RadcliffesLeBrasseur

November 2003 Employment Update

CORPORATE BULLETIN

Employment tribunals go overseas

Two recent cases discuss whether UK Unfair Dismissal Rules apply to overseas workers.

Question:-

Is an employee who is working overseas and reporting to overseas management able to sue for unfair dismissal in the UK?

Answer: Possibly yes…..

Changes were made to the territorial ambit of employment legislation in 1999 when Section 196 of the Employment Rights Act 1996 (ERA) was repealed. Previously, it had stated that the ERA did not apply to employment during any period when the employee worked "wholly or mainly outside Great Britain". The purpose of this change was to give effect to the EC Directive on posted workers which requires that workers posted from one EC country to another should enjoy employment protection rights wherever they work.

However, two recent decisions in the Employment Appeal Tribunal have muddied the waters.

In the case of *Lawson –v- Serco Limited* the Employment Appeal Tribunal held that Employment Tribunals have jurisdiction to hear unfair dismissal claims from employees based overseas, simply on the grounds that the employer carries on business in the UK. No other test is required to be met.

The result of the *Lawson* case is that a UK company employing staff abroad; or even an overseas company with a UK branch office, would need to have regard to UK notions of fair procedure before dismissing any of its overseas employees with sufficient continuity of service to bring a claim. The fact that those employees might not be UK Nationals or have no connection whatsoever to the UK would not defeat the jurisdiction of the Tribunal.

…..but possibly no

However, in another decision, *Bryant –v- Foreign & Commonwealth Office* the Employment Appeal Tribunal expressed the view that this was only one test, and the Employment Appeal Tribunal limited the scope of protection for employees based overseas. The suggestion in this case was that protection would only be offered where dismissals occur within Great Britain, or which affected employees based in the United Kingdom at the time they were dismissed.

Whilst the Bryant decision is more orthodox, it has left us with two conflicting decisions of the Employment Appeal Tribunal and it is difficult to say which one is better authority.

So what do you do?

Both *Lawson* and *Bryant* have been joined for an appeal to the Court of Appeal and therefore we will soon have clarification on this area. However, what do you do, if in the interim, you have an employee based overseas who may, under the *Lawson* decision, have potential rights in the UK?

Our recommendation is to adopt a fair process in accordance with UK legislation before dismissal, and comply with the other statutory rights that employees may have, for example, maternity rights or a statutory redundancy payment. Further, if it is likely that an employee is likely to assert his/her statutory rights on dismissal, you as employer may wish to rule out the risk of any claims being brought by entering into a binding compromise agreement.

If you have any questions regarding any aspect of this article, then please contact

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Who's watching you?

New Instalment of the Data Protection Code

"Day 36 in the Big Brother House. At 11.06 am only two of the housemates are awake…"

This summer saw another social experiment where 12 contestants had their every movement caught on camera 24 hours a day for as long as they remained in the "Big Brother House". The general public could follow the housemates' activities (should they have had the time and the inclination) on the television and internet.

Whilst these 12 contestants willingly subjected themselves to this exposure, as a result of technological developments in the last 20 years, we are all susceptible to some intrusion into our private lives. Therefore, it is perhaps not surprising that the law has sought to provide individuals with some protection in the context of their employment.

"Day 22, September 2003 in the office of N Parker & Co. At 1.34pm, the accounts clerk is typing an email to her boyfriend…"

Earlier this year the Information Commissioner published the Employment Practices Data Protection Code ("the Code") on monitoring at work. This is the third code to be published containing guidance to assist employers in complying with the Data Protection Act 1998 ("the Act"). Employers will "monitor" employees where they collect information about workers by keeping them under some form of observation. It includes using methods such as CCTV cameras, video and audio equipment, recording telephone calls, automated software for checking emails and monitoring through third parties.

It is recognised that employers need to make some checks on their workers in relation to the quantity and quality of the work they are producing. Employers may also monitor their workers to ensure their employees' safety and that of their property. However the Code seeks to balance these legitimate interests of the employer against the workers' expectation that information about them will be used appropriately. Employers should bear in mind that it will usually be intrusive to monitor their workers and that the workers should be aware of the nature, extent and reasons for any monitoring, unless (exceptionally) covert monitoring is justified. The Code advises employers to carry out an impact assessment to decide whether the proposed monitoring is a proportionate response to the issue it is looking to address. An impact assessment should involve:

- identifying the purpose of the monitoring and the likely benefits;
- identifying any adverse impact of the monitoring, for example, what intrusion will there be into the private lives of workers, whether workers know they are being monitored, what impact there will be on the relationship of mutual trust and confidence;
- considering alternatives to monitoring or to the method of monitoring, for example, could a new system of supervision be established, can the monitoring be limited to the highest areas of risk or to spot-checks or an audit instead of continuous monitoring?;
- considering the obligations arising from monitoring, for example, whether and how workers will be notified and how the information which is collated will be kept and handled; and
- judging if monitoring is justified - essentially weighing up your responses to the above.

Tips for good practice

The partners of N Parker & Co who are monitoring the accounts clerk's emails would be advised to bear in mind the following good practice points.

