Appeal No. UKEAT/0281/16/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 23 February 2017
Judgment handed down on 30 June 2017

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

SEAHORSE MARITIME LIMITED — APPELLANT

NAUTILUS INTERNATIONAL (A TRADE UNION) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARCUS PILGERSTORFER (of Counsel) Instructed by Thomas Cooper LLP Ibex House 42-47 Minories London EC3N 1HA
For the Respondent	MR CHRISTOPHER STONE (of Counsel) Instructed by Bridge McFarland Solicitors Sibthorp House 351-355 High Street Lincoln LN5 7BN

SUMMARY

REDUNDANCY - Collective consultation and information

JURISDICTIONAL POINTS - Working outside the jurisdiction

The Respondent, a company registered in Guernsey, is a supplier of employees to specialist ships owned and operated by other companies. These are stationed in seas all over the world for such operations as oilfields. The Respondent's employees who are of many different nationalities and countries of residence tend to return to the same vessel from their homes for their tours of duty. A Trade Union, Nautilus, has collective bargaining rights. In a redundancy situation the Union alleged a failure to consult in accordance with section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** in respect of employees resident in the United Kingdom. The Employment Judge did not err in holding that each vessel was not an "establishment" for the purposes of section 188. Whilst there was some conflation by the Employment Judge of the two questions of identifying the establishment and that of assignment of employees to it, this did not undermine the conclusion. **USDAW v WW Realisation 1 Limited** [2015] IRLR 577 applied and **Renfrewshire Council v Educational Institute of Scotland** [2013] IRLR 76 considered.

The Employment Judge did not err in deciding that the Employment Tribunal had jurisdiction over the section 189 claim. Whilst the Employment Judge may have erred in considering that the employees were peripatetic rather than international commuters, the findings of fact supported the conclusion of the Employment Judge that the connection of the employment with the United Kingdom and UK employment law of those employees domiciled in the UK was sufficiently strong to give the Employment Tribunal jurisdiction, the test for international commuters, although he also observed that the key question was where the employees were

based, the test applicable to peripatetic employees. **Ravat v Halliburton Manufacturing and Services Ltd** [2012] IRLR 315 applied.

Appeal dismissed.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. This appeal raises two issues arising from a claim by Nautilus International, a Trade Union ("the Claimant"), that there had been a failure to consult about redundancies pursuant to section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULR(C)A"). The issues are whether each specialist ship operated by Sealion Shipping Ltd ("Sealion") for which Seahorse Maritime Limited ("the Respondent") provided crew was a separate "establishment" for the purposes of **TULR(C)A**. The second issue was whether the Employment Tribunal ("the ET") had jurisdiction to consider the claim as most of the ships were located outside the United Kingdom and indeed European territorial waters. The Respondent appeals from the Decision of the ET, Employment Judge Allen sitting alone who by a Judgment sent to the parties on 19 August 2016 ("the Judgment") answered no to the first issue and yes to the second. The Respondent contends that each ship on which their employees worked was a separate establishment and that the ET did not have jurisdiction over those located outside United Kingdom ("UK") territorial waters.

2. The Employment Judge recorded in paragraph 49 that the Claimant was only seeking a determination in relation to UK domiciled employees. There was no dispute in relation to those employees working on ships in UK waters, those working on ships which were laid up in Hull. There was also no dispute as to peripatetic employees working on the spot market cargo run who were UK based**.**

3. As before the ET, Mr Pilgerstorfer appeared for the Respondent and Mr Stone for the Claimant.

The Relevant Facts in Outline

4. The Respondent is a company incorporated in Guernsey. Farnham Marine Agency Limited ("FMA") is the Respondent's UK administrative agent and Sealion is the Respondent's client. The Respondent employs crew for vessels owned by Toisa Ltd ("Toisa"), a company incorporated in Bermuda whose vessels are operated by Sealion. Some but not all of the crew on these vessels are provided by the Respondent. A sister company, Seahorse Maritime (Auckland) Limited also supplies some of the crew for the vessels operated by Sealion. Other organisations provide other crew for the vessels. If each ship was an establishment the Respondent agreed that there was a proposal to dismiss as redundant 20 or more employees on the following ships in Hull: Elan, Explorer, Wave and Voyager. The Respondent contended that as no crews were assigned to Conqueror or Envoy at the time redundancies were proposed, redundancies did not affect those vessels.

5. Employment Judge Allen clearly summarised the functions of the ships operated by Sealion for which the Respondent provided some crew. He held:

> **"9. The fleet of 25 ships operated by Sealion support functions of the energy and telecommunications industries. These include platform supply vessels, remotely operated vehicles support, well testing vessels, dicing support vessels, construction support vessels and anchor handling tug supply vessels. The support of each ship is provided to charterers, wherever in the world those charters need that support. A charter of a specific ship can be for months or years and many require the ship to be stationed in a particular country's territorial waters for the duration of the charter. Most of the ships operated by Sealion are not used to move from one port to another - but rather are stationary for period of time - or for example move around a particular oilfield. About 6 ships however are involved in the 'spot market cargo run' - operating typically from Aberdeen to and from locations in the North Sea (e.g. oil rigs).**
>
> **10. The individual ships operated by Sealion are variously registered under the flags of Liberia, the Bahamas and the UK. Four are registered under the UK flag. In the past 18 months, ships from the fleet have been stationed in China, Vietnam, Bahamas, Brasil, Greece, Indonesia, Singapore, Mexico, Italy, West Africa, South Africa and in relation to the North Sea spot market, UK, Germany and Denmark."**

6. At paragraph 11 the Employment Judge held:

> **"11. Aside from the spot market vessels, the crew [employed by the Respondent] join and leave the ships stationed offshore by helicopter or crew boat (unless the ship happened to be berthed in port) and then they live on board. A rotation typically lasts for 4 to 6 weeks."**

7. The employment contract between the Respondent and their relevant employees provides:

- By clause 1.2 the employees agree "to serve in any vessel managed by" Sealion;
- By clause 5.1 "Leave will generally be earned at the rate of 1 day for every day served".
- By clause 7.1 "Service counting towards leave accrual will commence on the day of leaving home to join the vessel and will finish on the date of signing off the Ships Articles of Agreement, or arrival in your country of residence, whichever is the later".
- By clause 34.1 the contract of employment is "governed by … English Law and the parties submit to the jurisdiction of the English Courts".

8. The Claimant is recognised by the Respondent for collective bargaining purposes. By clause 29 of the contract of employment in the first instance employees are to communicate with FMA about any administrative queries.

9. The ET held:

> **"13. In reality most employees tended to return to the same ship for periods of time - although transfers between ships can and do take place and at least during the period leading up to the redundancies, employees were transferred between ships and a 'riding squad' of a small number of mobile workers was established who worked on different ships as and when needed.**
>
> **14. The crews are of a variety of nationalities. The Respondent's evidence was that the total number of employees fell from about 800 to under 500 between 2014 and 2016 and that the number of UK employees fell from 213 to 118 over the same period.**
>
> **…**
>
> **17. In 2014 and 2015, due to the fall in the price of oil and a glut of new ships entering the market, there was a consequential contraction in Sealion's business. Sealion therefore took the decision to 'lay up' (i.e. take out of service) some of the ships it operates. Initially 'warm lay ups' were proposed (where each ship remains in port, operational with a limited crew) rather than 'cold lay ups' (where all crew are removed from the ship which is moored in port with all engines, generators and machinery shut down). Later it became necessary to place some ships in cold lay up."**

10. By email of 10 July 2015 from John Thomson, Personnel Manager of FMA to All.Ships titled "Seahorse crew on Sealion ships", all Masters were told to inform all on board of a risk of redundancy. The email continued:

> **"I will update those affected from 20th onwards separately per ship group. If I do not contact crew on your ship, then positions on your ship are not affected by this redundancy consultation."**

The email stated that anticipated losses were below 20 per ship and that this would therefore be a case of individual rather than collective consultation.

