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Liability of overseas co-workers for whistleblowing detriment (UK)

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Summary

This was a case alleging detrimental treatment for whistleblowing brought by an employee working outside the UK against two co-workers also working abroad in the same location. The Court of Appeal (CA) ruled that there was no jurisdiction for the Employment Tribunal (ET) to hear the claim in relation to personal liability of the co-workers because they were outside the scope of UK employment law. The CA's judgment potentially has implications for other types of claim brought by UK employees posted abroad where similar personal liability provisions apply, such as discrimination and harassment.

Background

Since 1999, workers in the UK who 'blow the whistle' on their employers have had the right not to be dismissed or otherwise penalised as a result. The legislation protecting whistleblowers is set out in the Employment Rights Act 1996 (ERA). This provides that a worker has the right not to be subjected to detriment by their employer on the ground that they have made a 'protected disclosure' in the public interest.

A worker in this situation also has the right not to be subjected to a detriment on the same ground by another of the employer's workers. A claim can be brought in the ET against the employer and/or the co-worker, as appropriate. Accordingly, the ERA whistleblowing provisions can potentially make co-workers personally liable if they subject a whistleblowing colleague to a detriment.

The ERA says very little about the territorial scope of the rights and obligations that it contains, but the courts have provided guidance on the categories of cases in which employees working outside the UK can claim. In essence, the principle is whether the connection between the circumstances of the employment on the one hand, and UK employment law on the other, is sufficiently strong that it would be appropriate for a claim to be brought in the UK (see, in particular, *Ravat – v – Halliburton Manufacturing and Services Ltd* [2012] IRLR 315). In other words, employees who work abroad normally have no UK statutory employment rights unless there is a sufficiently strong relationship with UK law – for example, because they are posted abroad to work for a British business.

Facts

The events in this case took place in Kosovo in a European Union (EU) mission called EULEX, which was established to support the Kosovan justice system after the Balkan war. All EULEX staff were seconded to work there by various governments within and outside the EU. They had to act in the best interests of EULEX and follow its code of conduct, but they remained employed by their seconding governments.

The claimant was employed by the UK's Foreign and Commonwealth Office (FCO) and was seconded to work at EULEX as a prosecutor. She claimed that her manager and a colleague, both of whom were also employed and seconded by the FCO, treated her detrimentally because she was a whistle-blower. She also claimed that the FCO did not renew her contract for the same reason (although the CA did not have to consider that part of her claim).

The manager and colleague both argued that they were outside the territorial scope of the ERA whistleblowing provisions, despite being employed by the FCO on contracts governed by UK law. Importantly, therefore, the dispute here was not about whether the claimant had any rights under those provisions against the FCO. As mentioned above, employees who work abroad normally have no UK statutory employment rights against their employer unless there is a sufficiently strong relationship with UK law. The FCO had not, however, contested the ET's jurisdiction to hear the claim against it, so the dispute that the CA had to resolve was purely about the personal liability of the co-workers.

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Judgment

The CA decided that a claim could not be brought against the co-workers under the ERA personal liability provisions, for the following main reasons:

1. When deciding if UK law applied to the co-workers' liability, the focus should be on the relationship between the claimant and the co-workers while at EULEX rather than on their individual employment relationships with the FCO.
2. The claimant, her manager and her colleague were all seconded to EULEX separately, not together as a group. The manager's predecessor was not an FCO employee, nor was the colleague's predecessor. EULEX was an international enclave, not a British one. The fact that they had a common employer was essentially a coincidence, and not sufficient to make their co-working relationship subject to UK employment law.

The relationship between the co-workers was therefore not a relationship to which UK law applied.
From a practical perspective, the CA added that there is currently no international consensus about whistleblowing protection. Applying UK whistleblowing law between FCO secondees working in EULEX – when most staff were seconded from elsewhere – would have caused real difficulty for the running of EULEX.

Commentary

Although there have been many cases about the rights under UK employment law of claimants working abroad, this is the first case about the potential liability of overseas perpetrators. The CA's judgment does not establish a general principle that such individuals will always escape liability in this type of case. It implies that the answer might have been different if the co-workers had gone on secondment as a group and worked together by design rather than coincidence. If a project team is sent from the UK to work on secondment at an overseas client site, for example, the relationships within that team are much more likely to be governed by UK employment law.
The decision only deals with the scenario where the claimant and the co-workers are *all* based abroad. This raises a question about whether a claimant based in the UK, who wants to make a claim against a co-worker based abroad, must also first establish that their co-worker relationship is governed by UK law. It is unclear what the ingredients of the co-worker relationship would need to be in order for this to be the case.
The ERA whistleblowing provisions are similar (but not identical) to the UK's discrimination and harassment legislation, contained in the Equality Act 2010, which also follows similar principles for establishing whether an employee working abroad falls within its scope. The courts may have some difficult policy decisions to make if, for example, the CA's approach in this case led to overseas perpetrators of sexual harassment against UK colleagues avoiding personal liability entirely.
The decision relates only to claims against the co-workers in respect of their *personal* liability. The CA did not have to decide about whether the FCO could be *vicariously* liable for what the co-workers were alleged to have done, even if the co-workers themselves could not be made personally liable for it. The relevant whistleblowing and discrimination provisions provide that a detrimental act done by an employee should also be treated as having been done by the employer, but with the possibility of the employer running a defence of having taken all reasonable steps to prevent it. This question is due to be decided separately in the next stage of the case.
As the CA noted, there is no current common legislation protecting whistle-blowers. The EU is, however, in the process of adopting a new Directive on whistleblowing, which would establish some common protection throughout EU Member States.

