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A Newsflash from Dechert's UK Employment Group

## Lords' Decision Set to Trigger Increase in Unfair Dismissal Claims by "Overseas Workers"

Employers and their advisors now face increased uncertainty and more litigation from overseas workers lodging unfair dismissal claims. Yesterday's judgment by the House of Lords on the joined cases of *Lawson v Serco*, *Crofts v Veta* and *Botham v MOD*, broadens significantly the circumstances in which overseas workers can claim unfair dismissal - very probably at the increased cost of employers.

### Background

The statutory right of an employee (who has the requisite continuous service) not to be unfairly dismissed is contained in section 94 (1) of the Employment Rights Act 1996 ("ERA"). This says, "An employee has the right not to be unfairly dismissed by his employer". A jurisdictional test for this right was formerly included in section 196 ERA. This provided that section 94 did not apply to employment "where under the employee's contract of employment he ordinarily works outside Great Britain".

Section 196 was repealed in 1999. Since then unfair dismissal claims have been brought, in a variety of circumstances, by employees engaged in work wholly or mainly outside Great Britain and this has given rise to conflicting case law on the issue of which employees are covered by section 94 ERA.

Most commentators felt that the Court of Appeal had settled matters in January 2004 when it decided that the right to claim unfair dismissal only applies to "employment in Great Britain". It said that where the employee is employed will be a question of fact in each case and suggested that in most cases it will not be difficult to decide whether the employment is in Great Britain. Borderline cases would depend on an assessment of all the circumstances of the employment in the

particular case. The Court of Appeal rejected other conflicting tests such as the "sufficient or substantial connection" test; the "base" test; the "territorial extent" test and the test based upon whether the employer resides or carries on business in the UK.

### House of Lords Decision

This decision has been overturned by the House of Lords, which has replaced the simple formula preferred by the Court of Appeal with an altogether more uncertain test. Lord Hoffman (who gave the only judgment) said;

*"In my opinion the question in each case is whether section 94(1) applies to the particular case, notwithstanding its foreign elements. This is a question of the construction of section 94(1) and I believe that it is a mistake to try to formulate an ancillary rule of territorial scope, in the sense of a verbal formula such as section 196 used to provide, which must then itself be interpreted and applied."*

He gave the following guidance:-

- if the employee was employed to work in Great Britain at the time of his dismissal he will be able to claim unfair dismissal;
- there will be situations where this does not apply but the tribunal will still have jurisdiction to hear a claim;
- an example is a "peripatetic" employee, i.e. an employee whose duties require him to travel and work in a variety of locations (such as an international airline pilot). A peripatetic employee who can show that he is "based" in the UK will have a claim. Lord Hoffman approved

guidance given on this issue by Lord Denning in *Todd v British Midland*. Lord Denning said, "A man's base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas.....I do not think that the terms of the contract help much in these cases. As a rule, there is no term in the contract about exactly where he is to work. You have to go by the conduct of the parties and the way they have been operating the contract. You have to find at the material time where the man is based";

- another example is an "expatriate employee", i.e. an employee posted abroad by a UK based employer for the purposes of a business carried on in the UK - Lord Hoffman gave as an example a journalist for a British newspaper sent to work as its correspondent in Rome;
- a third example is an expatriate employee of a British employer who works in "what amounts for practical purposes to an extra- territorial British enclave in a foreign country" (both Mr Lawson - who worked in the Ascension Islands - and Mr

Botham - who worked on a military base in Germany – fell into this category). In such cases the House of Lords felt that the connection between the employment relationship and the United Kingdom was "overwhelmingly stronger" than the employee's connection with the local jurisdiction;

- Lord Hoffman said that there may be other examples but to qualify "they would have to have equally strong connections with Great Britain and British employment law".

### Conclusions

In a somewhat surprising decision the House of Lords appears to have preferred a flexible interpretation of the statute which will enable tribunals to do justice in individual cases over the narrower but more certain finding of the Court of Appeal. Its decision no doubt delighted Messrs Lawson, Botham and Crofts, but employers and their advisors will be left to pay the price in terms of increased uncertainty and more litigation.

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