

## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/104056/04 & Others Held at Aberdeen on 16<sup>th</sup> to 18<sup>th</sup> May 2005

5 Chairman: Mr R G Christie (sitting alone)

Mr Thomas L Russell & Others  
Glenarran  
10 St. Ola  
Kirkwall  
Orkney, KW15 1SF

### **Claimants**

#### Represented by:

Mr A O'Neill – Q.C.  
Mr P Edwards - Counsel  
Mr A Uttely – Solicitor  
Ms C McCrossan – Solicitor  
Mr G Bathgate – Solicitor  
15 Ms I Joiner - Solicitor

Transocean International Resources Limited & Others **Respondents**

20 Manor Lodge Complex  
Building #1, Suite #2  
Lodge Hill  
St. Michael  
Barbados

#### Represented by:

Mr J Goudy – Q.C.  
Mr I Truscott – Q.C.  
Mr A Kemp - Solicitor  
Mr S Saluja – Solicitor  
25 Mr P Sharp – Solicitor  
Ms A Woods – Solicitor

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## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the employment tribunal is:-

35 **1. that the Working Time Regulations 1998, as amended by the Working Time (Amendment) Regulations 2003, apply to offshore work (as defined therein) performed in the United Kingdom sector of the continental shelf (other than an area or part of an area to which the law of Northern Ireland applies);and**

40 **2. that the said Regulations apply to the present claims which shall now proceed to a full Hearing.**

## **REASONS**

### Introduction

1. These proceedings comprehend 278 claims brought against a variety of respondent companies (15 in number) all of whom are contractors engaged in carrying out contracts in the North Sea in connection with the offshore exploration and production of oil and gas. All claimants are employed by one or other of the various respondents in connection with that work and all seek, in one form or another, to enforce rights to paid leave under the Working Time Regulations 1998, as amended (“the 1998 Regulations”).
2. The cases have come before the Tribunal at this stage on a preliminary matter which is concerned with the scope of the application of the 1998 Regulations and in particular whether or not they apply to employment on offshore installations situated in the UK sector of the continental shelf, or even beyond. All the present claimants held such employment.
3. For the purpose of this Pre-hearing Review, the parties helpfully had prepared and presented an agreed statement of facts, with the effect that no oral evidence was necessary, the issue being canvassed by a combination of written and oral submissions, together with a joint inventory of productions and volumes of statutory and case law authorities to which counsel made reference.

### **Statutory Provisions**

#### *Working Time Directive 93/104/EC*

##### *Article 1*

*(3) This Directive shall apply to all sectors of activity, both public and private.....with the exception of air, rail, road, sea,.....other work at sea and the activities of doctors in training.”*

#### *Working Time Regulations 1998 (Unamended)*

*Reg. 1(2) These regulations extend to Great Britain only*

*Reg. 18 Excluded Sectors*

*Regulations 4(1).....13 and 16 do not apply –*

*(a) to the following sectors of activity –*

*(b) .....*

*(III) other work at sea.....*

Directive 2000/34/EC

Article 1 (replacing Art 1(3) of 93/104/EC)

“(3) This Directive shall apply to all sectors of activity, both public and private, ....., without prejudice to Articles 14 and 17 of this Directive.

.....  
(8) ‘offshore work’ shall mean work performed mainly on or from onshore installation (including drilling rig), directly or indirectly in connection with the exploration, extraction or exploitation of mineral resources, including hydro-carbons, and diving in connection with such activities, whether performed from an offshore installation or a vessel.

Working Time Amendment (Regulations 2003)

Reg. 3(a).....

(b).....‘offshore work’ means work performed mainly on or from offshore installations (including drilling rigs), directly or indirectly in connection with the exploration, extraction or exploitation of mineral resources, including hydro-carbons, and diving in connection with such activities, whether performed from an offshore installation or a vessel;

Reg. 4. (replaces Reg. 18 of the 1998 Regs, but making no reference to ‘other work at sea’

**Authorities referred to**

*Mortansen v. Peters* (1906) 8 F(J) 93

*Pianka v. Owen* [1979] AC 107

*Earl of Lonsdale v. A.-G.* [1982] 1 WLR 887

*Marshall v. Southampton and South West Hampshire Area Health Authority (Teaching)* (C-152/84) [1986] ICR 335

*Duke v. Reliance* [1988] AC 618

*Pickstone v. Freemans PLC* [1989] AC 66

*Marleasing SA v. La Comercial Internacional de Alimentation SA* [1990] ECR 1-4135

*Litster v. Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546

*Webb v. Emo Air Cargo Ltd* [1993] 1 WLR 49

*Faccini Dori v. Recreb Srl* (C-91/92) [1994] ECR 1-3325

*Addison v. Denholm Ship Management Limited* [1997] ICR 770

*R v. Secretary of State for Trade and Industry, ex parte Greenpeace (No 2)* [2000] 2 CMLR 94

*Lawson v. Serco* [2004] ICR 204

*Pfeiffer v. Deutsches Rotes Kreuz* [2005] IRLR 137

*Biggs v. Somerset County Council* [1995] IRLR 452; *Biggs v. Somerset County Council* [1996] IRLR 203

*Berlusconi*, C-387/02 Judgment of ECJ on 3 May 2005

*Garland v. British Rail Engineering* [1983] 2 AC 751

*Ghaidan v. Godin-Mendoza* [2004] 2 AC 557

*Cases 3/76, 4/76 and 6/76 Kramer* [1976] ECR 1279

*Case 61/77 Commission of the European Communities v. Ireland: Sea Fisheries* [1978] ECR 417

*Case 237/83 Prodest* [1984] ECR 3153 at paragraph 5

*Case 9/88 Lopes da Veiga [1989] ECR 2989*

*Case C-60/93 Aldewereld [1994] ECR I-2991*

*Case C-434/93 Bozkurt [1995] ECR I-1475*

*Case 214/94 Ingrid Boukhalfa v. Bundesrepublik Deutschland [1996] ECR I-2253*

5 *P&O v. Customs and Excise Commissioners [2000] Simons Tax Cases 488, QBD*

*Case C-37/00 Weber v. Universal Ogden Services Ltd.[2002] ECR I-2013*

*Clark v. Oceanic Contractors Inc. [1983] 2 WLR 94, HL*

*Haughton v. Olau Line (UK) [1986] 1 WLR 504*

*Deria v. General Council of British Shipping [1986] ICR 172*

10 *Bossa v. Nordstress Ltd. [1998] ICR 694*

*Enriquez v. Urquhart, 2001 SLT 1320, HCJ*

*Saggar v. MOD [2005] EWCA Civ 413*

*Case C-84/94 United Kingdom v. Council of the European Union: re the working time directive [1996] ECR I-5755*

15 *R v. Attorney General for Northern Ireland, ex parte Shirley Burns, [1999] IRLR 315, QBD*

*R v. Secretary of State for Trade and Industry, ex parte Greenpeace (No. 2) [2000] 2 CMLR 94, QBD per Maurice Kay J.*

20 *Robb v. Salamis (M&I) Ltd., [2005] CSIH28, 16 March 2005 (Lord Penrose, Lady Cosgrove, Lord Reed)*

*Case 314/85 Firma Foto-Frost v. Hauptzollamt Lübeck Ost [1987] ECR 4199*

*Webb v. EMO ECJ*

*Webb v. EMO No. 2 HL*

25 **Facts**

4. The agreed statement of facts was in the following terms:

(i) That the following respondent employers are companies registered in the United Kingdom under the Companies Act 1985 and are all domiciled in the United Kingdom with places of business in Scotland:

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(a) Wood Group Engineering (North Sea) Limited, John Wood House, Greenwell Road, Aberdeen, AB12 3AX.

