

Gone but not forgotten

Recent cases have highlighted the rights of overseas employees to make employment claims in the UK. Juliet Carp examines how employers can reduce the risks of such action by expatriate staff

The golden rule is to seek home and host country advice first. This will help you to assess the real costs of the assignment.

Expatriate arrangements are often structured to take account of tax, social security, pension and immigration issues, as well as the usual human resources considerations. These issues can be far more significant in relation to expatriates than to regular UK-based employees.

For example, French employers' social security contributions can be as high as 44 per cent. The length of the assignment and the identity of the employer can also make a difference to the employer's costs. The tax treatment, for instance, will often be different if the individual is to be employed during the assignment by a group company based in the host country, rather than the home country.

It is important that these issues are properly understood before you discuss the proposed assignment in any detail with the employee and before any documents are issued. Once discussions with the employee begin, the focus should be on setting expectations. There will be a number of issues that you will need to consider:

- **Identity of the employer.** Significant sums can hang on this – and it is also where many employers trip up. Both the documents and the practical arrangements (reporting lines, payment arrangements, inter-company charging arrangements and so on) should support the correct employer's identity.
- **Mandatory labour laws.** Check collective agreements as well as legislation, even if there does not appear to be a relevant trade union. Most labour laws cannot be avoided, but some problems can be resolved. For example, if a "13th-month" bonus payment must be paid, the salary you set can take account of this.
- **Termination arrangements.** Make sure that relocation packages, prospects for further assignment and any promises of severance pay are clear from the outset. This should make disputes

easier to resolve and could also help to avoid the ill feeling that often leads to claims against their employers. Most importantly, make sure that notice arrangements for ending both the overseas assignment and the underlying employment are clear.

- **Benefits.** Resist the temptation to reassure the expatriate by giving open-ended promises.
- **Existing contracts.** Consider whether UK policies will apply to expatriates. Make sure it is clear whether an existing contract will be varied or replaced by the assignment arrangements.

At the end of the employment

Again, the golden rule is to seek home and host country advice before doing anything. Again, there are several key issues:

- **Severance pay.** Calculate the severance pay due – you may be in for a shock.
- **Notice.** There are often mandatory host country requirements: to serve notice in a particular way or on a particular day of the month, for example.
- **Authorisation.** Permission might be needed from the relevant authorities (beware, salary may accrue until you receive this permission).
- **Tax and social security.** Consider whether the termination arrangements can be structured in a tax-effective way and don't assume that because tax relief is available in one country it will apply to another. For example, an American expatriate may be taxed on worldwide income, even if host country tax relief is available.
- **Repatriation.** Consider whether repatriation to a relatively low-cost country before termination will affect costs.
- **Practical issues.** Take steps to minimise the impact of the expatriate's departure on the business. Deal with practical issues, such as who will sign cheques, and, for some countries, consider whether it would be wise to grant additional powers of attorney in advance.
- **Directorships.** Think about how departing directors and other office holders will be removed from their offices and any registration/ notification requirements.

- **Severance agreements.** Make sure these will be effective in all relevant countries.

Host country advisers might sometimes appear impractical or unreliable, but most problems arise from misunderstandings. The importance of communicating clearly should not be underestimated. All the background information should be given and ambiguous words, such as “indemnity”, “redundancy” or “notice pay”, should be used with care. Ideally, the issues and advice should be discussed orally with advisers and confirmed in writing. Preparation will inevitably take more time.

The important thing is to focus on reducing the risks rather than achieving perfect certainty. To remove all risk is usually impossible and trying to do so will probably involve prohibitive cost and unacceptable delay. Accept that you won't know all the answers, prepare as thoroughly as you can in the time allowed and be ready for surprises.

Recent expatriate claims

In *Serco v Lawson* (23 January 2004), the Court of Appeal decided that an employee could make an unfair dismissal complaint if he is “employed in Great Britain”.

Lawson's employer, Serco Ltd, was registered and based in the UK. However, Lawson worked for Serco on Ascension Island, rather than the UK. The court decided that he could not make an unfair dismissal complaint in an English employment tribunal.

Although few would argue with the commonsense outcome of this case, the decision does not give any guidance as to how we might decide whether an employee is employed in Great Britain where the facts are less clear. The Serco principle was applied by the Employment Appeals Tribunal in the recent conjoined cases of *Expro Gulf*, *SSAFA Forces Help*, *Cathay Pacific* and *Sysdeco* (EAT, 24 June 2004), but the EAT did not offer any helpful guidance.

Sex and race discrimination legislation that provides that an employee can make a discrimination complaint “unless the employee does his work wholly outside Great Britain” was also examined by the EAT recently in the conjoined *Saggar (& Others) v Ministry of Defence* (EAT, 10 June 2004) cases. The EAT found that there was a *de minimis* exception (for example, for one-day visits to Great Britain). The EAT also provided some guidance on what counts as “work” and explained that you need to look at whether the employee works in Great Britain now, not whether he or she used to or might in the future.

Source: People Management

For further information, please contact:

Juliet Carp
020 7427 6412
juliet.carp@speechlys.com

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