

GUIDANCE NOTE

UK EMPLOYMENT PROTECTION FOR WORKERS WHO WORK ABROAD

JULY 2012

Statutory Protection

1. Lawson v Serco holds that the paradigm case is employment in GB but there may be protection where:
 - a) an employee is working here when dismissed (provided not on a fleeting visit);
 - b) although s/he works abroad:
 - i. s/he is peripatetic but based in GB; or
 - ii. s/he was recruited here by a British employer and posted abroad to work or the business in Great Britain (e.g. the FT foreign correspondent); or
 - iii. s/he was recruited here by a British employer and posted abroad to work in an extra territorial British enclave e.g. an embassy or a military base (though apparently not if recruited locally to do so as in Bryant v FCO);
 - iv. her connection with GB is equally strong to (ii) and (iii) above;
2. In each case, the issue is to be determined by the position in practice rather than the terms of the contract of employment.
3. In general the approach of the EAT was to regard the Lawson v Serco examples as fixed categories but now see:
 - a) Wallis v Ministry of Defence CA – claimants protected on the basis that they were employed by the MoD in jobs for which they were only eligible because they were the wives of GB servicemen, terms and conditions British etc., though not posted abroad and not working in a British enclave.
 - b) Duncombe v Secretary of State for Children, Schools and Families (No 2) UKSC – explicit about not torturing the facts into the Lawson v Serco categories; protection for employees working wholly abroad will be exceptional but C in this case protected (though not in any Lawson v Serco category) on the basis that employer = HMG, contracts governed by English law, employed in international enclaves rather than

part of the local community (contrast Bryant), anomalous for him not to be protected given counterpart in England would be.

- c) Ravat v Halliburton Manufacturing and Services Ltd UKSC – Duncombe flexible approach based on substantial connection applied; language of exceptionality only applicable where the employee works wholly abroad; claimant here protected though not in any Lawson v Serco category as his connection with GB was sufficiently strong – lived here, employed by GB company, English terms and conditions, deals with GB HR personnel, paid tax here, commuted from here to work abroad on a 28 day cycle etc.

- 4. This trilogy of cases heralds a more flexible approach. The task of the ET is to consider all of the evidence as to connection of employment relationship to GB system of law and then decide whether Parliament intended that the claimant in question should be in the protected category of employee/worker. ETs take a conservative approach in practice.

Contractual Rights

- 5. The proper law of the contract of employment is to be determined as follows:
 - a) The law chosen by the parties. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law.
 - b) To the extent that the law applicable to the individual employment contract has not been chosen by the parties the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
 - c) Where the law applicable cannot be determined pursuant to paragraph b, the contract shall be governed by the law of the country where the place of business through which employee was engaged is situated.
 - d) Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs b or c, the law of that other country shall apply.
- 6. In the ET:
 - a) For statutory claims it is highly likely that if the C has the relevant rights the ET will accept jurisdiction following Pervez v Macquarie Bank Ltd (the fact that the

foreign employer employed someone to work here meant that it resided or carried on business here even though it had no other presence here).

b) For breach of contract claims, the approach is as per a contract claim in the courts.

7. In the Courts, jurisdiction depends on the ability to serve the Defendant within the jurisdiction or permission to serve out of the jurisdiction, both of which are governed by the Judgments Regulation (2001/44) read with CPR Part 6.

The comments in this guidance note are of a general nature only. Full advice should be sought on any specific problems or issues

ASHTON BOND GIGG
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