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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102358/2020

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**Final Hearing Held by CVP on Thursday 12 February 2021 at 10.00am
Employment Judge Russell Bradley**

Mr John Anderson

**Claimant
R Lawson
Solicitor**

**Gareloch Support Services (Plant)
Limited**

**Respondent
N Moore
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. The claimant's application to amend his statement of claim is allowed under
20 exception of the insertion of the new paragraph 13; the Respondent is allowed
28 days in which to answer it by adjusting its grounds of resistance if so
advised.
2. The claim that the Respondent was in breach of contract in respect of the
claimant's entitlement to paid annual leave in the period between 23 January
25 2019 and 18 December 2019 is refused and dismissed.

REASONS

Introduction

1. On 30 April 2020 the claimant presented an ET1. In the attached statement of claim he makes various alternative bases for a claim for holiday pay. In the
5 statement (paragraph 2) he asserts that throughout his employment he received no payment in respect of annual leave. In its ET3 and the attached grounds of resistance the respondent sets out its answers to the various bases. The agreed dates of employment are between 25 January 2011 and 18 December 2019. The claimant was employed by the respondent as a
10 deckhand.
2. On 18 November 2020, the tribunal made six orders following a telephone case management preliminary hearing on 16 November. The first was that the claim should proceed to a final hearing on the issue only of whether the Respondent was in breach of contract in respect of the claimant's entitlement
15 to be paid annual leave as that claim was identified in particular paragraphs of the statement of claim. The second was to fix 22 January as the date for that hearing and to hold it by CVP. Due to an administrative error by the tribunal that hearing was not listed. It proceeded on 12 February instead.
3. For this hearing parties had prepared and lodged a joint bundle of 17
20 documents extending to 102 pages. They had also prepared and lodged (i) an agreed statement of facts and (ii) skeleton submissions.
4. Present with Mr Moore for the Respondent were Mr McGarry and Mr Ferguson, directors of the Respondent. They were present throughout the hearing on the basis that neither would be giving evidence at this or any
25 subsequent hearing. Mr Moore had anticipated calling Anthony Drake as a witness for the Respondent. He was not present for any of the claimant's evidence. As it transpired, he was not called and was not present for any of the hearing.

Amendment to the claim

5. By email on 20 January and at a time when it was not clear if the hearing fixed for 22 January was proceeding, Mr Lawson sought to amend the claim. He did so by attaching to his email two versions of his statement of claim, one with tracked changes and one “*clean*” version incorporating them. The Respondent opposed the application. I heard parties on it before considering the issue.
6. The claimant’s position from his email and oral submission can be summarised as follows; as it was originally drafted, the statement did not specify the period of claim; the intended effect of the amendment was to clarify that the “*contract claim*” related to the period from 23 January 2019 to 18 December 2019, when the employment ended; it was only on 13 January 2021 that Mr Lawson became aware of the terms of a written contract of employment between the parties entered into on 28 April 2011 (now **pages 36-42** of the bundle); the primary purpose of the amendment was to avoid any argument of *res judicata* and to answer a time-bar point taken by the Respondent in its skeleton at paragraph 10(c) insofar as that argument was relevant to the 2011 contract; there is no new complaint being added; there is no prejudice to the Respondent, and if the amendment is not allowed the claimant may be left without a remedy (at least in relation to the “*contract claim*” prior to 23 January 2019). Mr Moore opposed the application. To summarise his opposition; the Respondent had prepared for this hearing on the basis that the contract claim spanned the whole period of the claimant’s employment; that claim in his view had no merit; the effect of allowing the amendment would be to permit the claimant to (i) carve out the contract claim for the period prior to 23 January 2019 and (ii) litigate it in court with additional unnecessary time and expense being incurred by the Respondent; and his recollection was that Mr Lawson was aware of the 2011 contract earlier than 13 January.
7. I allowed the application to amend excepting the proposed changes to paragraph 13 of the tracked version. The effect of the amendment is to limit the claim for this hearing to a period of 47 weeks, being the period from 23rd January 2019 until the end of the claimant’s employment. I took account of