11. At paragraph 20 the Employment Judge recorded that:

> **"20. On 27 July 2015, John Thomson sent out an update to All.Ships which stated "There is apparently some confusion as to exactly who is at risk at present. The redundancy consultation affects all Seahorse employees - Guernsey and Auckland … Crew may well be transferred where their abilities and experience can best be used. Just because 'their' ship is laid up does not put them at risk more than others." When asked about this in cross examination, Steve Marshall said that the Respondent didn't want crew to be concerned that if they were on a particular ship - that was going to be laid up - that they would necessarily be under inevitable threat of redundancy and he made reference to the possibility of redeployment."**

12. On 22 September 2015 Steve Marshall, Fleet Director of Sealion emailed Masters of Elan, Explorer and Wave that these ships were to be placed in cold lay up in Hull and on 23 September 2015 Mr Thomson confirmed that these ships would be joined in cold lay up by Voyager. The email confirmed that as each of these ships in Hull had more than 20 crew employed by the Respondent, collective consultation with the Claimant would be required.

13. Redundancies took place in or after October 2015.

14. The Claimant brought a claim under **TULR(C)A** section 189 asserting that "UK based" but not other employees of the Respondent were entitled to a protective award.

15. The Employment Judge set out the two issues to be determined at the Preliminary Hearing of the Claim:

> **"Whether by virtue of a connection with Great Britain, which is at least partly a connection with England, the Employment Tribunals of England and Wales have jurisdiction to determine a claim presented by the Claimant. ('the territorial jurisdiction issue')"**
>
> **"Whether the ships of the fleet on which employees of the Respondent were employed are one establishment or whether each such ship is a separate establishment. ('the establishment issue')"**

16. The ET and the parties on appeal considered the 'establishment' issue before the 'jurisdiction' issue.

The Relevant Statutory Provisions

17. The **Trade Union and Labour Relations (Consolidation) Act 1992**:

> **"188.** ***Duty of employer to consult representatives***
>
> **(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.**
>
> **…**
>
> **(1B) For the purposes of this section the appropriate representatives of any affected employees are -**
>
> > **(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, …**
>
> **(8) This section does not confer any rights on a trade union , a representative or an employee except as provided by sections 189 to 192 below.**
>
> **189.** ***Complaint and protective award***
>
> **(1) Where an employer has failed to comply with a requirement of section 188 or section 188A, a complaint may be presented to an employment tribunal on that ground -**
>
> > **…**
> >
> > **(c) in the case of failure relating to representatives of a trade union, by the trade union,**
> > **…**
>
> **(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.**
>
> **(3) A protective award is an award in respect of one or more descriptions of employees -**
>
> > **(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and**

(b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188,

ordering the employer to pay remuneration for the protected period.

(4) The protected period -

(a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and

(b) is 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 in complying with any requirement of section 188;

but shall not exceed 90 days …

190. ***Entitlement under protective award***

(1) Where an employment tribunal has made a protective award, every employee of a description to which the award relates is entitled, subject to the following provisions and to section 191, to be paid remuneration by his employer for the protected period.

…

192. ***Complaint by employee to employment tribunal***

(1) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which a protective award relates and that his employer has failed, wholly or in part, to pay him remuneration under the award.

…

(3) Where the tribunal finds a complaint under this section well founded it shall order the employer to pay the complainant the amount of remuneration which it finds is due to him.

(4) The remedy of an employee for infringement of his right to remuneration under a protective award is by way of complaint under this section, and not otherwise.

193. ***Duty of employer to notify Secretary of State of certain redundancies***

…

(2) An employer proposing to dismiss as redundant 20 or more employees at one establishment within such a period shall notify the Secretary of State, in writing, of his proposal …

(4) A notice under this section shall -

…

(b) where there are representatives to be consulted under section 188, identify them and state the date when consultation with them under that section began, …

285. ***Employment outside Great Britain***

(1) The following provisions of this Act do not apply to employment where under his contract of employment an employee works, or in the case of a prospective employee would ordinarily work, outside Great Britain -

…

In Part IV, sections 193 and 194 (duty to notify Secretary of State of certain redundancies).”

The 'Establishment' Issue

The Conclusions of the Employment Tribunal

18. The Employment Judge considered that the wording of the contracts of employment and the way in which the redundancy exercise was carried out did not reflect the contention of the Respondent that each of the ships operated by Sealion was an establishment to which the Respondent's employees were assigned to carry out their duties. The Employment Judge observed that each ship may be an individual business unit within Sealion's business, but the Respondent does not control the deployment of such ships. It does not necessarily follow that each ship is an establishment at which the Respondent proposed to dismiss a number of employees. The ET held at paragraph 45:

> **"45. … Generically individual ships are capable of being establishments, but in this case it cannot really be said that each one of the ships operated by Sealion are distinct parts of the Respondent's undertaking."**

19. At paragraph 46 the Employment Judge observed that "The authorities suggest a **focus** on the employee rather than the employer" (my emphasis). Although most employees went to and from the same ship on their 4 or 6 week roster, in accordance with their contracts which did not allocate them to a particular ship, some employees were transferred to other ships. The Employment Judge gave as examples employees who had been on the Conqueror and the Envoy and others, the riding crew, who were not attached to any particular ship.

20. Other facts which the Employment Judge relied upon in reaching his conclusion that each individual ship was not an establishment were that the employees' duties commenced when they left their homes and included the period of travel to the ships, and that FMA which dealt with administrative queries was based in Farnham. In some of the correspondence in the run up to the redundancies, in particular that of 27 July 2015, FMA appeared to treat the employees as a group rather than in relation to each individual ship.

21. At paragraph 47, the Employment Judge considered "the fact that the ships are not establishments of the Respondent is one factor weighing against the Respondent's arguments". The Employment Judge also bore in mind the comment of Mr Justice Langstaff in **Renfrewshire Council v Educational Institute of Scotland** [2013] IRLR 76 in which he stated at paragraph 26:

> **"26. … where a choice has to be made on the facts between holding that a greater or lesser unit is the relevant 'establishment', in circumstances where it would be permissible logically to conclude that either or both were the unit to which the relevant number of workers were assigned to carry out their duties, it is a relevant consideration in choosing between them that one choice will afford early consultation rights to their workers, whilst the other will not. …"**

22. The Employment Judge held at paragraph 48:

> **"48. Both sides have good points to make but on balance, the Tribunal considered that the Respondent's arguments concentrated on demonstrating that the individual ships operated by Sealion were distinct from each other rather than examining how and where the employees were assigned to. The Tribunal preferred the Claimant's argument that the reality reflected the contractual situation that the employees were assigned to any of the vessels operated by Sealion. That part of the Respondent's workforce on each ship - forming some but not all of the crew of each ship - did not on the facts before the Tribunal, fulfil the *USDAW* / *Rockfon* / *Athinaiki* definition of 'establishment'."**

Submissions of the Parties

23. Grounds 1, 2 and 3 of the Notice of Appeal challenge the Decision of the ET that each ship was not a separate establishment. By ground 1 it is contended that the ET erred in law by failing to focus on the issue of whether the individual ships were separate establishments and wrongly regarded the question of whether any employees were assigned to each of the ships as determinative of the issue. By ground 2 it is said that when considering whether the employees were assigned to individual ships the ET erred in law by failing to apply its own findings of fact that the employees were in reality so assigned. Instead, the Employment Judge wrongly relied on the contract of employment and other features to reach the opposite conclusion. Further, by ground 3 it is contended the ET erred by reference to the contractual wording, centralised control, the ability to transfer employees between ships, ships not being distinct parts of the Respondent's but of Sealion's organisation and that reaching a conclusion that the entire

A Respondent operation was the establishment could afford early consultation rights to employees.

