

Transport Committee & Business, Energy and Industrial Strategy Committee

Oral evidence: [P&O Ferries](#), HC 1231

Thursday 24 March 2022

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Members present:

Transport Committee: Huw Merriman (Chair); Mr Ben Bradshaw; Simon Jupp; Chris Loder; Grahame Morris; Gavin Newlands.

Business, Energy and Industrial Strategy Committee: Darren Jones (Chair); Alan Brown; Ms Nusrat Ghani; Paul Howell; Andy McDonald.

Questions 1–15

Witnesses

[I](#): Professor Alan Bogg, Professor of Labour Law, University of Bristol; Professor Jason Chuah, Professor of Commercial and Maritime Law, The City Law School; and Andrew Burns QC, Barrister, Devereux Chambers.

Examination of witnesses

Witnesses: Professor Alan Bogg, Professor Jason Chuah and Andrew Burns QC.

Chair: This is the joint Select Committee meeting on the action taken by P&O Ferries to make 800 of their seafarers redundant, and on the response of Government thereafter. It is a joint meeting of the Transport Committee and the Business, Energy and Industrial Strategy Committee. I am delighted to see all the members, and I thank Darren Jones, Chair of the Business Committee.

I will run through the agenda and at what we are looking to cover before I hand over to Darren. Our first panel will look at the legal position and the minimum wage, so we have a panel of lawyers. That will last for 30 minutes. On the second panel, we have the unions who are representing the P&O workforce. The third panel consists of the Government agencies responsible for maritime safety, and for the notification process, with the penalties that may ensue if it is not followed properly. Those will last for 30 minutes. We then move to two 45-minute panels: the fourth panel, at 11 o'clock, is with P&O Ferries and DP World; and our final panel is with the Ministers from the Departments for Business, Energy and Industrial Strategy and for Transport.

Before we crack on, do Members have any declarations of interest to make?

Ms Ghani: I draw Members' attention to my entry in the Register of Members' Financial Interests. Also, I was previously the maritime Minister.

Chris Loder: I would like the Committees to know that I am a former member of the RMT union.

Grahame Morris: I am a member of the RMT parliamentary group. I have known Mick Lynch for a number of years. On Monday, I had meetings with some of the sacked and victimised seafarers from the RMT and from Nautilus International.

Chair: As did I—I should declare that interest. I was there with you at the time, Grahame.

Andy McDonald: I am also declaring my membership of the RMT parliamentary group. Again, I have had meetings with Nautilus and the RMT on this issue.

Chair: Excellent. I think we have all remembered that we have been meeting the RMT. For reasons known to my Clerk, I need to swap the Chair over to Darren Jones, who will take us through the first four panels.

[Darren Jones took the Chair]

Chair: Thank you, Huw. Good morning, everybody. For our first panel, we are delighted to welcome, on the screen, Professor Alan Bogg from the University of Bristol and Professor Jason Chuah from the City Law School; and in the room Andrew Burns, QC. Good morning to all three of you. Our first question, please, is from Simon Jupp.

Q1 **Simon Jupp:** The key question of this session is: is what P&O Ferries have done legal in this country? Andrew, I will come to you first.

Andrew Burns: The law requires any employer that is contemplating making redundancies on a large scale to give two things: first, to give notice to the Secretary of State; and, secondly, to consult with the appropriate representatives. There is a specific provision for employers that have employees on ships that are flagged in other countries apart from the United Kingdom, which is that 45 days before the first dismissal, the company must give notice to the appropriate authority in the country where the ship is flagged.

There are two matters. I cannot say whether or not what has happened is legal, because I am not instructed on any of the cases. I do not know the exact facts; I know broadly what I have been told. What I say comes with that caveat, but in broad terms, all employers, all employers with ships, must give notice to the appropriate authority 45 days before the first dismissal.

My understanding, from what I have been told this morning, is that notice was given to the appropriate authorities in the countries where the ships were flagged only on the day of the dismissals and not in advance. That appears to be a breach of section 193A and potentially 194, which is the provision which means that there is an unlimited fine for a failure to notify the Secretary of State. And if 194 is looked at in the light of 193A, the amendments which were made for companies which have ships flagged overseas, it may be that they are liable to a prosecution.