the overriding objective and the need to deal with cases fairly and justly. I accepted Mr Lawson's position that he was not aware of the 2011 contract until relatively recently, 13 January 2021. I took account of the potential prejudice to the Respondent in having to defend court proceedings and the attendant management time and cost of legal representation. I also took account of the respondent's confidence in its defence of any such proceedings and thus the likely recovery of judicial expenses. If I had refused the amendment the prejudice to the claimant may well have been to lose a part of the claim. In my view that outweighed the prejudice to the respondent in having to answer the claim elsewhere. With the agreement of parties, I excepted the amendment which is the proposed introduction of paragraph 13 on the basis that it is properly an issue which is to do with a statutory basis of the claim, an issue to be determined at a later hearing.

8. I allowed the respondent 28 days in which to answer the amendment, if so advised.

The issue for this hearing

9. Parties were agreed that the only issue was whether the respondent was in breach of contract in respect of the claimant's entitlement to be paid annual leave as that claim was identified in paragraphs 1 to 8 of the statement of claim. After allowing the amendment, the issue narrowed to whether the respondent was in breach of contract in respect of the claimant's entitlement to be paid annual leave in the period 23 January 2019 to 18 December 2019.

Evidence and findings in fact

10. The parties had agreed a statement of facts. The claimant gave evidence and was cross-examined. From those sources I found the following facts agreed, admitted or proved which were relevant to the issue before me.

11. The claimant is John Anderson. The Claimant was employed by the Respondent as a deckhand. His employment commenced on 25 January 2011. The Claimant principally worked on the Respondent's workboat Lesley M. As far as he was aware all of the vessels on which he worked while employed by the respondent were British flagged vessels. From 26 February 2015 until 18 December 2019, he did so exclusively. Lesley M is British/UK-registered as belonging to the port of Glasgow. She is licensed to operate up to 60 nautical miles from a safe haven. The Claimant ordinarily worked a regular roster of equal Time On/Time Off. From the commencement of employment on 25 January 2011 until 23 January 2019 his contract was not specific as to the number of days he was to work per year. The claimant worked equal time on/time off for the majority of that time, on either a 3 weeks on/3 weeks off or a 4 weeks on/4 weeks off cycle. With effect from 23 January 2019, his contractual obligation was to work at least 182.5 days per year. During his last year of employment his working routine was generally 4 week on/4 weeks off. In September 2019 he worked 3 weeks on (5 September to 25 September) followed by 24 days off (26 September to 19 October) then 25 days on (20 October to 13 November) followed by 35 days off (14 November to 18 December). The claimant's normal change over day was a Wednesday or a Thursday. The variation to his roster towards the end of the time in 2019 was as a result of a surprise holiday which had been planned by the claimant's wife.
12. With effect from 23 January 2019, the Claimant's terms and conditions of employment were set out in a Seafarer Employment Agreement (the SEA) (pages 43-46). The claimant signed the SEA at his home on 19 January 2019. He had read clause 9. He understood when he signed the SEA that he was getting six months off (on shore) which included his leave. At that time he did not know that he was entitled to any additional payment for that leave. The payments which are shown on the payslips (page 101) reflect elements set out in Schedule A to the SEA (page 46). In relation to "Annual paid leave" on Schedule A, the claimant understood that he did not get a payment, just time off. His salary from 23rd January 2019 was £26,650.

