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Unfair dismissal boost for Britons working overseas

House of Lords gives employers something else to think about, write Andrew Dekany and Joseph Sutton

In a landmark decision the House of Lords has held that some of the hundreds of thousands of Britons who work overseas will be able to claim unfair dismissal in the UK where previously this would not have been possible.

The right not to be dismissed unfairly is probably the most important of a bundle of UK statutory employment protection rights. Certainly more unfair dismissal claims are presented to UK employment tribunals — about 40,000 in 2004-2005 — than any other type of claim. The maximum compensation for unfair dismissal is currently £67,100 ($118,600).

With globalisation, increasing numbers of Britons are working overseas. Many are posted abroad by British employers. Others, while based in Britain, are employed by foreign companies and spend much of their time travelling. Employees working in the UK are protected from unfair dismissal irrespective of the law applicable to their contracts. It is often assumed, however, that they will lose their UK unfair dismissal rights if working overseas for an extended period.

In a string of decisions since legislative repeals in 1999 left the matter to the judges, courts and tribunals have struggled to find the territorial limits of the unfair dismissal legislation. The House of Lords has now introduced some clarity into this situation by holding that whilst it would be generally unusual for an employee who works and is based abroad to come within the scope of British labour legislation, there is a significant group who in fact do so.

Those who benefit from this judgment include employees who are "posted abroad by a British employer for the purposes of a business carried on in Great Britain". So, for example, a foreign correspondent of a British newspaper is protected from unfair dismissal. Likewise the executive of a British company who is sent abroad to run a new representative office which subsequently closes.

Others who benefit include Mr Lawson, who was a security supervisor working in the Ascension Islands for an English employer, Serco Ltd, and Mr Botham, who worked at various MOD establishments in Germany as a youth worker. Both employers were operating within what amounted for practical purposes to an extra-territorial British enclave. The House of Lords overturned rulings that neither Mr Lawson nor Mr Botham could bring unfair dismissal claims in the UK and held that both could do so.

The House of Lords also held that workers with no fixed workplace such as Mr Crofts, who was a pilot working for a wholly owned Hong Kong subsidiary of Cathay Pacific, could claim

unfair dismissal if their "base" was England. "Unless one regards airline pilots as the flying Dutchmen of labour law, condemned to fly without any jurisdiction in which they can seek redress, I think there is no sensible alternative," said Lord Hoffman. Since Mr Crofts was based at Heathrow, the House of Lords was prepared to allow him to bring an unfair dismissal claim in the UK against his Hong Kong employer. The same reasoning would apply to international management consultants, marketing and other senior executives, even if their work is mainly outside the UK.

The House of Lords did not need to comment on the position of mariners on board British registered ships, some of whom are protected against unfair dismissal by a specific provision which survived the legislative repeals in 1999 fairly unscathed. There are also specific provisions for those working on oil rigs etc in territorial waters or on the continental shelf.

The judgment of the House of Lords will be of concern to British employers, who already face significant costs when expatriating employees, and will have to be considered when reviewing relocation policies. The principles established are not limited to employees posted abroad to work for a business conducted in Great Britain and to employees working in a political or social British enclave abroad. There may be other cases with "equally strong connections with Great Britain and British employment law", said Lord Hoffman. No doubt this will remain a fertile area for litigation in future.

Furthermore, British employers should not assume that a choice of foreign law in the contract of employment will operate to exclude unfair dismissal rights. For example, Mr Crofts' contract was governed by Hong Kong law but he was still protected because of the circumstances of his employment. Most UK statutory employment protection rights are mandatory and apply regardless of contractual choice of law. Nor is it sufficient, in the case of international workers with no fixed workplace, to specify in their contracts that they are based abroad if they are in fact based in the UK at the time of their dismissal.

Assuming that the expatriate or peripatetic employee is or may be within the grasp of UK unfair dismissal legislation, it is important that the employer should have a "fair reason" for dismissing him and also follow a fair procedure, as set out in a mix of legislation and case law. The crunch point will often be when the foreign posting comes to an end, the employee does not wish to extend the posting for family or career reasons but the employer finds it awkward to reintegrate him into a UK structure that may have changed significantly in the meantime. If strong British connections exist, and the termination of employment is not handled carefully, employers are at increased risk of unfair dismissal claims in light of the decision of the House of Lords.

Alternative protection sometimes afforded to expatriate employees through long contractual notice periods or generous enhanced redundancy schemes will not necessarily avoid claims, especially if the circumstances of termination are not amicable. Furthermore, unfair dismissal is but one strand in a web of UK statutory employment protection rights. Extensions in the territorial limits of UK discrimination legislation over recent years mean that, where there is sufficient connection with the UK, even someone who works "wholly outside Great Britain" can bring discrimination claims in the UK on grounds of race, sex, disability, religion or belief, sexual orientation and soon also age.

While discrimination claims are more specific in their nature, there is no financial limit on compensation. Payouts are typically larger than for unfair dismissal claims with which, however, they can be combined. Where there are British connections the practical implication of all these developments is to confer UK statutory employment protection

rights on a significant group of overseas workers.

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