The territorial scope of Employment Tribunals – The Court of Appeal decisions in British Airways plc v Mak

The territorial scope of Employment Tribunals has seen many challenges over the years, usually from employees in the aviation or shipping industries who as part of their role may work between two (and often many more) legal jurisdictions, and who do not do all of their work at an establishment in Great Britain.

In the recent case of *British Airways plc v Mak and others [2011] EWCA Civ 184* the Court of Appeal considered whether the employment tribunal had jurisdiction to consider race and age discrimination claims brought by cabin crew based, and ordinarily resident in Hong Kong, and recruited in Hong Kong to serve as members of BA's international cabin crew.

The 16 claimants are former cabin crew members, who come from Hong Kong and who served on BA flights between Hong Kong and Great Britain. Ms Eliza Mak, who completed about 28 flight cycles between Hong Kong and London a year, stands as the lead case.

The claimants worked on flight cycles to London Heathrow and Gatwick beginning and ending in Hong Kong and lasting as long as 11 days. The Court heard that aircraft flying from Hong Kong normally spend about 30 minutes in British airspace before landing. This is followed by a 45 minute debrief and a rest period in London of about 58 hours in hotel accommodation arranged and provided for by BA; and they require permission to leave the hotel for more than 8 hours of the rest period. Cabin crew members are also required to attend compulsory training courses in London at various stages in their employment.

The claimants complained that they had been compulsorily retired at the age of 45, whereas BA international cabin crew working out of London and other bases are not forced to retire at 45. The claimants are unable to bring their unfair dismissal claims in England, or these discrimination claims in Hong Kong.

The jurisdictional issue turns on whether Ms Mak's employment was to be regarded as being at an establishment in Great Britain for the purposes of s.8(1) of the Race Relations Act 1976 (the 1976 Act) and the similarly worded Regulation 10(1) of the Employment Equality (Age) Regulations 2006 (the Age Regulations). The crunch question was did the Claimants do their work "partly in Great Britain"?

BA argued that Ms Mak was not employed by it at an establishment in Great Britain: she was based in Hong Kong, was resident there and was employed under a local contract of employment. BA took the point that s.8(1) of the Race Relations Act 1976 related to employment "at an establishment." It did not apply to Ms Mak's employment, as it was not "*at* an establishment": her employment was in an aircraft flying through the air.

Lord Justice Mummery dismissed BA's appeal. Holding that there was no error of law in the Employment Tribunal's ruling that Ms Mak did "*her work partly*" in Great Britain. That is sufficient to confer on the ET jurisdiction to hear and determine her claims (and those of her fellow claimants) for race and age discrimination. The jurisdiction exists as a result of the statutory process of deeming her employment to be at an establishment in Great Britain under s.8(1); that takes priority over the deeming process under s.8(4), which does not therefore apply to Ms Mak's case.

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