the period between the end of Tour of Duty #13 and the date on which the Claimant purported to resign from the Respondent's employment - the Claimant did no further work for any Carnival group entity (the Claimant accepts this) and received no pay after June 2020 (the Claimant also accepts this). The absence of work and pay during this lengthy period is consistent with the Claimant's final contract of employment having expired on 26 April 2020 and having not been renewed thereafter, and the Claimant having no separate employment contract with Carnival plc during this period.

78. Seventh, the Claimant's case that he was an employee of Carnival plc in 2020 is inconsistent with his acceptance on 24 December 2020 that he was out of contract.

79. Eighth, the Tribunal accepts Ms. Milner's evidence that the Carnival group structures its internal organisation so that parent company Carnival plc employs no seafarers at all. There is nothing obviously improper or unlawful about that arrangement, and it is certainly not an arrangement which Carnival plc in any way kept hidden from the Claimant. If the Claimant was unhappy with the terms of the fixed-term employment contracts offered to him, he was at liberty to reject them or to seek to renegotiate their terms. So far as the Tribunal is aware, the Claimant did neither.

80. Ninth, on 1 April 2020 the Claimant was given written notice of the termination of his employment contract by FMS-B. The Claimant did not challenge its right to do so, from which the Tribunal infers that the Claimant accepted at the time that FMS-B was his employer and had the right to terminate his employment contract (as well as pay him a gratuity payment) arising out of the onset of the Covid-19 pandemic.

81. Tenth. in April 2021 the Claimant withdrew from a Carnival group contract he had already accepted. At the time, the Claimant clearly thought – the Tribunal considers rightly – he was under no contractual obligation to any Carnival group entity to perform that tour absent a written contract to that effect. He suffered no adverse consequence from his withdrawal. A hallmark of an employment contract is an employer's obligation to find suitable work for an employee, and the employee's obligation to do that work. The Claimant's trouble-free rejection of this contract is

inconsistent with his case that he was an employee of Carnival plc at the time.

82. Eleventh, in similar vein, in July 2021 the Claimant rejected a further offer of a new employment contract without any suggestion from any Carnival group entity at the time that the Claimant was not free to do so. Again, this incident is inconsistent with the Claimant's case that he was bound to do work for Carnival plc pursuant to an employment contract to that effect in place at the time.

83. Twelfth, the Claimant's payslips do not support his case that he was an employee of Carnival plc [AB/175-201]. They tend to suggest FMS-B was his employer.

84. The Tribunal rejects the Claimant's case that the first, second and/or third SEAs, all of which provided for permanent employment, remained in effect after the Claimant signed subsequent SEAs providing for fixed-term employment or somehow formed part of an 'umbrella' contractual arrangement. That interpretation is inconsistent with the fact that during the later tours of duty, the Claimant was only paid when he was on a tour of duty for that particular tour. And if the Tribunal is wrong to draw that conclusion, the consequence would be at most that the Claimant had a permanent, non-fixed term employment contract with FMS-B "*in the background*", not a permanent, non-fixed term employment contract with Carnival plc.

85. The Tribunal declines to draw an inference supportive of the Claimant's case that Carnival plc was his employer based on the fact Carnival plc occasionally stamped his sea service record [AB/100-101]. First, no document was put before the Tribunal which showed or suggested those records can only be stamped by a seafarer's employer. Second, on at least one occasion the Claimant's record was signed by Cunard Line Ltd., a company neither party has suggested was his employer. Third, the Tribunal considers it more likely that the stamping of a record of sea service is an administrative act which can lawfully be performed by any group company.

86. The Tribunal rejects the inference that Carnival plc was the Claimant's employer because it discharged Carnival group HR functions. It is not uncommon in group situations for one entity in the group to assume primary responsibility for certain groupwide functions, eg, HR, or treasury. The fact Carnival plc may have discharged groupwide HR functions does not mean Carnival plc was the employer of every employee in the group who looked to Carnival plc for HR guidance and support.

87. The Tribunal rejects the inference that Carnival plc was the Claimant's employer because it owned and/or operated the ships he worked on. No inference about the identity of his employer can be drawn from that fact. Indeed, the Part As and B37 and B40 incorporated by reference to the SEAs the Claimant signed all made it clear Carnival plc was the shipowner – it was literally defined as such in those agreements.

88. The Tribunal draws no inference supportive of the Claimant's case that Carnival plc was his employer based on the fact Carnival plc paid the Claimant to attend a limited period of training. That fact is entirely consistent with the terms of the SEAs.

89. The Tribunal rejects the Claimant's case that the SEAs he signed or was sent but did not sign were a mere sham and not reflective of his true contractual situation.

This is a serious allegation, which is unsupported by cogent or compelling evidence.

90. There is no allegation nor is there evidence that any SEA was novated either at all or on terms which made or included Carnival plc as the Claimant's employer.

