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Dear committee members,

Welcome to the 17th issue of the
International Employment Lawyer.

International employment law covers many
issues. In this newsletter we cover everything
from issues of democracy to stock option
plans.

As with last issue, the financial crisis still
affects the topics of the articles. This is also
the case with the upcoming Spring Meeting,
where post-crisis strategies and executive
compensation in the banking sector.

It was good seeing many of you at the Spring
2010 Meeting in New York.

Best regards,
Anders Etgen Reitz
Editor in Chief

France

Stock Option Plans and the Condition of Presence

By **Katell Déniel-Allioux**

Salans & Associés SCP

Generally, stock option plans stipulate a condition of presence within the Company for the beneficiary to be entitled to vest his/her options.

French case law admits the validity of these types of clauses, i.e. possibility to vest options on condition of being an employee of the Company at the vesting date. Then, subject to the terms and conditions of the stock option plan, employees made redundant before the vesting date may validly lose their related rights. To be enforceable vis-à-vis the employees concerned, the employers must have duly informed the potential beneficiaries of the terms and conditions of the Plan.

However, the French Supreme Court also considers that in case of unfair termination (as any termination of an employment contract, at the employer's initiative, must be sustained by a "real and serious" cause under French law), an employee whose contract is considered as unfairly terminated is eligible for a financial compensation for the prejudice suffered due to the loss of non-vested options. Then, the delicate question for the Court is how to determine the relevant compensation...

The legitimate purpose of the presence clause (recognized as such by the French Supreme Court) is obviously for the companies to establish a strong link between the capacity of employee and the capacity of shareholder and to avoid that third parties without any contractual link become shareholders.

However, in a recent case law (Cass. October 21, 2009) involving an employee deprived of unvested options due to a termination for gross misconduct, the Supreme Court also recalls that the stock option plan must comply with the provisions of Article L1331 1 of the French Labor Code which prohibits pecuniary sanctions. In the case at hand, beneficiaries of the plan would be deprived of their rights only in a case of termination for gross misconduct. The Judges consider that limiting the deprivation of the rights under the plan to termination for gross misconduct was obviously a pecuniary sanction. Concretely, the fault which justified the termination of the contract could not deprive the employee of any remuneration or even potential gain (options).

Then, if a condition of presence in a stock option plan is still valid, the condition must be drafted carefully.

France

The Law On Social Democracy: Is This The End of A French Paradox?

By **Roselyn S. Sands & Laurent-Paul Tour**

Ernst & Young

Company-wide collective bargaining agreements (CBAs) are a fundamental source of employees' rights in France. Their provisions often apply to all employees, whether unionized or not, and to all employees within an industry whether signatory to the CBA or not.

Since World War II and prior to the enactment of the Social Democracy law in August 2008, five unions benefited from an irrebuttable presumption of representation of the workers; other unions had to prove their representation.

Thus the well-known "French paradox": while union membership in France is one of the lowest in the European Union (around 8% of workers), 95% of French companies are covered by a CBA. Thus, despite low union membership, unions remain a key player in the workforce and in any business transformation or redundancy.

The 2008 law now abolishes this irrebuttable presumption. From now on, unions must prove that they represent workers according to seven criteria defined by the law, including, among others, their score at the last works council's elections, their independence, and the number of members.

In addition, a company-wide CBA will be enforceable only if signed by unions having obtained at least 30% of the vote at the last works council's elections (without the opposition of unions representing 50% of such vote).

This reform is too recent to know its consequences on industrial relations. Will the necessity to establish representation weaken unions and thus, give employers an upper hand in collective bargaining in the future, or will it have the opposite effect: encourage employees to join unions, create more competition among unions, and thus strengthen the overall power of unions in France?

Only the future will tell.

Germany

Germany's Long Way to Tighter Employee Data Protection Laws

By Alexander Wolff

Baker & McKenzie

During the past year, several employee data protection scandals have caught the public attention in Germany. Deutsche Bahn, Germany's state-owned railway company, got into the focus of the media as its headquarters automatically crosschecked all suppliers' account data with the data of its employees to discover cases of bribery.

In October 2009, the company agreed to pay a fine of more than Euro 1.1 million. Meanwhile, Deutsche Telekom, Germany's telecom giant, received negative publicity for monitoring private telephone bills of several members of its supervisory board who happened to be employee representatives and union members. And in 2006, as a result of an internal investigation, Deutsche Telekom's CEO Rene Obermann had to confess the loss of personal account data of 17 million clients. Another worst-case-scenario in data security was presented by Lidl, a German supermarket chain. The company got into the headlines for monitoring its employees by detectives at their workplace, in the dressing rooms, and in their private homes. The investigation reports included information about tattoos, possible love affairs among employees, and the cleanliness of employees' underwear. The public outrage was immense and Lidl was fined to pay Euro 1.5 million. The company apologized to the public and promised to do better. However, a few months later, the company once again violated data protection laws. A woman had found dozens of files containing confidential employee data in a trash bin in front of a public car wash. The files contained information about sick days, illnesses, mental disorders, and the names, private addresses, and social security numbers of Lidl employees.

