Case review - Regulatory, Maritime Pensions, Employment
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Review of R (On the application of Fleet Maritime Services (Bermuda) Ltd v The Pensions Regulator [2015] EWHC 3744 (Admin) [2016] Pens L R 29

This case presents an interesting review by Leggatt J of the applicability of automatic enrolment provisions of the Pensions Act 2008 and the role of the Pensions Regulator in enforcing them against peripatetic employees, most notably seafarers living in the UK but working on vessels that spend little time in UK territorial waters. It has relevance to employment law but also regulatory and criminal practice.

The Pensions Act 2008 ('the Act') requires an employer automatically to enrol an eligible 'jobholder' into an automatic enrolment pension scheme as defined by the Act. The word 'jobholder' is defined in section 1(1) of the Act as a worker:

a. who is working or *ordinarily works (my italics)* in Great Britain under the worker's contract,
b. who is aged at least 16 and under 75 and
c. to whom qualifying earnings are payable by the employer in the relevant pay reference period.

The Pensions Regulator ('the Regulator') is charged with enforcing the automatic enrolment obligations placed on employers; failure to comply with a duty of automatic enrolment can give rise to criminal liability. The procedure is for the Regulator to issue a compliance notice requiring the employer to remedy a contravention of its duties under the Act. If the employer fails to comply then the Regulator can issue a penalty notice imposing a financial penalty.

Fleet Maritime Services (Bermuda) Ltd ('the employer') is a shipping company incorporated in Bermuda; it has no place of business in the UK. For payroll and administrative purposes it uses a corporate vehicle in Guernsey. It is a wholly owned subsidiary of Carnival plc, an English company with headquarters in Southampton. Carnival owns those vessels that operate under the names of P and O and Cunard. Most of these ships are registered in Bermuda and spend most of their time outside UK waters. Some of the seafarers live in the UK, some do not. They are mostly paid in UK pounds but where the ship concerned uses dollars they are sometimes paid in dollars.

The Regulator, on 10 July 14, notified the employer that it had determined that some categories of workers employed by the employer fell within section 1(1) of the Act. In particular that:

a. Where a worker lives in the UK but works on a British or foreign registered vessel spending several weeks away working in foreign waters and joins and leaves the vessel from a port

within the UK, they should be assessed as ordinarily working in the UK even though most of their 'tour of duty' might be spent outside the UK;

b. Where a worker lives in the UK, begins and ends their tour of duty outside the UK and [there is] evidence in relation to travel and other arrangements at the beginning and end of a tour of duty to support the view that their work begins and ends in the UK, then they too should be assessed as ordinarily working in the UK even though most of their 'tour of duty' might be spent outside the UK.
c. A worker who lives in the UK but begins and ends their 'tour' outside the UK and there is no such evidence as at 'b' above then the worker is not to be regarded as ordinarily working in the UK.

The third of these categories was not in dispute. Rather Leggatt J had to consider whether the Regulator's interpretation of 'jobholder' under section 1(1) was correct vis a vis 'a' and 'b' above. The essential issue (see paragraph18 of the judgment) was whether or when a seafarer engaged by the employer to work on a ship which spends all or most of its time outside Great Britain ordinarily works in Great Britain under the worker's contract.

Leggatt J reviewed at length the authorities defining the territorial scope of employment legislation. Under the 1971 Industrial Relations Act the test of where the worker 'ordinarily worked' was to refer to the contract. The matter was settled, according to *Wilson v Maynard Shipping Consultants [1978] QB 665* when the contract of employment was made and was to be determined by reference to the terms of the contract. If the contract specified where the employee was to work then that was decisive; if the contract left it to the employer's discretion then regard was to be had to where the employee's 'base' was. In *Todd v British Midland Airways [1978] ICR 959* Lord Denning MR cast doubt on this approach of regarding the issue as determined by the contract; rather he said you have to "go by the conduct of the parties and the way they have been operating the contract". However this opinion was *obiter;* the other two judges in the Court of Appeal reached the same decision by applying the 'contract' test and that continued to be applied in later cases. However in *Lawson v Serco [2006] UKHL 1 [2006] 1 All E R 823* Lord Hoffmann took the view that the manner in which a contract has been operated was of more importance than what was contemplated at the time the contract was made and the terms of the original contract. He cited the words of Lord Denning MR as providing the most helpful guidance for determining the working base of the 'peripatetic employee' such as a seafarer.

Similar decisions were identified by Leggatt J in *Diggins v Condor Marine Crewing Services Ltd [2009] ICR 609 (EAT),* where the seafarer was employed by a Guernsey company on a ferry between Portsmouth and the Channel Island; the ferry was registered in the Bahamas. However Mr Diggins joined the ship on a daily basis in Portsmouth and at the end of each day's work disembarked at Portsmouth. The Court of Appeal agreed with the Employment Appeal Tribunal that he was based in Great Britain.

