Employment News

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Seahorse Maritime Ltd v Nautilus International: Court of Appeal rules in employer's favour

The Court of Appeal has allowed an appeal from Seahorse Maritime Ltd against a ruling from the Employment Appeal Tribunal on the question of whether seafarers working outside Great Britain are entitled to consultation rights in respect of a collective redundancy under Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

Section 188 places a duty on employers contemplating redundancy dismissals of 20 or more employees at a single establishment within a period of up to 90 days to inform and consult the affected employees and/or their representative organisations. In the present case, the issue arose whether this right applied in relation to offshore employees who worked outside Great Britain. While section 286 of the TULRCA sets out provisions that do not apply to such employees, it is silent on the right to be consulted under section 188.

Seahorse issued notices of redundancy to a number of seafarers as a result of the laying-up of Sealion vessels following the 2015 collapse of the price of oil. Nautilus International claimed that this process triggered section 188 and that the failure to inform and consult with employees domiciled in Britain entitled each of those employees to a protective award of up to 90 days' gross pay. Nautilus claimed that the "base of employment" test established in the case of Lawson v Serco and applied in Diggins v Condor meant that the redundant employees were entitled to benefit from the protection of s188. The seafarers were domiciled in Britain, their employment contracts were governed by English law and Seahorse was a company registered in Great Britain. Nautilus also claimed that, for the purposes of the 20 employee threshold, Seahorse was the establishment, rather than each individual ship. The seafarers were not contractually assigned to a particular ship and could be transferred between ships.

Seahorse claimed that each vessel was a separate establishment. Since fewer than 20 British crew members had been made redundant on each vessel, the precondition for collective consultation had not been met. In addition, Seahorse argued that the test of territoriality for section 188 ought to attach to each separate establishment, as opposed to the employees themselves. In this case, the vessels did not have sufficient connection to Great Britain to justify the imposition of collective consultation obligations.

The Employment Appeal Tribunal agreed with Nautilus International, dismissing Seahorse's appeal against the ruling of the employment tribunal. Seahorse appealed to the Court of Appeal. It drew attention to established case law of the Court of Justice of the European Union and domestic authorities, that a work unit could constitute an establishment notwithstanding that certain functions, including the HR function, were administered centrally.

The Court of Appeal agreed with this approach, stating that, in practice, the ships were each self-contained operating units, falling within the definition of establishment. The crew were assigned to particular ships and returned, rota after rota, to the same ship for extended periods of time. It made no difference that the owner or operator of the unit was the same legal person as the employer of some or all of the workforce. On this basis, it was very likely that no obligation to consult arose under section 188.

The Court of Appeal then considered whether, as a matter of law, the establishment or the seafarers were the relevant entity in respect of the issue of territorial scope. It then had to decide on the facts whether the relevant entity was within the territorial scope of s188 and ruled that the establishments had insufficient connection to Great Britain.

The decision is significant for two primary reasons; it confirms that ships can constitute separate establishments and clarifies the collective nature of the obligations under s188. This distinguishes the law on collective rights from the individual rights arising from the Employment Rights Act 1996, such as the right not to be unfairly dismissed which was the focus of Diggins v Condor.

Nautilus International have been refused leave to appeal to the Supreme Court, but may yet seek to appeal the ruling by petitioning the Supreme Court.

Government published White Paper on future immigration policy

The UK Government has published its White Paper on immigration, setting out how the ending of free movement of persons will affect the ability of nationals from other Member States of the European Economic Area (EEA) – as well as nationals of other countries – to work in the UK following its departure from the EU. The new regime will affect seafarers working in domestic UK trades that are subject to the requirement that non-EEA nationals obtain work permits before taking employment, meaning that they are currently effectively open only to UK and other EEA nationals.

The Government's intention is that the future immigration, which will apply equally to EEA and non-EEA nationals, will be based on the skills levels of potential immigrant workers. It is proposed to remove the cap on numbers in the existing Tier 2 route and abolish the resident labour market test (which currently requires employers to advertise any vacancies locally for a minimum of four weeks before advertising overseas.) It is also proposed to lower the skills threshold in Tier 2 to include occupations at the intermediate skills levels. Hence the current threshold of National Qualifications Framework level 6 – which excluded all seafarers – will reduce to level 3, thus allowing holders of Officer of the Watch level Certificates of Competency (CoCs) to qualify.