35 (b) Cape Industrial Services Limited, Kirkton Drive, Dyce, Aberdeen.

(c) Compass Group, UK and Ireland Ltd., a company incorporated under the Companies Acts and having their registered office at Parklands Court, 24 Parklands, Birmingham Great Park, Rubery, Birmingham, West Midlands trading as ESS Support Services Worldwide.

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(d) Kellogg Brown & Root (UK) Limited, Wellheads Place, Wellheads Industrial Estate, Dyce, Aberdeen.

45 (e) Salamis (M & I) Limited, Greenhole Place, Bridge of Don, Aberdeen.

(f) AMEC Group Limited, City Gate, Altens Farm Road, Nigg, Aberdeen.

(g) Aramark Limited, Palmerston Centre, 29 Palmerston Road, Aberdeen, AB11 5QP.

5 (h) Apache North Sea Limited, Alba House, Stoneywood Park, Aberdeen, AB21 7DZ.

(i) Sparrows Offshore Services Limited, Denmore Road, Bridge of Don, Aberdeen, AB23 8JW.

10 (ii) That the following respondent employers are overseas registered companies who have associated companies or subsidiaries established and domiciled in the UK which provide services (including in relation to employment matters) to or on behalf of the undernoted respondents from business premises in Scotland in relation to operations connected with the exploration of the sea bed or sub-oil or the exploitation of their natural resources within the UK sector of the North Sea:

(a) Universal Sodexho (The Netherlands) BV, registered in the Netherlands.

20 (b) Transocean International Resources Limited registered in Barbados.

(c) KCA DEUTAG (Cyprus) Limited, registered in Cyprus.

(iii) That the following respondent employers are non-UK overseas registered companies which currently have no place of business in the UK but which have agents who provide services from business premises in Scotland in relation to operations connected with the exploration of the sea bed or sub-soil or the exploitation of their natural resources within the UK sector of the North Sea:

(a) Stena Drilling PTE Limited, registered in Singapore with a place of business 78 Shenton Way, #12-03/04 Singapore 079210, engaging as adviser in UK employment matters Swecal Limited, Alba House, 2 Central Avenue, Clydebank Business Park, Clydebank, Dunbartonshire, G81 2LR.

35 (b) Bluewater Services International Private Limited, registered in Singapore with a place of business 78 Shenton Way, #12-03/04 Singapore 079210, engaging as adviser in UK employment matters Bluewater Services (UK)

Limited, Bluewater House, Badentoy Crescent, Badentoy Industrial Estate, Portlethen, Aberdeen, AB12 4YD and who are successors as respondents to Aker Kvaerner Offshore Partner Limited, Aurora House, Blackness Road, Altens Industrial Estate, Aberdeen.

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(iv) That the employee applicants (but not necessarily all the respondents' employees generally) are for the most part British nationals ordinarily resident in the UK.

10 (v) That those applicants who are employed by non-UK overseas companies have employment contracts samples of which contracts are produced.

(vi) That the employee applicants were all recruited in the UK and they are for the most part paid in Pounds Sterling.

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(vii) That the parties' employment relationship is governed as per the sample employment contracts referred to above.

(viii) That the employee applicants (but not necessarily all the respondents' employees generally) mostly belong to the UK social security scheme.

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(ix) That the employee applicants are mostly liable for UK income tax and National Insurance contributions in respect of their employment with the respondents.

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(x) That the employee applicants mostly normally embark for a tour of duty on an offshore installation from Great Britain and are normally returned there.

(xi) That the continued training of most of the applicants is normally carried out in Great Britain.

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(xii) That the oil and gas prospecting, drilling and production operations carried out from the installations on which the applicants habitually work is done under licence from the UK Government and, in terms of that licence, oil and gas

produced has to be piped or otherwise transported to the UK landmass, whether for onward transport, use or refining, save that the requirement may be waived upon application to the Department of Trade and Industry, and there has been shipment for some years directly from offshore by shuttle tanker to other Member States of the European Union e.g. to Rotterdam and elsewhere in the Netherlands.

(xiii) That as at 1 August 2003 the following installations were situated within the territorial waters of the United Kingdom (as defined by the Territorial Seas Act 1987 and subordinate legislation made thereunder):

- (a) Beatrice
- (b) Lennox
- (c) Borgney Dolphin
- (d) Borgsteen Dolphin
- (e) Byford Dolphin
- (f) Bulford Dolphin
- (g) Arctic II
- (h) Petrolea
- (i) Transocean Explorer
- (j) Transocean Prospect
- (k) Transocean Wildcat
- (l) Sedco 706

(xiv) That all of the above listed installations (with the exception of the Beatrice Platform and the Lennox Platform) are Mobile Offshore Drilling Units, or "MODU's" which could just as easily be working within UK territorial waters as on the UK Continental Shelf.

(xv) That (with the exception of the Beatrice Platform and the Lennox Platform) all of the fixed units - in respect of employment on board which the present applications have been brought - are situated outside UK territorial waters but within waters which have been designated (by Orders made under Section 1(7) of the Continental Shelf Act 1964, as amended) as being part of the

United Kingdom Continental Shelf (UKCS) sector but not within such of the waters in this sector which fall within the defined “Northern Irish area” and in which the law of Northern Ireland applies by virtue of the provisions of the Civil Jurisdiction (Offshore Activities) Order 1987. The Stena Dee rig was situated outwith both territorial waters and UKCS.

(xvi) That the fixed installation Beatrice Platform is situated within UK territorial waters in the Moray Firth but was shut down as at 1 August 2003 and is currently being converted from an oil installation into an installation for power storage and/or distribution unit for an associated wind farm in the immediate area. The Beatrice Platform retains only a skeleton staff, none of whom are applicants in this case.

(xvii) That the Lennox Platform is owned and operated by BHP Petroleum and is situated within UK territorial waters in Liverpool Bay. The Lennox installation is described as a “Normally Unmanned Installation” (NUI). This means it is operated as a “satellite” installation from the primary installation in the immediate area, in this case the “Douglas” platform. Workers only rarely visit the installation to do maintenance work after which they are returned to the Douglas Platform or else housed on a “flotel” or similar type barge. No workers on this installation are applicants in this case.