The second point is that they are indeed potentially liable for claims to be made for protective awards, of up to 90 days' pay, from all of the 800 employees, who were made redundant without notice going to their appropriate representatives—in this case, I suspect, the RMT union—and consultation. The law is quite clear and it is abided by, in my experience, in the vast majority of cases, which is why the circumstances we are facing today are so unusual.

The law says that employers will, at least 45 days before the first dismissal—normally before that, because the obligation is to do it in good time when redundancies are first proposed by the management of the company—provide in writing to the union or the appropriate representatives some statutory information. And that is done, in my experience, in the vast majority of cases. Also, HR1s are supplied in the vast majority of cases.



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I only know of one other case where an HR1 was not supplied, and that was a City Link case where the company effectively was on the brink of collapse on 22 December and the thing didn't collapse until Christmas eve and the HR1 was served on Boxing day, so they were very different circumstances to this. But I think that is the only previous prosecution that I know about.

So I can't tell you whether this particular case was lawful or not, but that is the context of two of the broad matters. Plainly, other legalities are involved. Were the workers sacked fairly or unfairly? They may have individual claims for unfair dismissal. Is there a transfer of undertaking between P&O Ferries and the new company which is supplying the agency workers? Potentially there might be. There is potentially even—maybe—discrimination if there is a nationality element to who was dismissed and who was not dismissed. There is a number of different options. This appears to be a case which engages quite a number of the employment law rights that people who are employed in the United Kingdom are subject to.

Q2 Simon Jupp: Thank you for that very full answer. I just want to understand—so that you can explain to the Committee and those watching—to what extent this matter is a matter for UK law and international law, because actually this practice has been done before. We will talk about flagging later in this session, but this practice is commonplace, but not on this scale, so is this a bit of a grey area between UK and international law?

Andrew Burns: There will always be a dividing line between the extent to which UK employment law can intervene for a person who is employed not entirely within the UK—there is a body of case law about people who are employed in different countries but are based here or have attachment here. Parliament has decided not to legislate specifically to say who is in and who is out of UK employment law, but to leave it to the courts, and the courts have filled that gap by putting together a body of case law to say who is ordinarily working in—actually, “Great Britain” is the language that is used, rather than “United Kingdom”.

The difficulty that comes is that the different provisions of employment law sometimes have different jurisdictional limits. For instance, national minimum wage applies if you are ordinarily working in the United Kingdom. That doesn't apply to territorial waters. It doesn't apply to international waters. But it would apply when you are working in your port, at your base, for instance.

So one thing that the Committee could consider is whether or not it is important now for Parliament to fill that gap that has been filled by the courts up until now, and legislate more particularly about who is covered by UK employment law and who is not.

Q3 Simon Jupp: On that point about UK employment law, there has been an awful lot on social media that what P&O have done was only possible because of Brexit or the fact that fire and rehire legislation was not agreed



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to by Parliament in the last couple of months. Is there any truth in that?

Andrew Burns: Fire and rehire legislation is irrelevant to this because what P&O have decided to do is not what many employers would have done, which is to say to the employees, "Will you change your terms in order to make us more commercially viable?", and then go to negotiations with the employees and their unions to decide. That has been done successfully, and it has been hard. Centrica and British Airways in the last couple of years came in for a lot of flak, but they successfully consulted the unions and reached deals for all or most of their employees during that process. Certainly there is that example. It does work, and has worked on many occasions. It is very unusual for a company not to attempt it at all, in my experience.

Q4 **Simon Jupp:** You have talked about some of the legal implications of this. What steps could the Government take at this stage to do something about it retrospectively?

Andrew Burns: I should say I have probably been dominating the conversation. I wonder whether Alan—

Simon Jupp: I will open it up in a moment, don't worry. In your mind, what steps could the Government take at this stage?

Andrew Burns: When the first thing that a union or employees know about dismissal is being told that it is happening now, it is quite difficult for the courts to intervene because the courts generally will not grant an injunction to force somebody to employ workers and have an active employment relationship with them. There are some cases in which employers are forced to keep employees on the books while a disciplinary process is gone through. There has been a recent case involving Tesco in which the courts have, unusually, said that dismissals in order to re-engage on lesser terms was unlawful and could be subject to an injunction.

