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Newsletter March 2012

UK: Employment Update

Welcome to the March UK Employment Update which features an important Supreme Court decision on when overseas' employees can pursue unfair dismissal claims. This Update also examines recent decisions on when a resignation can be withdrawn and when an employer's choice of redundancy selection pool can be challenged. Finally, we consider changes to the Employment Tribunal that come into effect in April.

Key issues

Strong connection: when expatriate employees can claim unfair dismissal

The increasingly global market place is naturally reflected within the modern workplace. Many companies recruit individuals in Great Britain to work permanently or intermittently overseas within the organisation either for the recruiting entity or on a secondment basis. UK companies may also host employees that have been seconded from overseas' associated companies to work in the UK.

In all such cases the employing entity and the entity receiving the benefit of the employee's services must be mindful that such 'expatriate' employees may enjoy statutory employment rights in Great Britain (as well as in the country where they are located), albeit that their duties may never be performed in Great Britain or may be performed there only on incidental occasions (e.g. for training or appraisal meetings). Similarly employees working temporarily in Great Britain on secondment, or otherwise, may also enjoy English statutory employment protection.

A number of areas of vulnerability exist: (i) unfair dismissal claims upon the termination of the employment arrangements; (ii) discrimination claims arising either during the currency of employment or upon termination; (iii) redundancy rights; (iv) minimum notice periods; and (v) statutory employment rights generally (e.g. the right to paid holiday).

The legislation under which employees enjoy the right not to be unfairly dismissed does not contain any geographical limitations and read literally appears to apply to any employee who works under a contract of employment anywhere in the world. The Courts have however clarified that it is necessary to imply a territorial limit such that only employees who are working in Great Britain should be entitled to bring unfair dismissal claims in the Employment Tribunal.

So who works in Great Britain for these purposes? The House of Lords clarified a few years ago that employees who work outside Great Britain can, in certain cases, be regarded as working in Great Britain. Peripatetic employees who return to a UK base at the end of each assignment can claim unfair dismissal, as can expatriate employees working in British social or political enclaves overseas; such as a civilian employee in a British military base in Germany. The House of Lords also held that one further category of overseas' employee was protected from unfair dismissal; the expatriate employee of a British employer working overseas for the benefit of the UK company.

The Supreme Court has now clarified that the categories of expatriate employee who can bring unfair dismissal claims is not limited to those identified above. It has held that the test for determining whether an employee can claim unfair dismissal is whether the employment relationship has a stronger connection with Great Britain than with the country where the employee works.

R was employed by H, a UK company, under a contract of employment governed by English law. He worked in Libya for the benefit of a German group company reporting daily to its Libya based operations manager and to the Africa region finance manager based in Cairo and employed by a different UK company. R sometimes attended meetings in Germany. R's salary was paid by H but was recharged back to the German company. He worked four weeks on and four weeks off and returned home to Lancashire during his 'off' periods. His salary was paid in Sterling and was subject to the deduction of UK income tax and national insurance. He liaised with H's Aberdeen office in relation to HR matters such as travel, medicals and payroll.

Before R started his role in Libya he asked for confirmation that UK employment law would continue to apply to him. He was given that reassurance. When R was made redundant he was paid a redundancy payment in accordance with the English statutory redundancy formula.

R brought a claim of unfair dismissal; H argued that the Employment Tribunal did not have the jurisdiction to hear the claim because R did not work in Great Britain. The question of whether R did enjoy protection against unfair dismissal proved to be less than straightforward prompting a variety of different judicial approaches as the case progressed through the courts.

Ultimately the Supreme Court held that aside from the fact R worked in Libya for the benefit of a German company and the decision to dismiss was taken in Cairo all the other factors pointed towards Great Britain as the place with which in comparison with any other, R's employment had the greatest connection. He could therefore claim unfair dismissal in the Employment Tribunal.

The Supreme Court distinguished between truly expatriate employees who live and work abroad and employees who work abroad but live in the UK such as R. In the latter case it did not consider that the employee would have to achieve such a high standard to show that they come within the exception to the general rule that the place of employment is decisive in relation to the ability to claim unfair dismissal. The Supreme Court also commented that the vehicles that multi-national companies use to conduct their business will be driven by a multitude of factors that may deflect attention away from the reality the employee finds himself in.

This decision illustrates that employees of UK companies who work overseas can pursue unfair dismissal claims in the UK where there is considered to be a closer connection with the UK than elsewhere. Each case will be considered on its own facts but it appears that all or some of the following factors may well be taken into account: how the employee has been classified internally, who pays the employee, whether UK tax and social security deductions are made, the governing law of the contract, whether the employee has statutory protection elsewhere, where the employee lives, which company receives the benefit of the employee's work and who the employee reports to.

