

# Can overseas employees still claim unfair dismissal?



CLIENT ALERT

Sending employees to work abroad raises many legal issues – not least the question of whether these individuals retain the right to claim unfair dismissal in the UK. This is rarely straightforward, since the employee or the employment relationship may be subject to different legal jurisdictions at different times.

## Employee categories

In two recent cases, the UK courts considered the circumstances in which an employee working overseas can bring a claim for unfair dismissal in Great Britain. In both cases the courts referred to principles laid down by the House of Lords in *Lawson v. Serco* (2006 IRLR 289), which divide overseas employees into the following categories:

- In the ‘standard case’, an employee who ordinarily works in Great Britain can claim unfair dismissal if he was working in this country at the time of his dismissal.
- A ‘peripatetic’ employee, who goes from place to place, can only claim unfair dismissal in Britain if he is based in this country. The decisive factor in determining the base will be where the employee has his headquarters or where his travels begin and end.
- An ‘expatriate’ employee, who both works and is based abroad, can bring an unfair dismissal claim in Great Britain only in exceptional circumstances. Expatriates might be able to bring such claims if they work in an extra-territorial enclave, were posted abroad for the purposes of a business carried out in Britain, or have “equally strong” connections with Britain.

## Lawson’s categories applied

In the YKK case (2010 IRLR 563), a British employee sent to work in Germany was told that his role there was “to cease”. He was repatriated to Britain on garden leave and then dismissed.

*‘The territorial scope of discrimination legislation in the UK is not the same as for unfair dismissal. The Equality Act 2010’s explanatory notes state that “as far as territorial application is concerned ... and following the precedent of the Employment Rights Act 1996, the [Equality] Act leaves it up to tribunals to determine whether this law applies’*



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The employment tribunal upheld his unfair dismissal claim, but the EAT ruled that where an employee was not working at the time of dismissal, as in this claimant's case, the tribunal needed to identify the Lawson category into which he fell. It would then be helpful to consider why the employee was absent from work; where he would have been working at dismissal had he not been absent; where the contract was operated from, and whether the employee had unfair dismissal protection when he became absent. The EAT remitted the case to the ET to determine the employee's claim on the basis of these factors.

However, the recent Scottish case of *Ravat v. Halliburton Manufacturing & Services Ltd*, (Ravat-2010 CSIH 52), has qualified the Lawson principles somewhat. Ravat was employed by a British company to work in the UK. After 13 years' employment, he was transferred to Libya to work on a rotational basis for a group company incorporated in Germany. This involved working for 28 days in Libya, followed by 28 days 'leave' in the UK.

Most aspects of his employment, including the redundancy procedure that resulted in his dismissal, were dealt with by the British company in Aberdeen. Yet in overturning the tribunal's finding that Ravat could claim unfair dismissal in Scotland, the EAT found that he "plainly" fell within the expatriate category but did not qualify for protection because his work furthered the interests of the German, and not the British company.

## Court ruling

Ravat appealed and the two majority judges of the Scottish equivalent of the Court of Appeal ruled that he did have protection, although they each gave different reasons. The first held that employees needed to demonstrate "strong connections" with Britain, rather than to show that they fell into one of the Lawson categories. The second judge held that Lawson set out "three definitive categories of employees, into which every person is capable of being squeezed" and that Ravat was "more peripatetic than expatriate".

However, this is a Scottish case, which may not be followed by the English courts. Employers should therefore consider the Lawson principles before dismissing any employees they have sent abroad.

## Discrimination: what this means to you

The territorial scope of discrimination legislation in the UK is not the same as for unfair dismissal. However, the Equality Act 2010's explanatory notes state that "as far as territorial application is concerned ... and following the precedent of the Employment Rights Act 1996, the [Equality] Act leaves it up to tribunals to determine whether this law applies, depending for example on the connection between the employment relationship and Great Britain". Employers need to be very careful in making assumptions about differences here. One possibility is that tribunals will, under the Equality Act, simply apply the Lawson principles to discrimination claims. However, until a test case comes before the courts, this is far from certain.

## Preparation points

In order to prepare the company for such situations, you may find it useful to consider some of the following points:

- Try to determine the Lawson category of any employee you send overseas.
- If you wish to avoid liability in Great Britain, think about weakening any connections to the country - for example, by transferring the employment contract to the overseas company or paying the employee in foreign currency.
- Before dismissing an overseas employee, consider whether they may be able to claim unfair dismissal in Britain – as well as what rights they may have under the overseas jurisdiction.

This article was written by Barry Mordsley, Consultant and James Davies, Senior Associate; and was first featured in People Management Magazine on 2 September 2010.

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