But generally, although fire and rehire has been much criticised by politicians and others, it is subject to reasonableness, and it may be that the reason it did not happen in this case is that the view was taken that it would not be reasonable in these circumstances to fire and rehire, because you can only fire and rehire lawfully if an employment tribunal finds that it would be reasonable to do so, and that is a huge break on fire and rehire.

New legislation, in my personal view, does not help because we have already got the reasonableness test, and the reason that employers think very hard and long before they fire and rehire is because the penalties of getting it wrong are financially very significant. Reasonableness is a very good test because, if it is reasonable to fire and rehire, why should it not be lawful to do so?

Q5 **Simon Jupp:** Thank you. I will open it up to Alan and Jason, if I may. On the points that have been covered, specifically around your interpretation of whether P&O have acted legally in this case, I will come to you first, Alan.



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Professor Bogg: As a lawyer, I would add the same caveats as Andrew had added. I am not familiar with the detail of the facts. Before I came to a conclusive view, I would need to understand exactly what happened and be privy to the contracts and the timeframes. But on what I know, there is absolutely—I wouldn't say no doubt; that wouldn't be true. There is very little doubt in my mind that what has occurred involves multiple breaches of labour legislation—the collective redundancy provisions, unfair dismissal, and perhaps discrimination law. I could go on.

In legal terms, what happened was so blatant and so outrageous that there can be very little argument about whether the law covered it. The key issue is an issue of remedies, and a lack of effective remedies in situations of this nature. For me, that should be the focus for the Government as it now looks at P&O within the wider context of an enforcement crisis in UK employment law.

Simon Jupp: Jason, is there anything that you would like to add to that?

Professor Bogg: To take an example of breach of collective redundancy procedure, there is a penal award for that. That is leaving aside the possible criminal penalties, which may be more controversial, but for breach of the consultation procedure, there is the protective award, which is extensive. It is capped at 90 days, but there is no limit on weekly pay for that purpose, so it can be quite a significant financial remedy.

However, for a company with the financial heft of P&O, the fact is that there is a cap on the protective award. The employer can calculate in advance what its financial liabilities will be, and then it can effectively buy itself out of the rule of law by offering compensation packages that go beyond what the legal remedies would be. In this kind of situation, I would be in favour of removing caps and limitations on remedies in situations where you have such a gross violation of employment laws as you have here, because it removes the possibility of efficient breach, which is an affront to the rule of law. It is effectively buying out of the legal system.

Q6 **Simon Jupp:** Jason, is there anything you would like to add to Alan and Andrew's testimony so far?

Professor Chuah: I should add a health warning to what I am about to comment on. Obviously, I am a maritime lawyer, so I am going to be focusing on the seafarer side of things, rather than employment rights in general.

The questions raised concerns about, first, the legality of what P&O Ferries have done and, secondly, what can be done as far as the Government or any other stakeholders are concerned. As far as the legality is concerned, I think it is quite right to say that notice has to be given, and that actually was a change to our previous law following the seafarers directive from the European Union. That essentially meant that the duty to notify the Secretary of State that was established in law before had to give way to a duty to notify the place where the ship was registered, and there are three places where the ships were registered: Cyprus, Bermuda and the



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Bahamas. It is a 45-day notice period for Cypriot-registered vessels, and it is 30 days for Bermuda and the Bahamas.

As to what the consequences are, I am not an employment lawyer—I have to stress that—but among shipping circles, there is some concern or some troubling thoughts as to whether the failure to notify the ship registries in these different jurisdictions would attract a penalty. The relevant section simply refers to the duty to notify, or the failure to notify, the Secretary of State; it does not actually refer to a failure to notify the flag state, so we are a little bit unsure whether the failure to notify within those set parameters would attract any kind of sanctions under the Trade Union and Labour Relations Act. That is one aspect of the discussion that has been going on so far.

Back to your secondary question earlier about to what extent Brexit has to do with this, to some extent, I suppose one could say that the dispensation of the requirement to notify the Secretary of State was actually introduced by EU law, and that has been kept as retained EU law. But of course, with Brexit, it is now possible for Parliament—if it so desires—to change that and move it back to a duty to notify the Secretary of State, rather than the flag state registries. Maybe I should pause there and see if there are any follow-up questions, and then I can move on to other aspects of seafaring.

