

became the bill of lading holder. The only possible uncertainty is whether BP's indorsement was a lawful indorsement after novation of the charterparty. It is submitted that the indorsement should be considered lawful. First, the bill of lading was issued to BP and subject to order of BP. Secondly, the charterparty did not prohibit the indorsement of the bill of lading. Therefore, the indorsement was not affected by the charterparty including the novation of the charterparty. If the bill of lading was a document of title at common law, then the bank as the holder was entitled to sue the owners since the owners did not deliver the cargo upon the production of the bill of lading.

### Liability for misdelivery

The court went on to discuss the issue of the owners' liability for misdelivery in case its conclusion on the above issue were wrong. The issue was whether the owners' breach caused the bank any loss, or whether the bank would have suffered the same loss in any event. The owners asserted that the loss had not been caused by the breach of contract because the cargo was delivered to Gulf with the authority and approval of the bank. However, the bank pleaded that it did not authorise or permit Gulf to arrange delivery of the cargo by the owners without production of the bill of lading. Whether there was such a permission given by the bank is a matter of fact and was examined based on evidence.

The bank submitted that Ms Bodhya, the person responsible for managing the day-to-day relationship with Gulf, was clear in her evidence in cross-examination that she did not approve Gulf making delivery and that if she had been asked by Gulf to authorise discharge she would not have done so. However, the court accepted the common ground that it was inherent in the financing scheme that the financed cargo would be discharged without production of the bill of lading and the

evidence that the bill of lading would not be available to the bank until after the discharge had taken place.

Accordingly, the court found that the bank did permit and, in any event, would have permitted discharge without production of the bill of lading and if the bank had been aware, or told that discharge was to be made, the bank would not have halted discharge. Therefore, the court held that the owners did not cause the loss or in the alternative that the bank would have suffered the same loss in any event.

### Comments

If BP was the claimant for misdelivery of cargo, it may well be right to conclude that a bill of lading issued under a charterparty will not contain or evidence the contract of carriage between the charterers and the owners after termination of the charterparty by novation or other reasons because the bill of lading is not evidence of contract in the hands of the charterers unless parties agree otherwise. However, since it was the bank that raised the misdelivery claim in this case, it is questionable why the evidence function of a bill of lading can directly ascertain a third party's right to sue the carrier in the case of misdelivery under the 1992 Act. It has been submitted that the dispute should primarily focus on the function of the bill of lading as a document of title.

Generally speaking, carriers are liable to bill of lading holders for delivery of goods without bills of lading. An exception, as seen from this case, is the delivery with permission from the bill of lading holder, similar to the waiver of production of bill of lading for delivery. The uncertainty in this exception is the circumstance in which evidence does not prove actual permission or waiver but implied permission or waiver, hence it is inferred that the bill of lading holder would have permitted misdelivery and therefore would have suffered

loss in any event caused by himself. In this circumstance, it will be safe for the bill of lading holder, especially trade financing banks, to expressly refuse the request for delivery without bill of lading or request a security for their interests that might be damaged by misdelivery.

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## A sufficient connection to Great Britain for maritime employees

***Horgan v Chevron Transport Corporation Ltd [2022] UKET 4109707/2021***

*The strength of the connection between the employee and Great Britain (GB) was considered, in order to determine whether the employee has the right not to be unfairly dismissed under section 94(1) of the Employment Rights Act 1996 (ERA) in Horgan v Chevron Transport Corporation Ltd.*

Two issues were considered by the Employment Tribunal (ET) in deciding whether it had jurisdiction for the claim of unfair dismissal. First, the more minor issue, of when the dismissal occurs after an assignment to GB ends whether there could be a sufficiently strong connection to GB. Secondly, whether there was a sufficiently strong connection between the employee and GB for British employment law to apply, in this instance the right not to be unfairly dismissed.

### The facts

This case arose following a claim by Horgan that he was unfairly dismissed for making a protected disclosure under section 103A ERA, which is an automatic unfair dismissal under section 94(1) ERA. The respondent resisted this

claim, and raised the preliminary issue of territorial jurisdiction, which this judgment concerns.

The claimant was first employed as an officer in September 2006, while living in Cork, Ireland. He was inducted and trained in Ireland. The respondent, Chevron Transport Corporation Ltd, is registered in Bermuda, with headquarters in California, and is part of a business known as Chevron Shipping. The respondent has three companies, which are registered as UK companies, but the claimant was not employed by these companies. Under the respondent's terms and conditions of service, the governing law was that of the nation where the vessel was registered. It was also provided that when an employee was offered and accepted a special assignment, the terms and conditions of the assignment letter overrode the terms and conditions of service.

Horgan received numerous special assignments during his employment, and the one in question was his final special assignment which was in Glasgow from August 2019 to December 2020. The assignment agreement for Glasgow did not include an applicable law or local law compliance clause. At first this assignment was to be for a few months, but then another did not occur, and the assignment in Glasgow continued.

During the pandemic, Horgan worked from Ireland. He also took a work trip to Rotterdam while on this assignment. He had a flat in Glasgow, and paid income tax and national insurance (the costs of which were met by the respondent). Horgan's point of origin was identified as Cork for the purposes of repatriation, and he had allowances for repatriation. He was on the seagoing payroll to be paid in US dollars. During 2020 the respondent restructured its business. At this time, the claimant was offered, but declined, a transfer to the UK payroll.

During the restructuring, the claimant applied for other roles. On 28 October 2020 he was notified that his last working day in Glasgow would be the 18 December 2020. He was repatriated to Ireland on the 19 December 2020. On the 21 December 2020 he was contacted and informed that his employment would terminate on 1 January 2021.