Comments from other jurisdictions

Germany (Othmar K. Traber, Ahlers & Vogel Rechtsanwälte PartG mbB): It should be noted that there is currently no law providing for whistleblowing protection in Germany. Having said that, employees who blow the whistle are to a certain extent protected by very concise case law. This case law and the critical legal prerequisites for whistleblowing have been probed through the European Court of Human Rights (ECHR). The decision of the ECHR in 2011 has defined the relevant criteria more thoroughly (ECHR, judgment 21 July 2011, case no. 28274/08 *Heinisch*). First, the relevant information must, basically, be given to the relevant superior in terms of the contractual duty of loyalty and confidentiality arising from the employment. Secondly, the information must be accurate and reliable. Finally, no milder measures may be available in-house which can remedy the situation. In implementation of the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (EU/2016/943) (the Whistleblower Directive), German law now contains rudimentary provision for whistle-blowers in § 5 No. 2 GeschGehG (Law on the protection of trade secrets), according to which whistle-blowers are exempted from the restrictions on the protection of secrets if the above criteria are met. However, further protection is still lacking, but will probably have to be regulated by law in the future, as the Whistleblower Directive has since been adopted by Parliament in April 2019.
Concerning the decision's core theme German law does not provide specific national legislation for the question which law applies in case of secondments abroad. How-

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ever, the answer would give, certainly, Articles 3 and 8 of the Rome I Regulation which clearly applied here. Following Article 8, the legal system of the country applies, basically, in whose territory the activity is habitually carried out if parties did not choose a specific law for their employment relationship (which is very likely and, therefore, often the case that parties do not). However, the Regulation says that in case that the applicable law cannot be determined in that sense, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. Finally, where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in the aforementioned senses, the law of that other country shall apply.
In the present case, British FCO workers with a contract in England and hired there were seconded abroad to work in Kosovo for EULEX. Under these given circumstances German courts would have probably decided that German law would still apply, since the origin of the employment relationship lays in the employees' home country. Bearing the given facts in mind, there would, probably, be a closer connection to the original place of residence than to the country where the seconded activity is being carried out. In the end, it would be likely that German industrial tribunals would have decided differently and would have held that German law remains applicable even in a case of a secondment to European institutions notwithstanding possible contractual provisions which implement a change of law during the posting.

Italy (Caterina Rucci, Katariina's Gild): This looks to be a quite specific and peculiar case, hence the difficulties in commenting on it from the perspective of a different jurisdiction.
In any case, Italy has adopted its own rules on whistleblowing between 2016 and 2017 and maintains a difference between the public and private sector. In addition, in the private sector, whistleblowing rules are strictly connected to organizational schemes which are adopted by most but not all companies, in order to avoid criminal liability and sanctions.
As far as the applicable law is concerned, in this case all employment contracts (of the two employees and the employer concerned) were governed by UK law: in the Italian perspective it would be irrelevant that this might have been different (since the predecessors, as we can read, were under contracts governed by other laws), since what would be considered are the actual facts and not additional hypothetical cases.

In addition, it sounds quite strange that – despite the fact that all employment contracts where governed by UK law – the relation between the three subjects might be ruled by a different law (which one is not indicated by the decision).
In any case, under Italian law, although cases between employees are not directly ruled by whistleblowing statutes, a general principle is set according to which it is up to the employer to give evidence that detrimental conduct was not caused by whistleblowing but to other objective reasons.
Although, as indicated, no rule exists for cases between employees, in my opinion it is quite clear that behaviour by colleagues is clearly and normally behaviour adopted by line-managers. Therefore, it would still be up to the employer to either cancel the effects of such behaviour or to 'cover' it and therefore become liable for the same.
What is especially clear in this case and the report is that, for obvious reasons, the facts revealed by the whistle-blower could not be mentioned, although they might have made the case clearer: and this brings with it a question, should an additional rule be adopted on confidentiality also for judicial cases on whistle-blowers' protection?

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