Issue #2 (Jurisdiction): Discussion/Conclusions

91. The only respondent in this case is Carnival plc. All of the Claimant's claims against Carnival plc are based on the case stated in his ET1 that Carnival plc was his employer (the ET1 puts no alternative case). The Tribunal has found that Carnival plc was not the Claimant's employer at any relevant time. Give the way the Claimant has put his case, it follows that the Tribunal has no jurisdiction to consider those claims, or – if that is technically incorrect – that they must be dismissed on their merits because Carnival plc was not his employer.

92. Because Carnival plc was not the Claimant's employer at any relevant time, the Tribunal lacks jurisdiction to consider his claim of unfair dismissal under ss.94-98 of ERA 1996 because the Respondent did not continuously employ him for at least 2 years (as required under s.108(1) of ERA 1996).

93. The Tribunal declines to decide the issues identified at paras. 14.2.1 and 14.2.2 of the CMO. If the Tribunal has erred and there is to be a final merits hearing in respect of some or all of the claims identified in para. 3 above, the Tribunal considers it to be in the interests of justice to leave those issues for determination at that final hearing where there will be a fuller evidential record.

Issue #3 (Time Limits): Discussion/Conclusions

94. Technically, these issues do not arise in light of the conclusions above concerning the identity of the Claimant's employer. Notwithstanding that, the Tribunal's conclusions on Issue #3 are (or would be) as follows:

95. First, the Claimant's claim of unfair (constructive) dismissal under ss.94-98 of the Employment Rights Act 1996 was not presented in time. The Tribunal has already found that the Claimant's last employment ended on 26 April 2020, and the Claimant did not contact ACAS until 19 December 2021 [AB/1].

96. But if that is wrong, and the Claimant remained in employment in 2020 and at least part of 2021,is not in dispute that by email on 21 July 2021 [AB/158], the Claimant rejected an offer of employment in the following terms: "*Sorry Rachel, I won't be returning to sea for the foreseeable future. Thank you for the consideration though*". By email on 22 July 2021 [AB/157], Ms. Mann thanked the Claimant for getting back to her, and stated – reasonably, in the Tribunal's judgment – that she would take his email as his resignation and would update the system to reflect that. The Claimant's query asking whether he was still employed by Cunard suggests to the Tribunal that the Claimant never really understood the contractual basis upon which he had been employed – every single contractual document made clear he could be required (when working for his employer) to work on any ship owned or operated by Carnival plc under any brand.

97. In the Tribunal's judgment, the Claimant's 22 July 2021 email constituted a clear, unambiguous resignation from any on board cruise ship-related employment he may have had at the time. The Claimant's entire work history up that point had consisted in him working on board Carnival plc cruise ships. In that context, stating he would not be returning to sea in the foreseeable future was akin to a pilot telling his employer he would no longer fly in the foreseeable future, and was inconsistent with an intention on his part to continue working for any Carnival group employer on board a ship. If the Tribunal is wrong to find that the Claimant resigned in clear, express terms, the Tribunal finds that the Claimant's words were reasonably understood by their recipient as a resignation at the time.

98. The Claimant neither presented an ET1 alleging unfair dismissal within 3 months of 22 July 2021 (ie, by 21 October 2021) nor did he contact ACAS during that 3 month period, the effect of which (had he done so) would have been to gain some extra time to present a timely ET1. The Tribunal is not satisfied it was not reasonably practicable for him to have presented his unfair dismissal claim (or contacted ACAS) within 3 months of 22 July 2021. This claim is therefore still out of time.

99. Second, for the reasons stated above, the Claimant's unfair (constructive) dismissal claim under s.103A of the Employment Rights Act 1996 was out of time. The Tribunal is not satisfied it was not reasonably practicable for him to have done so.

100. Third, for the reasons stated above, the Claimant's claim of wrongful dismissal/notice pay was presented out of time.

101. Fourth, in light of the decisions in Woodward v Abbey National plc [2006] EWCA Civ. 822 (detriment for purposes of whistleblowing legislation can occur after relevant relationship with employer has ended/terminated) and BP v Elstone [2010] IRLR 588 (detriment for purposes of whistleblowing legislation can occur even if protected disclosure was made by worker when working for a different employer), the Tribunal declines to decide at the PPH whether the Claimant's 'whistleblowing' claim under s.47B of the Employment Rights Act 1996 was presented in time – that issue (which was far from central to the parties' submissions at the PPH) should be determined (if appropriate) at any final merits hearing.

Issue #4 (Two Years' Continuous Service): Discussion/Conclusions

102. For the reasons stated above, the Tribunal's conclusion is that the Respondent did not continuously employ the Claimant for a minimum continuous period of at least two years required in order to bring a claim of 'ordinary' unfair dismissal against it under ss.94-98 of ERA 1996. The Tribunal's conclusion is that the Claimant was not employed by Respondent Carnival plc at any relevant time.

103. At the PPH, the Tribunal stated the Claimant would be given a window of time to apply to amend his ET1 claim if some or all of his claims were struck out or dismissed at the PPH. This window has been incorporated in paras. 6-7 above.

Employment Judge Tinnion
Date: 18 June 2023

Judgment sent to the parties: 04 July 2023

FOR THE TRIBUNAL OFFICE