Similar reasoning was applied by the Supreme Court in *Ravat v Halliburton [2012] UKSC 1, [2012] 2 All E R 905*. There Mr Ravat worked for a German company in Libya, one month there followed

by a month on leave at home. He commuted to begin work in Libya. The Court concluded he was not based in Great Britain even though he set out from Britain to start work in Libya.

Before Leggatt J the employer argued that section 1(1) should be given the ordinary meaning that one must ask where the working time is spent. If partly in the UK and partly outside then one must ask where they are ordinarily working. Therefore if a seafarer works on a vessel that is ordinarily outside the UK then the seafarer works outside the UK. However Leggatt J rejected this argument. The consequences of such reasoning for peripatetic workers would be arbitrary; those who happen to spend more than half their time outside UK waters would lose protections given to those who spend slightly more time in UK waters; how, he asks, does one determine the test of how much time in UK waters is required? Rather he returned to the test of asking where the employee is based. This is so even if the majority of time is spent outside the UK. This is especially the case for seafarers who may travel far and wide and there may be no single country in which most of their working time is spent.

The employer also sought to argue that in order to ascertain an employee's 'base' the contract must be seen as providing the answer. However Leggatt J again rejected this argument, referring with approval to Lord Hoffmann in *Lawson* (supra) where he ruled that the actual operation of the contract was more significant than its terms. Leggatt J stated that "it makes no sense that a worker whose base was contemplated as being outside Great Britain when the contract was made should be precluded by that fact from benefiting from automatic enrolment if in the event he becomes based in Great Britain". He concluded the appropriate test was that set out by Lord Denning in *Todd* and the House of Lords in *Lawson*.
Dealing specifically with seafarers the employer sought to argue that where a seafarer spends long periods on board a ship then his base is naturally to be regarded as the ship. On this reasoning where the vessel spends the majority of its time outside Great Britain it cannot be said the seafarer ordinarily works in Great Britain. Counsel for the employer prayed in aid for this argument that the Maritime Labour Convention, as implemented in the UK by The Merchant Shipping (Maritime Labour Convention)(Minimum Requirements for Seafarers) regulations 2014, applies to all seagoing ships whatever their flag, when in UK waters. This meant that seafarers were not 'rightless' simply because they did not have a 'base' as defined, other than the vessel.

In perhaps the most forthright passage of the judgment Leggatt J stated:

"I cannot accept that the ship on which a seafarer works (for whatever length of time) can be regarded as that worker's base. As applied to a peripatetic worker, the concept of a base is that of a place from which the worker sets off at the start and to which the worker returns at the end of a period when the worker is travelling in the course of their work. A ship is not such a place; rather it is a means of transport from one place to another"

Equally he concluded that seafarers are not regarded as working in Great Britain (for the purposes of employment legislation) simply because they work on a ship which is registered in a port in Great Britain.

Having reviewed these authorities Leggatt J turned with agreement to the words of Elias J in *Diggins* (supra) that where an employee's base is "where his duty begins and where it ends".

Therefore returning to the issue raised by the regulator's definitions of 'jobholder', he concluded that for a seafarer to satisfy the test in section 1(1) of the Act and hence for the duty of automatic enrolment to apply, there must be a sufficient degree of regularity in the seafarer's departure from and return to a port or ports in great Britain to institute the ordinary or normal pattern of their work. It would not be enough that the seafarer was engaged on a single voyage; rather there must a series of voyages from which he comes and goes to the UK.

In reviewing the Regulator's decision Leggatt J concluded that a worker who lives in the UK but works on a vessel (British or foreign registered) spending several weeks way working in foreign waters and joins and leaves the vessel from a port in the UK, then as the Regulator ruled, he is ordinarily working in the UK. However, the worker who lives in the UK but joins the vessel at a foreign port, even if his travel from the UK to that port is paid for and he is regarded as working by travelling to the foreign port, is not to be regarded as ordinarily working in the UK. The travel to and from the port whether classed by the employer as work or not is in fact merely commuting as per Mr Ravat (supra) when travelling to Libya.

This case has obvious significance for determining the application of employment law to seafarers as well as other peripatetic workers. The terms of the contract are not decisive, rather regard is to be had to how a contract is implemented. Thus determining the 'base' and hence where a peripatetic employee is ordinarily working will be largely a holistic test. Interestingly the court rejected the Regulator's second test. In doing so Leggatt J concluded that whilst it may be possible to ascertain the 'base' to be in the UK, it is not necessary that a seafarer have an alternate country for his base when he does not meet the first test set out by the Regulator and approved by the court; thus it is possible the court may conclude, when assessing whether the automatic enrolment provisions apply, that the seafarer has no 'base' according to the tests set out by Leggett J. The judge did not regard this as problematic.

It is worth noting when considering Leggatt J's assessment of the significance of the flag of the vessel on which the seafarer serves that the ECJ in *Voosgeerd / Navimer C-384/10 of 15 December 2011* concluded that when determining the law applicable to the employment agreement with a seafarer little regard is to be paid to the nationality / flag state of the vessel; the flag of a vessel cannot be equated with the State where the employee carries out his work. This case was not quoted to Leggatt J but has clear parallels and is consistent with his reasoning.

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