When do individuals working abroad have the protection of UK employment law?

14 NOVEMBER 2011

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CATEGORY:
ARTICLE

In our September 2010 edition of Employment News, we highlighted recent cases on the issue of whether workers who spend some or all of their time abroad can claim unfair dismissal in Great Britain (and other rights under the Employment Rights Act 1996). Since then, we have had first hand experience of this issue in the Employment Tribunal. Before telling you of our experience, and giving you some tips, we will remind you of why this is legally problematic.

Law in theory

There is nothing in the Employment Rights Act 1996 (which sets out the rights not to be unfairly dismissed or to suffer unlawful deductions from wages) that states clearly whether the Act has any effect outside the UK. This leaves a problem – when does the Act protect employees who spend some or all of their time abroad? The House of Lords (now the Supreme Court) looked at the issue in the case of Lawson v Serco. The Lords decided that three categories of employee qualify for protection: the employee who is working in Great Britain at the time of his dismissal; the employee who moves around but has his base in Great Britain (the 'base test'); and the employee who works abroad but has a strong connection with Great Britain and British employment law.

The Lords found the third category to be 'rather more difficult' than the others. They said that it would be very unlikely that someone would fall within this category unless he or she worked for an employer based in Great Britain, but this alone would not be enough – 'something more' is needed. They gave a couple of examples of 'something more' and said that any other examples would have to have equally strong connections with Great Britain and British employment law.
At the time of our report last year, two reported cases had considered the meaning of 'equally strong connections'. There has since been a further case, Duncombe v Secretary of State for Children, Schools and Families. All three decisions went in favour of the employees, but all were highly dependent on the facts (and it is notable that, in two of them, including Duncombe, there was a strong connection between the employment and the UK Government). However Duncombe, in particular, is important because it is a Supreme Court decision and therefore contains guidance from the UK's highest court.

Law in practice

This year, we have had to apply these cases on behalf of our clients, including one individual who brought a complaint in the Tribunal against his British employer. The individual was of dual nationality (British and another) and he spent significant amounts of time in both countries (amongst others). He had no base, in the sense of nowhere that he identified as his permanent home and/or that he owned or rented in his name, and variously he spent more or less time in the UK and abroad, with family and friends. His job (in sales) was one that, with a laptop and telephone, could be done from any location (except for occasional meetings and conferences).

How did we argue the case for the employee?

As with most cases, this case did not turn on any one fact, although some were arguably more important than others. The employer took the view that by far the most important fact was where the individual spent the majority of his time and it relied heavily on the 'base test' (see above). For us on the other hand, it was important to emphasise all the factors connecting our client with Great Britain, and in so doing we hoped to show a stronger connection with Britain (and British employment law) than anywhere else.

What factors did we point to?

Some of the factors we considered were:

- Time (work and personal): Where did the employee spend his personal and work time and how could this be evidenced (bills, travel documents, bank account records etc)?
- Contract terms: What did the employee's contract say, for example about his place of work but also about the law(s) that applied to him? Did his contract differ from the contracts of other staff (especially those abroad)?
- Business: What was the nature of the employer's business (including its operations overseas), how did the employee fit into that

business and with whom did he work?

- Pay and tax: Where (and in what currency) did the employee receive his salary, and where did he pay tax and social security contributions?
- Communications: What else had the employer said or done that might have indicated that the employee was to be regarded as a member of its British workforce?
- Other links: What else was there to evidence either the existence of a link with Great Britain (eg electoral roll, driver's licence, NHS card etc) or the severance of a link with overseas?
  By engaging in this exercise, we successful persuaded the Tribunal that our client had an overwhelmingly closer connection with Britain and with British employment law than with any other system of law, and his claims were allowed to proceed to a full hearing.

Tips

In our case, of great interest to the Tribunal was the fact that the individual had a standard UK contract, which was governed by English law and which made various references to English employment legislation, and that the employer had never previously tried to say that the individual was not employed in Great Britain. Indeed, the employer had previously tried to disassociate its business from the country in which it now argued the employee was based. As Lady Hale stated in Duncombe, and as the Tribunal echoed in our case, the law stated to govern the employee's contract "must be relevant to the expectation of each party as to the protection which the employees would enjoy".

A key lesson for any employer with staff who spend time abroad – whether for business or personal reasons – is to take great care in deciding the law and specific terms to be given to those staff and in communicating those terms. If you fail to do so, you could unwittingly find that you help staff secure rights (here or abroad) beyond those that you envisaged they would have.

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