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# Territorial scope of the Singapore Employment Act

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## Background

The purpose of this note, which is intended to be one of a series of notes, is to consider legal issues which are in my view likely to increase in importance in Singapore following recent changes to the scope of employment laws in Singapore.

This article deals with the territorial ambit of the Employment Act (EA)

### 1. The expanded coverage of the EA means that cross-border issues as a practical matter become more relevant in Singapore

The coverage of the EA was significantly widened from 1 April 2019 to include all employees. Previously, only rank-and-file staff, and managers and executives earning not more than S$4,500 a month, were covered.

One implication of this expanded coverage in my view is that the need for employers to understand, and take a practical position with regard to, the EA's potential for extra-territorial impact will have materially increased.

This is because middle-to-higher level employees are rather more likely to undertake work across borders. Such cross-border elements may arises in relation to different forms of employment relationships such as:

- International business travellers
- Secondees and expatriate employees

- Peripatetic or mobile employees (e.g., aircrew, sailors etc.)
- Staff hired in one country to work in another
- Employees living in one country, but working in another
- Employees working in a foreign country for a local employer (e.g., a foreign correspondent of a local newspaper)
- Employees whose job roles span multiple countries

Disputes with more senior employees are also potentially more likely than with junior staff. This is why the issue has become more relevant. So, what is the territorial ambit of employment law?

**2. The EA does not expressly define its territorial ambit and therefore the question falls to the common law**

Like most statutes, the EA does not expressly define its territorial scope, leaving the question to the common law.

This is similar to the position which prevails in England currently, i.e., the territorial ambit of the Employment Rights Act 1996 is not spelt out clearly in the statute, but it is left to the Courts to (in the words of Lord Hoffmann in the leading case of *Lawson v Serco Ltd[2006] UKHL 3*) "... imply whatever geographical limitations seemed appropriate to the substantive right." (emphasis added)

By contrast, in certain other territories, e.g., Australia and in the states of Canada, the matter is regulated by statute.

For example, under Section 34 of the Australian Fair Work Act 2009 and Regulation 1.15F of the Fair Work Regulations, certain Australian employment rights apply to all employees working primarily in Australia plus all employees (except those engaged outside Australia to perform duties outside Australia) of an Australian-based employer, irrespective of where the employee works.

In Ontario, Canada, the Employment Standards Act 2000 applies to work performed outside Ontario which is a continuation of work performed in Ontario.

In the US, the major US Federal discrimination laws extend to US citizens working abroad for US controlled MNCs. However, other labour statutes, such as the Family and Medical Leave Act (FMLA), Fair Labor Standards Act (FLSA) and Occupational Health and Safety Act (OSHA), have essentially territorial ambit only.

So the international pattern is somewhat mixed but one can say that:

- The law of the place of work will usually apply irrespective of the governing law of the employment agreement—this simply reflects the fact that an employment relationship is not *merely* a private contract between two parties of equal bargaining power, but social protection considerations often loom large;
- A jurisdiction's employment law may have extra-territorial application at least to some extent—the question being what extent?; and

- It is certainly possible for the rules of more than one jurisdiction to apply simultaneously.

Before further analysing the common law regime, we first consider (but reject) a possible argument that the Employment Claims Act (EC Act) statutorily defines the territorial ambit of the substantive rights under the EA.

**3. Does the EC Act provide a clear statutory choice-of-law rule for substantive rights under the EA?**

Section 12 of the EC Act provides that an Employment Claims Tribunal (ECT) has jurisdiction to hear and determine any claim where prescribed conditions are met. These conditions include specification of which employees may bring a claim.

In the Employment Claims Regulations (EC Regs), for various types of claims, including:

- Specified contractual claims;
- Specified statutory claims such as for paid annual leave and public holiday entitlements; and
- Claims in relation to dismissal without just cause or excuse,

the EC Regs specify that an employee may claim if (amongst other conditions):

- The employer (being a non-individual) is incorporated or formed under any written law in Singapore, or carries on business in Singapore; and
- The employee is a citizen, permanent resident or holds (or held) a relevant work pass.

The question arises whether this provision not merely defines the jurisdiction of the ECT, but also the substantive choice-of-law rule for the underlying claim.

In my view, the provision cannot be read as a choice-of-law rule for the substantive rights under the EA, because it would be a clear over-expansive assertion of jurisdiction to apply Singapore employment law rights to, for example, a Hong Kong branch of one of the Singapore local banks that engaged, in Hong Kong, a permanent resident of Singapore to work solely in Hong Kong.

The connections to Singapore in that situation would be very weak. Therefore, it would be clearly necessary, in my view, to read some *additional* territorial limitation to the substantive rights above and beyond the jurisdictional provisions in the EC Act, i.e., the EC Act provision cannot be applied as the substantive choice-of-law rule for the EA without more.

In addition, in my view, in the case of certain employment-related rights in particular, e.g., the right to public holidays or annual leave, the "place of work" should be regarded as exercising a particularly strong pull. Therefore, unless compelled by authority, I would not be prepared to concede a wide extra-territorial ambit to the EA in relation to these rights. Hence, because the jurisdiction provisions in the EC Act apply (largely) the same jurisdictional approach to a whole swathe of claims

(including e.g., holiday days) I think this supports the view that its ambit should be confined to the question of jurisdiction only.

**4. A look at the English common law regime**

Since England is a major common law country, and given that it adopts the common law approach to deciding on the territorial ambit of employment protections, a look at the English common law test would be instructive although decisions in England will clearly not be binding in Singapore.

