

UPDATE

# Landmark Tribunal decision - do you 'ordinarily work' in Guernsey?

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The recent case of *Newark v VTSI Limited and Global Jet Luxembourg SA*, which was determined by the Guernsey Employment and Discrimination Tribunal (the **Tribunal**) on 18 March 2016 has provided landmark guidance on exactly this question.

This update discusses the Tribunal's decision and highlights key considerations and practical tips for employers to protect themselves against liability.

## The law

In order for employees to claim that they have been unfairly dismissed under Guernsey statutory protection, certain eligibility factors need to be satisfied. In particular and, relevant to the *Newark* case, an employee who 'ordinarily works' outside Guernsey does not have protection.

## The case

The *Newark* case concerned a pilot who claimed to have been unfairly dismissed. He asserted his claim against two respondents, VTSI (the **First Respondent**) with whom he had an express employment contract and Global Jet Luxembourg SA (the **Second Respondent**) in respect of which he claimed he had an implied contract of employment. As a preliminary matter, the Respondents raised issues of eligibility in terms of jurisdiction and continuous service and the Applicant raised an issue as to the identity of the employer.

The focus of the Tribunal's decision was on whether or not Mr Newark 'ordinarily worked' in Guernsey. The other two issues were not addressed by the Tribunal. Mr Newark claimed that his 'base' was in Guernsey and that the 'base test' should be applied in determining whether or not he 'ordinarily worked' in Guernsey. In particular, he argued that:

1. the First Respondent was incorporated and based in Guernsey (the Second Respondent was incorporated and based in Luxembourg);
2. he lived and was personally based in Guernsey;
3. he paid personal tax and social security contributions in Guernsey;
4. his travel to the aircraft upon which he worked was paid for by the Second Respondent and claimed he was 'on duty', from the moment he arrived at Guernsey airport to commence his travel to the aircraft (evidenced by the fact that he wore or 'carried' his uniform); and

5. his contract of employment with the First Respondent provided that Guernsey law applied and that Guernsey Courts had exclusive jurisdiction in relation to disputes arising out of the terms of that contract and the relations between the parties.

The Respondents each contested that the 'base test' was not the determinative factor and asserted that he did not 'ordinarily work' in Guernsey because:

1. the Applicant's work was that of a captain of a specific aircraft and that aircraft was based and travelled exclusively outside of Guernsey;
2. the Applicant did not work in Guernsey;
3. the only connection that the:
  - (a) First Respondent had to Guernsey was that it was incorporated in Guernsey;
  - (b) Second Respondent had to Guernsey was that it paid for the Applicant's travel to and from Guernsey so that he could join the aircraft to commence his duties;
4. the Applicant was not expected or required to travel in his uniform and was not considered to be on duty, whilst travelling to and/or from his home in Guernsey; and
5. the Applicant was expected to report for duty shortly before the aircraft was ready to leave and the concept of 'duty hours' under civil aviation regulations was relevant only to determine necessary rest periods, and therefore not to be indicative of when an individual was on duty.

### **The decision**

Decision was given in favour of the Respondents. The Tribunal held that the Applicant's personal base in residential and contractual terms may have been in Guernsey but that the eligibility to claim unfair dismissal is clearly defined in the Law as only being available to those who 'ordinarily work' in Guernsey. This was consistent with the jurisdiction clause in his contract of employment which provided for the application of Guernsey law to any disputes arising out of the relations between the parties. Guernsey law has a limitation in terms of its application to those who 'ordinarily work' in Guernsey.

The Tribunal held that the 'base' test argued by the Applicant 'was only one factor and that the key term in determining [Mr Newark's] eligibility or otherwise was that of his "work"'.

The Tribunal found as a matter of fact that his 'work' was that of captaining/piloting the specific aircraft and that that 'work' was carried out wholly outside of Guernsey.

In reaching their decision, the Tribunal distinguished the earlier 2009 case of *Burford v Flybe* which confirmed that Ms Burford 'ordinarily worked' in Guernsey because she reported for duty in Guernsey and she both commenced and completed her shift in Guernsey.

In contrast, Mr Newark's 'work' as a captain on the aircraft began and ended outside of Guernsey. The Tribunal found that his 'work' did not actually begin until he started performing his duties at the location of the aircraft. It held that his travel time to and from the aircraft was to facilitate the performance of his 'work' and that he was not 'on duty' during that time.

Accordingly, the Tribunal found that Mr Newark's 'work' was carried out wholly outside of Guernsey and determined that it was unable to hear Mr Newark's complaint. His claim was therefore dismissed.

### **What this means for Guernsey employers**

This is a landmark case in Guernsey and provides clarity for the first time on the statutory reference 'ordinarily works'. So, what can we learn from this decision?

Firstly, just because a contract of employment provides that Guernsey law applies and that Guernsey courts have jurisdiction over any disputes, it does not mean that an employee will have the right to bring a statutory claim for unfair dismissal in Guernsey. Any such claim is always subject to the eligibility requirements of the Law, which as we know, specifically carves out certain categories of employee, including those who do not ordinarily work in Guernsey.

Secondly, in reaching its conclusion in Newark, the Tribunal considered all the circumstances of the case. The fact that Mr Newark's contract was governed by Guernsey law and that he resided in Guernsey were factors to consider but were not held to be definitive. The key was where Mr Newark performed his 'work'. This clarification serves as a reminder for Guernsey employers (and/or companies who use Guernsey

employment contracts) to review and clarify their contracts of employment, to safeguard against liability as much as possible, by:

- expressly stating, not only what the employee's duties are expected to be performed, but when they are considered to start and finish;
- confirming what is considered to be commuting time and what is deemed to be part of an employee's duties;
- being clear on when an employee is on duty and off duty;
- being clear on who is responsible for the payment of income tax and social insurance contributions; and
- considering whether an exclusive or non-exclusive jurisdiction clause is appropriate.

For assistance with the above, please do not hesitate to contact the Mourant Ozannes Employment Team.

## Contacts

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