

Key Insights on Unfair Dismissal Laws in the UK for US-Based Employers

by Lisa Patmore

A recent British legal case, which could impact U.S. and other international companies, has reinforced the complexities of cross-border employment, particularly where group companies are involved. The fact that a US company does not, itself, have operations in Great Britain does not mean that they won't face legal claims in the British Employment Tribunals ("ET"). If an individual successfully argues that the British courts have jurisdiction (both international and territorial jurisdiction (see below)) to hear the case, the US company will then need to take steps to defend the claim. One of the claims that can be made, and which some US companies may not be as familiar with, is the right to claim unfair dismissal. This alert aims to distill the key elements of Britain's unfair dismissal laws, with a special focus on the territorial jurisdiction considerations. This overview will ensure you are equipped to identify the areas of risk and navigate effectively.

What is unfair dismissal - Unfair dismissal is a legal claim that certain employees can make if they believe that there is no fair reason for their dismissal or a fair procedure has not been followed prior to dismissing them. An unfair dismissal claim is heard in an ET.

Who can claim unfair dismissal - an employee (see below) who has been dismissed (which may include a constructive dismissal i.e., resignation by an employee in acceptance of a fundamental breach of their contract by the employer) and who, in most cases, has the requisite qualifying period of service, currently two years. The qualifying period does not apply in most cases where the dismissal is for an automatically unfair reason – see below. See, also, the jurisdiction provisions below.

International Jurisdiction – *before commencing an unfair dismissal claim, an employee will first need to satisfy an ET that they have international jurisdiction to hear the matter. This is rarely a point of contention between the parties where the employee works in the UK and has a UK employment contract. Where this is not the case, though, the ET will need to assess the facts of the case in light of the relevant (international jurisdiction) legal test (which differs depending upon the date that the employment commenced).*

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One notable case (related to an employment contract entered into prior to 2020) arose where a US company issued restricted stock units to the employee of a UK subsidiary and was found to be the employer. The court commented that a company providing benefits to employees of group companies could be regarded as an employer (for the purposes of international jurisdiction) if it provided benefits to employees of group companies to reward the employees for the benefit of their employer and the group as a whole.

Territorial jurisdiction – assuming that the ET has international jurisdiction to hear the case, the next consideration is that of territorial jurisdiction. The employee's work must have been done in Great Britain (England, Wales or Scotland) or must have a sufficient connection to Great Britain to bring the employee within the territorial scope of the unfair dismissal legislation. It is the date of dismissal that is relevant, regardless of what was contemplated at the time their employment contract was entered into. There are many cases on what "employment in Great Britain" means. They are too extensive to summarise in this note but a key case that is worth mentioning is one that gives guidance on the treatment of peripatetic (travelling) employees, and employees based abroad. In summary:

- *For peripatetic employees, the country in which the employee is based should be treated as their place of employment.*
- *Employees based abroad will only be able to claim unfair dismissal in exceptional circumstances, for example:*
 - *Employees working for a British employer operating within what amounts, for practical purposes, to an extra-territorial political or social enclave in a foreign country (such as a British military base)*
 - *Employees posted abroad by a British employer for the purposes of a business carried on in Great Britain.*
 - *Employees whose employment has equally strong connections with Great Britain and British employment law.*

These have been stated to be merely examples of employees with a "substantial connection" to Great Britain. What matters is that the "employment relationship must have a stronger connection with Great Britain than with the foreign country where the employee works". This will often turn on the facts of the case.

The employer does not, therefore, have to be a British company and the employee doesn't necessarily have to be working in Great Britain on a permanent basis.

Who is an employee – those individuals who have entered into employment contracts will be employees. However, an employment contract does not have to be written, and can be oral (which is unusual). Even an individual who is not stated to be an employee (e.g., is described as a self-employed consultant) can be classed as an employee if an ET decides that, in practice, the relationship is akin to an employee/employer relationship.

Who is the employer – this is usually a straightforward question, being the entity that the employee has an employment contract with. However, given the increased

protections that employees have compared to other workers and self-employed individuals (one of these being the right to claim unfair dismissal), the greater the risk that an individual will argue that they are actually employed by a business that they either have no contract with at all or have a contract with but are stated to hold a non-employee role. Whilst the contractual terms (or lack of them) is potentially relevant to the question of whether an individual is an employee, they are not necessarily determinative, and the ET must conduct their own analysis. The ET can take into account a number of factors, two key factors being the level of control that the alleged employer has over the individual and the mutuality of obligation that exists between them. The greater the control that the alleged employer has over the individual, and the mutuality of obligation that exists between them, then the greater the risk that the alleged employer could be found to be the actual employer.

What will an ET consider when determining if a dismissal was unfair – in summary, the ET will consider whether the employee's dismissal was fair or unfair by looking at:

- The reason for the employees dismissal; and
- Whether the employer acted reasonably in all the circumstances (which includes the procedure followed prior to dismissal).

What are the potential fair reasons for dismissal – these are conduct, capability (which can include poor performance and ill health), redundancy, breach of a statutory requirement and "some other substantial reason" (examples of what fall within this last category are detailed in case law – which is not exhaustive). If the employer can show that the dismissal was for one of those reasons, the ET will then consider whether the employer has followed a fair procedure, and whether it was reasonable for the employer to dismiss for one of those reasons, taking into account all the circumstances including the size and administrative resources of the business.

What is a fair procedure – what the fair procedure is depends upon the reason for dismissal. It will generally involve, though, giving advanced notice that the employee may be dismissed, conducting an investigation (if necessary), allowing the individual to state their case in a disciplinary hearing, and providing an opportunity to appeal the decision. The ET will also, in some cases, expect a series of warnings to be given (and chances to improve) prior to dismissal. This is particularly for conduct and capability dismissals. This means that the length of any process can differ depending upon the reason for dismissal.

Whilst employers are usually given a certain latitude, and ETs recognise that there will be a "range of reasonable responses" by different employers to the same set of circumstances, it is often claimed that ETs are very sympathetic towards terminated employees.

What is automatic unfair dismissal - when an employee is dismissed for reasons such as pregnancy, taking maternity/paternity leave, whistleblowing, trade union membership, asserting a statutory right, or asserting rights related to health and safety. In these cases, the employee is not required to have a minimum period of employment to claim unfair dismissal.

What are the remedies for unfair dismissal - If an ET finds that the dismissal is unfair, it can order the employer to re-engage or reinstate the employee or (as is more likely in practice) pay the employee compensation. In rare cases where re-engagement or reinstatement is ordered, the employer can choose not to do this but the ET may order further compensation to be paid.

What about the costs of the litigation – both parties generally bear their own costs. There are exceptions where an ET may order one party to pay the other party's costs e.g., where a party has, in bringing the claim or in conducting it, acted vexatiously, abusively, disruptively or otherwise unreasonably or the bringing or conducting of the proceedings have been misconceived. However, in practice, securing a cost award against the other party is rare and, even if one is given, the level of costs that employees are required to pay are usually very low. This means that employees can often threaten proceedings knowing that an employer will likely settle the claim as the cost of defending the claim will usually be higher than the settlement monies they are looking for.