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INTERNATIONAL SECONDMENTS AND UK EMPLOYMENT LAW

EMPLOYMENT

Many businesses operate across multiple jurisdictions and expect their employees to spend time throughout their careers in one or more international offices. The business reasons for promoting a mobile international workforce are clear, but consideration of the employment law implications of international postings and secondments is vital if employers are to avoid being unwittingly caught out by local rules.

The very recent case of *Fuller v United Healthcare Services Inc* (UKEAT/0464/13) demonstrates the issues acutely. Mr Fuller is an American citizen, and was employed by an American company and paid in US Dollars. His contract did not expressly state which law would govern the relationship, but it confirmed that all disputes would be dealt with under the rules of the American Arbitration Association. From January 2012 until his dismissal in November 2012, Mr Fuller worked for around half his time in the UK, overseeing the UK and Abu Dhabi businesses. His contract entitled him to a daily allowance for each day spent in the UK, and contained tax equalisation and travel provisions. A flat was provided by the company, and Mr Fuller moved some of his personal effects there. He continued to sit on various US boards and committees, and continued to advise the US company on worldwide markets.

When the company decided to find a permanent local CEO to head the UK business, Mr Fuller's secondment was terminated and, eventually, he was made redundant. The secondment termination and eventual dismissal were carried out while he was in the US. Mr Fuller claimed his dismissal was unfair, and was motivated by his having blown the whistle and/or by his sexuality. He sought to argue that the UK Employment Tribunal had jurisdiction to consider those claims, but he was unsuccessful at first instance and on appeal. The decision of the Employment Appeal Tribunal demonstrates the fact-sensitive nature of these types of cases, and should be carefully studied by those responsible for managing international assignments.

The difficulty in the UK is that neither the Employment Rights Act 1996 nor the Equality Act 2010, the two statutes which provide the vast bulk of employment protection rights, contains a clear statement of their territorial scope. The courts are therefore left with the complex task of determining which sorts of employees are entitled to protection, and which are not. There is a large body of case law in this area, but almost all the key cases deal with the position of UK nationals working overseas, rather than foreign nationals working in the UK. Both situations need careful examination.

UK NATIONALS WORKING OVERSEAS

The main principles come from the 2006 decision of the House of Lords in *Lawson v Serco* [2006] IRLR 289, in which three categories of worker were said to be within the legislative grasp of UK employment law. The first is the most obvious: those employees who ordinarily work in the UK. The second group covers so-called 'peripatetic employees', those who are based in the UK but travel internationally on their employer's behalf. An employee's base will be a matter for the courts to determine, taking into account the individual's home residence, their pay and tax arrangements, the terms of their contract, and how those terms actually operate in practice. The third category covers expatriates, who will only be entitled to bring UK employment protection claims if they can show a close connection to the UK by, for example, being posted overseas as a foreign correspondent for a British newspaper, or by working for the British Army in a British enclave overseas.

The House of Lords left open the possibility that other employees, not in any of those three groups, might also be able to show such a strong connection to the UK that they also ought to be entitled to protection. Defining the borders of that catch-all category has troubled the courts ever since. It now seems clear that an employee must show a sufficiently strong connection to the UK, and also that the connection is stronger than with any other jurisdiction.

Where UK nationals are working within the European Union, the scope of their protection will normally be more extensive, by virtue of the decisions of the Employment Appeal Tribunal in *Bleuse v MBT Transport Ltd* [2008] IRLR 264, and of the Court of Appeal in *Duncombe and others v Secretary of State for Children, Schools and Families* [2010] IRLR 331. Those cases make clear that the UK courts should seek to allow employees to pursue any rights deriving from EU Directives, such as working time restrictions and anti-discrimination provisions, so far as this is achievable.

FOREIGN NATIONALS WORKING IN THE UK

Most foreign nationals working in the UK will be within the first category set out in the Lawson decision, because they ordinarily work here. That basic premise is, however, just the starting point, and UK courts and tribunals must undertake a careful fact-finding assessment of all the evidence before concluding that Parliament must have intended a particular individual employee to have been entitled to protection from UK employment law.

In Mr Fuller's case, the Employment Tribunal and Employment Appeal Tribunal found the connection with the US was paramount, and that the link to the UK and to British employment law was insufficient for him to pursue a claim here. The EAT confirmed that all Mr Fuller's claims - for unfair dismissal, automatically unfair dismissal under the whistleblowing legislation, and sexual orientation discrimination - require the same strong connection with the UK, although it is worth noting that the position as far as the discrimination claim might have been different is Mr Fuller had been an EU national because of the *Bleuse* and *Duncombe* judgments.

IMPACT FOR INTERNATIONAL BUSINESSES

While the law in this area remains extremely complex, what is clear is that HR professional and international assignment managers should ensure that they carefully scrutinise the practical arrangements for employees seconded from or into the UK. The practical day-to-day management of those employees needs to be considered, as does the underlying contractual documentation. Each case will depend on its own particular facts, and will inevitably involve balancing a number of factors, even well-drafted international assignment policies will need to be reviewed against each individual employee's circumstances. Employees will typically be concerned mainly with their pay and benefits, and protection of their tax position, but HR and line managers should not lose sight of the need to ensure they understand if, and to what extent, UK employment rights are likely to be created by any arrangement.

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