The Government will consult on the minimum annual salary that must be offered to overseas workers. The current minimum is £30,000 but it is reported that one cabinet source has said that, given the pressure from employers, they expected the final outcome to be closer to £21,000 than £30,000. The chamber will ensure that members are given an opportunity to contribute to its response to the consultation when it is opened.

The Government is also proposing, as a transitional measure, a time-limited route for temporary short-term workers. This route will allow people to come and work for a maximum of 12 months, with a cooling-off period of a further 12 months to prevent people effectively working in the UK permanently.

No restrictions on the number of foreign students coming to the UK to study are being proposed. Students will generally need to obtain permission before they travel to the UK, with the exception of non-visa nationals who can be granted entry as short-term students for a course of up to six months' duration without permission to travel – as is currently the case. In future, once introduced, non-visa national short-term students will require an Electronic Travel Authorisation to enter the UK.

The white paper shows the Government wants to enact the new regime at the end of the transition period, which is currently set as January 2021. The visa scheme will be opened in autumn 2020 to allow would-be migrants apply in good time. However, in the event of no deal, the system could be in operation as early in April 2019.

Survey on the provision of internet access to seafarers for personal use on board ships

A circular was issued to members of the Employment Committee on 4 December kindly requesting members to complete a survey to collect information from companies regarding the provision of internet access to seafarers for personal use on board ships, developed by the International Chamber of Shipping (ICS) and the European Community Shipowners' Association (ECSA).

The issue of the availability of internet access to seafarers for personal use on board ships has been discussed at various fora and events in recent years and is frequently raised in the context of crew welfare, the recruitment and retention of seafarers and concerns about safety implications for shipboard operations. The survey addresses the provision of internet access to seafarers for personal use, and any company policies, charges, limitations and concerns related thereto.

The response rate to date has been very encouraging and the Chamber is most grateful to those members who have completed the survey. However we still hope to receive more responses before closing the survey and drawing some results therefrom, in order that we can gain the most comprehensive picture possible of the extent of provision on ships. For this reason the deadline for completion of the survey has been extended to Friday **18 January 2019.**

Participation in the survey is anonymous (no company name or details are requested) and it should take around 8 minutes to complete. The results of the survey will be used to inform an international shipowners' view regarding internet access by seafarers for personal use on board ships in the future.

The survey can be accessed here: https://www.surveymonkey.co.uk/r/P7PGQZL

Post-Implementation Review of UK MLC Legislation - Workshop, 29 January 2019

It is now five years since the UK made domestic legislation to implement the Maritime Labour Convention, 2006 (MLC). It is a legal requirement that the Maritime and Coastguard Agency (MCA) now carry out a review of the implementing legislation and consider whether it succeeded in meeting the original objectives and whether it remains fit for purpose.

As part of the review process, MCA will hold an all-day stakeholder workshop on Tuesday 29 January 2019 at the offices of the Chamber of Shipping.

The workshop will include review of the following legislation and their associated impact assessments:

- SI 2014/1613 The MS (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014,
- SI 2014/1616 The MS (Maritime Labour Convention) (Health and Safety) (Amendment) Regulations 2014
- SI 2014/308 The MS (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014 an
- SI 2014/1614 The MS (Maritime Labour Convention) (Consequential and Minor Amendments) Regulations 2014
- SI 2018/242 The MS (Maritime Labour Convention) (Miscellaneous Amendments) Regulations 2018
- SI 2018/667 The MS (Maritime Labour Convention) (Compulsory Financial Security) (Amendment) Regulations 2018. (Implemented the 2014 amendments to the MLC)

It is considered extremely important that members provide their input into this process and bring to light any difficulties that the UK legislation might have caused. Therefore any members who wish to participate are kindly requested to let me know by e-mail not later than Monday 14 January 2019. Should the workshop be over-subscribed, the chamber will aim to ensure that as many sectors of the industry as possible are represented.

For further details on all the items in this edition of Employment News, please contact Tim Springett (tspringett@ukchamberofshipping.com) or 020 7417 2820, or Robert Carington (rcarington@ukchamberofshipping.com) or 020 7417 2821.

A VERY HAPPY CHRISTMAS TO ALL READERS!