13. Clause 4 of the SEA (**page 44**) states: *“The Seafarer is employed on an Overtime and Weekend Work payment contract. Schedule A details Payment, Hours of Work and Annual Paid Leave, subject always to section 5 below. The form of Schedule A for Fully Consolidated Salary is incorporated into this SEA and forms part of it.”*
14. Clause 5 of the SEA (**page 44**) states: *“The terms and conditions of employment which apply to this SEA are Part A and also Part B of the Employer's Standard Terms and Conditions of Employment for Seafarers ('Standard Terms'). The Employer will keep the Standard terms under review and may vary them from time to time as it considers necessary for legal compliance and/or to meet the needs of the business. It is agreed that any variations to the Standard Terms will, on adoption by the Employer, apply to and be incorporated into this SEA. The Seafarer was given personal copy of the current Standard Terms with this SEA prior to its signature.”*
15. Schedule A to the SEA (**page 46**) states: *“Annual paid leave - 30 days or in accordance with the flag state legislation governing the ship to which the Seafarer is for the time being attached (if superior).”*
16. The Standard Terms as given to the Claimant with the SEA in January 2019 remained unaltered until the termination of his employment. No variations were issued to him. Part A of the Standard Terms (**page 47**) opens with this explanation: *“Part A - applicable to all seafarers - employed and independent contractors In this Part A, when applied to a seafarer who is not stated in his SEA to be an 'independent contractor: 'engagement' is synonymous with 'employment' unless the context otherwise requires.”*
17. Within Part A of the Standard Terms-clause 1- Contract and conditions of engagement - (**page 47**) provided: *“1.1 These Standard Terms and Conditions of Contract are incorporated into and form part of the personal Seafarer Employment Agreement (SEA) on which a Seafarer is engaged to the extent specified in the SEA. clause 7 - Remuneration - (**page 50**) provided: 7.1 All remuneration is fully consolidated. It covers all time and all the hours of work anticipated whilst the Seafarer is serving on board a vessel; also*

Annual Leave. There is no additional entitlement to remuneration for any elements which might be said to require some additional compensation, such as overtime payments, weekend and/or public holiday working, watchkeeping bonus, pilotage, stowing and cargo lashing, seniority etc. unless explicitly provided for in the Seafarer's SEA. Clause 17 - On-Board Complaint Procedure - **(page 53)** provided: If the Seafarer has a complaint or grievance concerning the provision of any rights established through the International Labour Organization Maritime Labour Convention 2006, this must be raised through the Company's On-Board Complaints Procedure. It is non-contractual. Any appeal against a determination may be brought in accordance with the On-Board Complaints Procedure.”

18. Within Part B of the Standard Terms Clause 24 - Salary - **(pages 54-55)** provided: “The Company will pay the Seafarer the annual salary (Salary) appropriate for his/her rank/rating as stated in Appendix A to his/her SEA. Salary will be remitted monthly in arrears in equal monthly instalments to the Seafarer's nominated bank account on the last business day of each month or, where this falls on a weekend or public/bank holiday, the closest banking day. Salary scales are set for equal Time On/Time Off working ...” Clause 25 - Tours of duty Time On and Time Off - **(page 55)** provided: “For most Company vessels the ratio of time off will be one day off (Time Off) for each day worked on board (Time On). Roster patterns will generally be established on this principle, subject to clauses. The Company may in its discretion adopt different Time On/Time Off ratios from time to time for specific vessels and/or services. The Seafarer will work the roster pattern for the vessel to which s/he is for the time being appointed. The day of joining a vessel and the day of leaving together count as one day of Time On. In appropriate circumstances rosters may be adjusted to meet the trading requirements of the vessel. Every endeavour shall be made to give due notice to the Seafarer of any change.” Clause 26 - Paid Annual Leave **(pages 56-57)** - provided: “The Leave Year is the calendar year. The Seafarer's entitlement to paid annual leave is as stated in Appendix A to his/her SEA (Annual Leave). Payment for Annual Leave is included in Salary. Annual Leave is taken during Time Off. Accordingly, there is no entitlement to any additional time off and/or pay in respect of Annual

Leave. Annual Leave accrues evenly through the Leave Year. Annual Leave is taken automatically during Time Off It is taken as follows On the first available days of Time Off, so that the Seafarer has used his/her full any outstanding balance of entitlement which has accrued due to him/her up until that time. In the final days of Time Off before the Seafarer's next Time On, so that the Seafarer takes in advance his/her entitlement which will accrue during the next rostered Time On; Accordingly, all Annual Leave which has accrued due up to the date of joining, plus all Annual Leave which is anticipated to accrue due during the Seafarer's next Time On will have been taken when the Seafarer joins a vessel for that Time On. On termination of employment, any Annual Leave which has accrued due but not been taken under the preceding provisions of this clause will be compensated in accordance with Flag State legislation. Clause 34 - Grievances (**page 59**) provided: "34.1. All complaints or grievances which do not relate to rights established through MLC 2006 must be raised using the Company's Grievance Procedure. It is non-contractual. Any appeal against a grievance decision may be brought in accordance with the Grievance Procedure."