B 24. Mr Pilgerstorfer, counsel for the Respondent, contended that in deciding whether each ship was an establishment, the ET erroneously focussed on whether the Respondent assigned their employees to a particular ship, each ship being part of the establishment which was their organisation. Counsel contended that the correct approach was to decide whether each ship was a separate establishment and then to decide who, if anyone, was assigned to each establishment.

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D 25. Mr Pilgerstorfer drew attention to the judgment of the Court of Session in **City of Edinburgh Council v Wilkinson** [2012] IRLR 202. Although this was an equal pay case, the Court considered as relevant the judgments of the CJEU in collective redundancies cases. Having referred to **Rockfon A/S v Specialarbejderforbundet I Danmark** [1996] IRLR 168 and **Athinaiki Chartopoiia AE v Panagiotidis** [2007] IRLR 284, Lord Emslie held at paragraph 21 that for the purposes of the collective redundancies directive, Directive 98/57 and an 'establishment':

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> **"21. … a distinct geographical separation might not be essential for the constitution of such a 'unit', it respectfully appears to me that a distinct geographical location may, depending on the circumstances, constitute an important definitional element in identifying the establishment."**

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In the circumstances Lord Emslie held in respect of the term 'establishment' in equal pay legislation:

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> **"22. …the term 'establishment' is largely directed to the place of work. … Similarly, an employer which has a plurality of establishments may include in its contracts of employment a mobility clause; but the power to move an employee from one place or establishment to another is not inconsistent with the existence of a plurality of establishments - indeed it may often be a reflection of the existence of such separate establishments within the employer's undertaking. …"**

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A

26. Counsel contended that in the case of Seahorse the Employment Judge erred in reaching his conclusion in placing no weight on the email of 10 July 2015 to All.Masters which indicated that the Respondent were to treat crew on each ship separately.

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27. Mr Pilgerstorfer referred to the judgment of the CJEU in **USDAW and Anor v WW Realisation 1 Limited (in liquidation) and Lyttle and others** [2015] IRLR 577 in which the Court held at paragraph 45 that 'establishment' has an autonomous meaning in EU law. At

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paragraph 47 the Court observed that:

> **"47. … It is not essential in order for there to be an 'establishment' that the unit in question is endowed with a management that can independently effect collective redundancies."**

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Similar observations in **Rockfon** paragraph 32 and **Athinaiki** paragraphs 19-27 were relied upon. Accordingly it was said by counsel that in the second sentence of paragraph 44 the Employment Judge wrongly placed weight on perceived centralised control and the fact that

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FMA carried out the redundancy exercise and was the reference point for employees' administrative queries.

28. Further it was said that undue reliance was placed on the email of 27 July 2015 sent to

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'All.ships' with an attachment informing of redundancy consultation with Nautilus affecting all the Respondent's employees and the statement that "Just because 'their' ship is laid up does not put them at risk more than others". Further, Mr Pilgerstorfer contended that the Employment

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Judge erred in failing to have regard to the email of 10 July 2015.

29. Mr Pilgerstorfer submitted that in rejecting the Respondent's contention that their

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employees were assigned to a particular ship and that this satisfied the second limb of the relevant enquiry, the ET erroneously relied on their contracts of employment and disregarded

A their own findings of fact. The provision obliging the employees to work on any Sealion ship was no more than a mobility clause which could be said to support assignment to a particular ship.

B

30. Mr Pilgerstorfer contended that contractual provisions do not override what happens in practice in determining whether employees are assigned to a particular establishment. The Employment Judge found in paragraph 46 that most employees went to and from the same ship

C on their 4 or 6 week roster for periods of time. However the Employment Judge erroneously relied on the terms of the contract employment that

> **"Employees employed by the Company agree to serve on any vessel managed by the Client (SSL)"**

D as overriding the finding of fact supporting the practice of assignment to a particular vessel. In light of their finding in paragraph 46, the observation in paragraph 48 that:

> **"48. … The Tribunal preferred the Claimant's argument that the reality reflected the contractual situation that the employees were assigned to any of the vessels operated by Sealion. …"**

E was curious.

31. It was contended that the Employment Judge erred by placing weight in paragraph 46 on

F the transfer of some employees to other ships and that there was a 'riding crew' of employees not attached to any particular ship. This was the position after redundancies became necessary. Mr Pilgerstorfer submitted that the ET should have considered the situation at the time the

G section 188 obligation was triggered and not that after measures were taken in response to 'cold lay-up' of ships such as the Conqueror and Envoy mentioned by the Employment Judge in paragraph 46.

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32. Mr Pilgerstorfer contended that the Employment Judge erred in relying upon the judgment of Mr Justice Langstaff at paragraph 26 of **Renfrewshire** as tipping the balance in

favour of conferring a right to collective consultation on redundancies. It was said that this only applies where factors are equally balanced between the application or not of the obligation to consult. It was said that this was not this case. On a proper application of the law, the factors were not evenly balanced. These should have led to a conclusion that each ship was an establishment for the purposes of section 188.

33. Mr Stone, counsel for the Claimant, submitted that as he made clear in paragraph 38, the Employment Judge did address the two questions relevant to the decision of whether each ship individually constituted an establishment for the purposes of section 188. In paragraph 45 the Employment Judge considered whether each ship was an establishment. He then considered the question of whether the employees were assigned "by the employer to the establishment". In this case Mr Stone submitted that it cannot be said that each ship is a distinct part of the Respondent's organisation. Counsel relied on paragraph 66 of **Renfrewshire**. He submitted that the two central questions referred to in that case: 'is the postulated unit capable of being an establishment; and, if so, is the employee assigned to it', were addressed by the Employment Judge in this case.

34. Mr Stone further submitted that there is a factual distinction between a labour only supplier as is the Respondent in this case and an employer who operates premises in which they employ labour. It cannot be said that the Employment Judge concentrated on the assignment issue while giving insufficient regard to whether each ship could be a separate establishment.

35. Mr Stone contended that the Employment Judge did not err in holding that the factual position with regard to allocation of employees to ships reflects the contract of employment. Merely being told to go to work on a particular ship does not mean that ship is the employee's

only place of work. Mr Stone drew attention to paragraph 21 of the ET3 Grounds of Resistance to the Claim in which the Respondent relied on the email of 27 July 2015 which was also relied upon by the Employment Judge to support the finding that the redundancies were being considered on a fleet wide basis rather than treating employees on each ship as a separate establishment.

36. Mr Stone contended that the Employment Judge correctly directed himself in law. The conclusion that each ship was not a separate establishment was a finding of fact which was not perverse. Further if and to the extent that the competing factors were evenly balanced, the Employment Judge did not err in applying the dictum of Mr Justice Langstaff to accept the argument which gave the employees the protection in a collective redundancy which **TULR(C)A** section 188 was designed to provide.

Discussion and Conclusion

37. The statutory provision at issue in this appeal, **TULR(C)A** section 188, is to be interpreted as far as possible in conformity with judgments of the CJEU on the Collective Redundancies Directive 98/59 which it is designed to implement. The CJEU in **USDAW** considered the interrelationship of an 'establishment' with an 'undertaking' and built on the previous decisions of **Rockfon** and **Athinaiki**, to explain the criteria for identifying an 'establishment' for the purposes of Directive 98/59.

