# Redundancy – duty to consult with overseas employees

**Janet Simpson**, of Watson Farley & Williams LLP, warns the shipping sector of a new ruling out of the UK with wide scope

**In *Nautilus International (A Trade Union) v Seahorse Maritime Ltd* the UK's Employment Appeal Tribunal (EAT) has considered, for the first time, the territorial scope of collective consultation duty under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The EAT found that a fleet of ships constituted one establishment and that the key question in determining the territorial scope of the collective consultation obligation was whether the employees themselves, rather than the establishment at which they were assigned to work, had sufficiently strong connections to the UK.**

Under section 188, employers have to inform and collectively consult where they propose to make 20 or more employees at one establishment redundant within 90 days or less. Enforcement of the obligation to consult under TULRCA is by way of complaint to an employment tribunal. If the tribunal finds a complaint well founded, it must make a declaration to that effect and may also make a protective award. Each employee covered by the protective award is entitled to a "week's pay" for each week of the protected period and a proportional sum for each part week. If the employer fails to pay, then an individual employee who is "of a description to which a protective award relates" (rather than their representative) can ask the employment tribunal for an order for payment.

## Facts of the case

Seahorse, which is incorporated in Guernsey, employed crew of various nationalities to work on a fleet of ships operated by a separate company, Sealion. Most of the ships operated exclusively outside UK territorial waters. The contracts of employment between Seahorse and its employees did not allocate them to a particular ship, although in practice most stayed on the same ship for the duration of their four-to-six week roster. Most of the ships were stationary, although a few moved around oilfields and around the world. Seahorse used Farnham Marine Agency (FMA) as its UK administrative agent, which included carrying out the administration with respect to employees. The employees' contracts were governed by English law and they were told to contact FMA about any administrative queries.

Following a downturn in the oil industry, Sealion decided to take four ships in the UK out of service, which meant that the crew would no longer be needed. Initially "warm lay-ups" were proposed – where each ship remains on port, operational with a limited crew rather than "cold lay-ups" – where all crew are removed from a ship moored in port with all engines, generators and machinery shut down. Later, some ships had to be placed in cold lay-up and Seahorse made some employees redundant, without going through a full consultation. SeaNautilus International, a trade union representing many of Seahorse's employees, brought a claim seeking protective awards for failure to collectively consult under section 189 of TULRCA.

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Seahorse argued that the approach to territorial jurisdiction over individual employment rights cannot be carried across to collective rights and that the focus should be on whether the establishment to which the employees were assigned, but not the employees themselves, had a sufficient connection with the UK or UK employment laws. Section 285 of TULRCA provides that certain provisions do not apply to employment where under the employee's employment contract, the employee works outside Great Britain. Section 285 previously excluded employees who work outside Great Britain from the right to be consulted under section 188, but this exclusion was removed by section 32 of the Employment Relations Act 1999, which means that TULRCA is now silent on that issue.

Seahorse also argued that each ship was a separate establishment so that, with a few exceptions, the threshold of 20 redundancies was not met. Further, it argued that only in respect of the few ships based out of Hull, was there the necessary connection between the ship and the UK for TULRCA to apply.

## Court's view and legal background

At a preliminary hearing, an employment tribunal found in favour of Nautilus. It found that the whole fleet of ships constituted one establishment and that the territorial scope of section 188 was determined, not by the connection between the establishment at which employees are assigned to work and the UK, but by the connection between the employees themselves and the UK. The EAT upheld both parts of the decision. With regard to the territorial scope of section 188, the EAT made the point that, while the duty to consult is collective, it may be enforced by an individual employee who has not been paid a protective award. A tribunal must therefore determine whether there is a sufficiently strong connection between the individual employees concerned and the UK. The test of "sufficiently strong connection" is the same as for individual rights such as unfair dismissal under the Employment Rights Act 1996 (ERA).

The ERA is silent as to its territorial scope. Prior to 1999, an employee's right to claim unfair dismissal was restricted in that he or she must not ordinarily work outside Great Britain. When section 196 was repealed by section 32(3) of the Employment Relations Act 1999, nothing was put in its place, leaving the issue to be decided by the courts. The House of Lords set out guidance on determining the territorial scope of unfair dismissal protection in *Lawson v Serco* [2006] UKHL 3. Employees are protected if, at the time of dismissal, they: work in Britain; move between jurisdictions but have their base in Britain (peripatetic employees); or have been posted abroad by a British employer and provide services to the British business (expatriates). This was expanded on in *Ravat v Halliburton Manufacturing and Services Ltd* [2012] UKSC 1 where it was held that the *Lawson* categories were not exhaustive and it would be sufficient for an employee to demonstrate "strong connections with Britain and British employment law" to obtain unfair dismissal protection.

An employee's rights with respect to collective consultation for redundancy purposes will therefore be determined by reference to their connection with the UK and UK employment law. In *Wittenberg v Sunset Personnel Services Ltd* (UKEATS/0019/13/JW), a German employee, living in Germany and working off the coast of Nigeria for a company in Aberdeen under a contract governed by English law could not claim unfair dismissal or discrimination in the UK as he did not have a sufficiently close connection with the UK. However, in the *Seahorse* case the tribunal found that the UK domiciled employees *did* have a strong enough connection and therefore did have the right to be informed and consulted about the redundancies. Relevant factors included that: the employees were domiciled in the UK; their employment contracts were stated to be governed by English law; and Seahorse used a UK-registered company to manage the employees.

## A potentially costly mistake for employers

In practice, this decision means that an employer has to carry out a collective consultation exercise at any one establishment anywhere in the world if it is proposing within 90 days or less to make 20 or more employees redundant who each, individually, have a sufficiently strong connection with the UK. The significance for employers is, first, that the redundancy process will take much longer. If there is no recognised trade union or existing employee consultation body then elections must be held for employee representatives. Consultation must then be undertaken by the employer with a view to agreeing with appropriate representatives issues such as ways of avoiding dismissals or reducing the number of employees to be dismissed, and this can be a lengthy process. There are penalties for employers that fail to fulfil the statutory duty to inform and consult. If a tribunal finds that the employer has acted in breach of the statutory duty it must make a declaration to that effect and may make a protective award. The protected period will be of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default, subject to a maximum of 90 days. The rate of remuneration is one week's pay per employee for each week of the protected period and there is no ceiling placed on a week's pay for these purposes. Failure to consult in a large-scale redundancy process could therefore prove to be very costly for a defaulting employer.

Many employers in this sector have employees with similar employment arrangements to the Seahorse employees, but the threshold for collective consultation – more than 20 employees – may not be met on a single vessel. The crucial aspect of this decision is the willingness of the tribunal and the EAT to treat the fleet of ships, rather than the ship to which the employee is assigned, as the establishment, and this has implications beyond floating production vessels to any employer with a fleet of vessels with employees with strong connections to the UK.

It is understood that the EAT has given the employer permission to appeal to the UK's Court of Appeal. ***MRI***

Janet Simpson

**Janet Simpson, a professional support lawyer with the employment team in London of Watson Farley & Williams LLP**



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