ALL ABROAD

Introduction

We have prepared this note as a result of two very recent cases. These have emphasised that English employers face claims by employees working outside England, and that the territorial reach of English employment law is greater than previously understood. The one previous case which had raised this point had generally been felt to be exceptional, and not indicative of a general approach. It now appears that the earlier case is the start of a new approach. However, we believe that there are a number of practical steps which employers can take to analyse the risk and to reduce the scope for unexpected liabilities.

Broadly speaking, in order to sue an employer in England, the employer needs to be based in England or to carry out business in England (even if its registered office is outside England). In order to be sued under English law, it is necessary to demonstrate that the relevant legal obligation covers the particular employee. It is the second of these requirements which has been expanded by the recent cases.

Thirdly, it is sometimes relevant to work out the law of the contract of employment itself. This can affect the interpretation and extent of the obligations accepted by the parties in the contract. If the parties expressly specify the law of a particular country in the contract, then this will be treated by the court as applying to the contract. If no law is specified by the parties, the court will usually look to the country where the employee habitually works. If the individual works in a country in the EU, the mandatory rules of that country's laws will always apply to the individual, regardless of the choice of law specified by the parties in the contract. So, for example, an employee originally from Germany, but now working in England, is entitled to protection from discrimination under English statutes, regardless of the choice of law the parties put into the contract.

Background

It had appeared that the Courts were fairly clear on the rules to determine whether an English employee was protected by English employment legislation. For most employment rights (excluding discrimination) the employee has to be employed to work in England. There are very limited exceptions for individuals who are peripatetic but based out of England, or for individuals who are expatriates but working abroad for the purpose of an English business, e.g. a journalist sent out by a London newspaper to report back to the newspaper on events in, say, New York. The rules are slightly more favourable for the employee under discrimination legislation. The employee can still be covered, even if he or she did not do any work at all in England, if the employee was ordinarily resident in England at any point when the contract was created or during the lifetime of the contract, and was working for the purposes of the English business. There are separate and special rules for employees posted from one country to another.

The new approach

The two recent cases (*Duncombe v Secretary of State* and *MoD v Wallis and Grocott*) demonstrate neatly the legal risks for employers under the new wider approach. Mr Duncombe was a teacher working in Germany for nine years. The school at which he worked had a rule that required all employees to leave after a maximum of nine years' service. His contract stated that it was governed by English law. Mr Duncombe was able to bring a claim in England for breach of the English Fixed Term Regulations and for unfair dismissal. Mrs Wallis was employed in Belgium, working for NATO. Her contract contained a clause stating that it was covered by English law. She was able to bring a claim for unfair dismissal and sex discrimination in an English Tribunal.

The reasoning in the two recent decisions is not a model of clarity. In essence, the Courts have decided that, for purely English employment obligations, the old approach remains correct. However, if the employee is seeking to rely on an employment right deriving from a European directive or article, different rules should apply. If the law of the contract is English, this imports English statutory employment law into the relationship. (So Mr Duncombe was protected by the Fixed Term Regulations by virtue of the express choice of law clause in his contract and so he could complain about the non-renewal of his fixed term contract.) If English statutory rights apply, it is wrong to exclude the employee from protection merely because he or she worked in the European Union but outside England. So the old test has to be disapplied for EU-derived rights, and the court must agree to hear the case.

So now there is one set of rules for enforcement of a purely national employment obligation and a more relaxed set of rules for enforcement of an employment obligation deriving from the EU. The trouble is that most important employment obligations (apart from unfair dismissal itself) derive from European obligations. These include discrimination legislation, working time rules and most of the Transfer Regulations.

Identifying the risks

The risks for employers are self-evident. Foreign management, unfamiliar with English employment law, may well act in a way which flouts English employment law obligations. As such, the employee has a clear cut claim for damages. It is likely that the extension of territorial jurisdiction for EU-derived claims will rapidly become well-known to claimants' lawyers.

It is also likely that there will be further cases to clarify the position. *Duncombe* is to be heard by the Supreme Court in January 2011. There may need to be a referral to the European Court of Justice. However, in the meantime, we recommend that employers review their risk profile and take action now to avoiding incurring further difficulties.

Existing employees working outside England

1. If the employee's contract expressly states English law applies, and the employer carries out business in England, and the employee is working in the EU, this is a high risk case. This employee can claim for breach of English employment obligations derived from the EU. Unless the employer wants to recontract such employees or transfer the employee to a company which does not carry on business in England, then the employer needs to ensure that any treatment of that employee is in line with the way the employee would have been treated if he or she was working in England. It may be easier to persuade the employee to accept a new employer, but with the same terms of employment, as opposed to changing the terms of employment to remove the English choice of law clause.

2. If the employee's contract expressly states English law applies, and the employer carries out business in England but the employee is working outside the EU, then our reading of the cases indicates that this is a lower risk (unless the employee qualifies under the old test, i.e. the employee is working on behalf of the English business as an expatriate employee or is a peripatetic employee but based in England). At the moment, the cases have dealt with individuals working in the EU and the reasoning is consistent with limiting the extension to employees in the EU. However, this may change in future cases, and it would clearly have a significant impact on recruitment of staff outside England on English law contracts. For now, however, we would not recommend rushing to recontract, given that the law does not seem to apply to these employees and recontracting may simply destabilise the employment relationship.

3. If the employer carries out business in England and the employee is working in the EU, but the contract is silent as to the law of the contract, the employer should review the rules relating to identifying the proper law of the contract itself. Generally this will be where the employee habitually works, but if this is unclear or there are competing countries which might be treated by a court as being most closely associated with the contract, then it may be essential to analyse whether it is better to take no steps, and hope that no dispute arises, or whether to fix the uncertainty by specifying a choice of law in the contract, identifying one which is acceptable to the employee, but is sufficiently favourable to the employer.

New employees being recruited to work outside England

1. Consider whether it is better to include an English choice of law clause or not in the contract. If no choice of law is included this will leave it unclear as to which law applies, and there may be a dispute in the future about which law is the law of the contract. An employee may well take advice and shop around for a country with a link to the performance of the contract, with a higher level of protection for the employees, and then try and establish that country's law as the law of the contract. Specifying a choice of law clause may cut down the opportunities to do this. If a choice of law clause is to be specified then the employer should check whether the local legal system is preferable to English law. It has been suggested that, possibly, one could have an English law clause but expressly exclude English statutory law, but we feel that this is very risky, and a court might well decide that it is not possible to pick and choose which bits of English law are applied to the contract.

2. Consider whether an English company should be the employer. If the employer is not located in England nor carries out business in England, then no questions of English jurisdiction arise. It may be relatively easy to persuade the employee to accept a new employer but with the same terms of employment, as opposed to changing the terms of employment to remove the English choice of law clause.

Conclusions

There is no doubt that this issue is a hot topic. Given the ability to reduce risk significantly for EU staff, we would strongly recommend employers review their contracts of employment between employers carrying on business in England and employees working in the EU outside England. For new contracts it may be necessary to reword the template terms or change the employer of offshore employees.

Uncertainty will be increased when the Equality Act 2010 comes into force, starting in October this year. The existing statutory rules or claims under discrimination legislation will be removed and nothing will be said explicitly in the Act about territorial jurisdiction. It is to be left to the courts to determine the appropriate test. Clearly, this issue is going to run for some time yet.

If you have any questions about any of the issues raised in this legal update, please contact your usual Employment contact:

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September 2010