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The price of breaking the law: the saga of the P&O Ferries redundancies

On 17 March 2022 P&O Ferries (P&O) made 786 seafarers redundant, prompting the outrage of employees, unions, lawyers, politicians and the general public. P&O stated that these redundancies were necessary as part of a change to its crewing model, to make the business viable. This article will focus on employment law issues concerning British law, unfair dismissal, consultation for redundancies, and the notification of relevant authorities regarding large-scale redundancies.

The seafarers were employed by P&O under Jersey law, and the ships on which they were working were registered in Cyprus, Bermuda, and Barbados. Many of these seafarers were British nationals, and most were resident in Great Britain. Therefore the issue becomes whether British employment law provides them with the desired protection.

Connection with British law

Due to the international nature of the maritime industry, and the work of seafarers, it is clear that there are limits to the applicability of British law. Andrew Burns QC, in his oral evidence to the House of Commons, noted how it has been left to the courts to determine to whom the employment law of Great Britain applies.[1]

The enforcement of employment rights depends on the employee. The enhanced compensation package offered by P&O to the seafarers requires the seafarers to forfeit their right to legal action and their ability to enforce their rights. John Lansdown is the only seafarer who was dismissed and is pursuing a claim through the Employment Tribunal, and thus discussion of these issues should be forthcoming. He is pursuing claims for unfair dismissal, racial discrimination and harassment.[2]

Redundancy: reason and procedure

A dismissal by reason of redundancy itself is not unfair dismissal but recognised as a fair reason for dismissal. However, for it to be fair it must be a true redundancy situation (as defined in section 139 of the Employment Rights Act 1996 (ERA)) and follow a fair procedure. There has been some dispute as to whether this is a true redundancy situation, given that the new crewing model involves hiring agency workers, and the procedure followed has also been questioned (eg the means of informing the seafarers, the requirement

[1] "HC 1231, Oral Evidence: P&O Ferries (Questions 1–15)", Q2 (Transport Committee & Business, Energy and Industrial Strategy Committee, House of Commons, 24 March 2022), https://committees.parliament.uk/oralevidence/9986/pdf/ (accessed 23 May 2022).
[2] Rianna Croxford, "Ex-P&O Ferries chef sues for unfair dismissal" (BBC News, 6 April 2022) www.bbc.co.uk/news/business-60995784 (accessed 23 May 2022).

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for meaningful consultation on an individual and group level, and early consultation).

Redundancy: consultation

"There is absolutely no doubt that we were required to consult with the unions. We chose not to do so." – Peter Hebblethwaite.[3]

Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) requires consultation with the union when more than 20 employees are being made redundant. As Professor Alan Bogg noted in his evidence, the price for the breach of collective redundancy procedure can be calculated by an employer, so that "it can effectively buy itself out of the rule of law".[4] By offering packages in excess of the legal remedies they can incentivise dismissed employees to forgo the legal system, which then eliminates the costs and time incurred in legal dispute. Although P&O had determined that no union would accept the new operating model and any other option would result in P&O not being viable, the purpose of consultation is to be open to the possibility of other options. An optimistic view is that there may have been an option P&O had not considered, one which involved no or fewer redundancies, which could have been identified through consultation.

Redundancy: notification of authorities

The Seafarers (Transnational Information and Consultation, Collective Redundancies and Insolvency Miscellaneous Amendments) Regulations 2018,[5] following the 2015 Seafarers Directive,[6] removed the requirement for the Secretary of State to be informed when there are large-scale redundancies on ships that are not registered in Great Britain. Instead, it is provided under section 193A TULRCA for the flag state to be informed.

The flag states were informed on the same day as the seafarers, on 17 March 2022. Section 193A TULRCA does not explicitly alter the notification periods of section 193, as noted in the "P&O ferries: Employment law issues" research briefing by Patrick Brione.[7] Section 193 requires a notice to the Secretary of State of at least 45 days where an employer is proposing to dismiss as redundant 100 or more employees at one establishment within a period of 90 days or less; at least 30 days before the first of those dismissals take effect where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within such a period. Professor Jason Chuah in his oral evidence to the House of Commons noted that for the Cypriot-registered vessels the notice should have been 45 days, and 30 days for the vessels registered in Bermuda or the Bahamas.[8]

In the case of non-compliance, Professor Alan Bogg in his written evidence to the House of Commons argued that section 193A TULRCA should be read in conjunction with section 193 when considering penalties under section 194.[9] Professor Jason Chuah instead emphasised the uncertainty in section 194, which refers to failure to notify the Secretary of State and does not refer to flag states.[10] Peter Hebblethwaite stated that P&O was clear that they had not breached that law.[11]

It is evident that the law in this area is uncertain and, in the future, could be clarified in Parliament. In relation to P&O, if it was determined that the flag states were not informed or were informed with insufficient notice, then it is unclear whether the penalties in British law will apply or if it will be a matter wholly for the flag states (as noted by Dean Beale in his oral evidence to the House of Commons).[12] An answer to this may come from the investigations being carried out by the Insolvency Service.

