Automatic enrolment – High Court guidance on meaning of "ordinarily working in the UK"

The High Court has provided guidance on the meaning of "ordinarily working in the UK" for the purposes of the automatic enrolment legislation. The High Court's decision contradicts the interpretation given to the phrase by the Pensions Regulator (the **"Regulator"**).

Background

The Pensions Act 2008 (the **"Act"**) requires employers to enrol eligible "jobholders" into a pension scheme that meets certain criteria, unless the jobholder is already an active member of a qualifying scheme. In order to be eligible, a jobholder must (among other things) work or "ordinarily work" in the UK under their work or employment contract. Regulations provide that the automatic enrolment obligations apply without modification to persons employed or engaged in any capacity on board a ship. The Act gives the Regulator the power to issue a compliance notice directing an employer to remedy a breach of the employer's duties under the Act.

Facts

The company involved in this case (the **"Employer"**) was the overseas subsidiary of an English company. The English company owned various ships, most of which were registered overseas, and the Employer employed the crew who worked on the ships. The Employer's payroll and administration was operated outside the UK, and it had no place of business in the UK. Crew members lived on board the ships during their tours of duty which were usually 12 weeks long (but could be up to 6 months), following which they received 6-12 weeks' leave. The ships spent a significant majority of their time outside UK territorial waters. During their leave periods, some crew members resided in the UK, while others resided outside the UK.

In July 2014, the Regulator issued a compliance notice to the Employer stating that, in its view:

- where crew members live in the UK but work on a British or foreign-registered vessel spending several weeks away working in foreign waters, and join and leave that vessel from a port within the UK, they are "ordinarily working in the UK", even though most of their tour of duty may be spent outside the UK; and
- where crew members live in the UK, begin and end their tour of duty outside the UK, and work under a permanent contract of employment in a similar form to those sent as examples by the Employer to the Regulator, there is evidence in relation to travel and other arrangements at the beginning and end of their tours of duty to support the view that their work begins and ends in the UK and that they are therefore "ordinarily working in the UK", even though most of their tour of duty may be spent outside the UK.

The Employer requested a review of the compliance notice and, when that review resulted in the Regulator confirming its decision to issue the notice, the Employer sought judicial review of the Regulator's decision.

The High Court's view

Having conducted a review of the case law on the meaning of "ordinarily working in the UK" for the purposes of other legislation, the High Court concluded that, for the purposes of the Act:

- crew members are "ordinarily working in the UK" during any period when they are working from a base in Great Britain even if the ship spends most of its time outside Great Britain and the majority of the work is performed outside Great Britain;

- crew members are based in Great Britain and therefore "ordinarily working in the UK" if they live in Great Britain and work on a ship which, although it spends most of its time outside Great Britain, habitually begins its voyage from and returns to a port in Great Britain; and
- crew members are not based in Great Britain and are not therefore "ordinarily working in the UK" if they live in Great Britain but work on a ship which spends all or most of its time outside Great Britain and their tours of duty do not habitually begin and end in Great Britain.

For these purposes, the Court considered that the fact that a crew member might travel from Great Britain to another country to join their ship and be paid for that travel time did not mean that they were working from a base in Great Britain because the example contracts of employment provided by the Employer made it clear that each tour of duty began when the crew member joined their ship and ended when they left it.

Mayer Brown acted for the Employer in the proceedings.

Comment

Although very specific to the facts of this particular case, the High Court's decision has wider relevance on two points. Firstly, it provides additional guidance on the level of connection to the UK that will be required in order for an individual to be "ordinarily working in the UK". Secondly, it demonstrates that the Regulator's interpretation of legislation is capable of being successfully challenged in the courts.

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