38. In order to constitute an entity which is an 'establishment', for the purposes of Directive 98/59 the CJEU in **USDAW** has identified the following criteria relevant to this appeal.

(1) "It is not essential in order for there to be 'an establishment' that the unit in question is endowed with a management that can independently effect collective redundancies" (paragraph 47);

(2) As explained at paragraph 27 of **Athinaiki** "for the purposes of the application of Directive 98/59, an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks" (paragraph 49);

(3) "By the use of the words 'distinct entity' and 'in the context of an undertaking', the Court clarified that the terms 'undertaking' and 'establishment' are different and that an establishment normally constitutes a part of an undertaking. That does not, however, preclude the establishment being the same as the undertaking where the undertaking does not have several distinct units" (paragraph 50);

(4) "… the entity in question need not have any legal autonomy, nor need it have economic, financial, administrative or technological autonomy, in order to be regarded as an 'establishment'" (paragraph 51).

39. The meaning of 'establishment' in **TULR(C)A** was considered by the EAT in **MSF v Refuge Assurance plc and Anor** [2002] IRLR 324. The case concerned the merger of two life assurance companies, each with their own branch offices and field staff operating out of a network of branch offices. Following the merger there were to be redundancies affecting the field staff. In a claim by the Union MSF alleging breach of **TULR(C)A** section 188 the ET held that although each member of staff was assigned to a branch office, the 'establishment' was not the branch office but the entire field staff of each respective employer. However they

held that there had been compliance with consultation requirements. The Union's appeal from this finding was dismissed and a cross-appeal from the finding that the entire field staff and not each branch constituted the 'establishment' for the purposes of section 188 succeeded.

40. Whilst expressing concern about the correctness of the **MSF** decision, Mr Justice Langstaff in **Renfrewshire** did not consider that it was open to him to take an approach other than that taken in **MSF**. However at paragraph 26 he held:

> **"26. … Finally, where a choice has to be made on the facts between holding that either a greater or lesser unit is the relevant 'establishment', in circumstances where it would be permissible logically to conclude that either or both were the unit to which the relevant number of workers were assigned to carry out their duties, it is a relevant consideration in choosing between them that one choice will afford early consultation rights to those workers, whilst the other will not. …"**

Mr Justice Langstaff considered whether the EAT could substitute their decision for that of the ET but concluded that two central issues of fact were to be decided which required remission.

41. The factual basis of the decision in **MSF** is important. The branch offices to which employees were assigned were owned and operated by their respective employers. At paragraph 53 of **MSF** the EAT referred to the decision of the ET in which they held that each branch office manager was the direct line manager of the field staff assigned to that particular branch office. This was the factual background against which the EAT concluded that the ET erred in holding that the 'establishment' is not the branch office.

42. In the course of finding that the ET in **Renfrewshire** erred in relying on its third reason for holding that the Council was the 'establishment' for the purposes of section 188 Mr Justice Langstaff held at paragraph 52:

> **"52. This again demonstrates the error of failing to realise that an establishment as defined will most usually be a subsidiary part of the employer. The employees at any establishment will be employees of the employer, however many establishments it may have. In that sense, they are bound to be its workforce, rather than a separate workforce of the establishment.**

> **The employer is inevitably likely to have a large degree of control over the recruitment to, and number of its employees at any establishment. … The concept of assigning an employee to a unit to perform his duty necessarily involves his being directed (i.e. in the judge's words 'placed' or 'moved') to work there having first been recruited by the employer."**

43. The application of the 'two central questions' explained in **USDAW** and by Mr Justice Langstaff in **Renfrewshire** paragraph 66 "is the postulated unit capable of being an establishment; and if so, is the employee assigned to it" presents particular difficulties when the employer's business is as in this case, the supply of labour only and the employer is not the owner or operator of a unit to which employees are sent which may be a separate 'establishment'.

44. The term 'establishment' is not defined either in Directive 98/59 or in **TULR(C)A** section 188. The CJEU in paragraph 47 of **USDAW** referred to paragraph 31 of **Rockfon** which in turn referred to **Botzen and Others v Rotterdamsche Droogdok Maatschappij BV** [1985] ECR 519 that:

> **"An employment relationship is essentially characterised by the link existing between the worker and the part of the undertaking or business to which he is assigned to carry out his duties."**

Whilst a different meaning is to be given to 'establishment' and 'undertaking', the CJEU in **USDAW** found **Botzen** of assistance in concluding that 'establishment' must be interpreted as the unit to which the workers made redundant are assigned.

45. Mr Pilgerstorfer submitted that an 'establishment' within the meaning of **TULR(C)A** Section 188 may not have a workforce. I agree. A retailer may have built a new store to which they plan to assign a workforce. The store may be an 'establishment' within the employer's business even before employees are assigned to it. However, in my judgment neither **TULR(C)A** nor Directive 98/59 or the relevant authorities considering 'establishment' support

A a contention that the 'establishment' to which employees are assigned need not be an establishment of the employer. The 'establishment' may not be a physical unit. It could be an organisational unit in a service industry set up to provide a certain type of labour or to provide labour at a particular location. The operator may not own or operate the unit, such as one providing catering services to a particular organisation or at a particular building. The relevant 'establishment' will be the unit within the employer's organisation to which the employees are assigned not that of the client for whom their employer provided services.

46. Applying the two relevant questions to the findings of fact in this case, a ship owned by Toisa and operated by Sealion is not a physical establishment of the Respondent. The Employment Judge recognised that "section 188 does not have the words 'of the employer' after the word 'establishment'". However the Employment Judge considered that "the fact that the ships are not establishments of the Respondent is one factor weighing against the Respondent's arguments". In my judgment the Employment Judge did not err in relying on the fact that each ship was not owned or operated by the Respondent as one factor in concluding that they were not establishments for the purposes of the section 188 claim.

47. By ground 1 of the Notice of Appeal the Respondent contends that the Employment Judge erred in law by failing to focus on whether the individual ships were separate establishments rather than whether employees were assigned to each of the ships. There is some justification for this criticism. Whilst Mr Justice Langstaff observed in **Renfrewshire** at paragraph 66:

> **"66. … the question is employee, not employer focussed. It is as to which unit the worker is assigned to perform his duties. …"**

A He continued by saying that this involves two questions. These are first whether the postulated unit is capable of being an establishment and if so, second whether the employee is assigned to it.

B

48. In challenging the conclusion of the Employment Judge that each ship was not a separate establishment as perverse or reached in error of law Mr Pilgerstorfer relied upon the findings of fact by the Employment Judge that ships were positioned all around the world for

C months or years carrying out different tasks and had a distinct identity and flagging. In my judgment these facts do not support a contention that each ship is part of or an establishment in the Respondent's organisation. Mr Pilgerstorfer relied upon the findings of fact that employees

D tended to stay on a particular ship and that crews had to be adjusted for working in certain places. These facts may be relevant to the second question, whether employees are assigned to a ship but do not show that the Employment Judge erred in answering the first question,

E whether each ship was an establishment.

49. In paragraph 34 of his skeleton argument, Mr Pilgerstorfer contended that "The focus should, instead, have been the organisation of the employees". However no finding of fact or

F evidence was relied upon to show that the Respondent organised their business into individual ship based units. Rather the findings of fact relied upon in the Annex to the Notice of Appeal and in paragraph 32 of the skeleton argument relate to the second question, were the employees

G assigned to the establishment. Nor is the email of 10 July 2015 referring to notifying of redundancies "separately per ship" and that if crew on a ship are not contacted they are not affected by redundancy consultation, to be given weight in determining the 'establishment'

H issue in light of the later email of 27 July 2015 relied upon by the Employment Judge. Crew were told:

"There is apparently some confusion as to exactly who is at risk at present.