Sparked by the scandals and due to the fact that in 2009, federal elections were held in Germany, all public parties published their own proposal for modified employee data protection laws. As a first step, however, a new provision of the German Data Protection Act entered into force on 1 September 2009. Accordingly, employee personal data, including personal data revealed by applicants, may only be collected, processed or used if it is either necessary for the application procedure or for the execution or termination of an existing employment relationship. The Federal Agency for Data Protection emphasizes in a statement on its website that these provisions apply to all data carriers, including electronic files, paper files or hand written notes. Data that is irrelevant for the employment

Germany

Germany's Long Way to Tighter Employee Data Protection Laws - Continued

relationship may not be collected at all. Furthermore, employee personal data may only be collected, processed or used for the purpose of identifying criminal action committed within the context of the employment relationship if the employer has hard facts supporting a reasonable suspicion that the employee was involved in criminal actions. Employers not respecting these new rules face severe fines.

Despite the new provision, there are still a number of practical questions when it comes to employee personal data not yet sufficiently answered by the legislator: For example, under which circumstances is it legal that employers check the employee's e-mail account? To which extent can an employer monitor the private use of the internet during working time? May data be used in court if it was collected non-compliant with data protection laws? Can company cars be tracked by GPS or company mobile phones by the service provider? How long may the data of a job applicant be stored?

The newly elected German government has agreed to a codification of specific employee's data protection laws to enter into force presumably in autumn 2010. One thing is sure: The new legislation will bring about further limitations and sanctions for non-compliant employers.

United Kingdom

Religious Liberties and the Impact on Workplace Equality Issues; Dress Codes

By Anna Birtwistle

CM Murray

The Court of Appeal has held that a British Airways (“BA”) uniform policy which precluded a Christian employee from wearing a visible silver cross was not indirectly discriminatory under the UK’s Employment Equality (Religion or Belief) Regulations 2003 (the “Regulations”).

Religious discrimination has been a particularly dominant issue in the UK over recent months; the Pope himself even having intervened in the public debate as to how religious beliefs will be protected under the forthcoming Equality Act.

Eweida v British Airways plc follows a number of cases where Christian religious rights have been repeatedly trumped by discrimination protections of other groups of workers. They include the failed claims of the Christian relationship counsellor who did not wish to provide sexual counselling to gay couples; the Christian magistrate who did not wish to hear gay adoption cases; and most recently, the Christian Registrar who refused to officiate at gay civil partnership ceremonies. All felt that those aspects of their jobs went against their religious beliefs; and all failed.

In Eweida, E, a devout practising Christian, worked on BA’s check-in desk. BA’s uniform policy at the relevant time permitted employees to wear any jewellery they wished provided that it was not visible. An exception allowed for items deemed being a mandatory religious requirement which could not be concealed. E refused to conceal a silver cross she wore on a necklace and was sent home without pay.

Following the dismissal of her claims for direct discrimination, indirect discrimination and harassment at the first instance and appeal tribunals, E appealed the decision reached in respect of her indirect discrimination claim in the Court of Appeal. The Court observed that, for an indirect discrimination claim to be successful, there must be a provision, criterion or practice (“PCP”) applied to all employees which puts ‘or would put’ persons who shared the claimant’s religion or belief at a disadvantage compared to other persons. E, on the other hand, argued that it should have been sufficient for her to show that she alone suffered the disadvantage on the grounds of her religion.

The Court of Appeal rejected E’s appeal; in the Court’s view, there was no need to suggest that the word “persons” in the EU Equal Treatment

United Kingdom

Religious Liberties and the Impact on Workplace Equality Issues - Continued

Framework Directive (No.2000/78) was intended to include solitary disadvantage within the scope of indirect discrimination. The Court placed significant weight on the fact that the detriment was suffered by E alone, that her wish to wear the cross did not arise from any doctrine of faith and that it did not interfere with her observance of it.

Comment

This decision does not sit well with the general principle that protection from discrimination should be interpreted broadly and one might have expected the Court to have taken a more generous approach when interpreting the Regulations given that unlike other decisions concerning religious discrimination, the manifestation of E’s belief arguably had no discernable affect upon others.

Whilst it is correct that it was E’s personal decision to wear a visible cross (and was not one which was required by scripture or as an article of her faith like, for example, the Sikh turban), it is questionable why, when discrimination legislation has moved forward so as to encompass arguably non-traditional philosophical beliefs such as climate change, the law should look to the requirements of scripture as they pertain to religions rather than individuals’ own interpretation of their faith and subjective belief of how this should be observed.