### The law

Employment Judge F Eccles gave the judgment and noted that it is generally recognised that *Lawson v Serco Ltd*<sup>1</sup> is the starting point for determining issues of territorial jurisdiction. Judge Eccles then considered subsequent case law, which focused on the need for a strong connection between GB and the employee.<sup>2</sup> There are three ways that section 94(1) ERA applies: the paradigm case of the employee working in GB; peripatetic employees who are based in GB; and expatriate employees in exceptional cases where the connection to GB is overwhelmingly strong.<sup>3</sup>

### The decision

The respondent had raised an issue on the basis that the claimant was not working in Glasgow at the time of dismissal, as the assignment had ended. However, as there was no evidence of the claimant starting any work outside of Glasgow and was still employed by the respondent, the return to Ireland before the dismissal was not a decisive factor.

The respondent also submitted that the Horgan was an expatriate. The ET, however, dismissed the submission and held that the claimant was not an expatriate within the meaning of *Lawson v Serco* test.

This case involved significant discussion of the facts in determining whether there was a sufficient

connection to GB. The respondent had submitted that the claimant was employed to work globally, and it was only by chance that he was working in Glasgow temporarily, so there was only a weak connection with GB. They identified several factors in support of this, whereas the claimant emphasised the connection to Glasgow.

The ET considered the facts and that there were various factors which indicated a stronger or weaker connection with GB. In particular, it was recognised that he was not recruited in GB and most of his employment had occurred outside of GB. It was stated by Judge Eccles that: "The tribunal recognised however that the place of employment to determine territorial jurisdiction should not be applied as an absolute rule".<sup>4</sup> That is why the *Lawson v Serco* test provides that casual visits will not establish a sufficiently strong connection with GB. The ET concluded that based on the length of the assignment, the flat rented throughout, the particular circumstances of the pandemic causing the work from home order, that there was a sufficient connection between the employee and GB. The ET did not consider that there should be any significant weight given to the assignment being described as temporary. Although, there were factors that weakened the connection with GB these were not determinative or deserving of significant weight (eg company's place of registration or headquarters).<sup>5</sup>

The ET concluded that: "Parliament would have intended the right not to be unfairly dismissed under the Employment Rights Act 1996 to extend to the claimant's circumstances".<sup>6</sup>

### Comment

One of the factors raised by the respondent in support of their argument that there was a weak connection to

<sup>1</sup> [2006] UKHL 3.

<sup>2</sup> *Duncombe v Secretary of State for Children, Schools and Families* [2011] UKSC 36; *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1; *Ravisy v Simmons and Simmons LLP* [2018] UKEAT/0085/18.

<sup>3</sup> *Lawson v Serco Ltd*, paras 25, 28, 31 and 36 to 40.

<sup>4</sup> [2022] UKET 4109707/2021, para 34.

<sup>5</sup> *Ibid*, paras 34 to 38.

<sup>6</sup> *Ibid*, para 39.

GB was that the contract was drafted on the basis that the employee would likely be working on a vessel. However, as made clear in *Lawson v Serco* the contract does not always provide for the reality of the employment situation, especially as roles change, and thus the contract should not be determinative.<sup>7</sup> Therefore, the place of employment should be considered first and foremost.

A case that was not raised in this instance is *Diggins v Condor Marine Crewing Services Ltd*,<sup>8</sup> (noted by Liz Williams in (2009) 9 LSTL 3 5) which related to those employed on vessels, where Elias LJ stated in relation to peripatetic employees: “In my view, if one asks where this employee’s base is, there can be only be one sensible answer: it is where his duty begins and where it ends.”<sup>9</sup> If this question was asked in the instant case, then the answer would be Glasgow, as this assignment became more than a casual visit (ie more than temporary) and the work from order did not alter

this. Indeed, the claimant, while based in Glasgow, went on a casual visit to Rotterdam.

In *Diggins v Condor* it was held that the place where the company was registered should not have a significant influence on where a particular employee is based.<sup>10</sup> In the instant case, this reflects the insignificance of the registration of the company in Bermuda and the headquarters being in California. Therefore, the ET may have been too generous in saying that these weakened the connection with GB although they were not determinative of the decision.<sup>11</sup> It is important following *Lawson v Serco* and *Diggins v Condor* that the emphasis is on where that particular employee is employed.

The employment contract in the shipping industry can be particularly challenging due to the peripatetic nature of mariners and other employees within the industry. When this is combined with the changing nature of an employee’s

role throughout their employment, employees in the shipping industry are some of those most vulnerable to being left unprotected by employment law.<sup>12</sup> Therefore, the position has been taken following the *Lawson v Serco* test to provide the protection of British employment law when there is a sufficiently strong connection, while not permitting double claiming.<sup>13</sup>

The importance of this protection has also been emphasised in this case in relation to the pandemic. The pandemic has had a considerable impact on mariners and other employees in the industry. Therefore, the ET made the logical decision not to put significant weight on the impact of the work from order resulting in peripatetic employees working from home in other countries. It is important to retain the emphasis on the employment and the base of employment so that those who have a sufficiently strong connection to GB will benefit from British employment law.

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<sup>7</sup> *Lawson v Serco Ltd*, paras 25 to 27.

<sup>8</sup> [2009] EWCA Civ 1133.

<sup>9</sup> *Ibid*, para 30.

<sup>10</sup> *Ibid*, para 30.

<sup>11</sup> [2022] UKET 4109707/2021, para 38.

<sup>12</sup> *Lawson v Serco*, para 8; *Diggins v Condor*, paras 10 and 12 to 21.

<sup>13</sup> *Lawson v Serco*, para 41.

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