The redundancy consultation affects all Seahorse employees - Guernsey and Auckland. …"

50. In my judgment there is some conflation in the analysis made by the Employment Judge in identifying the 'establishment' within the meaning of section 188 and deciding the second question of assignment of employees to it. However it was open to the Employment Judge to rely on the fact that the ships were not owned or operated by the Respondent to conclude that they were not their establishments. Whilst the Employment Judge appears to have reached his conclusion on the 'establishment' issue by concentrating on the second 'assignment' question rather than whether each ship was an establishment, the Respondent has not identified any findings of fact which render the conclusion that each ship was not an establishment perverse. Whilst the Employment Judge stated that he bore in mind the comment of Mr Justice Langstaff in paragraph 26 of **Renfrewshire** that there were factors for and against a unit to which employees were assigned being held an establishment an answer could be given which would afford early consultation, in my judgment on the facts of this case the question was not evenly balanced - they did not support a conclusion that each ship was an establishment of the Respondent for the purposes of section 188.

51. It is only if the Employment Judge erred in concluding that each ship was not an 'establishment' for the purposes of the obligation placed on the Respondent to consult on redundancies that it becomes material to consider whether they also erred in deciding that the employees were not assigned to a particular ship.

52. The Respondent can with justification point to findings of fact in paragraph 46 which support the contention that most employees of the Respondent tended to work on the same ship for periods of time. Mr Justice Langstaff held at paragraph 42:

> **"42. … 'assignment' does not refer to the contractual, but rather the factual, position. … if a worker is actually working at or in or from a given unit for more than a purely temporary or transitory period which might indicate he was not in fact assigned to that unit, the legislation regards him as assigned to it."**

53. The Employment Judge referred to the material passages in the contract of employment which do not allocate the employee to a particular ship but to work on any vessel owned, managed or chartered by Sealion. His findings of fact can be said not to support the conclusion of the Employment Judge in paragraph 48 that:

> **"48. … the reality reflected the contractual situation that the employees were assigned to any of the vessels operated by Sealion. …"**

However this error does not affect the conclusion of the Employment Judge supported by other findings of fact that the individual ships operated by Sealion do not constitute separate establishments for the purposes of the section 188 **TULR(C)A** claim against the Respondent. Whilst some criticisms have been made of the way in which this conclusion was reached they are not sufficient to disturb what is essentially a finding of fact.

The Jurisdiction Issue

Grounds 4, 5, 6 and 7

Decision of the Employment Tribunal and Submissions of the Parties

54. The Respondent contends that the ET erred in law when reaching the conclusion that it had territorial jurisdiction to determine the claim brought by the Claimant in respect of UK domiciled employees.

55. The parties agreed and the Employment Judge held that there is an implied territorial limit to the jurisdiction of the ET over claims under **TULR(C)A** section 188. In **Lawson v Serco Ltd** [2006] UKHL 3 at paragraphs 6 and 23 the House of Lords held in the context of

A unfair dismissal rights that the implied limit is a matter of statutory construction. It is agreed that this approach applies to the territorial reach of other statutory rights such as that in **TULR(C)A** section 188.

B

56. Mr Pilgerstorfer contended that on a proper construction **TULR(C)A** confers a collective not individual employment rights. Accordingly the territorial reach applicable to individual employment rights, such as that applicable to claims of unfair dismissal, are not

C applicable to collective rights. Mr Pilgerstorfer advanced the argument which was not accepted by the Employment Judge that the focus of the territorial reach of section 188 was on 'the establishment'. On counsel's analysis, which has been rejected in the first part of this

D Judgment, the 'establishment' was each ship to which employees were assigned.

57. Counsel contended that the Employment Judge erred in relying on **Netjets Management Ltd v Central Arbitration Committee** [2012] IRLR 986 in holding that

E '**Lawson**/**Ravats**' principles were to be applied to 'individual workers as a group' and that these supported the Employment Judge's approach. Mr Pilgerstorfer submitted that the ET erred in reaching the conclusion in paragraph 52 that in deciding the territorial reach of section

F 188 "the focus should be the employees". The Employment Judge erred in applying the 'stronger connection' test explained in **Ravat v Halliburton Manufacturing and Services Ltd** [2012] IRLR 315 to the reach of the collective rights conferred by section 188. Therefore the

G ET erred in treating the fact that UK domiciled employees "have a stronger connection with the UK than elsewhere" as important or determinative of the territorial reach of section 188.

H 58. Mr Pilgerstorfer pointed out that Mr Justice Supperstone in paragraphs 31 and 36 of **Netjets** distinguished the approach to the importance of characteristics of individual employees

when determining whether the Union has collective bargaining rights and then deciding on the bargaining unit. Counsel contended that the Employment Judge failed to distinguish between the question of whether section 188 applied "the group of collective question" and that of whether individuals within the group were entitled to protective awards, the individual rights. The Employment Judge therefore erred in law in placing undue weight in determining the territorial reach of the collective section 188 right on '**Lawson**/**Ravats**' principles which are relevant to determining the reach of individual rights.

59. Mr Pilgerstorfer submitted that the approach to territorial jurisdiction over individual employment rights cannot be carried over to collective rights. He submitted that the Employment Judge erred by failing to determine jurisdiction by considering whether the establishments to which the employees who were subject to proposed redundancies were assigned, had a sufficiently strong connection with the UK for it to be inferred that Parliament had intended such proposed redundancies to be within the scope of section 188.

60. Mr Pilgerstorfer submitted that the Employment Judge should have determined the territorial reach of section 188 by considering whether the establishment to which employees were assigned had a sufficient connection with the UK and UK employment law. On the approach adopted by the Employment Judge it would be a difficult task to check where each employee was domiciled and decide the territorial jurisdiction accordingly.

61. Both counsel referred to the legislative history of **TULR(C)A** section 285 which currently provides that in Part IV, sections 193 and 194, the duty to notify the Secretary of State of certain multiple redundancies, does not apply where under his contract of employment an employee works outside Great Britain. Prior to amendments introduced by the **Employment**

Relations Act 1999 the exclusion list included all of Part IV in which sections 188 to 192 are located. It was submitted that the removal of section 188 suggests that an approach based on where under the contract of employment an individual employee works is not to be applied.

62. By ground 5 of the Notice of Appeal it is asserted that the Employment Judge erred by regarding the employees of the Respondent as 'peripatetic' and therefore determining the jurisdiction of the ET over the section 188 claim by applying the 'base' test. Further it was submitted that the Employment Judge was wrong to determine where an employee was based solely by reference to where his duties begin and end. In so deciding it was said that the Employment Judge overlooked his finding that employees were assigned to work on a ship and in most cases returned to a particular ship.

63. Mr Pilgerstorfer submitted that the Employment Judge erred in categorising the Respondent's employees as peripatetic and therefore applying the 'base' test to them when determining jurisdiction to hear the section 188 claim. Unlike the employees in **Diggins v Condor Marine Crewing Services Ltd** [2010] IRLR 119 and **Windstar Management Services Ltd v Harris** [2016] IRLR 929, on the findings of fact of the Employment Judge most of the employees of the Respondent worked on a particular ship. Their work was not peripatetic. Their place of work was in one place. They did not travel from place to place. The employees who travelled from place to place were the 'riding crew', a group formed after redundancies were contemplated.

