What a carry on...

In our "All Abroad" update of September 2010, we identified a trend by the courts in England to extend the territorial reach of English employment law when the employment right derives from a European Directive or Article.

In order to enforce employment rights in England, an employee needs to demonstrate that two tests are met. First, the employee must show that the legislation covers his or her particular situation. The All Aboard article explained that the courts are willing to apply English statutory rights to individuals living and working abroad in some circumstances. Secondly, the individual must demonstrate that the employer carries on business in the United Kingdom to give the English employment courts jurisdiction to deal with the matter under the Employment Tribunals (Constitution of Rules of Procedure) Regulations 2004 (the "Regulations"). Having been persuaded to take a very expansive view of the scope of employment legislation, the courts are now being asked to take a similarly expansive view of the second test.

The case of *Pervez v Macquarie Bank Ltd (London Branch)* marks a further development governing companies outside Europe as a Hong Kong employee seconded to an English third party has been allowed to enforce English employment rights against his Hong Kong employer.

In this case the Hong Kong employer had seconded one of its Hong Kong employees to London to a company within the employer's group of companies for an indefinite period of time (likely to be between 1 to 5 years). The employee's contract was expressly governed by Hong Kong law and the secondment letter contained a proviso requiring the employee to resign when the secondment was ended by the employer or "host" company. The employment was terminated by the employer and the employee brought proceedings in England for unfair dismissal and alleged discrimination. The Employment Tribunal said it had no jurisdiction to hear a claim against an employer based in Hong Kong. The Employment Appeal Tribunal ("EAT") disagreed. It found that this employee had discrimination rights he could enforce as he was wholly/partly working in England under the relevant legislation. He also had claims under the Employment Rights Act 1996 as he was working in England on a settled and indefinite basis so satisfying the "*working in England*" test under that Act.

Carrying on business

So the employee had the rights but could he enforce them against his employer in Hong Kong? Although it is possible to enforce some discrimination claims against third parties, if the alleged act of discrimination was committed by the employer rather than the third party, then the claim must be brought against the employer too. Further an unfair dismissal claim is only enforceable against the employer. Therefore in this case the employee needed the employer to be a respondent to the litigation. In order for the employer to be joined into the litigation, the EAT had to find that the employer "*carried on business in England and Wales*" under the Regulations. The EAT found that it did and in doing so adopted a "*strained*" interpretation of the "*carrying on business*" in the Regulations. The EAT felt this strained interpretation was necessary as it could not have been the intention of Parliament to provide a right but deny the employee a remedy.

It was accepted in this case that the employer had no place of business in England, nor was the secondment of employees part of its ordinary business, both previous indicators for the test of "*carrying on business*" under the Regulations.

What does this mean?

The case has great significant implications for foreign employers who second their employees to a third party in London. It is clearly policy driven and the courts are straining to protect employee rights given the increased mobility of individuals in global markets. The approach

adopted by the EAT significantly lowers the threshold for bringing claims in the UK. Doubtless future claims will argue that if the employee was present in the UK, so that he or she is covered by the relevant employment legislation, then the employer must be "*carrying on business in the UK*", because the employee was present in the UK. Therefore, the focus will move to establishing the first part of the two stage test. However, a significant factor in this case was the settled and indefinite nature of the secondment which gave the employee rights under the ERA and was also considered by the EAT to make the secondment "*sufficiently long term*" to allow it to fall under the interpretation of "*carrying on business*" in the Regulations.

Our view is that the second test continues to exist but employers outside the UK should be alive to the ease with which the UK will accept jurisdiction to hear claims against them. We consider that shorter term secondments may be capable of being distinguished from the longer term secondment here.

What should an international employer do?

The implications of this decision are significant. However since it is a policy decision, designed to protect employees, we anticipate that a court will lean towards following this approach. There is no clear way of drafting around this approach.

Our recommendations are to keep secondments as short as feasible. Secondly, "drift" should be avoided, so that the employer does not allow a short term secondment to become a longer one in practice over a period of time, without being aware of the potential circumstances. Thirdly, all employers of secondees to the UK should operate on the basis that English employment rights apply to the individual. This may present challenges, particularly where the seconder is not familiar with UK employment rights. The seconding company will have to rely on the host company to alert it to potential claims, particularly if it is proposing to implement a decision which could give rise to such a claim. Since, in practice, some seconders do not involve host companies in their decision making at an early stage, this may require a change of approach.

Clearly, one question of concern for a seconding employer is, whether the UK tax authorities might now try and rely on this wide approach to claim that for tax purposes a foreign employer is carrying on business in the UK, even if there is merely a longer term secondment of one or more individuals to the UK. However, the policy underlying the employment legislation and tax legislation is very different, and so it is to be hoped that a rather more conventional approach will be adopted by HMRC.

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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