19. The claimant's payslip dated 30 September 2019 (**page 101**) shows an entry for pay "over 12 hours." This entry represents time spent at work over the 12 hours of "Basic" also shown on the payslip. The basic hours were 7 until 7. The "over 12 hours" was overtime. The entries on the payslip for "Saturday" and "Sunday" are based on set weekend working on board and are also overtime payments.

20. On 20 November 2019, whilst on Time Off, the Claimant tendered his resignation. The Claimant e-mailed Mr Tony Drake, Operations manager of the Respondent: "Subject: Notice period Hi Tony, I hope this finds you well. I am planning on submitting my resignation time for a change, something ashore and less hours. What notice period would you be requiring from me?" Mr Drake replied: "Hi John That's really sad news, you will need to provide 4 weeks' notice, please feel free to pop in and discuss as I am in the office in Rosneath today that's if you feel we can do something to persuade you not to leave and worth a chat..." The Claimant replied: "Hi Tony, Please accept this

as my resignation. I will give 4 weeks' notice as of today. I have put a lot of thought into this decision and it has not come easily, my time with GSS is some of the happiest and enjoyable times I have experienced and will always be appreciated. I would like to thank you personally for all you have done for me during my time with GSS and hope there are no hard feelings over my decision. But it's time for a change and I need to be spending more time at home and working less hours and have been offered an opportunity that allows that."

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21. The Claimant's last day of work on board ship was 13 November 2019. That was the last day of a 25-day continuous period of Time On. The effective date of termination of the Claimant's employment was 18 December 2019. The Claimant was on Time Off continuously for 35 days and on continuous pay from his last day of work on board ship (13 November 2019) up until the effective date of termination of employment.

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15 22. At no time during his employment with the Respondent did the Claimant request to take paid annual leave during a period of Time On; raise any grievance asserting an entitlement to paid annual leave and more specifically asserting an entitlement to take time off as paid annual leave outside of and/or in addition to Time Off, either under the Onboard Complaints Procedure or under the Respondent's Grievance Procedure; or raise informally with the Respondent's management either orally or in writing the issue of an entitlement to paid annual leave and more specifically an entitlement to take time off as paid annual leave outside of and/or in addition to Time Off. The claimant understood that the rota provided him with 6 months per year off. During his employment he assumed that holiday was taken while on shore. Following the end of his contract, and in a conversation about his future he was asked if he had sorted out with the respondent the question of holiday pay. His understanding had been that he did not get holiday pay. He spoke with his trade union who had explained that there was reason to look into the issue. That discussion had resulted in the bringing of these proceedings.

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23. The claimant's salary was £26,650. The payslips for the months of July to November 2019 inclusive (**pages 101 and 102**) show that he was paid £2220.83 monthly which is 1/12 of his Salary.

Comment on the evidence

5 24. In very large measure the relevant agreed findings in fact replicated tranches of the contract for the period 23 January 2019 to 18 December 2019.