5. Attached to the agreed statement of facts was a schedule setting out the offshore installations on which the applicants respectively worked as at (a) 1 August 2003 and (b) the date on which they lodged their applications with the Tribunal. I have not thought it necessary to incorporate that detail in the body of this judgment.

### **Submissions for the Respondents**

6. It had been agreed that the respondents would be the first to present their submissions and in opening for them Mr Goudy made some preliminary points of a general nature. Firstly he said that this Tribunal was exercising the jurisdiction

conferred under UK primary legislation. An Employment Tribunal derived no jurisdiction from the European Community. Accordingly the starting point was not the Working Time Directive, but exclusively the Working Time Regulations themselves (“WTR”).

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7. He went on to point out that none of the respondents were emanations of the state so that the Directive itself had no direct application. In the exercise of interpreting the Regulations, and as we were dealing with the statutory instrument, no assistance could be derived from Hansard, nor from *travaux preparatoires*, nor from any ministerial comment, nor from whatever the respondents themselves may have thought about the application of the Regulations.

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8. Mr Goudy then referred, with amplification, to the respondents’ written submissions which comprise a most helpful document. I hope that it implies no disrespect if for the sake of brevity they are here merely summarised. The respondents’ core and quite simple submission was that the Regulations, made pursuant to the European Communities Act 1972, contained, in Regulation 1(2), an express territorial reach, in that they “*extend to Great Britain only*”. There was no reference to the Continental Shelf. The key expression was “Great Britain” but there was no definition provided; nor was it defined in the Interpretation Act 1978. The plain meaning of “Great Britain”, depending on the legislative context, was either solely the land mass, or, exceptionally, the land mass plus territorial waters. (*Pianka v. The Queen [1979] AC107* and *Earl of Lonsdale v. Attorney General [1982] 1WLR87*). These indicated that Great Britain was not normally taken to include territorial waters but that an extension to do so could be achieved by express provision or by necessary implication. The WTR are a case of the latter as they apply in their amended form to “offshore work” (see Regulations 21(1)(a) and 25(B)). However there was nothing to indicate in the Regulations that the “offshore work” and its reference to “offshore installations” went beyond the landmass of Great Britain and its territorial waters and accordingly the Regulations did not reach beyond the limits of the territorial waters. Crucially, there was no express reference to the Continental Shelf, nor anything in the Regulations themselves which would require such an extension by necessary implication. As there was no defined geographical reach apparent from the

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definition of “offshore work”, it was inevitable to conclude that the WTR had not been extended beyond territorial waters to the Continental Shelf or anywhere else. **Lawson v. Serco Ltd [2004] ICR 204** afforded an example of such an interpretation.

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9. In dealing with what he described as the “legislative approach”, page 4 of Mr Goudy’s written submission pointed to seven examples of legislation which had been extended beyond the Continental Shelf, but where such had been done only by express provisions. It was apparent therefore that when the legislature wished a particular measure to extend to the Continental Shelf it merely did so expressly. Parliamentary draftsmen therefore had available numerous precedents for express extension to the Continental Shelf, and would have been aware of the decision of the Employment Appeal Tribunal in **Addison v. Denholm Ship Management Limited [1997] ICR 770** which had held that in the absence of express extension, the Transfer of Undertakings etc. Regulations 1981 did not apply to the Continental Shelf.

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10. Mr Goudy proceeded to make certain points in relation to the Working Time Directive itself: Firstly, the Directive does not state expressly that it extends to the Continental Shelf or indeed to any other non-territorial waters. Article 29 merely states that the Directive “*is addressed to the Member States.*” This gave rise to the question of what was meant by a “member state”? Any suggestion of the claimants that the Directive was to apply worldwide, with no boundary of any kind, would be absurd. The position in this case was not akin to that in **Litster** where words had been implied in order to counter an attempt at deliberate avoidance of the purpose of a European Directive. In the present case, the offshore installations were in their present locations solely because of the whereabouts of the oil and gas being extracted, not because of any attempt to remain outside any particular jurisdiction.

11. Secondly, when a Directive was intended to apply to the Continental Shelf, express provision was made (see Council Directive 95/21/EC concerning the enforcement of international standards for certain matters in respect of shipping and sailing in waters under the jurisdiction of member states, where “offshore

installation” is defined as meaning “a fixed or floating platform operating on or over the continental shelf of a member state.”). The Working Time Directive contained no such provision. Again precedent for express extension to the Continental Shelf was already present. The absence of a similar provision in the amending Directive accordingly indicated a contrary intention.

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12. Thirdly, in relation to the Directive, Mr Goudy submitted that although there was an obligation upon Courts and Tribunals to interpret domestic legislation which implements an EC Directive so as to accord with the Directive itself, such applies “only if that can be done without distorting the meaning of domestic legislation” (*Webb v. Emo Air Cargo Limited [1993] 1WLR49*; *Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A. [1990] ECR I – 4135*; *Pfeiffer v. Deutsches Rotes Krausz [2005] IRLR 137*). Such could not be achieved in the present case, as the Regulations merely extended “to Great Britain only”, i.e. an express geographical connotation.

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13. Further, Mr Goudy contended that the interpretive obligation could not extend to a question of jurisdiction as the obligation arose only if the jurisdiction of the Tribunal had been established in the first place. Until implemented by domestic legislation an EC Directive gave no rights to individuals. He referred to *Biggs v. Somerset County Council [1995] ICR 811 (EAT)* and *[1996] ICR 364 (CA)*.

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14. Mr Goudy urged that it was not possible to interpret the expression “Great Britain only” in the Regulations as embracing in addition the Continental Shelf. As an analogy Mr Goudy referred to the decision of the EAT in Scotland in *Addison v. Denholm Ship Management Limited [1997] ICR 770* in which it had been held that neither the Transfer of Undertakings etc. Regulations 1981 nor their parent, the Acquired Rights Directive, applied outside territorial waters to the Continental Shelf. In addition there was no authority to the effect that any health and safety or employment protection regulation or any directive extended to the Continental Shelf in the absence of any express reference therein. Although *Addison* had been doubted by the High Court in England in *R v. Secretary of State for Trade & Industry, ex parte Greenpeace (No. 2) [2000] 2CMLR 94*, the criticism had focused on the question of *vires* and the respondents in any event did not rely

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upon **Addison** in the present case. In any event the **Greenpeace** case concerned the Habitats Directive and associated Regulations and was thus dealing with a matter entirely different from the present case. Notwithstanding that, the **Greenpeace** case did not detract from the fact that the law as stated in **Addison** in 1997 would have been known to the draftsman at the time of the Working Time (Amendment) Regulations in 2003 – as was the **Greenpeace** case itself.

15. Finally, Counsel asserted that domestic legislation, including the WTR, could be extended to the Continental Shelf whether or not the parent directive extended there. No question of *vires* would arise. What was fatal to the claimant's case was simply that the Working Time Regulations themselves were not made so to extend.