- Follow the monitoring policy they should have in the firm's staff handbook and which should have been communicated clearly to all their workers.
- Remember that they must be satisfied, and be able to satisfy a court if necessary, that the monitoring can be justified in that the benefit to the firm is greater than the adverse impact on the employee.
- The monitoring should only be undertaken by authorised personnel.

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More problems in giving references?

Post – employment discrimination

Lara Crane considers a recent extension to the application of discrimination laws. In June this year, the House of Lords, in *Relaxion Group plc –v- Rhys Harper* extended the application of discrimination laws so that they apply after, as well as during, employment.

Courts and tribunals in recent years have failed to settle the issue as to whether the Sex Discrimination Act 1975 ("SDA"), the Race Relations Act 1976 ("RRA"), and the Disability Discrimination Act 1995 ("DDA") cover discriminatory acts that occur after employment has terminated. The reason this has caused courts and tribunals difficulty is because of the ambiguity in the wording used in the Acts. Both the SDA and the RRA, one might think, limit the employer's exposure by identifying the protected person with the words, "employed by him" and the DDA with the words "whom he employs".

The issue for the House of Lords in the Relaxion case was whether the wording used in any of the above Acts could extend to discriminatory acts occurring after the contract of employment had been terminated.

This is an extremely important issue when considering the conduct of an employer during an appeal against dismissal, benefits offered to ex-employees post employment, and in relation to references for new jobs.

Although the House of Lords only decided on the outcome of the case by a majority, they were unanimous in their view that the legislation in each Act extends beyond termination of employment.

What are the implications of this decision? It is clear that there is now no longer any distinction between employees and ex-employees as far as discrimination legislation is concerned. This will mean that internal appeals against dismissal are now covered by discrimination legislation. Employers therefore need to ensure that their equal opportunities policy extends to disciplinary appeals. Employers also need to exercise great care when they provide references. They should ensure a consistent policy is operated in respect of all ex-employees. This may mean the employer decides that it will not provide any references, or that only factual references will be given. Whatever decision is taken, employers should ensure that the decision is communicated to all those who are authorised to provide references so as to operate a consistent policy. Finally, if an employer offers any benefit to an employee post-employment, such as life insurance, it should check that it is not accidentally creating discrimination.

Lara Crane
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Who's watching you? continued

- Whilst the Code suggests that a mental evaluation of the impact assessment may suffice, it would be sensible to keep a record of the thought process and motives behind any monitoring in case they are required to justify their monitoring actions before a court or tribunal.
- Covert monitoring should only be undertaken in exceptional circumstances.
- A failure to follow the Code may mean that they are guilty of unlawful processing of data under the Act and could face civil and criminal sanctions.

Kerry Scott-Patel
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Meet the team

Kerry Scott-Patel recently celebrated the end of her second year of post-qualification membership of the team. Robert O'Donovan took the opportunity to ask her a few questions.

R: What attracted you to law and, later, employment law?

K: When deciding on a university course, I liked the feeling that law opened a number of options for my career. I enjoyed presenting an argument or point of view but I admit I was attracted by the idea of taking an English degree with a view to a career in journalism or teaching.

As to the attractions of employment law as a specialisation, a particular attraction at RLB is the range of our clientele. For example, one day I could be working on a substantial corporate transaction, the next advising an individual having difficulties with his or her employer.

R: Is there any legislation which, in your view, has been particularly good for society?

K: A very difficult question to answer and one invariably ends up by being highly subjective. I would therefore pick the National Minimum Wage Act as I have seen it have a very direct and beneficial interest on some groups of low paid workers.

R: Kerry was married on 7 June 2003 (hence the change from Kerry Scott to Kerry Scott-Patel) – do you think marriage has changed your outlook as a lawyer?

K: I don't think there has been any major change. My husband is also a lawyer and is therefore very understanding that, on occasion, client needs come first.

R: You originally joined Radcliffes as a trainee – what made you choose Radcliffes?

K: I had whittled down my choice to a decision between Radcliffes and a large firm with a number of provincial offices. The decision was finally made very much on the basis of the people I met. Radcliffes staff came across as friendly and very down-to-earth. The provincial firm seemed to lack personality.

R: What tip would you give someone getting married and moving house in the same year?

K: No problems in doing both in one year, but doing both and my husband starting a new job all within six weeks, as I did is another matter.

R: What was the proudest moment in your career?

K: I would prefer not to answer this by defining a particular moment, but I am proud that the Employment team at RLB has continued to thrive, particularly following the tragedy of the death of Mike Thomas, our Head of Department, last year.

STOP PRESS

Upper age limits for redundancy and unfair dismissal are lawful at least for the time being. The Employment Appeal Tribunal has finally handed down its judgement in the case of *Secretary of State for Trade and Industry –v- Rutherford and Others* confirming this.

But can upper limits survive age discrimination legislation? To find out (or not?), come to our Seminar on 18 November.

If you require any further information regarding the seminar, please contact Sejal Raja.

Workshop/seminar news

Discrimination, discrimination and more discrimination.

The Employment Department's annual seminar takes place on 18 November 2003.

Sessions will include introductions to religious and age discrimination.

For further details of event please contact **sejal.raja@rlb-law.com**

If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

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