Submissions

25. For the claimant Mr Lawson spoke to his skeleton. His principal submission was that the SEA provided for payment to the claimant for periods of annual leave which payments were "*in addition to normal remuneration.*" (**skeleton, paragraph 1**). The theme of entitlement to be paid in addition to an annual salary of £26,650 recurs in paragraphs 3, 4, 5, 11 and 17 of the skeleton. Mr Lawson referred to five principles by which contractual documents are to be construed, summarised by Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society and Others* [1988] 1 All ER 98. In his submission the material which is background knowledge, reasonably available to the parties and which would inform or convey the meaning of the SEA to a reasonable person includes (i) the entitlement to paid annual leave under the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 and antecedent and associated legislation; (ii) the minimum standards for annual leave with pay for seafarers contained in the Maritime Labour Convention 2006; and (iii) the fact that by virtue of the Charter of Fundamental Rights of the European Union, every worker has the right to an annual period of paid annual leave. He further submitted that on the respondent's interpretation of the contract, the word "*paid*" (in the expression "*Annual paid leave*" on Schedule A) is redundant. His skeleton emphasised the point by reference to the fact that while Schedule A specifies 30 days leave, the claimant's entitlement (by virtue of the relevant flag state (UK) legislation, the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018) was in fact to 38 days of paid annual leave. He further submitted that in the context of the relevant parts of Clauses 26 and

28 if an employee who was absent due to sickness requested annual leave during a period on Time Off, that employee would receive no payment in respect of that annual leave. On that analysis, he submitted that the Standard Terms (in Parts A and B) contain no mechanism for an employee who is absent due to sickness for a whole leave year to receive any payment in respect of annual leave entitlement. If the respondent's interpretation of the SEA is accepted, the effect of that would be to deprive those absent from work from any contractual entitlement to paid annual leave. In answer to the respondent's reference to Clause 7.1 of the Standard Terms, Mr Lawson emphasised the wording "*unless explicitly provided for in the Seafarer's SEA*" but made the point that the SEA provides additional entitlement to remuneration for overtime payments, weekend working and also annual leave, and accordingly, the clause has no impact on the claimant's contractual entitlement. In answer to the respondent's reference to Clause 26 he made two points. First, Schedule A is the "*key component*" of the contractual documentation and should take precedence over an "*internally inconsistent*" provision buried in Clause 26. Second, the *contra proferentem* rule should apply so that any ambiguity should be read against the respondent who seeks to avoid making payments to the claimant for his entitlement to leave. On the quantification of the claim, Mr Lawson's submission was that; gross annual salary was £26,650; the annual days of work were 182.5; dividing the former by the latter produces a daily rate of pay of £146.03; the claimant's annual leave entitlement was 38 days; in the 47 weeks of the claim, he thus was entitled to 47/52 of those 38 days (34.35 days); on the question of pay then, his claim is for 34.35 days x £146.03 per day, equalling £5,016.13. His position in his skeleton was that accrued holiday entitlement at termination was calculated as set out above so as to be 34.35 days. In reply to the respondent's skeleton, Mr Lawson identified paragraphs 15 to 20 as its substance on the issue. On paragraph 15 his position was that reference to there being "*no material alteration*" to the position from the 2011 contract was of no relevance to the interpretation of the SEA, and that the subjective intention of clarifying "*the interrelationship between paid annual leave and Time Off and to the incidence of paid annual leave within Time Off*" was not

relevant in the context of the third principle in ***Investors Compensation Scheme Limited***. On paragraph 16, his position was that it was open to find that the claimant did not get paid beyond his annual salary. On the reference to the case of ***Russell and Others v Transocean International Resources Limited and Others*** [2011] UKSC 57, Mr Lawson's position was that it dealt only with the issue of leave as opposed to paid leave, in contrast with the situation here. And on the issue of paid annual leave being consolidated into the claimant's salary (respondent's skeleton 19 under reference to Clause 7.1 of the standard terms) the contrast was with for example overtime which was meaningless and was no aid to interpretation of the contract.