#### Submissions for the Claimants

16. Submissions for the claimants were opened by Mr O'Neill who had submitted a most comprehensive written note to which I could not possibly do proper justice in the following and necessarily abbreviated summary. Prior to embarking on the various subjects contained in his written note, Mr O'Neill urged the importance of recognising that the 1998 Regulations did not exist as an exercise of the sovereign power of the UK Government, but were merely an attempt to implement the relevant EU Directive, the only authority for doing so being Section 2(2) of the European Communities Act 1972. The Regulations accordingly could not be applied without a proper understanding of the community obligation, the starting point for which was to identify the purpose of the Directive and then to determine whether that had been fulfilled by the Regulations. The clear purpose of the amendment to the original Directive, as introduced by the Horizontal Application Directive, was to extend the protections therein to the offshore sector and in particular to protect those working in the Continental Shelf. The question for the Tribunal was as to whether that purpose was capable of being realised by the Regulations. It was vital to consider the matter in that context.

- 5 17. Turning to the sequence of submissions contained within his written note, Mr O'Neill dealt briefly with the history of the Working Time legislation, beginning with the original Working Time Directive 93/104/EC which had been issued as a health and safety measure, as distinct from a measure relating to employment or worker's rights. I shall refer to that history later.
- 10 18. The application of the provisions relating to offshore workers and indeed also to workers onboard fishing vessels were without specification as to the location of the offshore installation or fishing vessels being within any member state's territorial waters. Such was never intended by the Community legislature. Further there was no presumption against the possibility of Community law having extra-territorial effect, particularly in relation to work at sea. There is no express territorial limitation in the terms of the Directive, nor was any such intended or assumed. An analogy can be seen from the terms of the Merchant Shipping (Hours of Work) Regulations 2002, and from the terms of the Fishing Vessels (Working Time: Sea-Fishermen) Regulations 2004, implementing domestically the Seafarers Working Directive 99/63/EC, all of which regulated working time upon the high seas generally. It would be inconsistent with the purpose of the Horizontal Application Directive to protect the health and safety of the workers only if their place of work was an installation situated within territorial waters, when it was evident that the vast majority of such installations were not situated there, but on the Continental Shelf.
- 15 19. Mr O'Neill went on to submit that there was no question but that it was competent for Community law to regulate activity on the Continental Shelf. An example was the Directive 92/91/EEC concerning the safety of workers involved in drilling activities for the purpose of general extraction (commonly referred to as "the 11<sup>th</sup> Directive"). Although there was no express reference to the continental shelf, separate parts of that measure dealt with such activity onshore and offshore respectively. Parts of these provisions relating to offshore drilling were given domestic effect by, inter alia, the Offshore Installations (Prevention of Fire and Explosion, and Emergency Response) Regulations 1995 which, by reference to the Health and Safety at Work Act 1974 (Application Outside Great Britain) Order 1995, was applicable to the continental shelf. It could not be said therefore that
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national provisions purporting to implement a community obligation would have no application to offshore installation once they were more than 12 miles offshore (i.e outside territorial waters). In this context Mr O'Neill referred also to the very recent decision of the inner house in ***Robb v. Salamis (M & I) Limited (16 March 2005)***.

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20. Under reference to the ***Addison & Greenpeace*** cases, Mr O'Neill went on to submit that it could not be taken as a generality that community law by its nature was territorially confined to the landmass and territorial waters of member states. ***Addison*** was dealing with the application of a Directive (the Acquired Rights Directive – 77/187) which contained an express territorial limitation, namely to an undertaking “*situated within the territorial scope of the treaty*”. No such expression appeared in the Working Time Directive. Accordingly, ***Addison*** did not bind this case. Further, in ***Greenpeace***, Maurice Kay J. expressed the view that it was quite competent for a Directive to have application beyond the territorial sea of a member state. Indeed there was authority (***Boukhalfa***) showing that community law was not necessarily territorially limited.

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21. The Tribunal was required to interpret the Working Time Regulations (these being domestic legislation intended to implement the Working Time Directive, in such a way as to give effect to the purpose and intention of the Directive (***Litster; Webb; Ghaidan***). ***Webb*** was of importance since it went so far as to ignore the wording of a UK statute in order to arrive at a result which was compliant with EU law. ***Ghaidan*** (also a decision of the House of Lords) more recently emphasised the obligation of purposive interpretation even where a court might require to apply a reading of particular provisions which involved a “*considerable departure from actual words*” or implied words to “*go with the grain of legislation*”.

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22. The words “extend to Great Britain only” in Regulation 1(2) could be given a community compatible effect either, as a matter of geography, by adopting an interpretation which included the continental shelf therein; or, as a matter of jurisdiction, rendering the Regulations applicable to those offshore workers who had a “significant connection” with the English or Scottish legal system. As to the first of these choices, ***Weber*** indicates that work in an area of the continental

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shelf “belonging” to a particular member of state is to be regarded as being carried out in the territory of that state, at least for the purposes of applying the Brussels Convention.

- 5 23. As to the second possibility, of a “jurisdictional interpretation”, Mr O’Neill referred to **Enriquez** where the High Court of Justiciary held that “*the order extends to Scotland only*” was not a geographical reference, but referred to the Scottish legal system which the particular piece of legislation applied. As regards the question of “significant connection”, it was noteworthy firstly that the Recitals to the  
10 codified Working Time Directive (2003/88/EC) referred to the protection of “community workers”, meaning workers who are nationals of member states, and who are to be entitled to the various protections contained in the Directive regardless of where they might be working. In the context of the Rules of Freedom of Movement for Workers, the opinion of the Advocate General Leger in  
15 **Boukhalfa** was of significance (quoted in Mr O’Neill’s written submission at pages 59 and 60). The present case does not concern issues of free movement so that a cross-border element is not required.
24. Unlike the Transfer of Undertakings Regulations and the “Sexual Orientation”  
20 Regulations, which are confined to, respectively, an undertaking situated in the United Kingdom, and an establishment in Great Britain, the Working Time Regulations merely refer to the Regulations extending “to Great Britain only”. The latter phrase has no connotation of actual physical presence. The place of employment need not be on the land mass or in the territorial waters of Great  
25 Britain. All that is required is a sufficiently close link with Great Britain.
25. Mr Edwards, Counsel representing a separate groups of claimants, adopted all of Mr O’Neill’s submissions and supplemented these by two further points. Firstly, the Directive 95/21/EC (enforcement of standards for ship safety) was the only  
30 known Directive which included an express reference to the continental shelf in a definition of “offshore work”. Although Article 2(8) of the Consolidating Directive (2003/88/EC), defining “offshore work” made no such reference, it should be presumed that the same definition was applicable. In this regard Mr Edwards

referred to *Linster [2000] ECR I-6917* at paragraph 43. The same principle was repeated in the case of *Yiandom [2000] ECR I-9265..*