Unfair dismissal

Under British employment law there is a right not to be unfairly dismissed in accordance with section 94 of the ERA. There are limits under section 199 of the ERA as to the applicability of the ERA, Part X focuses on unfair dismissal in relation to mariners. Section 199(7) of the ERA provides:

> "The provisions mentioned in subsection (8) apply to employment on board a ship registered in the register maintained under section 8 of the Merchant Shipping Act 1995 if and only if–
>
> (a) the ship's entry in the register specifies a port in Great Britain as the port to which the vessel is to be treated as belonging,
>
> (b) under his contract of employment the person employed does not work wholly outside Great Britain, and
>
> (c) the person employed is ordinarily resident in Great Britain."

Part X of the ERA is listed in section 199(8) of the ERA as applying if these conditions are met. However, these are the provisions for employment on a ship registered in Great Britain. This means, there is no provision as to the legal position of an employee in relation to section 94 of the ERA when the ship on which seafarers are working is not a British-registered ship.

Considering that these seafarers were working on ships registered in Cyprus, Bermuda, and the Bahamas, and following the removal of section 196 of the ERA which had further provisions for employment outside of Great Britain, the guidance comes from the leading case of *Lawson v Serco*.[13] Lord Hoffmann in the leading judgment stated: "I think that the application of section 94(1) should now depend

[3] "HC 1231, Oral Evidence: P&O Ferries (Questions 96–194)", Q124 (Transport Committee & Business, Energy and Industrial Strategy Committee, House of Commons, 24 March 2022), https://committees.parliament.uk/oralevidence/9989/pdf/ (accessed 23 May 2022).
[4] "HC 1231, Oral Evidence: P&O Ferries (Questions 1–15)", Q5 (Transport Committee & Business, Energy and Industrial Strategy Committee, House of Commons, 24 March 2022), https://committees.parliament.uk/oralevidence/9986/pdf/ (accessed 23 May 2022).
[5] SI 2018 No 26.
[6] Directive (EU) 2015/1794 of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers.
[7] Patrick Brione, "P&O Ferries: Employment law issues" (Research Briefing, CBP 9529, House of Commons Library, 19 April 2022), 13, https://researchbriefings.files.parliament.uk/documents/CBP-9529/CBP-9529.pdf (accessed 23 May 2022).
[8] "HC 1231, Oral Evidence: P&O Ferries (Questions 1–15)", Q6 (Transport Committee & Business, Energy and Industrial Strategy Committee, House of Commons, 24 March 2022), https://committees.parliament.uk/oralevidence/9986/pdf/ (accessed 23 May 2022).
[9] Professor Alan Bogg, "Supplementary Written Evidence (POF0001)", 1-2 (House of Commons, March 2022), https://committees.parliament.uk/writtenevidence/107566/pdf/ (accessed 23 May 2022).
[10] "HC 1231, Oral Evidence: P&O Ferries (Questions 1–15)", Q6 (Transport Committee & Business, Energy and Industrial Strategy Committee, House of Commons, 24 March 2022), https://committees.parliament.uk/oralevidence/9986/pdf/ (accessed 23 May 2022).
[11] "HC 1231, Oral Evidence: P&O Ferries (Questions 96–194)", Q101 (Transport Committee & Business, Energy and Industrial Strategy Committee, House of Commons, 24 March 2022), https://committees.parliament.uk/oralevidence/9989/pdf/ (accessed 23 May 2022).
[12] "HC 1231, Oral Evidence: P&O Ferries (Questions 38–95)", Q82 (Transport Committee & Business, Energy and Industrial Strategy Committee, House of Commons, 24 March 2022), https://committees.parliament.uk/oralevidence/9988/pdf/ (last accessed 23 May 2022).
[13] [2006] UKHL 3; [2006] ICR 250; [2006] 1 All ER 823.

