



# HR Briefing

## May 2008

### Workers Overseas- Legal Implications

As a result of globalisation, increasing numbers of Britons are working overseas. Equally, the skills shortage encountered by many sectors of the UK economy, combined with relatively high UK labour costs, has meant that UK employers are increasingly having to look overseas to find the right staff at the right cost.

This month we consider the potential legal implications for UK employers with overseas employees.

#### A Right to claim Unfair Dismissal in the UK?

Whereas employees working in the UK are clearly protected from unfair dismissal irrespective of the law applicable to their contracts, it has often wrongly been assumed that they would lose their unfair dismissal rights if they worked overseas for an extended period.

#### Lawson v Serco

In 2006, the House of Lords extended UK dismissal rights to Britons working overseas who had not previously been covered. Those who benefited, and can as a result now claim a right to unfair dismissal in the UK include the following: -

- 1) Employees working in Great Britain when they are dismissed;
- 2) Expatriate employees who have been posted abroad by a British employer for the purposes of a business carried on in Britain e.g. a foreign correspondent of a British newspaper or an employee working within what would amount to an extra-territorial enclave e.g. MOD establishment in Germany; and
- 3) Peripatetic employees whose base, being the place where the employee ordinarily works, is that of the UK.

Recent case law has since elaborated on the guidance provided in Lawson in the cases of **Williams v University of Nottingham** and **Hunt v United Airlines Inc.**

In **Williams v University of Nottingham**, Dr Williams who had been employed by Nottingham University as a senior lecturer to work in Malaysia, was unable to bring a claim for unfair dismissal (and disability discrimination) on the basis that the work being carried out was not for the purposes of the employer's business carried on at its establishment in Great Britain.

In the similar case of **Hunt v United Airlines Inc.**, the EAT held that a flight Attendant (working for United Airlines) who had been transferred from her base in Charles de Gaulle in Paris to Heathrow in London (due to expiry of her French working visa), but did not end up working at her London "base" due to

### Key Recommendations

- Employees who work overseas may have a right to claim unfair dismissal in the UK.
- Employers should consider whether any of their employees fall into the categories outlined in the case of Lawson and Serco before dismissing an employee.
- Contractual provisions which state that an employee's base is not in the UK will not protect an employer if in reality this was not the case.

long term absence through sickness, could not claim unfair dismissal in England.

In both cases, the EAT held that the correct approach in determining jurisdiction to bring a claim of unfair dismissal, is to consider **what was happening at the material time, rather than any contractual entitlement or what might have happened had the facts been different.** The EAT added that it was relevant that rather than return to their bases the employees had remained in their current location. In Hunt, she had remained in France despite the fact her transfer had taken place and in Williams, despite being ordered back by his employer, he was still residing in Malaysia at the time of his dismissal.

The reality means that UK employers with overseas offices or expatriate workers should take particular care when reviewing relocation policies. They should also bear in mind that a choice of foreign law will not exclude UK unfair dismissal rights; nor will a contractual provision specifying that an employee is based abroad, detract from the fact that their real base might be the UK.

Wherever a strong UK connection exists, employers should take advice to establish whether expatriate or “roaming” employees fall within the grasp of UK unfair dismissal legislation; and if there is a chance they do, all reasonable steps should be taken to ensure that any dismissals are for a fair reason and carried out in a fair manner.

#### **Other considerations- Posting of Workers Directive**

Under the Posting of Workers Directive, employers have an obligation to ensure that any workers posted to another EU country for a limited period to carry out the employer’s work, are provided with the same minimum employment rights being enjoyed by the permanent workers employed in that EU country, even if such terms are better than those provided in the employee’s contract.

Under the directive, a posted worker will be entitled to the same terms same terms and conditions relating to maximum working hours and minimum rest breaks, minimum paid holidays, minimum rates of pay (including overtime rates), health, safety and hygiene, protective measures in the terms and conditions of employment of children, young people and pregnant women (or those who have recently given birth and equal treatment between men and women and other non-discriminatory provisions which apply to the permanent workers of that country.

Employers should therefore ensure that any relocation policies address the new terms and conditions which will affect the posted employee.

- Employers should review relocation policies and consider whether the employee has a strong connection with the UK.
- Employers should ensure that, where there is a possibility that an employee is subject to UK employment protection legislation, the dismissal is fair.
- Employees posted to another member state are entitled to enjoy the same minimum terms and conditions enjoyed by the permanent workers of that country.
- Employers must ensure that an employee’s hourly rate or holiday entitlement for example is increased accordingly to comply with domestic legislation.

If you have any queries on any of the above please contact **Alison Loveday** at [alisonl@berg.co.uk](mailto:alisonl@berg.co.uk) to discuss further issues. Alternatively you contact **Alison** on **0161 833 9211**. If you do not wish to receive further mailings please email [alisonl@berg.co.uk](mailto:alisonl@berg.co.uk) with the words “unsubscribe” in the heading.

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