

## Lawson v Serco Limited: Does the UK Tribunal have Jurisdiction?



Ever since 1999, when amending legislation removed the territorial provisions contained in the Employment Rights Act 1996 ('ERA'), there has been uncertainty over the geographical scope of section 94 (1) of the ERA, which gives employees the right to claim unfair dismissal. It was hoped that when the House of Lords delivered its judgement in *Lawson v Serco* the position would become clearer. The waters have certainly become a little less muddled since the decision was issued a few days ago, but they are still by no means crystal clear.

### Background

To better understand the issues at hand, it is necessary to explain how the confusion surrounding the matter of tribunal jurisdiction first arose. In 1971, when the right not to be unfairly dismissed was first introduced, it was accompanied by a provision excluding claims from employees working outside Great Britain. This requirement changed little over time. In 1996, when the ERA came into force, it provided that there was no jurisdiction under the Act where "under the employee's contract of employment, he ordinarily works outside Great Britain". This provision, where it applied, had the effect of excluding the ability to bring claims under the Act including unfair dismissal, notice and redundancy payments.

This provision was removed by the Employment Relations Act 1999 ('ERA 1999'), which amended the ERA. However no substitute provision was inserted, and both employers and employees were left bewildered as to the geographical limitations (if any) of the ERA. A number of conflicting EAT decisions resulted. While it has generally been accepted that some territorial limitations must be implied confusion has reigned over exactly what those limitations might be.

### Court of Appeal

It was hoped that the Court of Appeal decision in *Serco Limited v*

*Lawson* would provide some sort of resolution to the matter (see January 2004 Update). The Court, however, delivered a cautious decision which ventured little beyond the facts of the particular case at hand. The points the Court did make are as follows:

- The employment tribunal rules of procedure do not create jurisdiction.
- The Court rejected the test set out by the EAT in *Jackson v Ghost* that there must be a "substantial connection" with Great Britain for there to be jurisdiction.
- A choice of law clause in the contract of employment will have no effect on tribunal jurisdiction.

The Court laid out a simple test: the ERA applies to "employment in Great Britain" (which includes for this purpose the UK Continental Shelf). In their view, the answer was "straightforward, though it may be difficult to apply in some cases". Those "difficult" cases include employees seconded to work overseas and peripatetic employees (those who travel around from one place to another for work purposes.)

### House of Lords

On 26 January 2006 the House of Lords issued its judgement on three conjoined appeals, including that of Stephen Lawson. Two of the appeals concerned expatriate employees (those who work and are based abroad), which included Lawson; and the third appeal concerned a peripatetic employee, in this case, a pilot.

Although previous cases have focussed on the territorial scope of the ERA as a whole, in this case their Lordships narrowed the focus down to the construction of section 94(1) (the right to claim unfair dismissal). In the leading judgement, Lord Hoffmann concluded that

there is no single test on whether section 94(1) applies. Instead, there are certain 'principles' which must be applied in deciding whether that section applies in a particular case. In summary those principles are as follows:-

### Standard Cases

Firstly, it was stated that the right to claim unfair dismissal (under section 94(1)) will depend upon "whether the employee was working in Great Britain at the time of his dismissal", and that an over-reliance on the contractual position should be avoided. He went on: "The terms of the contract and the prior history of the contractual relationship may be relevant as to whether the employee is really working in Great Britain or whether he is merely on a casual visit but ordinarily the question should simply be whether he is working in Great Britain at the time when he is dismissed".

### Peripatetic Employees

In Lord Hoffman's view, a peripatetic employee will include "airline pilots, international management consultants, salesmen and so on." In determining whether such an employee has the right to claim unfair dismissal, tribunals should ask where the employee is 'based'. If based in Great Britain the employee will be entitled to bring a claim in the UK tribunal regardless of the foreign elements of their employment. Although he gave no definition of 'base' in his judgement, Lord Hoffmann approved the 1978 guidance of Lord Denning in *Todd v British Midland Airways*: "A man's base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas". Lord Hoffmann also emphasised that tribunals should be more concerned with how the contract is in fact being operated at the time of dismissal than with the terms of the original contract.

### Expatriate Employees

Lord Hoffman recognised that the situation of the employee who works and is based abroad is a rather more difficult one.

Although an employee may be British, have an employer based in Great Britain, and/or have been recruited in Great Britain, those factors should not in themselves be enough to take the case out of the general rule that the place of employment is decisive. Something more is required. Accordingly most expatriate employees will not have the right to claim unfair dismissal unless their case is 'exceptional'.

Lord Hoffmann gave two examples of 'exceptional' cases:

- An employee is posted abroad by a British employer for the purposes of a business carried on in Great Britain. He will not be working for a business conducted in a foreign country which belongs to British owners or is a branch of a British business but is required to work as a representative of a business conducted in Great Britain. The illustration Lord Hoffmann gave was a foreign correspondent for a British newspaper.

- An employee of a British employer who works in what can be regarded as a British enclave in a foreign country e.g. an employee working at a British military base in Germany.

Despite acknowledging that there may be other exceptional cases, Lord Hoffmann confessed that he could not think of any but stated that they would have to have equally strong connections with Great Britain and British employment law to fall within the scope of section 94(1).

Serco Limited, a UK company, employed Mr Lawson to work as a security guard on Ascension Island, where Serco had a contract to provide security services to the RAF base. Ascension is a 35 square mile volcanic island in the South Atlantic with no indigenous population, and in practice (in the view of the House of Lords) the base was a British outpost. Although there was a local system of law, the House of Lords ruled that the connection between the employment relationship and Great Britain was overwhelmingly stronger. The Court of Appeal's decision that Mr Lawson had no "employment in Great Britain" was reversed, and his appeal was allowed so that his claim for unfair dismissal can now be heard by the UK tribunal.

### Conclusion

Accordingly even employees who do all their work outside Great Britain may, in appropriate circumstances, have an employment relationship which is so closely connected with Great Britain that they can be entitled to bring an unfair dismissal claim in the UK tribunal.

The refusal of the House of Lords to provide any simple test of jurisdiction means the answer to whether any employee can bring a claim of unfair dismissal will remain a difficult one. Given the significant exposures associated with unfair dismissal claims employers should seek advice before considering the dismissal of any employee whose employment may have a foreign element.

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