26. Secondly, there was a further means (additional to those proposed by Mr O'Neill) whereby the purpose of the Directive could be achieved, namely by the use of the doctrine of implied repeal, i.e. that if Regulation 1(2) is to be regarded as strictly geographical, it is so incompatible with or repugnant to the amendment to include offshore work, that despite the existence of a strong presumption against the use of implied repeal, it was appropriate to be applied in the present case (*Church Wardens of Westham v. Forth City etc. [1892] 1QB 654.*)

## CONCLUSIONS

27. The particular enactment with which we are concerned in this case is the Working Time Regulations 1998 – as amended by the Working Time (Amendment) Regulations 2003 and indeed it is that amendment which is key to the issue in this case. Both sets of Regulations derive from their respective parent European Directives (Nos. 93/104/EC and 2000/34/EC), and are the domestic implementations of these by the United Kingdom parliament exercising the power to do so under Section 2(2) of the European Community Act 1972.
28. It was clear that none of the parties to the present proceedings is the State and none is an emanation of the State. It follows that the Directives themselves do not have direct effect or application in this case. What apply or do not apply, as the case may be, are solely the Regulations themselves, and it is they that require to be construed – not the Directives. The place of the latter in considering the issues in this case is as a possible aid or tool in the interpretation of the former; although, of course, it may be necessary to construe the Directive to ascertain its purpose.
29. Further I am unable, with respect to him, to accept Mr Goudy's submission that this tribunal cannot deal with this matter since it does not have territorial jurisdiction, or can only deal with it once jurisdiction is established, and the Directive is of relevance only after that point. It seems to me that this tribunal has

5 been endowed with jurisdiction expressly, by Regulation 30, to determine complaints that an employer has refused a worker his right under, *inter alia*, Regulation 13 (entitlement to annual leave). An employment tribunal is well accustomed to adjudicating upon whether a particular worker or employee is qualified to exercise particular rights, and to doing so under a wide range of different pieces of legislation. The question may arise by reason of a person's age, his status, his length of service or, as here, whether his place of work falls within the ambit of the legislation. I do not regard such as matters of jurisdiction (although they are frequently referred to as such). In so far as the question may be described as a matter of jurisdiction, it is not one which in my view impairs the ability of this tribunal to determine it. I am not sure that the point is not slightly circular. It seems to me that the Regulations require to be interpreted in order to determine whether they are capable of encompassing these claims, and I see no reason why regard cannot be had to the Directive to assist in that exercise.

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### **The "Extent" of the Regulations**

30. The terms of Regulation 1(2) are essential to the respondents' case and are simply:-

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*"These regulations extend to Great Britain only".*

31. The expression "Great Britain" was agreed to refer to England, Wales and Scotland, but excluding Northern Ireland. According to the respondents, the territorial water around that landmass required to be included in that definition by means of necessary implication following the amendment to include "offshore work" in the amending Regulations. As the respondents would have it, that short sentence comprising Regulation 1(2) amounted to an express territorial reach and the Regulations could not apply to any person or matter beyond that limitation. On that fundamental point, I disagree with the respondents' position.

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32. Firstly, it seems to me that a distinction is to be made between the *extent* of an enactment and its *application*. I apprehend that where an enactment expresses

its own extent, it is merely stating that it is to form part of the *corpus iuris* of a particular state or territory, the courts of which will have (usually exclusive) jurisdiction in relation to its subject matter. An example of the limited meaning of “*extent*” was seen in **Enriquez**, where the High Court of Justiciary held that Article 1(2) of the Sea Fishing (Enforcement of Community Control Measures) (Scotland) Order 2000 (which stated – “*this order extends to Scotland only*”) was:-

“.....*simply an arguably unnecessary reference to the Scottish legal system, in which alone cognisance is to be taken of the Control Order.*”

33. Admittedly, the Order under consideration in **Enriquez** contained other express provisions for its geographical application, whereas the Working Time Regulations do not; but I do not consider that such negates the comment made by the High Court, nor alter what I understand such a clause to mean. Accordingly my interpretation of Regulation 1(2) is simply that the 1998 Regulations, along with its subsequent amendments, form part of the law in England, Wales and Scotland.

34. However, its *application*, which I take to mean the range of matters or persons in relation to which it is to operate, may be different and, depending upon various other forces and considerations, may have a scope which goes beyond the area stated as being its extent. (Bennion, 4<sup>th</sup> ed. p276). Regulation 1(2) does not use the word “apply”. Further, the primary purpose for its presence is probably to make it clear that the Regulations are not to form part of the law in Northern Ireland for which separate legislation on working time has been enacted. If the clause was absent, and the Regulations otherwise silent on “extent”, the presumption would be that they would form part of the law of the whole UK.

35. Secondly, on the matter of *application* there does appear to be the following principle of statutory interpretation (per *Bennion*, 4<sup>th</sup> ed. At p106) that:-

“*unless the contrary intention appears.....an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons or matters*”

36. An unqualified adoption of that statement would indeed seem to confine the application of the Regulations to the landmass and, as Mr Goudy says, by necessary implication, to the territorial waters. However, the principle, if it be such, is subject to the appearance of a contrary intention, and such might exist presumably by express statement or by other means as, for example, the exercise by a national court of its obligation to interpret the domestic implementation of a European Directive in line with the purposes and intentions of the latter.

10 **A “Purposive Interpretation”**

37. Following a number of landmark cases in recent times (*Litster* perhaps being the best known in the field of employment law) we have become familiar with the concept of the purposive interpretation of domestic legislation which seeks to implement European law by reason of the UK treaty obligations. The exercise to be undertaken is commonly expressed by reference to a passage in the judgment of the European Court of Justice in *Marleasing*, holding that the obligation of the national courts (including presumably this Tribunal) was to interpret domestic legislation –

20 “.....as far as possible, in the light of the wording and the purpose of the [community] directive in order to achieve the result pursued by the latter.....”

38. The obligation is presumably now so well recognised as to render the citation of further dicta unnecessary, but it was referred to again in the recent decision of the House of Lords in *Ghiadan* in which there can be seen powerful expressions of the lengths to which domestic courts may go, and the variety of methods which may be adopted in the interpretative exercise to achieve the purpose. As Mr O’Neill brought to my attention, Lord Steyn referred to the “undoubted strength” of the interpretative obligation. The case concerned certain terms of the Rent Act 1977 which gave the right to succeed to a protected tenancy to a surviving spouse of the original tenant, the word “spouse” being defined therein to include a person living with the original tenant “as his or her wife or husband”. By application of section 3 of the Human Rights Act 1998 (the requirement that legislation be given a convention – compliant meaning “so far as it is possible to do so”) the House held that the provision under discussion could be read as

extending to homosexual partners so as to eliminate what would otherwise be a discriminatory effect on such persons, but without contradicting any cardinal principle of the 1977 Act.

