
When Can Employees Based Overseas Claim Unfair Dismissal in the United Kingdom?

2006-01-27

For well over two years, the British courts have been grappling with the issue of when it is permissible for employees whose employment is terminated while working overseas to make a claim for unfair dismissal in Great Britain. The old rule, which excluded employees from suing for unfair dismissal if they were ordinarily working outside Great Britain, has long been abandoned. However, the courts could not accept a situation in which any employee, of any employer, working anywhere in the world, could sue for unfair dismissal. After much to and fro, the matter has now largely been resolved by the House of Lords, the United Kingdom's highest court (see *Serco Limited v. Lawson* (and related cases) (2006) UKHL 3). Employers who assume that overseas employees can never sue in Great Britain should think again.

In most cases, the starting point is to determine whether the employment in question is in Great Britain. The location of the employment is determined not so much by looking at where employees may be required to work under the terms of their employment contracts, but rather by ascertaining whether employees, in practice, are working in Great Britain at the time of dismissal. Clearly, employees who just happened to be working in Great Britain for a casual visit, but whose employment was really based overseas, would not qualify. If it is determined that the employment is in Great Britain, then employees can sue for unfair dismissal—if they have completed the requisite period of qualifying service.

While the above reasoning will suffice in many cases, the House of Lords recognised that it will not cover all situations. The House was particularly concerned about "peripatetic employees," such as management consultants, salesmen and airline pilots, who may carry out their duties in several countries. Here, the court considered that the employees' "base" in most circumstances would constitute their place of employment. The base is normally determined by where employees ordinarily work, even if they spend a considerable amount of time overseas. If the base is in Great Britain, the employee would enjoy unfair dismissal rights. Therefore, those rights depend not on nationality, the law of the contract, or whether the employer is a UK or overseas company; the test is determined by where the employee is based.

Finally, the court considered the case of "expatriate employees," and, in particular, employees who

are posted overseas by an employer in Great Britain. While the court recognised that it would be unusual for an employee who works and is based abroad to be able to sue for unfair dismissal in the United Kingdom, it acknowledged that there could be exceptions. The fact that the employer is based in Great Britain is not sufficient to provide the employee with unfair dismissal protection. However, if the employee was posted overseas by a British employer for the purposes of a business carried on in Great Britain, then that would probably suffice. The court cited the example of an overseas representative of a British newspaper. In our view, however, the same circumstances could equally apply to an overseas sales representative employed by a British business to negotiate new contracts or develop its operations in the United States or elsewhere. Another example given by the court was an expatriate employee within what amounts to an "extra-territorial British enclave" in a foreign country. The court accepted, however, that in the case of expatriate employees, there still needed to be a strong connection with Great Britain and British employment law.

In light of this case, British employers who have posted employees overseas, or international companies employing peripatetic workers such as salesmen, need to be careful when it comes to terminating their employees overseas. Those employees may enjoy unfair dismissal rights in Great Britain, and if the correct procedures are not applied, the employer may be exposed to claims in the United Kingdom.

We have considerable experience advising in these situations and have crafted settlements and releases that marry local law requirements while meeting the conditions of a valid UK compromise agreement.

For more information on this or other UK or EU labour and employment matters, contact the attorney listed above.