Simon Jupp: Hopefully some of your questions will be answered later in the session, so I will hand over to my colleague Nusrat Ghani.

Q7 Ms Ghani: It has been made clear that their obligations, because of where they were flagged, would have been to the states where they were flagged. Professor Bogg, you talked about the multiple breaches in managing the way that the employees were dismissed and about what can take place next. Is there any support for the idea that, theoretically, because of the multiple breaches that you have spoken about, there could be a way of seeking an injunction restraining P&O from breaching UK employment law? I know that injunctions are very rarely granted, but there are so many employees involved—800—and there seem to be quite a few breaches in UK employment law on how you explain or conduct a consultation and how a redundancy can take place. What do you think, Professor Bogg—could there be an injunction?

Professor Bogg: It is possible for there to be an injunction in circumstances like this, but it would depend on what was in the individual contracts of employment, and whether specific procedures had been incorporated from a collective agreement into the individual contracts. That can sometimes be difficult, because sometimes collective procedures, as the courts would say, are not apt for incorporation.

At the current time, it is very difficult to give a definitive answer. What I can say is that there are obstacles to seeking injunctive relief. If I may say so, I think that provides another argument in favour of statutory reform to give provision in a case of this nature to free-standing interim relief under the statute. What you would say is that you don't need to look at the



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contract; you simply identify—anticipate—a breach of the statutory consultation procedure and the statute then gives an option for interim relief. That is what you have in trade union dismissal cases. It is possible to go to the court to get interim relief to keep the contracts on a footing until the issue has been considered by the court.

So I think it is possible, but there are difficulties. In terms of reform priorities, I absolutely think that this should be something to be considered. My recollection is that there was provision in clause 2 of the Barry Gardiner fire and rehire Bill for injunctive relief in situations where fire and rehire was in breach of procedure. There is no question—this isn't a fire and rehire situation, but this is fire and rehire on steroids. These are things that are on the same spectrum of contractual deregulation. I would push back at Andrew by saying that the failure to deal with fire and rehire has set a broader tone about the seriousness with which Parliament takes enforcement, and that, I think, can encourage a culture of impunity, which is maybe what we have seen here.

Q8 Ms Ghani: Thank you, Professor Bogg. Because this is an extraordinary situation, one could apply extraordinary responses, which could theoretically include an injunction.

I will keep my next question short, and I do need super-short answers, I am afraid. I will go to Andrew first. In legal terms, has P&O adequately demonstrated a business need to reduce staff numbers? If it had, what would that look like?

Andrew Burns: My understanding is that they are not reducing staff numbers; they are contracting out. They are having the same number of staff, but rather than being employed in-house by P&O Ferries, they are being contracted in from an external company. We all know that many, many companies have found it commercially advantageous, rather than employing their own staff, to contract in from third parties that provide staff. It is unusual to do it to this scale. What makes this case unusual is not contracting out, but contracting out with no notice and telling everybody on the day. The reason it is here is because this almost never happens, and the reason it almost never happens is that we do have really serious financial penalties—compensatory penalties—for employers who don't follow the rules about notification and consultation. So although there might be a knee-jerk reaction that the law needs to change to stop this happening, we obviously need to consider that it happens really, really infrequently because the present legal system does impose really, really significant financial penalties against employers that don't give any notice at all.

Ms Ghani: Thank you.

Q9 Chair: Two very quick wash-up questions from me. Mr Burns, it has been suggested that P&O Ferries might say that their contracts of employment are based in Jersey, and that the leadership in Jersey made the decision to make the staff redundant. If that was the case, does UK law bite?



Andrew Burns: Yes, it can bite, because the employment tribunals don't look just at what the contract says. The employment tribunals look at the reality of the situation. They look at where employees are based in reality, and that is often where they are assigned to. So if the employees in this case had bases in Dover, Hull or places like that where they checked in, where they were managed and where their employment was administered from, there is a real likelihood that UK law and the employment tribunal's jurisdiction will apply to them, unlike somebody who is based overseas, is managed overseas, paid overseas and taxed overseas. The employment tribunal looks at a range—a package—of factors to see whether UK employment law has the closest connection to their employment. The fact that the employer has an office overseas, or that the contract says "This is subject to a different law", is not the factor that wins.

