Seafarers - Changes to the Race Relations Act

The Department for Transport has begun consultation on proposed changes to the law which currently permit discrimination on grounds of nationality against foreign nationals who work as seafarers on UK registered ships. The consultation has arisen from a complaint made to the European Commission that in this respect the UK legislation infringes EU law.

The Legal Issues

Section 9(1) of the Race Relations Act 1976 (‘RRA’) permits employers to discriminate against seafarers who apply for or are engaged to work on UK registered ships outside Great Britain. Such discrimination is only permitted on the grounds of nationality and then only in relation to pay (section 9(2) contains a similar provision applicable to contract workers engaged outside Great Britain by an employment business or agency). The effect of these provisions is that workers from, say, India, Poland or Portugal who are recruited outside the UK can lawfully be paid lower rates of pay on a British ship than British nationals employed on the same ship.

Under EU law, workers of each member state are permitted to work in other member states without restriction (subject to certain exceptions for countries that have recently joined the EU). These migrant workers are entitled to be employed on the same terms and conditions as resident workers, including terms relating to pay and benefits. Section 9 of the RRA prima facie allows breaches of these provisions of EU law. The TUC has attacked Section 9 as a licence to discriminate against migrant workers while damaging the opportunities for UK seafarers, as employers are likely to seek to employ cheaper foreign nationals.

The RRA only applies in England, Wales and Scotland and does not extend to Northern Ireland. The NI administration is currently considering corresponding amendments to NI law to bring this in line with EU law on the free movement of workers.

The Consultation

The Government has commenced consultation on possible amendments to section 9 of the RRA. The consultation is to continue until 14th September 2007. The Government has set out 3 options:

1. maintaining the status quo;
2. amending section 9, so that discrimination would be permitted only against seafarers not from EEA (the EU member states together with Norway, Iceland and Liechtenstein) and other designated countries;
3. repealing section 9, so that no discrimination at all would be permitted.

The Department for Transport’s consultation paper states that the risk in Option 1, maintaining the status quo, is that the European Commission may commence infringement proceedings against the UK, which might result in heavy financial penalties if the UK is found to be in breach of EU law. The Consultation Paper also states that as the Government’s general position is not to ‘over-implement’ EU law, it is unlikely to pursue Option 3. Indeed, one particular concern with Option 3, raised during a previous consultation on amendments to section 9, is that many UK registered ships actually operate outside the EU and recruit local seafarers on terms comparable with the local employment market. The Government understands that this is in line with global shipping practice and the imposition of a complete prohibition would damage the UK shipping industry. Consequently it seems that Option 2 may be the way forward.

Impact of the Possible Reforms on UK Ship Owners

Adopting Option 2 will affect ship owners who have ships registered under the UK flag and who employ seafarers from various EEA or designated states on different rates of pay. The Department of Transport’s Regulatory Impact Statement attached to the Consultation Paper (‘RIA’) estimates that under Option 2 the total increase in staffing costs would be around £8.8 million per annum for vessels under the UK flag. Under Option 3, the total increase would rise to £21 million per annum. Ship owners who currently only employ UK or ‘Old EEA’ seafarers (i.e. seafarers from the original 18 EEA countries, such as France, Germany, Italy and Luxembourg, and not including recently joined members such as Poland, Lithuania and Latvia) should not be affected as there is unlikely to be significant wage discrimination. If Option 2 is adopted, ship owners may continue to pay lower wages to those employees recruited from any country not identified specifically in Option 2; this would include countries where seafarers are commonly recruited, such as India and the Philippines. Seafarers from the new EU accession states such as Poland, Lithuania and Latvia will, however, be protected. If Option 3 were adopted, those who would not be protected by Option 2 (such as seafarers from India and the Philippines) would be protected.

In practice, the options open to ship owners will be threefold: (1) to increase the wages of newly protected employees, (2) to decrease the wages of UK and ‘Old EEA’ seafarers to bring them in line with these employees, or (3) to terminate their employment and no longer re-recruit or employ them. Employers planning to reduce pay or terminate contacts of employment will have to tread carefully and take employment law advice to establish the extent of the rights which UK law gives to their employees and other workers providing services. Under a UK employment contract a reduction of pay without consent or in the absence of any contractual provision permitting this, would entitle the employee to resign and claim constructive dismissal. The correct approach would be to terminate the contact by giving proper notice and re-offering employment on the lower rate of pay. Where the employees have UK unfair dismissal rights, it will be important to follow the correct procedure. Failure to do so would expose employers to the risk of claims by such employees for compensation for unfair dismissal. Furthermore, foreign seafarers on UK flagged ships are entitled to the UK’s national minimum wage in respect of any service while they are in the UK. Other constraints on pay to consider are the International Labour Organization’s minimum wages for seafarers, the International Bargaining Forum established by the International Trade
In spite of the UK Government’s aim to encourage ship owners to register under the UK flag, a likely consequence of adopting Options 2 or 3, according to the Chamber of Shipping, is that ship owners will change the flag of their vessels so that they would not be subject to the new race discrimination laws. The downside of this for employees is that their working conditions may be detrimentally affected due to the less rigorous health and safety laws of many foreign flag states. For those ship owners who do not ‘flag out’, the RIA suggests that over the course of time, the wages which employers offer will adjust downwards, with the consequence that seafarers from the “Old EEA” countries may change employer or drop out of the seafaring employment market. This could have an adverse impact on the shore-based sector where wages will have to increase to attract suitable alternative labour, or shore-based firms may even move to lower wage economies to avoid paying higher wages.

According to the RIA, the proposed changes should not have any negative impact on smaller ship owners. Indeed, there is the possibility that employees of smaller owners may find it harder to bring race discrimination claims under the proposed new law than employees of larger companies. This is because a claimant must find an actual or hypothetical comparator engaged in similar employment, which will be more difficult for a smaller pool of employees in smaller companies.

The RIA provides that it is unlikely that either Options 2 or 3 will have significant negative impact upon competition within the sector. In fact, it suggests that the proposed changes may favour new entrants to the market, who are free to choose their employment structure at the outset, rather than having to make changes in light of the changes proposed to the RRA. However, shipping is a global industry and ships registered under the UK flag are in competition with ships registered to other countries with much less stringent regulations. While EC law applies across the EEA, so there should be fewer competition issues with regard to other EEA countries' fleets who are also subject to the same laws, owners of vessels registered under the UK flag will nevertheless be at a disadvantage in comparison with competitors whose vessels are flagged in non-EEA countries which do not have similar laws. However, as the RIA suggests, ‘flagging out’ is always a relatively low cost option and, under Option 2, ship owners of UK flag vessels will still have the option of employing solely third country nationals (such as workers from India or the Philippines) as a means of reducing wage costs.

With thanks to Laurence Rees and Michael Smith of Reed Smith Richards Butler for preparing this article.

1. As set out in Annex 1 to Regulatory Impact Assessment of the Consultation Paper and includes 79 African, Caribbean and Pacific Group States as well as 10 countries with relevant association agreements with the EC e.g. Russia, Turkey, Switzerland.