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European Employment Law ALERT

No Good Deed Goes Unpunished: UK Employment Law Applies Where Employee Works Overseas At Their Own Request

By Ming Henderson and Tessa Cranfield

In the recent case of *Lodge v Dignity & Choice in Dying* the UK Employment Appeal Tribunal (EAT) has extended UK rights to an employee who worked entirely outside the UK, through her own choice. The employee was an Australian national, who moved back to Australia for family reasons, using remote access technology (VPN). Although it did not have Australian operations, her British employer let her go ahead with the arrangement on a permanent "home working" basis, without changing her employment contract or job title. When relations soured, she raised a grievance and then resigned. The EAT held she was protected against unfair dismissal and whistleblowing detriment under UK law.

When do overseas employees enjoy UK rights?

As we have explained in previous alerts, UK case law has evolved to recognise certain categories of employees who work entirely overseas, but still have a "sufficiently strong" connection with the UK to be protected under English law. It is clear that this includes expatriate employees posted abroad by British employers, where they are working for the benefit of the UK business rather than local operations. However, previous litigation has always involved postings instigated by the employer. The question in this case was whether different rules apply where the overseas work arrangement is at the employee's own request, and does not benefit her employer.

The employee in this case was an Australian resident for tax and pension purposes and returned to the UK for only two weeks each year to work and for the occasional meetings. Most of her service with the employer was spent working remotely, in Australia. However, the EAT overturned the decision of the Employment Tribunal and held that her work was most closely linked to the UK. The key factor for the EAT was that all of the work carried out by the employee in Australia was for the exclusive benefit of the employer's London operation. Her location and whether she had asked to be relocated were irrelevant.

Key Takeaways

This case gives pause for thought when agreeing flexible and remote working arrangements. Technological advancements in the workplace has meant that a growing numbers of employees working for UK employers can and do work remotely in other countries. Employers should assume UK rights will still apply unless the employee will in fact become part of a viable local operation. Employees may be able to select the most favourable jurisdiction, or potentially a combination of both.

Employers should consider whether the *"strong connection with Great Britain and British Employment law"*, which was a feature in *Lodge*, can be severed.

The EAT's decision was made based on a wider backdrop of a UK connection - including the fact her contract was subject to UK law as it was never amended when she moved to Australia and a grievance the employee raised was handled under the employer's London procedures. It seems the decision would always have gone against the employer given the employee's work had no local link and was entirely for the benefit of the UK operation, but other cases have been more closely balanced on the facts, and these type of details can be key. When setting up overseas working arrangements, employers will want to consider whether to move the employee to local terms or integrate them into existing local operations, as well as looking at their expatriate benefits arrangements and how often they return to the UK, which have tipped the balance in previous cases (click here to read alert).

Aside from litigation and termination costs, remote working can also cause practical issues for any decision impacting the workforce. A separate, and potentially costly issue for an employer, is whether local tax and social security are triggered.

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