- 5 39. It does not appear to me that their lordships were confining their comments only to the express obligation in Section 3 of the 1998 Act which does not feature in the present proceedings. At paragraph 118, Lord Rodger of Earlsferry said:-

10 *“When parliament provided that, “so far as it is possible to do so”, legislation must be read and given effect compatibly with convention rights, it was referring, at the least, to the broadest powers of interpreting legislation that the courts had exercised before 1998. In particular, parliament will have been aware of what the courts had done in order to meet their obligation to interpret domestic legislation “so far as possible, in the light of the wording and the purpose of the Community Directive in order to achieve the result pursued by the latter.” [Marleasing]*

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40. In other words Section 3 of the 1998 Act was merely stating expressly what had been the pre-existing position as operated by the courts. After referring in paragraph 119 to certain decisions of the Privy Counsel, his Lordship went on:-
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*“Such cases are instructive in suggesting that, where the court finds it possible to read a provision in a way which is compatible with convention rights, such a reading may involve a considerable departure from the actual words.”*

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41. In *Litster* in 1990 Lord Oliver had summarised the position in relation to Regulations 8 for the express purpose for implementing a Directive (following the earlier case of *Pickstone v. Freemans Plc*) at page 559:-
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*“The approach to the construction of primary subordinate legislation enacted to give effect to the United Kingdom’s obligations under the EEC Treaty has been the subject matter of recent authority in this House (see *Pickstone*....) and is not in doubt. If the legislation can reasonably be construed so as to conform with those obligations – obligations which are to be ascertained not only from the wording of the relevant directive but from the interpretation placed upon it from the European Court of Justice at Luxemburg – such a purposive construction will be applied even though, perhaps, it may involve some departure from the strict literal application of the words which the legislature has elected to use.”*

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42. Reverting to **Ghiaden**, Lord Rodger went on at paragraph 121 –

5 “When the court spells out the words that are to be implied, it may look as if it is “amending” the legislation, but that it not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with convention rights, it is simply performing the duty which parliament has imposed upon it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the convention rights and, by its very nature, an implication will go with the grain of the legislation. By contrast, by using a convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute....”

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43. The principle of purposive interpretation therefore appears clear, but the difficulty lies perhaps in recognising, in any particular case, the line beyond which implication or distortion of the actual words becomes impermissible. From the words of Lord Roger the boundary appeared to lie at the point where the proposed implication collides or become inconsistent with the essential principles of the legislation itself. As he went on at paragraph 122:-

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25 “The key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with convention rights, the implication is a legitimate exercise of the powers conferred by Section 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendments.

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35 Nevertheless what matters is not the number of words but their effect. For this reason, in the community law context, judges have rightly been concerned with the effect of any proposed implication, but have been relaxed about its exact form.”

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44. Accordingly, if the obligation is to interpret the Working Time Regulations in such a way as to accord with the principles and scope or intention of the parent directive, the first step would be to identify those principles and the intention.

### The Purpose of the Directive

45. The overall purpose and principle behind the Directive was of course to provide various protections, such as annual leave, maximum weekly hours of work, rest periods and so on to “every worker in the European community” (from the recitals in Directive 93/104/EC, under reference to the Community Charter of the Fundamental Social Rights of Workers, 1989). As a generality, the details of the various protections in the Directive were faithfully transposed into the Working Time Regulations 1998. However the particular issue about which it is necessary to ascertain the Directive’s intention, for the purposes of the present proceedings, is in relation to the scope of its application to offshore workers.
46. As to the original Directive (93/104/EC) there can be no doubt about the matter. Article 1(3) contained an express exclusion of those involved in, *inter alia*, “other work at sea”. This was transposed verbatim to the original domestic Regulation in 1998 (Regulation 18).
47. Equally, it is stating the obvious that in the amending Directive (2000/34/EC) the intention, and the express effect was the removal of that exclusion. Article 1(1) provided that Article 1(3) of the original Directive was to be replaced by:-
- “3. This directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC.....”*
48. Further, it introduced the category of “offshore work” (an expression not used in the original Directive) and by inserting a new Article 17(a) made certain specific provisions applicable to such work. These changes were implemented for the UK by the Working Time (Amendment) Regulations 2003.
49. Whilst that amendment in intention and effect is clear and express, what is not clear or express is the intended scope of its application in a territorial sense, and it is that which is the crucial issue in the present case and requires regard to be had to other provisions and sources, these also being brought to my attention by Mr O’Neill.

50. The amending Directive itself, and the amending Regulations of 2003 define “offshore work” in identical terms namely:-

5                   “.....work performed mainly on or from offshore installations (including drilling rigs), directly or indirectly in connection with the exploration, extraction or exploitation of mineral resources, including hydrocarbons, and diving in connection with such activities, whether performed from an offshore installation or a vessel.”

10 51. The amending Directive in its early recitals (which are of course the clearest indicators of the purposes or intentions of the measure) cites the “proposal from the Commission” and the “Opinion of the Economic and Social Committee” (‘ESC’) as matters to which regard was had. The former of these (item 18 in the volume of materials supplied by the parties) includes in its own recitals, the  
15 following: -

                  “Whereas, at least some basic protection in respect of working time should be provided for mobile workers and those engaged in ‘other work at sea’ currently excluded.....”

20 52. The definition of “offshore work”, as adopted in the Directive and in the UK Regulations, is created in that proposal, revealing the intention that the proposed amendment should operate in relation to work in offshore installations which is in connection with the extraction or exploitation of mineral resources, albeit without  
25 stating expressly any particular location or territorial limit on the whereabouts of these installations.

53. The second reference, i.e. to the opinion of the ESC of 18 May 1999 (item 19 in the materials provided), shows that the amending measures would entail  
30 introducing or modifying specific legislation for, *inter alia*, “other work at sea”. In paragraph 3.7, under the heading “Other Activities at Sea (Offshore)” the Committee stated:-

35                   “3.7.1.. The ESC supports the commission’s idea of making Directive 93/104/EC apply fully to workers carrying out “other activities at sea”.....

                  3.7.2 The draft Directive amending Council Directive 93/104/EC takes account of the special shift work arrangements required by this sector.

3.7.3 *However, the ESC is reluctant to endorse the Commission's wish to authorise the member states, via the new Article 17A(3), to extend the reference period stipulated in Article 16(2) (for the application of Article 6 which lays down that the average working time for each 7 day period shall not exceed 48 hours including overtime) from 4 to 12 months in respect of workers who perform mainly offshore work."*

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54. In the amending Directive itself there is express recognition in the new Article 17(2.1) of the case of –

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*".....activities where the worker's place of work and his place of residence are distant from one another, including offshore work....."*

55. In the new Article 17(a) under the heading "Mobile Workers and Offshore Work", it is provided that, subject to certain matters, member states may, "for objective or technical reasons or reasons concerning the organisation of work", extend the reference period for the calculation of maximum weekly hours of work" to 12 months in respect of workers who mainly perform offshore work."

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56. Although there are no express territorial references in any of these materials it must be right to assume that those who framed this Directive were aware and took cognisance of certain facts which are widely and publicly known to anyone with even a slight acquaintance with the offshore oil and gas industry as it operates in the North Sea. It can surely be assumed that both the Commission and the ESC were aware of the fact that practically all "offshore work" is carried out on the continental shelf and not in territorial waters. On that assumption it seems inconceivable that it would have been the purpose of the Directive to restrict its ambit to areas where there are practically no offshore installations – i.e. to exclude the very area where the vast majority, if not all of such installations are active in the exploration for and production of oil and gas, namely the continental shelf. The above references are indicators to that effect.