26. For the respondent Mr Moore began by referring to paragraphs 11 to 19 of his skeleton submission. To summarise them here; the SEA is a new contract not a variation on the 2011 one; there is agreement as to 38 days of paid annual leave entitlement; the key provisions from the standard terms are Clauses 7 and 26; Part B of the Standard Terms (wherein there is to be found Clause 26) applies only to employees (such as the claimant); a distinguishing feature (in contrast with independent contractors to whom Part B does not apply) is the entitlement of employees to "*Paid Annual Leave*" within Clause 26, something which ought to have been of considerable interest before signing the SEA where there is added clarity of the interrelationship between paid annual leave and Time Off and to the incidence of paid annual leave within Time Off; from the claimant's evidence, he now accepted that he received paid annual leave during his employment; and the Maritime and Coastguard Agency guidance (referred to in his paragraph 18) explained the reflection of the statutory position in the SEA and Standard Terms which in turn make plain that paid annual leave is consolidated into salary. He referred to Clause 7.1 (within Part A) and to Clause 26 within Part B. Clause 26 provides for Paid Annual Leave. Clause 26.2 refers to the entitlement in Appendix A of the SEA. And while it is defined as "*Annual Leave*" there is no distinction between "*Annual Leave*" and "*Paid Annual Leave*." Clause 26.3 provides that payment for Annual Leave is included in Salary, a term contained in Appendix A. Referring to Clause 4 of the SEA, it provides that details including Annual Paid Leave are as contained in Appendix A but "*subject always to*" section 5 (which

is immediately below) and which provided that the terms of employment are as per Parts A and B of the Standard Terms. In his submission, on the issue of salary, Clause 7.1 is clear that “*all remuneration is fully consolidated*” and it is also clear on “*no additional entitlement*” “*unless explicitly provided for*” in the SEA. Looking at the claimant’s Schedule A, one can see what is explicitly provided for (weekday overtime and weekend working) but there is no explicit additional provision for Annual paid leave because it is already consolidated into the annual salary. In reply to points within the claimant’s skeleton, Schedule A distinguished its provisions and expressly provides for Annual paid leave. And the question of no provision for automatic salary variation in the event of different flag state legislation is irrelevant because all of the vessels on which the claimant worked while employed by the respondent were British flagged vessels. On the question of sick pay (and while it was not before the tribunal) Mr Moore made reference to Regulation 50 of the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014 which he said made provision for 13 weeks’ actual wages following sickness or injury sustained by seafarer. In addition, it was his submission that it was not typical for contracts to specify what was to happen in the event of a request for annual leave in a period of sickness absence during a period of Time Off. Separately, he made the point that at no time had the claimant ever raised the issue during his employment. Paragraph 20 of the respondent’s skeleton explained that Clause 26.5 operated for the claimant in such a way that he has taken his entitlement to paid annual leave up until 13th November, his last day of work on board ship. And paragraph 21 posited three approaches to the question of entitlement in the 35 day period between 14th November (when the claimant was not on board the vessel) and 18th December, the effective date of termination. On any of the three, submitted the respondent, the claimant has no claim for accrued and untaken paid leave.

30 **Law**

27. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that “*Proceedings may be brought before an*

employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;(b) the claim is not one to which article 5 applies; and (c) the claim arises or is outstanding on the termination of the employee's employment.” Article 5 does not apply in this case.

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28. “The task for the Lord Ordinary when interpreting the lease was to have, as his ultimate aim, the determination of what the parties meant by the language used, doing so by ascertaining what a reasonable person with all the background knowledge available to the parties would have understood the parties to have meant (**Rainy Sky SA v Kookmin Bank Co Ltd** , per Lord Clarke of Stone-cum-Ebony, para 14; **Arnold v Britton**, para 15), where the task was distilled by Lord Neuberger of Abbotsbury as being that: ‘The meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provision of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.’” (**@Sipp Pension TRS v Insight Travel Services Ltd** 2016 S.C. 243, referring to **Rainy Sky SA v Kookmin Bank Co Ltd** [2011] UKSC 50 and **Arnold v Britton** [2015] UKSC 36.)

Discussion and decision

29. Was the respondent in breach of contract in respect of the claimant's entitlement to be paid annual leave in the period 23 January 2019 to 18 December 2019? The question involves a consideration of the relevant

contractual provisions and the particular allegation said to be in breach of them.

