



# GOING GLOBAL

## Territorial scope of UK employment law



In an increasingly global market with mobile work forces, the territorial scope of UK employment law can become an important issue for international employers. In this briefing, Part One of our *Going Global Guide*, we consider when UK statutory employment law might extend to international employees, employees working in the UK for non-UK based companies and UK employees working overseas.

Different rules govern whether contractual, rather than statutory, employment claims can be brought in the UK and the next part of our *Going Global Guide* will focus on contractual issues.

### **Territorial scope of UK statutory employment rights**

An employee can bring a statutory employment claim in the UK if:

- they are protected by the relevant piece of legislation; and
- a UK employment tribunal has jurisdiction to hear the claim.

Complex analysis may be required to ascertain whether an international employee working in the UK, a UK employee working overseas, or an international employee working overseas for a UK employer, has the right to bring a claim based on UK employment rights in a UK employment tribunal or not.

### **Step one: protection under UK legislation**

The precise territorial scope of UK employment legislation differs depending on the relevant statute. We consider below the key UK employment law protections.

#### **Unfair dismissal**

The Employment Rights Act 1996 (ERA) sets out many key employment law rights, including the right not to be unfairly dismissed. ERA is silent as to its territorial scope, meaning this has been left to the courts to determine. Through case law, there are four categories of employee who can receive unfair dismissal protection:



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1. **Employees ordinarily working in Great Britain** This category will cover employees ordinarily working in Great Britain (i.e. Scotland, England and Wales but not Northern Ireland) at the time of their dismissal, including those who work for overseas employers. Identifying such employees is generally quite straightforward.
2. **Peripatetic employees** Employees who travel frequently for their work will be protected by ERA if their base is in Great Britain. The employee's base is determined by looking at what happens in practice as opposed to what the contract says. Relevant considerations will include where the employer has its headquarters, where the employee's travels begin and end, the location of the employee's home, where and in which currency the employee is paid, and whether the employee is subject to tax and national insurance in the UK.
3. **Expatriate employees** Employees working and based abroad, who were recruited in Great Britain by a British company, are not necessarily protected by ERA. However, they may be protected in some circumstances. For example, where the employee is posted abroad for the purposes of business carried on in Great Britain, such as a foreign correspondent for a British newspaper or an employee working for a British employer operating within an expatriate enclave abroad.
4. **Employees with a sufficiently strong connection with Great Britain** This final category will catch anyone who doesn't fit into one of the above categories but nonetheless has a connection with Great Britain that is sufficiently strong that they should be protected by ERA. This test is very fact sensitive and it is important to consider where the employment relationship is forged, where the employee's home is, how much time he/she spends in and out of Great Britain, in what currency the employee's salary is paid, what the employment contract says, and whether the employment has a stronger connection with another country.

### **Discrimination**

Like ERA, the Equality Act 2010 is silent as to its territorial scope. Non-statutory guidance confirms that discrimination protection will apply 'when there is a sufficiently close link between the employment relationship and Great Britain'. However, European case law also suggests that where a domestic employment right derives from EU law, the territorial scope of the domestic law should, where possible, be interpreted widely enough to give effect to the EU-derived right. On that basis, it is possible that the territorial scope of the Equality Act, and other legislation based on European directives (e.g. the Working Time Regulations 1998), is wider than that of unfair dismissal. This means an employee who doesn't have a sufficiently close connection with Great Britain to be protected from unfair dismissal could nevertheless be protected against discrimination, or be able to raise a holiday pay claim in a UK tribunal, for example.

### **Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)**

TUPE applies to any business transfer or service provision change when the undertaking, or organised group of employees, is situated in the UK immediately before the transfer. TUPE provides basic protections to employees, including protection from dismissal. TUPE applies even if the transfer is governed by the law of another country.



TUPE does not apply to a transfer into the UK from another country. However, transfers from other EU member states may be covered by local legislation implementing the Acquired Rights Directive (the EU Directive which TUPE implements in the UK).

### Step two: jurisdiction of the UK Employment Tribunals

As well as establishing the right to bring a claim under a relevant piece of legislation, an international employee must also establish that an Employment Tribunal has jurisdiction to hear the claim. The Employment Tribunals in England & Wales or Scotland, have jurisdiction to hear claims if any of the following conditions are satisfied:

- The employer resides or carries on business in the relevant part of Great Britain;
- One or more of the relevant acts complained of took place in the relevant part of Great Britain;
- The claim relates to a contract under which the work is or has been performed partly in the relevant part of Great Britain; or
- There is a connection between the claim and Great Britain, and that connection is at least partly a connection with the relevant part of Great Britain.

Due to this final aspect of the jurisdiction test in particular, most cases which come within the reaches of UK statutory employment law are almost certain to come within the jurisdiction of an Employment Tribunal in England & Wales or Scotland.

### Practical points

Once the employee has established a right to bring a claim in the UK tribunals, the question can arise as to whether to present a claim in Scotland or England & Wales. This is normally determined by practicality. Claims raised online will normally be allocated to the tribunal located closest to the employee's workplace. However, the employee has the option to raise the claim in another tribunal. The slight differences in procedure north and south of the border may have some bearing on those decisions, for example, the employee may feel they would benefit from the more extensive disclosure rules used in England & Wales. We may also see an increase in jurisdiction shopping within the UK if the Scottish Government's proposal to abolish tribunal fees in Scotland is enacted so that a fee is required to litigate in England & Wales but not in the Scottish Tribunals.

### Summary

The test as to whether a particular employee is protected by UK statutory employment law is very fact sensitive, and it is not possible to have a 'one-size-fits-all' approach to an entire workforce. Each case must be determined on its own facts. Employers should simply be aware that their international employees may be protected by certain aspects of UK employment law and advice should be sought on a case by case basis.

In the next part of our Going Global Guide, we go on to look at contractual issues which can arise in international employment relationships.

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This briefing is Part One of our six-part *Going Global Guide* to international employment issues. The complete guide includes:

- **Part One:** [Territorial scope of UK employment law](#)
- **Part Two:** Employment contracts
- **Part Three:** Restrictive covenants
- **Part Four:** Employment checklist
- **Part Five:** Secondments
- **Part Six:** International employees working in the UK

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