



European Employment Law ALERT

Expatriate Workers Denied UK Employment Protection

Recent case-law on the scope of UK unfair dismissal and discrimination rights

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In two recent decisions, the Employment Appeal Tribunal in the case of *Fuller v United Healthcare Services* and the Court of Appeal in *CreditSights v Dhunna*, employees with connections to the UK have been denied protection under UK unfair dismissal and discrimination law. Although the decisions ultimately went in the employers' favour, both went to the appeal courts - showing how finely balanced these cases can be.

Background - UK rights

Overseas employees will benefit from UK rights where they are ordinarily working in the UK at the time their employment terminates. This includes an overseas national seconded on a full-time basis to the UK, potentially even on a short-term assignment (*Pervez v Macquarie*). It also includes a peripatetic employee, such as an airline pilot, based in the UK. Where an employee is an "expatriate" who is not working in the UK at the time of termination, they should however only benefit from UK rights in exceptional cases.

US employee assigned to the UK - *Fuller v United Healthcare Services*

The case concerned a US citizen who worked for a US company, out of the US. The employee agreed that as an add-on to his previous role, he would take on responsibility for the UK and Middle Eastern business. This was agreed as a 2-year term for which he was provided with accommodation in the UK. The assignment was ended and the employee was terminated after he returned to the US.

Both the Employment Tribunal and, on appeal, Employment Appeal Tribunal rejected his claims for unfair dismissal, whistleblower and sexual orientation discrimination protection on the basis there was an insufficiently strong connection with the UK. The following factors were key:

- The UK assignment had ended and he had returned to the US at the time his employment terminated.
- There was no true break in his work connection with the US. The employee remained with his US employer on the same contract and key pay arrangements. Certain of his US work responsibilities also continued.
- The contractual documentation stated that the employee would be based in the US and would be required to spend time in other places including the UK and UAE, and the practical arrangements were consistent with that.

- The employee's strongest personal connection remained with the US, where he maintained his home and his partner continued to live. He was paid in US Dollars and his partner was provided with paid flights from the US to the UK to visit him.

Helpfully, the Employment Appeal Tribunal applied the same legal test for all the employee's claims. This means that claims under the unfair dismissal, whistleblowing and discrimination regimes all require the same strong connection with the UK.

UK national working outside the UK - *CreditSights Ltd v Dhunna*

In this case the employee worked as a salesperson and was initially based in London. He then relocated to its Dubai branch. There were later discussions as to his relocating to Singapore. Instead, the employee was terminated whilst in Dubai.

At the first hearing, the UK Employment Tribunal did not accept that the employee had sufficient connection with the UK to establish jurisdiction. The fact that he still had a UK employer, employment contract and remained on the UK payroll and administration (but not UK benefits) was not sufficient to give him UK rights. The fact the employee received support with his work from the UK was also judged to be irrelevant, given the same support was also available to staff of the employer's other overseas operations and he was not line-managed out of the UK. He had relocated to Dubai with no job to return to in the UK, and was working for the purposes of the Asian business, for an international company headquartered in New York.

On appeal by the employee, the Employment Appeal Tribunal overturned the Employment Tribunal's decision, on the basis it should have compared the relative strengths of the employee's connection with the UK and Dubai and the strength of employment law protection in each country. Appealed again by the employer, the Court of Appeal however, entirely disagreed: there should not be a comparison of connections between different countries, but simply consideration of whether the employee has a "much stronger connection" with the UK than another country. The Court also made clear that it is irrelevant that the employee may not be legally protected in the other countries where he or she has connections.

On this basis, he was not entitled to protection under UK law. He was not working in the UK at the time his employment terminated, and his working arrangements did not bring him into the exceptional category of expatriate workers who still maintain a sufficiently strong connection with the UK.

Top tips for employers

Sophisticated international employees can be expected to try to bring themselves within the most favourable legal regime. We recommend the following "top tips" to avoid inadvertently triggering UK employment rights:

- **Planning.** At the assignment planning stage, focus on the purpose and length of the assignment. Is the employee still based in their "home" location and will they have a job to return to, or is this a permanent change with no right of return? Will they still be managed out of their "home" country, with pay and career decisions taken from there?
- **Documentation.** The assignment documentation should make clear whether the underlying employment contract still applies, and state the governing law of the employment contract or assignment. Selecting an England and Wales governing law clause can make it easier for an employee to claim UK and European rights, although there still needs to be sufficient connection to the UK in practice.
- **Pay and benefits.** If the employment base is still regarded as the "home" location, the employee's pay and benefits plans should be consistent with that, and wholesale relocation avoided.
- **Termination.** Careful thought should be given to the timing and location of termination. The assignment should be terminated before any termination of employment: it can be helpful for termination to take place outside the UK, where this is consistent with the employee being based in that other country.

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