30. The question first turns on an interpretation of the contract between the parties entered into in January 2019. It is made up of (i) the numbered paragraphs 1 to 11 on **pages 43 to 45** (the SEA) (ii) Schedule A (**page 46**) which “*is incorporated into this SEA and forms part of it*” (paragraph 4 of the SEA) and (iii) the “*terms and conditions of employment which applyare Part A and also Part B of the Employer’s Standard Terms and Conditions of Employment for Seafarers (‘Standard Terms’).*” Those standard are in the tribunal bundle at **pages 47 to 59**. They are the respondent’s Standard Terms. It is convenient to refer to the three elements as “*the SEA*”, “*Schedule A*”, “*Part A*” and “*Part B*” as the parties did at the hearing. There is in my view no hierarchy of parts or terms from which it can be said that any is dominant or servient.

31. Clause 4 of the SEA narrates that the claimant is employed on an Overtime and Weekend Work Payment contract. Those two expressions are reflected in two entries on Schedule A. They provide for payments to the claimant for working “*Overtime*” (in excess of 12 hours on a weekday) and “*Weekend Working*” for hours worked on a Saturday or a Sunday. Those payments are in addition to the agreed annual salary of £26,650.00. Clause 4 of the SEA refers to Schedule A for details of “*Payment, Hours of Work and Annual Paid Leave, subject always to section 5 below.*” Schedule A provides details of Payment (of salary, and for Weekday Overtime and Weekend Working). It provides details of hours or work (up to 12 hours per day on weekdays and weekends as required). It also provides details of “*Annual Paid Leave*”. I note in passing that the heading in Schedule A refers to “*Annual Leave.*” In my view they mean the same thing. In my view both Clause 4 and Schedule A make clear that they are describing paid leave.

32. Those details are, however, subject to Clause 5 of the SEA. Its heading is “***Standard Terms and Conditions of Employment.***” Clause 5 narrates that the terms and conditions of employment which apply to the claimant’s SEA

are Part A and Part B. Clause 5 also narrates that the claimant was given a personal copy of them prior to signing the SEA.

33. Part A says that it applies to all seafarers – employed and independent contractors. It is made up of clauses 1 to 22. Part B says it applies to
5 employed seafarers – not independent contractors. It contains clauses 23 to 37.

34. For present purposes, the relevant clause from Part A is clause 7, “**Remuneration**”. The relevant clauses from Part B are Clauses 24 “**Salary**”, and 26 “**Paid Annual Leave**”. I pause there to note that there is the potential
10 for confusion where there are two clauses one in each Part both dealing with pay.

Clause 4 of the SEA sets out that “*the form of Schedule A for Fully Consolidated Pay is incorporated into this SEA and forms part of it.*” The expression “*fully consolidated*” relating to pay appears in Part A, clause 7.1.
15 It provides that “*All remuneration is fully consolidated. It covers all time and all the hours of work anticipated whilst [the claimant] is serving on board a vessel; also Annual Leave. There is no additional entitlement to remuneration for any elements which might require additional entitlement to remuneration*” then lists some, but subject to those explicitly provided for in the SEA. In my
20 view, the only additional entitlements for which explicit provision was made for the claimant were (i) Weekday Overtime and (ii) Weekend Working. Clause 7.1 makes clear that the claimant’s fully consolidated remuneration includes Annual Leave. Clause 24.1 (in Part B) provides that the respondent would pay the claimant Salary as stated in in Appendix A. Clause 24.2
25 provides that Salary will be remitted monthly in arrears in equal instalments to his bank account. **Pages 101 and 102** show that in the months July to November 2019 inclusive he was paid instalments (£2220.83) which equal 1/12 of his Salary. Clause 26 (in Part B) makes express provision for Paid Annual Leave. 26.2 expressly provides that entitlement to “*paid annual leave*”
30 is as stated in Appendix A of the SEA. It in turn provides for 30 days or in accordance with the flag state legislation. It was agreed that in this case the

flag state provided 38 days. Clause 26.3 provides that “*payment for Annual Leave is included in Salary.*” It is therefore clear, in my view, that Annual Leave, when it is taken is paid, and payment is included in the monthly instalments of salary.