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57. Firstly there is reference to "other work at sea" now to be included. No limitation is specified. Secondly, there is reference, in relation to offshore work, to a longer period than for other types of work for the calculation of the average number of weekly working hours (new Article 17A). Reasons for this, referred to in the

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Article itself, include those “concerning the organisation of work”. This can be assumed, reasonably I think, to stem from the quite distinct pattern of working rotas which, again as a matter of common knowledge, exist on installations on the Continental Shelf – typically two or sometimes more weeks offshore followed by two or more weeks onshore – due to the distance between home and work and the need for unique travelling methods and arrangements because of location. This also reflects the opinion of E.S.C. at their para 3.7.2 above. Thirdly, the express reference in the new Article 17(2.1) to offshore work as involving the “worker’s place of work and his place of residence (being)....distant from one another....”. That is of course well known to be the case for all offshore workers on the continental shelf where the installations are typically hundreds of miles not only from place of residence but also from any shore.

58. Reference was also made to a letter of 26<sup>th</sup> August 2004 from a Mr Gerry Sutcliffe, Minister for Employment Relations, which stated, *inter alia*, :-

*“It is true that the Working Time (Amendment ) Regulations.....do not specifically mention the UKCS but they should be interpreted in the light of the requirements of the Directive and are thus designed to cover workers in the Continental Shelf.....”*

59. It is unclear to me how this letter can assist in the present proceedings. Not only is there no clue to the context in which it was written, but it is dated more than a year after the amendment came into force. Mr O’Neill referred to **AMICUS-MSF** as authorising the use of government statements while a Bill was proceeding through Parliament as background information which might shed light on the purpose of any particular measure. However the opinion of one person, issued after the fact of enactment, seems to me to have no such useful purpose. Moreover, if the content of the letter is indeed an accurate statement of what was the government’s purpose at the relevant time, I am also at a loss to understand why the Regulations did not simply say so in a straightforward manner, rather than expect employment tribunals to attempt to divine what was intended as if it were on the page.

60. In seeking to identify the purpose of the Directive, as an aid to the interpretation of the domestic regulations seeking to implement its terms, I think it is permissible

for me to take cognisance of not only the facts which any admitted for the present proceedings, but also of those which are widely and publicly known. Such are perhaps particularly notorious in the North-East of Scotland which has had an inescapable association with the offshore oil and gas industry for so many years now. Accordingly, not only is it the case according to the agreed facts that all the present claimants are engaged in work on offshore installations outside UK territorial waters but in the UK sector of the continental shelf; but also it is not a matter of only my private knowledge that the overwhelming majority of all other offshore workers operating out of the UK (which I hope is a neutral expression in the meantime) are similarly located on the same work.

61. My conclusion on the purpose of the amending Directive is therefore that it was an instruction to member states to render applicable to those Community workers engaged in offshore work the various safeguards contained within it and to do so in respect of those locations where such work is taking place. However, presumably the territorial scope of the application of the Directive can reach only as far as the bounds of the member state's own legislative powers. This requires a consideration of the position concerning the continental shelf.

### Continental Shelf

62. The origin lies in the International Convention on the High Seas held at Geneva on 29 April 1958, part of which included a Convention on the Continental Shelf. The principal objective of the latter was to establish a general regime for a continental shelf which was defined in Article 1 as:

*“the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the sand areas; or (b) the seabed and subsoil of similar submarine areas adjacent to the coasts of islands....”*

63. The convention went on at Article 2:-

*“(1) The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.*

*(2) The rights referred to in paragraph 1 of this article are exclusive.....  
The rights of the coastal state over the continental shelf do not depend on  
occupation.....”*

5 64. And at Article 5:-

“.....  
10 *(2).....the coastal State is entitled to construct and maintain or operate on  
the continental shelf installations.....necessary for its exploration and the  
exploitation of its natural resources.....*

*(4) Such installations....., though under the jurisdiction of the coastal State,  
do not possess the status of islands.....”*

15 65. This convention was superseded by a further Convention on the law at sea which  
took place at Jamaica in 1982, but in the main the principle of the sovereignty of  
the coastal State over its adjacent continental shelf remained in place. The 1958  
Convention was given domestic effect through the Continental Shelf Act 1964,  
Section 1 of which provided, *inter alia*:-

20 *“(1) Any rights exercisable by the United Kingdom outside territorial  
waters with respect to the seabed and subsoil and their natural  
resources.....are hereby vested in Her Majesty.”*

25 66. The effect of this then has been to give the UK parliament sovereignty, for the  
limited purposes stated, over the UK part of the continental shelf. It is thus within  
that area (in addition of course to territorial waters) that the Secretary of State is  
empowered to grant licences to such persons as he thinks fit to search and bore  
for and get petroleum (now in terms of s.3 Petroleum Act 1998 which makes  
express reference to the Continental Shelf). Outside the scope of any other  
30 international treaties, the power would not appear to exist beyond that area. By  
virtue of such sovereignty, Parliament may thus apply legislation to that area  
where such is “with respect to“ the exploration and exploitation there of the  
natural resources. This of course has been done on numerous occasions,  
particularly with regard to the application on the continental shelf of legislation for  
35 the health and safety of offshore workers, for instance, by means of the Health  
and Safety at Work etc. Act 1974 (Application outside Great Britain) Order 2001.  
In addition a great deal of employment legislation has also been applied there, for  
instance by means of the Employment Protection (Offshore Employment) Order

1976. The parties referred to numerous other examples which I do not think it necessary to set out here.

### **Express Extension**

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67. These examples all contained express extensions, and for the respondents Mr Goudy argued forcibly that that was the only valid means by which such extension could be achieved. He says that quite apart from any background of implementation of a European Directive the UK Parliament is quite entitled to instigate legislation and render it applicable to the Continental Shelf – but it has only ever done so, and thus by implication can only do so, by the inclusion of an express reference, there being so many examples. Accordingly, on that basis there has been no such application of the 1998 Regulations, as amended.

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68. However it seems to me that for there to be the consequence for which the respondents contend there requires almost to be the presupposition that the draftsman had applied his mind to the matter and deliberately remained silent on the issue of application beyond territorial waters. I should be slow to suppose any such thing since, in the presumed knowledge that practically all offshore work takes place on the Continental Shelf (that being what it was created for), for the draftsman of the amending Regulations then deliberately to leave Regulation 1(2) as it stood before, without any further provision, might almost be regarded as perverse.

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69. In any event, it seems to me that the over-riding criterion in such matters is that it is the legislative intention which is to be followed. As Bennion has it as his “Code 163” (page 405, 4<sup>th</sup> Ed.)