64. It was submitted that a more apposite comparison was with the seafarers in **Fleet Maritime Services (Bermuda) Ltd v Pensions Regulator** [2016] IRLR 199. Mr Justice Leggatt considered whether seafarers employed by the Claimant fell within the territorial scope

of the **Pensions Act 2008** so as to qualify for automatic enrolment into a pension scheme. The answer depended on the meaning of section 1(1)(a) which brought within the scope of the Act a worker "who is working or ordinarily works in Great Britain under the worker's contract". Mr Pilgerstorfer relied upon the findings of Mr Justice Leggatt at paragraph 73 that the fact that under their contracts of employment seafarers are paid for travel days to and from their ship did not lead to the conclusion that they were working on those days. They were commuting to and from the place where they are required to begin and end their work. It was submitted that the Employment Judge erred in concluding that there was no relevant difference between the Respondent's employees stationed on a particular ship in a particular oil field for 6 week rostered periods and the case of Mr Harris in **Windstar** who sailed around the Caribbean or Mediterranean for 3 month periods.

65. Counsel contended that the fact that employees were paid for travel time to and from their vessel and that this was regarded as qualifying service for leave purposes did not lead to a conclusion that they started work when they left home to travel to the ship. The focus should have been on when they actually start work which could not happen until the Captain had checked the paperwork on board the ship.

66. Mr Pilgerstorfer submitted that if the approach in **Windstar** is correct all seafarers living in the United Kingdom would be within reach of United Kingdom employment law. He contended that this would make no sense when they performed no duties in the United Kingdom. Counsel referred to **Wittenberg v Sunset Personnel Services and Others** UKEATS/0019/13 in which Lady Stacey in the EAT in Scotland held of a seafarer whose residence was in Germany and his employer in Aberdeen that his connection with the United

Kingdom and the EU was not necessarily sufficient to bring him within the scope of rights under United Kingdom law derived from EU Directives.

67. This contention and those in paragraphs 63 and 64 are also relevant to ground 7 of the Notice of Appeal. By ground 7 it is contended that the Employment Judge erred in law when concluding that an employee's duties started when they left home rather than when they arrived on the ship.

68. In answer to the grounds of appeal regarding the territorial reach of **TULR(C)A** section 188, Mr Stone pointed out that the Claimant was only pursuing the section 188 claim in respect of employees living in the United Kingdom. They would not have information regarding those not living in the UK.

69. Mr Stone contended that the legislative history of the removal of the express territorial limitation on section 188 is instructive in determining its implicit territorial limitation. **TULR(C)A** section 285 defined the territorial scope of Part IV of the Act including section 188 by reference to the employment contract of an individual employee notwithstanding that the exclusion covered rights that are enjoyed collectively. By removing sections 188 to 192 from exclusion for employment where under his contract of employment an employee works outside Great Britain the legislature demonstrated that where work was performed under individual contacts of employment was material to the territorial reach of the obligation under section 188 and the right of individuals to bring claims for a protective award under section 189.

70. Mr Stone contended that to know whether a duty to notify arises in a given case, an employer must determine whether the proposal covers a sufficient number of employees who

A are not excluded by section 285. It was submitted that the appropriate test for this to be ascertained was that of whether an individual employee can bring a claim within the jurisdiction of the ET. The appropriate test is that of "sufficiently strong connection". Mr Stone contrasted the territorial jurisdiction in a section 188 claim with that considered in **Netjets**. The Court in that case was concerned with a collective right whereas individuals can bring claims under **TULR(C)A** section 189.

C 71. Mr Stone contended that a territorial jurisdiction test based on 'establishment' would be unworkable. What factors would be taken into account in determining whether an 'establishment' had a sufficiently strong connection with the United Kingdom or United D Kingdom employment law to bring it within scope of section 188? Mr Stone commented that Mr Pilgerstorfer could not state the criteria for establishing whether an 'establishment' had a sufficiently strong connection with the United Kingdom to bring it within the scope of section E 188.

72. Mr Stone observed that if considerations relating to individual employees are relevant to the territorial reach of the obligation to notify the Secretary of State of collective redundancies F under section 193 there was no inhibition on such considerations governing the territorial reach of section 188. The place of work of the employee will still retain persuasive force. The focus of the enquiry of territorial reach of section 188 jurisdiction was rightly focussed by the G Employment Judge on the individual employees.

73. Mr Stone submitted that the finding by the Employment Judge that the Respondent's employees are peripatetic was a finding of fact which was open to him on the evidence. The H

A contract of employment which obliged employees to work on any ship operated by Sealion supported such a conclusion.

B 74. The judgment of the House of Lords in **Serco** establishes that in determining whether a claim by a peripatetic employee is within the territorial reach of the ET it is material to decide where his base is located. Mr Stone submitted that **Windstar** and **Diggins** show that a mariner's duties start and finish before they reach their ship. What is material is where their C hours of duty start and finish. The Employment Judge did not err in relying on the evidence of Mr Marshall, a witness for the Respondent, that travel to and from the ships was included in the employees' duties and therefore that duty begins and ends at home.

D 75. The Employment Judge not only relied on the 'base' test applicable to peripatetic employees but also found that:

> **"50. … The connection between the circumstances of the employment and the UK and British** E **employment law are sufficiently strong to enable the Employment Tribunal to have jurisdiction given that base, the reference to English law in the contract, and the involvement of FMA and the employees' domicile."**

76. Mr Stone submitted that by ground 6 Mr Pilgerstorfer was seeking to re-argue matters F raised before and rejected by the Employment Judge. If the Employment Judge had erred in holding the employees to be peripatetic and regarding the base test as determinative of territorial reach of section 188 Mr Stone contended that the correct approach would be that G explained in paragraph 29 of **Ravat**, whether the connection with Great Britain and British employment law was sufficiently strong to found territorial jurisdiction.

H 77. In applying the sufficiently strong connection test Mr Stone pointed to the following factors referred to in the Claimant's Answer in the Employment Appeal Tribunal as showing

A that the conclusion of the Employment Judge should be upheld even if he erred in holding that the employees were peripatetic. The factors establishing the sufficiently strong connection with Great Britain and British employment law were that the parties chose English law to govern the contracts of employment, that the contracts were administered by FMA from Farnham in England, that the employees said to be in scope of the section 188 lived in England and that they started and finished their work in England. The last finding which was the subject of ground 7 was said to be fully supported by the evidence of Mr Marshall, FMA, the Respondent's witness, that travel to and from the ships was included in the employees' duties.

78. Mr Stone submitted that if the Employment Judge had erred in deciding that the employees were peripatetic and relying on the base test, he had found all the necessary facts to support this conclusion on the 'sufficient connection' test. Accordingly the appeal should be dismissed.

Discussion and Conclusion

79. The principal difference between the parties on the issue of the territorial jurisdiction of the ET to determine the claim under **TULR(C)A** section 188 is whether the focus or principal determinant should be the connection to the UK and UK employment laws of the establishment which is the subject of section 188 or of the employees who are assigned to that establishment. Both parties agree that in accordance with the judgment of Lord Hoffman in the House of Lords in **Lawson v Serco Ltd** [2006] IRLR 289 at paragraphs 6 and 23 the issue is one of construction, in this case of **TULR(C)A** section 188. There is no direct appellate authority on the question. The question of its territorial scope is not straightforward and each of the competing constructions presents practical difficulties.

