Employment news: When do individuals abroad have the protection of UK employment law?

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Today more and more staff have jobs that require or allow them to work abroad. With many countries around the world having less protective employment laws than the UK, it is perhaps no surprise that staff are increasingly trying their hand at claiming employment protection over here. In the first few months of 2010, a number of such cases have been heard by the Tribunals and Courts. These show that it is not always easy, but is not necessarily impossible, to benefit from UK employment rights whilst working abroad full-time.

The rules vary according to the right that the employee is seeking to claim. The basic position is as follows.

Unfair dismissal

Following the House of Lords decision in Lawson v Serco in 2006, three categories of employee qualify for UK unfair dismissal protection: (i) the employee who is working in the UK at the time of his dismissal (standard cases); (ii) the employee who moves around but has his base in the UK (peripatetic employees); and (ii) the employee who works abroad but has a strong connection with the UK and British employment law (expatriate employees). The Lords gave a couple of examples of individuals falling within this third category (including the employee who is posted abroad, by an employer based in the UK, for the purpose of the business carried on in the UK). However, the breadth of this category - and indeed the other categories - is often hotly disputed.

In W v Ministry of Defence, the Employment Appeal Tribunal the 'EAT' has very recently given us another example of expatriates benefiting from UK employment rights. It decided that two women, who were married to individuals posted abroad by the British military and whose eligibility for their own jobs was based on that connection, had a sufficiently strong connection with England to qualify for unfair dismissal protection. The 'tipping point' was said to be the fact that their employment was on terms and conditions given to public servant 'dependents' in their position: terms and conditions expressed to be governed by English law and which in effect treated them as UK employees (for example, in respect of notice periods, sick pay and parental rights). In these particular circumstances, it did not matter that the women were recruited abroad nor that there was no inherent feature of their work that connected them to the UK. They therefore succeeded where others had failed in the past.

In another case (Ravat v Halliburton Manufacturing and Services Ltd), the Inner House of the Scottish Court of Session (equivalent to the English Court of Appeal) decided that Mr Ravat (a British national) who worked in Libya on the basis of 'one month on, one month off' (in Libya/UK) was entitled to claim unfair dismissal in the UK. The judges hearing the case differed in their reasons for this decision, and were clearly not able to easily place Mr Ravat into any one of the three Lawson categories (although the closest seemed to be the expatriate category). However, again, the strong connection with the UK (including the fact that Mr Ravat lived here) appeared to swing the case in a different direction from earlier cases with not dissimilar facts.

Discrimination

The current position, as set out in UK legislation, is that an employee qualifies for protection against discrimination in the UK only if he either: works wholly or partly in the UK; or works wholly outside the UK, but is 'ordinarily resident' in the UK and his work is for the purpose of a business carried on by the employer at an establishment in the UK. If the work is not done at an establishment at all (eg home workers or field staff) then it is deemed to be done at the establishment with which it has the closest connection.

The meaning of 'ordinarily resident' was considered recently in Neary v Service Children's Education, Ministry of Defence & St John's School. The EAT decided that the principles regarding ordinary residence set out in tax cases should apply equally to discrimination law. Accordingly, a person could, in theory, be ordinarily resident in more than one country at the same time (although, in this case, it was found that Mr Neary was ordinarily resident in Germany, and Germany alone), but the whole context must be properly considered, eg the history of and reason for the individual's movements, the links retained with the UK and what, in particular, the position was at the time of the alleged discriminatory act.

