Can an overseas employee bring an Employment Rights Act claim in the Employment Tribunal?

When staff go overseas to work, will they still have employment rights under the Employment Rights Act 1996 in Great Britain and the right to bring claims in an Employment Tribunal?

Following the recent decision of the Employment Appeal Tribunal in Lodge v Dignity & Choice in Dying & Anor, employees who relocate abroad but continue to carry out work for an employer doing business in Great Britain may be able to bring claims in the Employment Tribunals in England and Wales.

Mrs Lodge (an Australian national) was employed as Finance Manager by Dignity & Choice in Dying, a not-for-profit organisation, from 27 February 2008 at its office on Oxford Street, London. Mrs Lodge’s employment contract contained a governing law clause specifying the law of England and Wales and the jurisdiction of the English courts.

In December 2008, Mrs Lodge returned to Australia due to her mother’s illness. However, Mrs Lodge retained her position and worked remotely via a virtual private network (“VPN”) set-up on her computer.

In October 2009, Mrs Lodge became jointly employed as Head of Finance by both Dignity & Choice in Dying, and a charity called Compassion in Dying and continued working from Australia until her resignation on 28 June 2013.

The Employment Judge recorded that the move occurred at Mrs Lodge’s instigation; on moving, Mrs Lodge took up Australian residence rather than remain a foreign resident, allowing her to benefit from lower tax; and she did not pay tax or national insurance in the United Kingdom.

Mrs Lodge sought to bring a claim for unfair dismissal and detrimental treatment for having made a protected disclosure (i.e. whistleblowing). However, Dignity & Choice in Dying and Compassion in Dying applied for the

Key facts:

- Employees working abroad but for a business based in Great Britain are likely to be able to bring Employment Rights Act claims in Employment Tribunals in England and Wales.
- This would be in addition to any claims which may be brought under applicable local laws.
hearing of preliminary issues, including whether the Tribunal had jurisdiction to hear Mrs Lodge’s Employment Rights Act claims.

**Employment Tribunal**

In the original Employment Tribunal hearing, Employment Judge Glennie decided that the Employment Tribunal did *not* have jurisdiction. The Tribunal considered Lord Hoffmann’s categorisation in the House of Lords case, *Lawson v Serco* [2006] IRLR, detailing examples of those employees who may be able to bring a claim in the Employment Tribunal; such categories including “the standard case: working in Great Britain”, “peripatetic employees” and “expatriate employees”. Employment Judge Glennie considered Lord Hoffmann’s category of “expatriate employee” and held that Mrs Lodge fell outside this as Mrs Lodge was not “posted” to work in Australia, but *chose herself* to return to Australia.

However, Employment Judge Glennie considered that despite the *Lawson v Serco* categories, “an especially strong connection with Great Britain and British employment law” (as per Lord Hope in *Ravat v Halliburton Manufacturing and Services Ltd* [2012] IRLR 315) would be necessary. Although Mrs Lodge’s employer and its activities are based in Great Britain and despite the governing law and jurisdiction clause, Employment Judge Glennie stated as follows:

“I have come to the conclusion that Parliament cannot reasonably be taken to have intended that an employee who is an Australian citizen, who asked to be allowed to work in Australia..., who relocated herself and her family to Australia, and who submitted herself to the Australian tax and pension regimes...should nonetheless be able to bring a complaint of unfair dismissal or detriment in relation to whistleblowing before the Tribunals in England and Wales.”

The appeal resulted from this decision of Employment Judge Glennie in the Employment Tribunal hearing of the preliminary issue.

**Employment Appeal Tribunal**

On considering Mrs Lodge’s appeal, His Honour Judge Peter Clark considered recent case law, including both *Lawson v Serco*, as well as the earlier case of *Financial Times Ltd v Bishop* [2003] All ER (D) 359.

“...this Claimant did not lose her right to bring her Employment Rights Act claims in the Employment Tribunal because, instead of working as a physical employee in the Oxford Street office, she continued to do so as a virtual employee from Australia.”
Recognising that Mrs Lodge did not fall “foursquare” within Lord Hoffmann’s “posted employee” category, His Honour Judge Peter Clark stated that “the examples there given [in Lawson v Serco] are just that”, and that Mrs Lodge was a “third sub-category” of “expatriate employee”. Further, “all of the work done by [Mrs Lodge] from...Melbourne was for the benefit of the Respondent’s London operation.”

His Honour Judge Peter Clark also thought it notable that Mrs Lodge could not bring her claim in the equivalent of an employment tribunal in Australia (the Fair Work Commission) and furthermore, Mrs Lodge had already had a grievance and associated appeal heard in London. In fact, it was following this unsuccessful appeal that Mrs Lodge was threatened with disciplinary action resulting in her resignation, and claim for unfair dismissal.

Summary

Employers based in Great Britain will need to be alive to the fact that employees working abroad (even on a permanent basis) are likely to retain employment rights under the Employment Rights Act and be able to bring claims in an Employment Tribunal in England or Wales where their work is in furtherance of the business operation in Great Britain.

This could mean that employers find themselves liable both in respect of employment rights in Great Britain and also in respect of any local laws that may apply.

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