A 80. In the absence of express provision setting out the territorial jurisdiction of an Employment Tribunal to hear and determine claims under section 188, the Court is to apply the guidance of Lord Hoffman in **Serco** at paragraph 6:

> **"6. … In principle, however, the question is always one of the construction of section 94(1). As Lord Wilberforce said in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130, 152, it**
>
> > **'requires an inquiry to be made as to the person with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?'"**

C 81. In accordance with the conventional canons of construction the meaning, in this case implied meaning, of legislation is to be derived from the legislative context. Other related provisions in that part of the statute to which the uncertainty relates indicate the intention of Parliament as does the legislative history of the statutory subject matter over which there is uncertainty. Where, as here, the statutory provisions in **TULR(C)A** sections 188 to 192 are designed to implement a European Directive, in this case Directive 98/59, the domestic legislation should be interpreted, as far as it is possible to do so, consistently with the terms and purpose of the European provision. Unlike **Renfrewshire** in which Mr Justice Langstaff considered the purpose of Directive 98/59 to be potentially material when there was a choice of units, to be regarded as 'establishments', it was not suggested by either party in this case that the decision on implied reach of section 188 would be assisted by consideration of the purpose of the Directive.

82. I consider the following statutory features of the legislation dealing with collective redundancies to be material in deciding the jurisdictional territorial reach of **TULR(C)A**. Section 188 does not stand in isolation. It forms the first step in a group of provisions imposing an obligation on employers to consult employee representatives, in this case a Trade Union, when the employer is proposing to dismiss as redundant 20 or more employees at one establishment within 90 days or less. The means of enforcement of the obligation are set out in

A the following sections. By section 189(1)(b) where an employer has failed to comply with their obligations under section 188 the Trade Union may present a complaint to an employment tribunal. By section 189(2) if the employment tribunal finds the complaint well founded it makes a declaration to that effect and may make a protective award in respect of those employees who have been dismissed as redundant or whom it is proposed to dismiss as redundant in respect of whose dismissal the employer has failed to comply with a requirement of section 188. Section 190 sets out the financial basis of the entitlement under the protective award. Section 192 provides the means of providing a remedy for an employee who is not paid the protective award to which he is entitled by application of sections 188 to 190. Section 192 provides:

> **"(1) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which a protective award relates and that his employer has failed, wholly or in part, to pay him remuneration under the award.**
>
> **…**
>
> **(3) Where the tribunal finds a complaint under this section well founded it shall order the employer to pay the complainant the amount of remuneration which it finds is due to him.**
>
> **(4) The remedy of an employee for infringement of his right to remuneration under a protective award is by way of complaint under this section, and not otherwise."**

83. Accordingly whilst section 188 imposes an obligation on an employer which arises from an action or proposal of treatment of a group the ultimate end point of enforcement of that obligation is granting a right to an individual employee to present a claim to an Employment Tribunal.

84. That **TULR(C)A** sections 188 to 192 are to be treated as a group is confirmed by **TULR(C)A** section 285. Section 285 provides:

> **"(1) The following provisions of this Act do not apply to employment where under his contract of employment an employee works, or in the case of a prospective employee would ordinarily work, outside Great Britain -**
>
> **…**

In Part IV, sections 193 and 194 (duty to notify Secretary of State of certain redundancies).

(2) For the purposes of subsections (1) and (1A) employment on board a ship registered in the United Kingdom shall be treated as employment where under his contract a person ordinarily works in Great Britain unless -

(a) the ship is registered at a port outside Great Britain, or

(b) the employment is wholly outside Great Britain, or

(c) the employee or, as the case may be, the worker or the person seeking employment or seeking to avail himself of a service of an employment agency, is not ordinarily resident in Great Britain."

Sections 188 to 192 are in Chapter II of Part IV. The exclusion relating to notifying the Secretary of State of certain group redundancies requires a consideration of the individual employee's contract of employment: whether under the contract he would ordinarily work abroad. Until an amendment effected by section 32 of the **Employment Relations Act 1999** **TULR(C)A** section 285(1) applied to the whole of Chapter II of Part IV. Accordingly until the 1999 amendment the obligation imposed by section 188 and the remedy available under section 192 did not apply "to employment where under his contract of employment an employee works outside Great Britain".

85. Further, as originally enacted by **TULR(C)A** section 283, section 188 and the other sections in Chapter II of Part IV did not apply to those employed as merchant seamen. Section 283 was repealed by the **Trade Union Reform and Employment Rights Act 1993**. Accordingly unless merchant seamen fall within the exclusionary provisions of section 285(2), the considerations applicable to the territorial jurisdiction of Employment Tribunals over claims concerning **TULR(C)A** sections 188 to 192 apply to them.

86. The legislative history of the exclusionary provisions of section 285 as they affect sections 188 to 192 demonstrated a focus on whether under his contract of employment an employee worked outside Great Britain rather than where the 'establishment' to which he is

assigned is located. That express exclusion did not depend upon assignment to an establishment located outside Great Britain. An employee can be assigned to an establishment located outside Great Britain but work in Great Britain. This may be the case where, for example, an employee works for a foreign bank or a head office unit within that bank but performs his duties in Great Britain. The current section 285(2) contains express workplace exclusion in certain specified circumstances. Where the legislature intended a focus on place of work as a bar to jurisdiction of certain statutory rights it has so provided. The legislative reach of sections 188 to 192 has been determined by where the employee works rather than where the establishment for which he works is located. In many but not all cases they may be the same.

87. Whilst it may be said that the obligations and entitlements provided by **TULR(C)A** sections 188 to 192 are hybrid rather than all collective or all individual, in my judgment territorial jurisdictional reach of all such provisions is to be determined by the rights and means of enforcement which are given to the individual employees. Unlike the statutory provisions considered in **Netjets**, in my judgment the end of the collective consultation obligation in section 188, its enforcement by section 192, depends on determination of the initial obligation. That situation is distinguishable from that in **Netjets**. In **Netjets** Mr Justice Supperstone considered whether the Central Arbitration Committee ("CAC") had erred in deciding that collectively the connection of Netjets' pilots within a proposed bargaining unit was sufficiently strong for the Union to seek recognition for collective bargaining purposes. Mr Justice Supperstone rejected the contention of the Appellant that in looking at the group the position of the majority of the workers in that group was highly relevant. Mr Justice Supperstone held at paragraph 31:

> **"31. In my view it is not appropriate to take into account characteristics of individual employees when considering whether the union has collective bargaining rights. At that stage the focus is on individual workers as a group. The appropriate time to take into account individual characteristics is when considering the bargaining unit. …"**

In my judgment the Employment Judge erred in relying on **Netjets** as requiring consideration of individual workers connections, '**Lawson**/**Ravats** principles' when dealing with "individual workers as a group". However as I have concluded that the obligations of the employer under **TULR(C)A** section 188 are determined by reference to the connection of employees with the UK and UK employment law rather than the connection of the establishment to which they are assigned, any reliance by the Employment Judge on **Netjets** did not affect his decision.

88. I have concluded that the Employment Judge did not err in focusing on the employees rather than the establishment in reaching his decision that the ET had territorial jurisdiction over the claim under section 188. The Claimant had restricted the scope of that claim to UK based employees.

89. As the focus of the enquiry into jurisdiction over the section 188 claim was properly to be on employees, did the Employment Judge err in considering them to be peripatetic and therefore to hold in paragraph 49 that:

> **"49. … The key question is where the employees were based."**

90. It is somewhat difficult to discern the basis for the decision of the Employment Judge that the Respondent's employees were peripatetic. The Employment Judge observed that "Any peripatetic employees working on the spot market cargo run were UK based". At paragraph 50 the Employment Judge appears to have reasoned that because Mr Marshall had accepted that travel to and from the ships was included in the employees' duties and therefore that their duty begins and ends at home it was "On that basis the employees working the UK [sic] were clearly UK based peripatetic employees". The Employment Judge rejected the argument advanced by Mr Pilgerstorfer that the situation of the employees of the Respondent was different from that of those considered in **Diggins** or **Windstar** who moved around the world in the performance

of their duties. The reason given by the Employment Judge for rejecting this argument was that it "focused on whether the ships moved rather than the employees".