Q10 **Chair:** Professor Chuah, if P&O Ferries did not adequately notify the Cypriot, Bermudan or Bahaman competent authorities within sufficient time, is that a breach of UK law?

Professor Chuah: According to the Trade Union and Labour Relations (Consolidation) Act 1992, it looks like a breach of UK law, because it is quite plain in that statute that they need to notify these flagged states' registries. However, as I was saying earlier, there may be a question as to what the penalties may be, because the penalties provision relating to notice does not actually specify this particular seafaring category. That is perhaps a gap in the law that could hopefully be plugged in the future.

Q11 **Huw Merriman:** Andrew, perhaps I will put this to you, because you raised it. The Prime Minister has said that the Government will ensure that mariners working in UK waters are paid the living wage. Is that a matter solely for Parliament to legislate to cause that to occur, or are you aware of international obligations in maritime that could cause that to be impossible?

Andrew Burns: The national minimum wage is domestic legislation. It is unrelated to our membership of the EU. It was something that we put in domestically, and we can enforce that as long as there is a connection between the companies and the employees in the UK. We plainly cannot say that somebody who is employed on the other side of the world by a company on the other side of the world should be paid a certain amount of money—that is obviously ridiculous. But if there is a connection with the UK, it seems to me that we could legislate to potentially make the national living wage apply to, let's say, UK territorial waters. At the moment, the legislation says it doesn't.

Q12 **Huw Merriman:** My understanding is that, at the moment, you would be able to enforce the national minimum wage for, say, ferries going between Scotland and Northern Ireland, but not for those going between Dover and Calais. But you believe there should be a way for Parliament to make that happen.

Andrew Burns: Parliament could amend the legislation in relation to seafarers. There are specific provisions in relation to the minimum wage for seafarers on UK-flagged ships and seafarers on non-UK-flagged ships.



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At the moment, the national minimum wage applies to the time when they are ordinarily in Great Britain or are based here—when they are onshore, doing their preparation and so forth. But as soon as they go into waters, I think Parliament has chosen that the national minimum wage should not apply to them at that point.

Q13 Huw Merriman: So, bizarrely, it could be that if you are going from Dover to Calais, you could actually apply the minimum wage for the time that you are in English waters on that strait. Hopefully, the French would do the same with their minimum wage on the other side.

Andrew Burns: At the moment—I have not looked at this in real detail—I think that the national minimum wage will apply only while they are in port.

Professor Chuah: May I come in on that point? I have done a bit of work around the minimum wage for seafarers within territorial waters and the continental shelf. The National Minimum Wage (Offshore Employment) Order was amended in 2020; it now requires that anyone who works, or ordinarily works, in UK territorial waters or the UK sector of the continental shelf is paid the national minimum wage. That means that a seafarer working on a vessel that is sailing from Northern Ireland to Scotland will be covered by the national minimum wage. But if you were sailing from England to Ireland, and would hit non-continental shelf waters, it raises a question as to whether that seafarer would be covered by the amendment introduced in 2020. This is an anomaly, which I know that Parliament had deliberated over previously, in 2020.

Chair: Professor Chuah, I am sorry to interrupt, but I am very conscious of time. We should be grateful if you could write to us with the details of that. I have one last quick question from Ben Bradshaw.

Q14 Mr Bradshaw: Professor Bogg, very briefly, are there any significant differences in French and Dutch labour law that have led to P&O not treating those workers in the same way?

Professor Bogg: I think the position in both of those jurisdictions is that there are more significant restrictions in place for failures to consult of this kind. The difference would be in the remedies and enforcement, and the possibility that dismissals might be amenable to an injunction, or might even be null and void because they have been undertaken in breach of procedures.

Q15 Mr Bradshaw: If you could write to us with more detail on that we would be very grateful.

Professor Bogg: Of course. One very quick point, if I may—

Chair: I am sorry to cut you off, Professor Bogg, but we have five panels of witnesses to get through. You are very welcome to write to us, and we would be very grateful to you for that.

Professor Bogg: I will send you a note.



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Chair: Thank you to the three witnesses from our first panel.