5 35. On how Annual Leave is taken, Clause 26.4 provides that it accrues evenly through the Leave Year. Clause 26.5 then provides that “*Annual Leave is taken automatically during Time Off.*” The Clause then provides (26.5.1 and 26.5.2) a mechanism whereby it ensures that “*all Annual Leave which as accruedplus all Annual Leave which is anticipated to accrue*
10*will have been taken when the claimant joins a vessel.*” In my view this mechanism is designed to avoid the accrual of Annual Leave as the Leave Year progresses.

15 36. Mr Lawson’s principal submission was that the SEA provided for payment *in addition to* normal remuneration. I do not agree. There is no doubt (from the terms of the contract) that Annual Leave accrues and is taken as the Leave Year progresses. There is also no doubt, in my view, that the claimant is paid for that Leave as part of his Salary, which is paid equally throughout the year. Indeed, it is inherent in Mr Lawson’s submission and the claim for payment “*in addition to*” normal remuneration that “*normal remuneration*” is in fact paid.
20 Mr Moore did not take issue with the principles relied on from the case of ***Investors Compensation Scheme Limited***. There is in my view no material difference in its approach from that set out in the later cases referred to, including the Inner House decision in ***@Sipp Pension TRS v Insight Travel Services Ltd***. But in my view the material referred to by Mr Lawson does not
25 advance matters. They provide for minimum standards of paid leave, which in my view are met by the contract between the parties. Further, I do not agree that the respondent’s interpretation of the contract means that the word “*paid*” is redundant. In my view, reading the relevant provisions together, it is clear how the entitlement to Annual Leave accrues and is taken, and that it is paid.
30 The claimant’s entitlement increased from 30 to 38 days by virtue of the flag state legislation. I accept that this resulted in a reduction in pay *per day* of Annual Leave. But that is irrelevant to the question of whether he was entitled

to paid leave. I did not accept the submission that Schedule A is a “*key component*” of the contract or that it took precedence over other provisions. In my view there is no inconsistency in Clause 26. Nor is “*buried*”. I did not accept that there was any ambiguity in the provisions of the contract and thus the *contra proferentem* rule was not engaged. On the contrary, and while it was necessary to refer to three sources to understand the matrix of contractual provisions, there was in my view no ambiguity on the question of whether the claimant was entitled to paid leave. On *Transocean*, which I accept was dealing with a dispute under the Working Time Regulations 1998, Lord Hope said (paragraph 38 of the report), “*the Respondents are entitled to insist that the appellants must take their paid annual leave during periods when they are onshore on field break.*” I noted that in his skeleton (paragraph 19) Mr Lawson said, “*The claimant’s period of employment in the relevant leave year was 47 weeks. The claimant’s accrued holiday entitlement at termination was $(38/52 \times 47)$ 34.35 days. The claimant seeks an award of damages in the sum of (34.35×146.03) £5,016.13 in respect of the respondent’s breach of contract.*” The premise behind the sum sought and the method by which it is arrived at is that the claimant took no leave in the 47 weeks of his employment in 2019. When I asked Mr Lawson about the use of the word “*accrued*” he accepted that the claimant had not accrued them untaken in the course of the year. Instead, as I understood it, the claimant was seeking damages representing an accumulation of underpayments. For each day of annual leave to which he was entitled (and took) in 2019 (34.35 days), he had been underpaid by the rate calculated by Mr Lawson. On my analysis, there was no underpayment. On Mr Lawson’s case, the claimant’s annual Salary would have increased by £5,549.14 (38 days x £146.03 per day) to £32,199.14. In my view that cannot have been agreed between the parties. Put shortly, Salary included payment for leave. Accordingly, in my view the respondent was not in breach of contract in respect of the claimant’s entitlement to be paid annual leave in the period 23 January 2019 to 18 December 2019. The claimant’s claim was for damages as detailed in his skeleton. As I have decided that the respondent was not in breach of contract,

I do not require to form a view on the respondent's various approaches to annual leave in the period from 14 November to 18 December 2019.

The claim for damages for breach of contract is refused and dismissed.

37. The claimant's claim under the various alternative bases should proceed.

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Employment Judge: Russell Bradley

Date of Judgment: 30 March 2021

10 Entered in register: 30 March 2021
and copied to parties

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