E-ALERT | Employment Law Briefing

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GLOBAL MOBILITY
EDITION 1: INTERNATIONAL COMMUTERS CAN CLAIM UK EMPLOYMENT RIGHTS

Whether UK statutory employment rights (such as unfair dismissal) extend to employees working abroad is a live issue for many employers.

On 8 February 2012, the UK's Supreme Court unanimously held that an employee who lived in Great Britain but worked wholly in Libya on a *"one month on, one month off"* rotational basis qualified for unfair dismissal protection under the UK Employment Rights Act 1996 ("ERA") (*Ravat v Halliburton Manufacturing and Services Limited* (2012)).

Multinational employers should, therefore, be aware that even employees working wholly abroad may still be covered by UK employment laws.

The *Halliburton* case confirms the widening of the UK's highest court's interpretation of the extraterritorial scope of unfair dismissal (and other ERA rights), expanding the previous test laid down by the same court in *Lawson v Serco Limited* (2006).

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EVOLUTION OF THE *LAWSON* TEST

The ERA allows employees with more than one year's service (extending to two years' service for employees hired after 6 April 2012) to benefit from unfair dismissal protection. While the legislation is silent as to its territorial scope, the courts have acknowledged that it must have limits.

This issue was resolved to some extent by *Lawson*, which held that in order for UK statutory employment rights to extend to employees working abroad, the employee had to fall within one of three categories:

THE LAWSON TEST

Is the employee:

a) **Working in Great Britain** at the time of dismissal;

b) **Peripatetic** (e.g. a travelling salesperson) but based in Great Britain during the employment; or

c) **Expatriate** (i.e. posted abroad), in exceptional circumstances, for example: (i) an employee posted abroad by a British-based employer to work on behalf of, or as a representative of, that employer; (ii) an employee working in an extra-territorial British enclave; or (iii) where there is an equally strong connection with Great Britain and British employment law.

THE NEW *HALLIBURTON* TEST

Halliburton is a rewriting of the *Lawson* test. In this case, a British employee, Mr. Ravat, who lived in Great Britain but worked wholly in Libya on a "*one month on, one month off*" rotational basis benefited from UK unfair dismissal protection under the ERA.

Mr. Ravat was described as a '*commuter*', albeit an international one. His employment circumstances did not fall neatly within the categories set out in the *Lawson* test. However, the Supreme Court stated that tribunals should not "*torture the circumstances of one employment to make it fit*" one of the *Lawson* categories.

The Court then went on to redefine the territorial test:

THE HALLIBURTON TEST

Is the connection between the circumstances of the employment and Great Britain and with British employment law sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain?

The 'peripatetic' and 'expatriate' categories of the *Lawson* test were held to be merely illustrative examples of the wider general principle of establishing a strong connection with Great Britain i.e. these are not fixed categories within which employees have to be fitted, or fail in their claims.

In each case, it will be a question of "*fact and degree*" whether the connection is strong enough to overcome the general rule that the place of employment is decisive. The Court distinguished between true expatriates (who live and work abroad) and UK commuters (who live in Great Britain but commute to work abroad). A UK commuter is not a true expatriate and, therefore, the test of establishing the necessary connection with Great Britain is less onerous than the especially strong connection that must be satisfied for expatriates.

In *Halliburton*, looking at the circumstances as a whole, the Court concluded that Mr. Ravat's employment relationship had a stronger connection with Great Britain than with Libya. In reaching this decision, the following factors were deemed to fit "*into a pattern, which points quite strongly to British employment law as the system with which his employment had the closest connection*":

- Mr. Ravat lived in the UK and commuted to work in Libya;
- he was employed under UK terms and conditions;
- he received the same pay and pensions benefits as UK-based employees;
- he was paid into a UK bank account and subject to UK tax and National Insurance deductions;
- based on the employment documentation, the parties clearly intended that the employment relationship was governed by English law;
- the employer had previously reassured Mr. Ravat that English law applied to his employment; and
- matters relating to the termination of his employment were handled by the human resources department in Scotland.

His employment structure was in fact more complicated - the employer (a British-registered company) was a subsidiary of a US corporation, its main office was in Scotland, Mr. Ravat's work benefited a subsidiary in Germany, and he reported to a manager in Libya and another manager in Cairo. However, the Supreme Court did not attach much weight to these corporate factors, stating that the vehicles which a multinational company uses to conduct its businesses across international boundaries should not "*deflect attention from the reality of the situation in which the employee finds himself*".

HALLIBURTON AND THE UK EQUALITY ACT

There is still uncertainty as to when employees working outside of Great Britain can bring discrimination claims under the UK Equality Act 2010 ("EqA") - which, like the ERA, is silent as to its territorial scope. Unfortunately, *Halliburton* did not address this issue as the claim related only to unfair dismissal under the ERA, and there has been no other appellate decision on the EqA point.

However, it has been held at the Employment Tribunal (whose decisions are not binding) that the *Lawson* test applies when considering the territorial scope of the EqA (*Bates Van Winkelhof v Clyde & Co and another* (2011)). If this approach is followed, then the broadening of the territorial scope of unfair dismissal in *Halliburton* will also apply to the territorial reach of UK discrimination laws.

CONCLUSION

In *Halliburton*, the Employment Tribunal, Employment Appeal Tribunal and the Court of Session all reached differing conclusions as to whether Mr. Ravat was an expatriate, a peripatetic employee or whether he even fell within the *Lawson* test. The Supreme Court, therefore, suggested that the *Lawson* test "*did not have the effect of eliminating uncertainty and that those who have been looking to it for guidance have found it difficult to apply*".

However, it is questionable whether *Halliburton* provides any greater certainty or clarity in relation to the issue. While the new test appears relatively simple it will almost certainly prove difficult to apply in practice, as it is ultimately a question of "*fact and degree*" and there are no "*hard and fast rules*" to apply. The territorial scope for certain UK statutory employment rights is, therefore, relatively wide and will depend on the facts of each case.

To minimise the risk of employees working outside Great Britain (particularly international commuters) being subject to UK statutory employment rights, employers should ensure that, as far as possible, the employment arrangements point away from a connection with Great Britain. For example, employers might consider employing individuals directly by the foreign company under local law contracts, paying their salaries in local currency into local bank accounts and subject to local tax laws, providing benefits that are different or separate to those enjoyed by their UK employees, and ensuring that the individuals report to, and are managed by, the foreign company.

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