91. The case of **Diggins** was concerned with the chief officer of a ship which plied between Portsmouth and the Channel Islands. He lived on the vessel for his two week rosters. The EAT allowing his appeal applied the test appropriate for peripatetic workers, where his base was. The issue before the Court of Appeal was not whether the Claimant was a peripatetic employee. Lord Justice Elias at paragraph 26 did not permit the employer to advance an argument that the seaman was not a peripatetic employee as it had not been advanced below. Lord Justice Elias observed at paragraph 26:

> **"26. … Lord Hoffman in terms treated mariners as an example of peripatetic employees. …"**

The appeal therefore proceeded on the basis that Mr Diggins was a peripatetic employee. Lord Justice Elias then explained at paragraph 27:

> **"27. … Lord Hoffman considered that the principles to be applied for determining whether somebody fell within the jurisdiction or not was, for peripatetic employees, whether they had a base in the United Kingdom. …"**

This is not where the employer is based but where the employee is based. Lord Justice Elias held at paragraph 30:

> **"30. In my view, if one asks where this employee's base is, there can only be one sensible answer: it is where his duty begins and where it ends. …"**

92. Mrs Justice Elisabeth Laing in the EAT in **Windstar** accepted at paragraph 45 that the ET made no express finding that the Claimant in that case was a peripatetic employee. However the Judge accepted that this was the tenor of the judgment. The Claimant was employed as the Master of a cruise ship. The ship spent the summers cruising around Europe and the winters cruising around the Caribbean. The calculation of his days of service began

from his departure from the UK airport and ended when he landed back in the UK. Mrs Justice Laing distinguished **Fleet Maritime Services** relied upon by the employer in that case as in this on the basis that the statutory provision at issue in that case under the **Pensions Act 2008** was whether the employee "ordinarily works in Great Britain". In the case of **Windstar** as in this case that is not the statutory provision in issue. In my judgment **Fleet Management Services** is not of assistance in determining the issues in this case.

93. However **Windstar** cannot be taken as authority for a proposition that all seafarers are peripatetic employees in the categorisation by Lord Hoffman. Each case must depend on its own facts. The facts of this case are unusual for seafarers. The vast majority of employees worked on vessels which did not move. Moreover on the findings of fact of the ET they for the most part returned to work on the same ship on their tours of duty. On those facts the only travel in which they were engaged was from their homes to their place of work outside Great Britain, the vessels moored at oil fields or other installations. In my judgment on those undisputed facts, a finding that the employees were peripatetic was perverse save in the case of those engaged on ships which moved, those on the spot oil market run. Accordingly the 'base' test for determining jurisdiction did not automatically apply.

94. However, in my judgment, the submission on behalf of the Claimant in the Claimant's Answer in the EAT that even if the employees were not peripatetic, those living in the UK were international commuters who had a sufficiently strong connection with the UK to give the Employment Tribunal territorial jurisdiction to determine the section 188 claim in relation to them is well made.

95. By ground 7 the Respondent challenges the finding of the ET that an employee's duties started when they left home rather than when they arrived on the ship. Mr Pilgerstorfer contended that the Employment Judge failed to make proper findings on the evidence before him that the Captain of a ship checks an employee's documentation on arrival before he is permitted to start work. The fact that employees are paid for travel time to and from the UK and that such time counts towards accrual of leave entitlement does not mean that their work 'base' is the UK. They did not start work until they reached their ship.

96. Even if the contention on behalf of the Respondent were correct and the employees were not based in the UK, the employees would be regarded as international commuters. The test to be applied to establish whether the ET has territorial jurisdiction over claims on behalf of international commuters is that applicable to all extra territorial cases, whether, as explained by Lord Hope in **Ravat** at paragraph 28:

> **"28. …the connection between Great Britain and the employment relationship is sufficiently strong to enable it to be presumed that, although they were working abroad, Parliament must have intended that s.94(1) should apply to them. …"**

The observations were made in relation to a claim for unfair dismissal. However there is no reason for not applying them to other statutory employment claims in which the territorial jurisdiction of the ET depends upon the presumed intention of Parliament. As I have decided that the principal relationship with the UK and UK employment law determining jurisdiction of the ET over a claim under **TULR(C)A** section 188 is that of the affected individual rather than of the establishment, the fact that the employee commutes to and from his home in the UK to his work is a material factor even if the UK is not to be regarded as his working base.

97. Although the Employment Judge stated in paragraph 49 that "The key question is where the employees were based" he relied on other additional factors in concluding that the ET had

jurisdiction to determine the claim. The Employment Judge also relied on the fact that by clause 34.1 the contract of employment was to be governed by English law, that a UK based organisation, FMA, was responsible for most administration in dealing with employees and that the employees in respect of whom the Claimant brought their claim were domiciled in the UK.

98. It was submitted on behalf of the Respondent that the ET erred in failing to consider all relevant matters in applying the sufficiently strong connection test and that had he done so the opposite conclusion on jurisdiction would have been reached. The first such factor was that the Respondent is based in Guernsey. Whilst the country in which the employing company is registered may be relevant, also of importance is the country from which the employees' duties are administered, in this case the UK. The former does not necessarily outweigh the latter. Reference was made to the finding of the ET at paragraph 8 that some or all of the employees sought tax advantages related to working 'offshore' including claiming the Seafarers' Earnings Deduction on income that would normally be taxable in the UK. It appears, as explained in paragraph 7 of **Fleet Maritime**, that this benefit is available to those who work wholly or mainly outside the UK. Claiming such a benefit is not inconsistent with seamen starting their work in the UK, being based there if they are peripatetic workers or commuting from there if they are not. The fact that the employees work on ships in fixed positions in foreign territorial waters is material. However the weight to be attached to this factor is to be assessed by the ET together with other relevant factors. In my judgment that the crew supplied by the Respondent to a particular ship is made up of a variety of nationalities, and are domiciled around the world is not a factor against a finding of a sufficient connection of UK domiciled employees with the UK to establish territorial jurisdiction over the **TULR(C)A** claim. The Claimant claimed that the Respondent had an obligation to consult under **TULR(C)A** section 188 in relation to UK domiciled employees. Applying the same reasoning as led to the conclusion that in deciding

the relevant connection with the UK it is the connection of the employee rather than of the establishment which is material, in calculating the number of employees for the purposes of determining the threshold number of 20 in section 188(1). In my judgment it is only those employees who would be able to claim an entitlement to a protective award who are to be included. In my judgment it cannot have been the intention of Parliament that the obligation to consult under section 188(1) is triggered if only one of a crew of 20 is UK based or UK domiciled and 19 have no connection with the UK other than that their contracts are governed by UK law. Accordingly the focus of the Employment Judge on crew domiciled in the UK of which the Respondent complains does not undermine his conclusion.

99. Some criticism can be made of the decision of the Employment Judge on the territorial jurisdiction of the ET to hear the section 188 claim; the finding that the employees were peripatetic and the absence of reference in the conclusions to the factors mentioned in the preceding paragraph. The contention by the Respondent that the Employment Judge erred in considering the connection of the employees with the UK to be the material question rather than the connection of the establishment, has been rejected. Mr Pilgerstorfer set out in the Notice of Appeal and in his written and oral submissions to the EAT all the facts upon which he relies to contend that the Employment Judge reached an erroneous conclusion. Those facts and the contentions based upon them do not undermine the conclusion of the Employment Judge.

Disposal

100. The appeal is dismissed.