*“An enactment has the legal meaning taken to be intended by the legislator. In other words the legal meaning corresponds to the legislative intention.”*

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70. Again because of the reality that practically the entirety of the “British” offshore oil and gas industry operates in and from the UK sector of the Continental Shelf, I cannot conceive that the amending legislation which has in express terms the purported effect of embracing “offshore work” can be said to have been intended to have what would amount in fact to the opposite effect (i.e. practically its entire exclusion). This appears to me to be all the more so when one keeps in view the

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existence of the sovereignty which Parliament has in any event over that area. The added weight of the Community obligation to implement domestically a European measure in a manner designed to further the purpose appears to me to put the issue beyond doubt.

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71. Inferences from prior practice as to incorporating an express reference, whether thought to be essential or not, appear to me to require to yield to the over-riding principles of (a) following what is bound to have been the domestic legislative intention, and (b) the weight of the Community obligation. In the result therefore it is my conclusion that the Regulations, as amended are applicable to offshore work on the continental shelf. This may be regarded as implying into the Regulations words or a scope which are not there on the page. However, following Lord Rodger in **Ghaidan** referred to above, I do not consider this impermissible. Such application not only does not appear to impair the fundamental nature of the legislation, nor to create discord with any express term (given my understanding of “extent”), it is positively necessary to allow the legislation to fulfil its purpose.

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72. The exercise here appears to me not dissimilar to that undertaken by Maurice Kay J. in **Greenpeace**. Although, as Mr Goudy pointed out, the subject matter was entirely different, I consider there are analogies. There the court was concerned with the scope of the application of the Council Directive 92/43/EEC (the ‘Habitats Directive’). This had amongst its aims the protection of cetaceans (certain species of whales, dolphins and the like) and the conservation of natural habitats “*in the European territory of the Member States to which the Treaty applies*”. The domestic implementation came in the shape of the Conservation (National Habitats etc) Regulations 1994 which expressly limited coverage to the twelve miles of territorial waters. Since the proceedings took the form of a judicial review of the decision of the Secretary of State to issue a particular licence for mineral exploration, the Court was concerned primarily with interpretation of the Directive itself as having direct vertical effect; but notwithstanding the reference to the “territory of the member state” it was held applicable to the Continental Shelf – with the domestic regulations presumably following suit despite their express terms.

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73. In reaching its conclusion, the court took into account, *inter alia*, that cetaceans spend most of their time beyond territorial waters and it was thus on the basis of “*the very nature of things*” that such legislation should also apply to maritime waters which came within the jurisdiction of the United Kingdom, these being held to include the Continental Shelf because of the sovereignty existing there, in order for it properly to achieve its purpose.

74. The analogy which I draw is that it seems to me to be in the very nature of the things with which this case is concerned, or at least it is the current state of affairs that practically all offshore installations, and thus practically all “offshore work” is outside territorial waters but within the UK sector of the Continental Shelf. Similarly, the aims, on a purposive construction, can only be achieved by the Regulations applying there.

75. I have been concerned of course with the effect of the decision of the EAT in **Addison**, even although neither party sought to rely upon it. It was concerned with the application on the continental shelf of the Transfer of Undertakings (Protection of Employment) Regulations 1981 and their parent, the Acquired Rights Directive (77/187). The former contained within its terms an express application to – “*an undertaking situated immediately before the transfer in the United Kingdom*”. This followed from Article 1 of the latter which provided expressly that it was to apply – “*where and in so far on the undertaking, business or part of the business to be transferred is situated within the territorial scope of the Treaty*”.

76. As Mr O’Neill points out, this contrasts with respectively the 1998 Regulations as amended and their parent, the Working Time Directive and its amendment. In neither are there any such words and thus nothing in my view to restrict the intended scope of this Directive to anything less than that over which a Member State already has sovereignty. Further, as Maurice Kay J. commented in **Greenpeace**:-

*“If **Addison** is intended to mean that as a matter of competence a Directive or Regulation can have no application beyond the territorial sea of the Member States, I do not think it can be correct.”*

5 77. He felt that if it purported to be no more than a decision on Council Directive 77/187 it was of limited value for his present case which concerned the application of the Habitats Directive. I consider I am entitled to draw the distinction proposed by Mr O’Neill, so as to regard **Addison** as having its own context, namely TUPE; and on that basis to reach a different conclusion in  
10 relation to the quite different Working Time Regulations.

78. Standing the view I have taken on the meaning of “extent” in Regulation 1(2), I have not felt it necessary to consider Mr O’Neill’s further argument concerning the possibility of extending the meaning of “Great Britain” geographically, so as to  
15 encompass the Continental Shelf; neither have I found it necessary to consider his submissions which sought to justify application of the Regulations outside territorial waters on the grounds of a “sufficiently close link” to Great Britain.

79. I would have to say that I would have some difficulty in relation to the latter  
20 proposition since it implies no geographical limit at all, and is thus capable of going far beyond any area over which the UK Parliament has any kind of sovereignty or jurisdiction. It seems to me obvious that the area over which a legislature can legislate cannot include territories over which it has no jurisdiction. It may of course be endowed with such in addition by means of international  
25 agreement. Beyond that it has no locus or right to seek to apply or enforce its laws. This is why I consider that the scope of the 1998 Regulations, as they are now, has its end at the limit of the Continental Shelf. The concept of “sufficiently close links” seems akin to that of “substantial connection”, and other similar expressions which are pertinent to international issues of choice of law, *forum*  
30 *non conveniens* and all that that involves. By contrast, the matter presently in hand seems to me to be to ascertain whether or not these domestic Regulations apply beyond these shores or not, and if so, to where.

80. Also, I have not felt it necessary to deal with the points made by Mr Edwards. I  
35 may add that I did not feel that the various Regulations dealing with shipping and

fishing were particularly to the point. Whilst clearly they had application to persons and matters outside territorial waters, and indeed anywhere in the world, it was not that aspect that was relevant to their validity. Such Regulations are made applicable by reference solely to the vessel itself being registered or owned in the UK. This factor is not present in relation to fixed offshore installations.

**Summary**

81. Finally, the principal points upon which I have reached a conclusion are:-

- a. that Reg. 1(2) does not define the territorial limits of the application of the Regulations;
- b. that as the Regulations are in implement of an EU Directive they should be interpreted in such a way as to achieve the purpose of that Directive;
- c. that the objective of the Directive was to extend the various protections as to working time to Community workers engaged in offshore work;
- d. that such purpose could not be achieved without the Regulations applying on the continental shelf, where it is competent for the UK Parliament to apply legislation related to the operation of the extraction of minerals; and
- e. such an application of the Regulations would not offend against the essential principles of the legislation.

82. Accordingly I conclude that the Working Time Regulations 1998 as amended should be regarded as applying not only to Great Britain and its territorial waters, but also to offshore work (as defined) being performed in the UK sector of the Continental Shelf (other than an area or part of an area to which the law of Northern Ireland applies).

Chairman:.....

Dated:.....

Entered in Register/Copied to Parties.....