Action points

- Before dismissing an expatriate employee some thought should be given to whether the employee would be eligible to claim unfair dismissal and if so whether the proposed dismissal process would render the dismissal procedurally unfair and if so whether steps should be taken to remedy this risk or compromise any potential claims.
- Be aware that the approach of the courts and tribunals in relation to an expatriate employee's ability to pursue discrimination claims is likely to be similar, if not more generous, than their approach in relation to an individual's ability to bring an unfair dismissal claim.

[Ravat v Halliburton Manufacturing and Services Ltd]

Withdrawing a resignation: by consent only

The Employment Appeal Tribunal (EAT) has recently considered the circumstances in which a resignation can be withdrawn.

C wrote to her employer resigning with immediate effect. Her employer however treated her resignation letter as a grievance letter and invited C to a grievance hearing, advising her that it would not accept her resignation until the grievance had been resolved.

After the grievance meeting HR wrote to C and advised her that: *"After careful consideration the college will allow you to rescind your resignation"*. C then returned to work but resigned shortly after.

The employer claimed that the first resignation had been effective and was the date from which the three month time limit for bringing an unfair dismissal claim should run from.

The EAT held that C's first resignation was clear and unambiguous. A resignation could not be unilaterally withdrawn, it could only be withdrawn by mutual consent of employer and employee. This had clearly occurred when the college then stated it would allow C to rescind her resignation and, in response, C then wrote a letter saying that she was grateful to the college that they had agreed to allow her to rescind her resignation and would return to work.

So what was the effect of the mutual agreement to withdraw the resignation? In the EAT's opinion withdrawal of the resignation by consent meant that the resignation was never effective. C's continuity of employment was preserved up to the date of her second resignation.

Where it is mutually agreed that an employee may withdraw their resignation ensure that the employee is not inadvertently given other grounds to complain; for example holiday should be calculated as if there has been no break in employment and thought should be given to what the employee is entitled to receive by way of pay. This will be dictated by the terms of the contract and whether the employee has been actively working from the date of the resignation to the date it is mutually 'cancelled'.

[Chelmsford College Corporation v Teal]

Employment Tribunal news: April changes

On 6 April a number of changes to the Employment Tribunal system will come into effect:

- Unfair dismissal cases will be heard by judges sitting alone (unless a full panel is considered appropriate because of the specific circumstances of the case, for example it may be factually very complex).
- The maximum deposit order that a Tribunal may make will increase from £500 to £1000.
- The maximum costs order that a Tribunal may make will increase from £10,000 to £20,000.

Redundancy: how safe is your selection pool?

A recent EAT decision illustrates that employers faced with a redundancy situation that is not simply a case of a unique role disappearing should give careful thought to their redundancy selection pool. Failure to do so will run the risk of an Employment Tribunal classifying any resulting dismissal as unfair.

B worked as an actuary alongside three other actuaries. A number of B's clients left leading to insufficient work for B to perform a full time role. The loss of clients was not attributed by her employer, C, to any misconduct or poor performance.

C elected to use a redundancy pool of one, i.e. B. After she was made redundant B brought a successful claim of unfair dismissal.

The EAT upheld the Employment Tribunal decision that C had acted unfairly in not including other actuaries in the redundancy selection pool.

In the Tribunal C had justified its one person pool on the basis that:

- B's clientele had reduced;
- the work done by scheme actuaries involved a personal appointment by the trustees;
- it was only B's work which had reduced and it was better and more appropriate for B to be regarded in a pool of one.

C appealed the finding of unfair dismissal on the grounds that the question of how the redundancy pool should be defined is primarily a matter for the employer to determine.

The EAT summarised the relevant principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates for redundancy:

- The dismissal must be within the range of conduct which a reasonable employer could have adopted;
- The redundancy pool does not need to be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine;
- It is difficult, but not impossible, for an employee to challenge the redundancy selection pool where the employer has genuinely applied his mind to the problem;
- The Employment Tribunal is entitled to scrutinise the reasoning of the employer to determine if he has *"genuinely applied"* his mind to the issue of who should be in the redundancy pool.

The Tribunal did not consider that C had genuinely applied its mind to the selection pool; it rejected the line manager's view that C would lose business if a scheme actuary was to be changed; concluding that this risk was *"slight"* as there had been a number of cases where the scheme actuary had been changed without the client leaving. It held that C had acted unfairly in not including other actuaries in the pool because:

- the other scheme actuaries did similar work;
- the performance of B was not criticised but was praised; and
- the chance of C losing business if scheme actuaries were changed was slight.

When determining a redundancy pool an employer may have regard to commercial concerns such as client demands, however it should be satisfied that any presumptions are borne out by hard fact so that they would withstand the scrutiny of the Employment Tribunal if challenged.

[Capita Hartshead Limited v Byard]

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