A Timely Analysis of Legal Developments

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The territorial reach of U.K. employment legislation has come under scrutiny recently. Two judgments handed down from the Court of Appeal and the Employment Appeal Tribunal (EAT) have broadly interpreted the territorial reach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the "Fixed Term Regulations"), the Race Relations Act 1976 (RRA) and the Employment Equality (Age Regulations) 2006 (the "Age Regulations").

English Courts Broadly Interpret the Territorial Reach of U.K. Employment Legislation

By John C. Kloosterman and Anita S. Vadgama

In the past two months, the territorial reach of U.K. employment legislation has come under scrutiny. Two judgments handed down from the Court of Appeal and the Employment Appeal Tribunal (EAT) have broadly interpreted the territorial reach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the "Fixed Term Regulations"), the Race Relations Act 1976 (RRA) and the Employment Equality (Age Regulations) 2006 (the "Age Regulations"). In the first case, the Court of Appeal held that the Fixed Term Regulations could be enforced by a U.K. national who worked overseas. More worryingly in the second case, the EAT held that the RRA and the Age Regulations could be enforced by foreign nationals who work partly in England. These two judgments potentially will have significant impact on U.S. companies operating in the U.K.

Fixed Term Regulations Applied to Unfair Dismissal Claim by U.K. National Working in Germany

In *Duncombe and Ors v Secretary of State for Children, Schools and Families*, [2009] EWCA Civ 1355, the Court of Appeal held that the territorial limit on the right to claim unfair dismissal, set down by the House of Lords in *Lawson v Serco Ltd.*,[1] [2006] ICR 250, should be modified where necessary for the effective vindication of a right derived from EU law. Said differently, if a statutory territorial restriction potentially prevents an employee from pursuing a claim derived from a right created by the EU, then such a restriction should be interpreted narrowly to avoid such a situation.

In this case, Mr. Duncombe was employed by what was then the Department for Education and Skills (DfES), a U.K. government department, to work under a succession of fixed-term contracts in a European School based in Karlsruhe, Germany. As a result of the expiration of his ninth successive "one-year" contract, Mr. Duncombe brought court proceedings against the DfES claiming wrongful dismissal[2] and unfair dismissal.[3]

Both parties accepted that Mr. Duncombe's claims could only succeed if Regulation 8 of

the Fixed Term Regulations[4] applied to convert his succession of fixed-term contracts into a permanent one. While Duncombe apparently satisfied the conditions of Regulation 8, there remained the issue of whether it applied to him as a matter of territorial jurisdiction, given that he lived and worked abroad. According to the test set out in *Lawson v. Serco Ltd*,[5] he should have been excluded *prima facie* from the Regulations' scope. However, Mr. Duncombe asserted that Regulation 8 should apply because his contract of employment specifically stated that the employment relationship "[must] be governed by English law and the English courts [must] have exclusive jurisdiction in all matters regarding it." An Employment Tribunal rejected his argument and found that the *Lawson* test applied to the Fixed Term Regulations. As Mr. Duncombe could not show that he had a sufficient employment connection with Great Britain that the Lawson test required, his claims failed. Mr. Duncombe successfully appealed his claim for wrongful dismissal to the EAT, but the EAT rejected his claim for unfair dismissal. Both parties appealed from the EAT's holdings.

The Court of Appeal agreed with the DfES that Mr. Duncombe would not be able to satisfy the *Lawson* test if it indeed applied to the Fixed Term Regulations. However, it said that the *Lawson* test was not the end of his wrongful dismissal claim. The court accepted Mr. Duncombe's "simple" and "beguiling" argument that he still had a cause of action in contract based on his fixed-term contract having become a permanent contract by virtue of Regulation 8. The parties had chosen English law as the law of the contract. The court ruled that, as Regulation 8 is a statutory part of English law, it applied to all fixed-term employment contracts governed by English law regardless of where those contracts are to be performed. As a result, the court concluded that the Lawson test was irrelevant; instead what was relevant was that Mr. Duncombe had a contract to which English employment law, including the Regulations, expressly applied.

The Court of Appeal acknowledged that different considerations applied to Mr. Duncombe's unfair dismissal claim. Whereas the choice of law clause in Mr. Duncombe's contract allowed him to proceed with his breach of contract claim in the Employment Tribunal, a claim of unfair dismissal has to be brought under the Employment Rights Act 1996 (ERA). In *Lawson*, the House of Lords had already ruled that such claims are subject to territorial limitation, and the Court of Appeal agreed with the DfES that, on a straight application of Lawson, Mr. Duncombe would not be able to establish the right to bring an employment claim in Great Britain. However, Mr. Duncombe argued that the Court should modify the Lawson test in accordance with the EAT's decision in *Bleuse v MBT Transport Ltd*.,[6] so that, where necessary, it gave effect to a claimant's rights under EU law. In essence, Mr. Duncombe argued that if he were to be prevented from bringing an unfair dismissal claim, he would be denied an effective remedy for breach of his rights derived from the EU Framework Directive on Fixed Term Work (No.99/70), which the Fixed Term Regulations implement. The Court of Appeal agreed that the *Bleuse* analysis applied.