In W v Ministry of Defence (mentioned above), the EAT also considered the right of the employees concerned (who were based in the EU, but not in the UK) to bring sex discrimination claims in the UK. On the face of the legislation, these employees were not able to claim for sex discrimination in the UK. However, the EAT decided that it must construe the legislation (which implements EU anti-discrimination law) to give effect to EU law. It said that it is inconceivable that EU law would permit the UK (or any other Member State) to give lesser rights to employees working in a different Member State. In taking this stance, the EAT followed two earlier cases concerning laws derived from EU Directives (the laws regarding working time and the protection of fixed-term employees).
This case gives a clue to the way in which discrimination cases involving overseas employees are likely to be treated once the Equality Act comes into force. The Act does not contain any provisions about working outside the UK and the courts will therefore have to rely on the principles that have emerged from the cases. The fact that the rights in the Equality Act are largely derived from EU Directives means, however, that the courts will be obliged to give effect to those rights when dealing with disputes.

**Contractual claims**

Yet another set of rules applies to contractual claims that employees might have. To bring a claim in the High Court in the UK, the Court must be satisfied that it has ‘jurisdiction’ to hear the claim (ie that it is the correct forum) and, if it has jurisdiction, it must then decide which law applies to the contract (the ‘aplicable’ or ‘governing’ law).

Because the courts and laws of different countries vary so much – particularly, for example, in relation to the enforcement of post-termination restrictions or the exercise of discretion on bonuses – jurisdiction and the applicable law can be hotly disputed issues.

If the employer and employee have chosen a particular law to apply to the contract, that law will usually apply. If not, the applicable law will depend on where the employee normally carries out his work (even if he is temporarily employed elsewhere), or (if he does not normally carry out his work in any one country) where the place of business through which he was engaged is situated. However, if the contract is more closely connected with another country, that law may apply instead.

Recently, the High Court in the case of *Chunilal v Merrill Lynch International Inc.* had to consider which law to apply to the contract of employment between Mr Chunilal (a British national resident in Hong Kong) and Merrill Lynch International Inc. (a Delaware corporation with its principal place of business in New York), where there was a secondment to another company (Merrill Lynch (Asia Pacific) Ltd) and no choice of law by the parties.

Mr Chunilal had been employed by Merrill Lynch’s UK subsidiary in London for 14 years. In 2003, he negotiated a transfer to Hong Kong. He negotiated his new contract (with the Delaware Corporation) in New York, albeit he was in London when he signed and faxed it back to New York. Under the contract, he was seconded to work in Hong Kong for Merrill Lynch (Asia Pacific) Ltd, but he reported to a line manager in New York. He was paid his salary in US dollars (into an English bank account), he received many UK expatriate benefits and he was relocated from (and given Dights for holidays to) London. The contract also stated that UK termination terms and conditions would apply. Mr Chunilal travelled extensively within Asia for work, and also occasionally to the US and UK. He spent two to four weeks in the UK each year.

Mr Chunilal’s employment was terminated. He claimed, in respect of his discretionary bonus, that Merrill Lynch had breached the UK implied term that it would not act irrationally or perversely in exercising its discretion. Merrill Lynch claimed that Hong Kong law applied (and that the Hong Kong Courts are not bound by the relevant UK case law decisions).

The High Court decided that, on these facts, Mr Chunilal was habitually resident in Hong Kong (and not just working there temporarily). It also seemed to conclude that the contract was not most closely connected with the UK. This meant that Mr Chunilal could not show that English law applied to his contract. (The Court commented that Mr Chunilal could have been seconded to Hong Kong directly by Merrill Lynch’s UK subsidiary - with the implication that this might have made a difference to his case - but he was not.)

**A note of caution**

Employers need to be mindful when entering into contracts with, and managing, staff who are outside the UK. At the start of the relationship, the employer should think carefully about the governing law and the specific terms to be given to foreign staff. At the end of the relationship, shortcuts with dismissal procedures, simply because the employee is not working in the UK, could leave the employer exposed.

Two categories of staff need particular care. Staff located in Europe may be entitled to insist on a more generous interpretation of the reach of EU-derived UK laws than individuals located in non-EU territories. US citizens may also benefit from the global reach of some US laws.

Employers should not assume that UK rights do not apply. In many cases they will not but, as the cases above illustrate, the law in this area is immensely complex and an employer can be taken by surprise.
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