upon whether the employee was working in Great Britain at the time of his dismissal …".[14] Lord Hoffmann recognised that in the absence of section 196 of the ERA for the general applicability to employment outside of Great Britain, there is only guidance for mariners within section 199.[15] Yet, as mentioned above, this provision is limited to mariners on British ships. Lord Hoffmann recognised three types of employees who may be subject to British employment law: those ordinarily working in Great Britain, peripatetic employees (which depend on whether they are based in Great Britain) and expatriate employees (in exceptional cases where they have a strong connection to Great Britain).[16] As recognised in *Diggins v Condor Marine Crewing Services Ltd*,[17] section 199(7) is not exhaustive in its provisions for mariners, and thus if they satisfy the *Lawson v Serco* test then there is no reason to exclude them from the provisions of Part X of the ERA.[18]

Other claims

Other potential claims from these dismissals have been raised. First, the lack of notice for the dismissals raises the potential claim of wrongful dismissal for which P&O's package includes up to 13 weeks' salary in lieu of notice. Secondly, the issue of discrimination on the basis of nationality has been raised due to the majority of those dismissed being UK nationals and the higher wages they are required to be paid compared to the wages paid to the new crew.

The price paid

The settlement of the claims is costing P&O (and thus its parent company DP World) £36.5 million. Yet, it may cost them even more depending on the outcome of John Lansdown's claims and the result of both the civil and criminal investigations by the Insolvency Service. Additionally, as was discussed during the oral evidence hearings in the House of Commons, there is also the cost to the reputation of P&O. Although P&O calculated the economic cost of these dismissals and of including an enhanced payment, in order not to follow the law on consultation, they may not have calculated the full price of this decision.

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[14] At para 27.
[15] At para 28.
[16] At paras 25, 28 and 35 to 40.
[17] [2009] EWCA Civ 1133; [2010] ICR 213.
[18] At paras 10 to 16.

Case update

Precautionary area collisions

Wilforce LLC and Another v Ratu Shipping Co SA and Another (The "Wilforce" and the MV "Western Moscow") [2022] EWHC 1190 (Admlty)

In this collision case Teare J highlighted, but did not resolve, an issue arising out of Nautical Challenge v Evergreen Marine[1] *compared with prior case law: what if a stand-on vessel has created the dangerous crossing situation? The case is also the first to consider the application of the collision rules in a "precautionary area".*

The facts

This litigation followed the collision on 31 May 2019 in a "precautionary area" of the Singapore Strait Traffic Separation Scheme (TSS) between *Wilforce* and *Western Moscow*. A precautionary area may be placed within a TSS where traffic crosses and clearly involves a heightened risk of collision as lanes are interrupted and traffic may approach from different directions. The IMO has adopted recommendations for precautionary areas generally and the Singapore Strait specifically, and the Maritime and Port Authority has issued procedures for vessels crossing such areas. These include what lights to display, that turns should be anti-clockwise and how to execute and signal course changes.

The claimants were the owners and demise charterers of the LNG carrier *Wilforce* and the defendants were the owners and demise charterers of the bulk carrier *Western Moscow*, and the combined claims for the damage caused were said to be in the region of £14 million. The collision had taken place during the hours of darkness. *Wilforce* was proceeding in the southern, eastbound lane of the TSS and *Western Moscow* was executing a loop through the eastbound lane within the precautionary area to join the northern, westbound lane. The two vessels agreed via VHF to pass port to port, but *Western Moscow* continued its turn rather than letting up – a course it asserted was commensurate with its role as stand-on vessel in the crossing situation. A further complication was that another vessel, a tug and tow, was proceeding on *Wilforce*'s starboard side, preventing a turn to starboard until the final minutes before the collision.

Questions included which vessel was the give-way vessel, how to navigate in the precautionary area and the standard of lookout on board both vessels.

The judgment

Teare J, sitting for the occasion with two Elder Brethren of Trinity House, had the opportunity to revisit the Supreme Court's decision in *Nautical Challenge v Evergreen Marine*.

On the facts, the preponderance of fault lay with *Western Moscow*: although *Wilforce* had been observed on radar at C-6, its presence was not

[1] *Nautical Challenge Ltd v Evergreen Marine (UK) Ltd (The Alexandra 1 and Ever Smart)* [2021] UKSC 6; [2021] 1 Lloyd's Rep 299.