Race Relations Act and Age Regulations Applied to Foreign Nationals Who Performed Some Duties in the U.K.

In *British Airways Plc v Mak & Ors*, the claimants challenged the territorial reach of the RRA and the Age Regulations. Both the RRA and Age Regulations state that their remit provides protection for an employee who is employed in "an establishment in Great Britain if the employee does his work wholly or partly in Great Britain."[7]

Here the claimants were cabin crew of Chinese nationality ordinarily resident in Hong Kong. They completed 28 "flight cycles" between Hong Kong and London each year. The claimants took part in a debriefing session on landing in London, had duties upon arrival and prior to departure from London, and underwent training in the U.K. On the facts, the Employment Tribunal held that the claimants did work at least partly in the U.K. and therefore, could proceed with their claims of race and age discrimination.

British Airways appealed to the EAT. The EAT held that the proportion of time an employee spent working in Great Britain was not determinative for deciding whether he worked "wholly or partly in Great Britain." under the RRA and Age Regulations. Instead, the nature of the job performed also should be taken into account. The EAT considered that the claimants' activities in London were an integral part of each flight cycle. Further, it considered that the training requirements were absolutely essential for those working in the

airline industry. As a result, the EAT held that the Employment Tribunal was entitled to conclude that the claimants worked partly at an establishment in Great Britain.

British Airways will most likely appeal this EAT decision, otherwise potentially all of its overseas cabin crew employees who travel to and from the U.K. could bring alleged discrimination claims in an U.K. Employment Tribunal. Further, if this decision remains unchallenged, its implications for foreign companies who send employees to the U.K. to work on an intermittent basis could be significant, because those foreign employees could seek protection from U.K. laws that offer greater rights than do their own country's laws.

Potential Impact on Multinational Employers

While each of these cases discussed different legal principles, multinational employers should note that U.K. legislation will be interpreted to give effect to allow an employee to proceed with a claim based on rights from EU law. In *Duncombe*, the court extended the territorial jurisdiction of the Fixed Term Regulations to include an employee who worked permanently overseas. As a result of the *Mak* case, foreign employees who have a working connection with the U.K. may opt to pursue discrimination claims in the U.K., rather than pursue a suit in their country of residence. Multinational employers with employees who are U.K. nationals should review any relevant employment agreements to make sure they contain appropriate choice of law provisions and to determine whether the contract's terms somehow bring the contract under U.K. law. Multinational employers with employees who occasionally work in the U.K. should review the employees' duties to see if the U.K. duties could be considered essential to their overall duties.

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[1] In this decision, the House of Lords considered the territorial limit of the right of an employee to bring a claim for unfair dismissal under the Employment Rights Act 1996 (ERA). The ERA provides that there is no jurisdiction under the Act where "under the employee's contract of employment, he ordinarily works outside Great Britain." The court held that the employee should be "based in Great Britain" in order for the Employment Tribunal to have jurisdiction to consider his unfair dismissal claim.

[2] A *wrongful dismissal* occurs when an employer dismisses an employee's employment in a way which amounts to a breach of the employee's contract of employment.

[3] Under section 94 of the ERA an employee has the right not to be unfairly dismissed. The burden of proof is on an employer to show that it had a fair reason to dismiss the employee.

[4] Regulation 8 states "[s]uccessive fixed-term contracts: (1) This regulation applies where *(a)* an employee is employed under a contract purporting to be a fixed-term contract, and *(b)* the contract mentioned in sub-paragraph *(a)* has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph *(a)*. (2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)*(a)* that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if (a) the employee has been continuously employed under the contract mentioned in paragraph 1*(a)*, or under that contract taken with a previous fixed-term contract, for a period of four years or more, and *(b)* the employment of the employee under a fixed-term contract was not justified on objective grounds time when it was entered into. (i) where the contract mentioned in paragraph (1)*(a)* has been renewed, at the time when it was last renewed; (ii) where that contract has not been renewed, at the time when it was entered into."

[5] *See* footnote 1 above.

[6] 2008 IRLR 264.

[7] See section 8(1) RRA and Regulation 10(1) of the Age Regulations.