In England, the leading case is the House of Lords decision in *Lawson v Serco*, and the principles set out in that case have since been developed by a number of other decisions of the UK Supreme Court (including *Duncombe v Secretary of State for Children, Schools and Families (No 2) [2011] UKSC 36* and *Ravat v Halliburton Manufacturing and Services [2012] UKSC 1*), and the English Court of Appeal.

In a recent case (*The British Council v David Jeffrey [2018] EWCA Civ 2253*), the English CA helpfully summarized some of the principles developed by the UK Courts to date as follows:

- In general, Parliament can be taken to have intended that an expatriate worker—that is, someone who lives and works in a particular foreign country, even if they are British and working for a British employer—will be subject to the employment law of the country where he or she works rather than the law of Great Britain, so that they will not enjoy the protection of UK employment rights. This has been referred to as "the territorial pull of the place of work";
- This does not apply to peripatetic workers, to whom it can be inferred that Parliament intended UK employment law to apply if they are based in Great Britain;
- There will be exceptional cases where there are factors connecting the employment to Great Britain, and British employment law, which pull sufficiently strongly in the opposite direction to overcome the territorial pull of the place of work—this question may be called the "the sufficient connection question";
- In *Lawson v Serco*, the House of Lords identified two particular kinds of case (apart from that of the peripatetic worker) where the employee worked abroad but where there might be a sufficient connection with Great Britain to overcome the territorial pull of the place of work, namely:

    1. Where he or she has been posted abroad by a British employer for the purposes of a business conducted in Great Britain (sometimes called "the posted worker exception"); and
    2. Where he or she works in a "British enclave" abroad;

- Later decisions of the Supreme Court in *Duncombe* and *Ravat* made it clear that the correct approach was not to treat the above as fixed categories of exception, or as the only categories, but simply as examples;
- In the case of a worker who is "truly expatriate", in the sense that he or she both lives and works abroad (as opposed, for example, to a "commuting expatriate"), the factors connecting the employment with Great Britain and British employment

law will have to be specially strong to overcome the territorial pull of the place of work. There have, however, been such cases;
- The fact that a UK citizen is recruited in the UK to work for a UK organization is "never unimportant" but not enough in and of itself to lead to the conclusion that UK law applies; and
- The fact that the employment contract provided for English law to be the governing law was "important".

The above principles do not bind the Singapore Courts but are at least instructive in considering the position here.

**5. A survey of local lawyers**

Interestingly, in an article in 2005 (*A Note on the Application of the Statute Law of Singapore within its Private International Law* [2005] SJLS 203), Professor Adrian Briggs (a well-known scholar of private international law) wrote that he had once conducted an informal audience survey concerning the territorial ambit of the EA at a seminar at the Singapore Academy of Law (which was presumably mostly attended by lawyers).

The results were as follows:

**Table 2.**
Opinions in respect of examples set out in Table 1

| | √√ | √ | χ | χχ | Employer | Employee | Place of work | Proper law | Default law |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 31 | 1 | 0 | 0 | Singapore | Singapore | Singapore | Singapore | Singapore |
| 2 | 25 | 7 | 0 | 0 | Singapore | Singapore | Singapore | England | Singapore |
| 3 | 14 | 21 | 13 | 0 | Singapore | Singapore | England | Singapore | |
| 4 | 4 | 11 | 21 | 12 | Singapore | Singapore | England | England | |
| 5 | 31 | 16 | 1 | 0 | Singapore | England | Singapore | Singapore | |
| 6 | 8 | 19 | 4 | 2 | Singapore | England | Singapore | England | Singapore |
| 7 | 0 | 18 | 26 | 4 | Singapore | England | England | Singapore | |
| 8 | 3 | 3 | 13 | 29 | Singapore | England | England | England | |
| 9 | 33 | 15 | 0 | 0 | England | Singapore | Singapore | Singapore | |
| 10 | 7 | 32 | 7 | 2 | England | Singapore | Singapore | England | |
| 11 | 2 | 17 | 28 | 1 | England | Singapore | England | Singapore | |
| 12 | 13 | 26 | 7 | 2 | England | England | Singapore | Singapore | |
| 13 | 3 | 17 | 18 | 10 | England | England | Singapore | England | |
| 14 | 0 | 4 | 17 | 27 | England | England | England | Singapore | |
| 15 | 1 | 3 | 10 | 34 | New York | Singapore | HongKong | England | |

Those participating were invited to choose from four possible answers (√√) yes, the Employment Act should be applied; (√) probably it should be applied; (χ) probably it should not be applied; (χχ) no, it should not be applied.

This kind of informal survey is, of course, not scientifically robust, nor binding on the Singapore Courts, but it is interesting and helpful to an employer in deciding on the position it wishes to take on the territorial ambit of the EA.

**6. Do all the rights under the EA have differing territorial scope or does the EA have only a single territorial ambit covering all rights?**

As Lord Hoffmann observed in *Lawson v Serco*, "... there is no reason at all why the various rights included in the [Employment

Rights Act 1996] should have the same territorial scope ... But uniformity of application would certainly be desirable in the interests of simplicity."

In England, the principle in *Lawson v Serco* has generally been applied across-the-board in relation to employment rights (under the Employment Rights Act but also other statutes such as the Equality Act 2010) and it may well be that this position is correct.

Nonetheless, in my view, under the present state of the law where there are no binding local decisions, the more practical and prudent approach would be to consider the potential extra-territorial application of different rights under the EA separately, and acknowledge the risk or possibility that they may have different territorial scope.

For example, it is possible that a Singapore Court could hold that provision relating to unfair dismissal may not have the same extra-territorial scope as the provision relating to public holidays.

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