Employees engaged abroad cannot (normally) bring discrimination claims in GB

Sometimes employers can face claims under British law from staff working abroad. Over recent years there have been a number of decisions which have shed light on this difficult area. The latest Judgment of the Court of Appeal in the case of R (on the application of Hottak and another) v Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Defence will be welcomed by employers as it appears to limit the extent to which British discrimination law can be relied upon by those recruited and working abroad.

The detail

The Claimants, who were both Afghan nationals, were employed by the British Government as interpreters working with the British Armed Forces in Afghanistan. They worked under local contracts of employment governed by Afghan law, were paid in US dollars, and were recruited and worked exclusively in Afghanistan. They brought judicial review proceedings to challenge a policy that the British Government had put in place to provide protection and benefits. They claimed that the terms were less generous than those given to individuals employed in Iraq, and that this constituted race discrimination on the basis of their nationality (under Equality Act 2010). A key question for the Court of Appeal was whether the territorial scope of the Equality Act 2010 extended to cover their employment.

The Court of Appeal has decided that the Equality Act 2010 did not apply to the Claimants.

The general rule which applies is that the place in which a person is employed usually dictates which laws apply and the jurisdiction in which an individual is able to bring a claim. So the starting point would be that an Afghan interpreter working in Afghanistan would be subject to Afghan law. Here the Court of Appeal applied the same principles for discrimination law as would apply to an unfair dismissal claim (from the leading case of Lawson v Serco). As a result, British unfair dismissal and discrimination protection extends to only four categories of employee:

- ‘Standard’ cases where the employee ordinarily works in Britain;
- Peripatetic employees (who move between jurisdictions but have a British base);
- Some expatriate employees (those posted abroad by a British employer) but only if there is a sufficiently strong connection with Britain; and
- Other employees who have an ‘equally strong connection’ with GB.
The Court of Appeal held that the Afghan interpreters did not fit into any of these categories and therefore could not claim under British discrimination law.

What was important was that the Claimants were locally engaged to provide local support. Their only connection to Great Britain was the identity of their employer. This was not sufficient for UK employment law to apply to them.

What does this mean for me?

This is a reassuring Judgment for all British employers who engage staff abroad. The decision means that you are highly unlikely to face a claim of discrimination in a British Employment Tribunal relating to an employee engaged abroad on local terms and conditions. This can be important as locally recruited and based employees will often have different terms and reward than British staff (or those in other countries), and this decision stops British race discrimination claims being brought as a result.

Your organisation may still of course face a local claim in another jurisdiction if similar protection from discrimination applies in that country.

However do remember though that the situation may be different where a British worker is posted abroad or spends some of their time in Britain and some in another jurisdiction. If the employee has stronger links with Great Britain and with British employment law than with the country in which they work, they may still be able to bring a claim under British law in a British Court or Tribunal.

Comment

Legally this case provides welcome clarification, confirming that the scope of the Equality Act 2010 is the same as the Employment Rights Act 1996 (which provides protection against unfair dismissal). This seems sensible as two types of claim are often brought together and both are usually dealt with by the Employment Tribunal.

The Court of Appeal rejected the Claimants’ emotive argument that discrimination law should apply more widely than unfair dismissal law as it concerned ‘the very essence of man’s humanity to man’. The Court’s decision that Parliament could not have intended British discrimination legislation to apply worldwide seems intuitively correct.

If an employee working abroad makes a claim under British law, the Tribunal will carry out a detailed factual analysis, taking in the contractual and practical arrangements applying to their work, to decide which jurisdiction applies. If you are uncertain about the arrangements your organisation has in place for employees working outside Britain please do seek advice.

If you have any questions about this Judgment or the extent of British employment law, please speak to your usual Weightmans contact or contact Phil Allen (phil.allen@weightmans.com).

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