USA

Properly Terminated for Leaking Information to Media

By Mo Syed
King & Ballou

The U.S. District Court for the Western District of Washington dismissed whistleblower claims brought by two former compliance auditors of a large aerospace company. The employees were auditors who performed testing on IT controls at the company. The tests being performed by the auditors were undertaken in compliance with the Sarbanes-Oxley Act's (SOX) mandate that publicly traded companies review their controls over financial reporting.

Both employees became "Audit IT SOX auditors" with the company in January 2007. During their employment, they made several complaints to supervisors about perceived auditing deficiencies, but eventually came to the conclusion that the company's auditing culture "was unethical and that the work environment was hostile to those who sought change." After making several complaints to supervisors about perceived deficiencies, the auditors provided information about the alleged deficiencies to a reporter at a daily newspaper.

When the company found out of the contact and disclosures made to the reporter, the employees were placed on suspension, and the matter was referred to a company Employee Corrective Action Review Board ("ECARB"). The ECARB voted unanimously to terminate both employees, and informed the men of these decisions. The employees filed whistleblower complaints with the Occupational Safety and Health Administration (OSHA). Faced with delays at OSHA, the employees decided to proceed in federal court. OSHA acknowledged the employees' right to proceed in federal court.

In their lawsuit they claimed that the company wrongly fired them as whistleblowers and that they were protected under Section 806 of SOX.

The court noted that Section 806 of SOX, 18 USC § 1514A(a) (1), prohibits employers of publicly traded companies from "discriminat[ing] against an employee in the terms and conditions of employment" for "provid[ing] information . . . regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law

USA

Properly Terminated for Leaking Information to Media - Continued

relating to fraud against shareholders." However, it noted that the protection exists when the information or assistance is provided to or the investigation is conducted by—
(A) a Federal regulatory or law enforcement agency;
(B) any Member of Congress or any committee of Congress; or
(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)
Since none of these three cover a reporter or media outlet, the whistleblowers were not protected.

The employees took the position that the company's reliance on the media disclosures to fire them was merely a pretext and that they were fired allegedly protected activity such as the complaints to their supervisors. The employees argued they relied on company's policies and procedures relating to sharing company information with outsiders that permitted disclosure of information protected under Section 7 of National Labor Relations Act (NLRA). The company took the position that media leaks are a violation of confidentiality rules and are not privileged by the NLRA. The court agreed that Section 7 of the NLRA did not apply because it related exclusively with the formation of labor unions and the practice of collective bargaining. The court went on to find that the company had demonstrated that the employees would have been fired even in the absence of activity protected under SOX – thus the reliance on media disclosures was not a mere pretext.

The court ruled that leaking information to the media is not protected activity under SOX, and the company was within its rights to terminate the auditors on this ground.

USA

Compliance with Pay Discrimination Laws

By Donald C. Dowling

White & Case LLP

In the push to launch cross-border rewards, multinationals can too easily overlook pay-related discrimination laws in each affected country. In this context, “discrimination” is a broad concept—pay discrimination laws can encompass not only U.S.-style “protected group” discrimination but also a distinct type of “job category” discrimination unknown in the United States. We examine both.

“Protected Group” Pay Discrimination

Most jurisdictions impose general employment discrimination laws that protect specified traits or groups, such as gender/race/religion, in hiring, firing, and terms of employment. Examples include: Brazil constitution art. 7 items XXX-XXXI; European Union (EU) Equal Treatment Directives 76/207/EC and 200/78/EC; South Africa Employment Equity Act 55/1998; Spain labor code arts. 4.2 (c), 17.1; and U.S. Title VII/Age Discrimination in Employment Act/Americans with Disabilities Act. Because rewards like pay, benefits and equity grants are vital terms of employment, discrimination in rewarding employees can violate these protected-group employment discrimination laws. Many countries include

as illegal discrimination a concept of “adverse impact” (called in Europe “indirect discrimination”), by which a facially-neutral compensation system may be held illegal if it disadvantages employees in some protected group.

Gender: In addition, many countries impose separate gender discrimination laws specific to the pay/benefits/equity context. Examples include: EU Treaty article 141 and EU Equal Pay Directive 75/117; the Ontario Pay Equity Act; the United Kingdom (U.K.) Equal Pay Act of 1970; and the U.S. Equal Pay Act of 1963. (Plus there are gender discrimination laws like Korea’s Gender Equality Employment Act that reach—but are not specific to—compensation). Some gender pay discrimination laws impose what in the United States used to be called “comparable worth” analysis and what in the U.K. is called “work of equal value.” These laws require equalizing pay across job categories traditionally worked by one gender or the other (for example, an employer’s janitors might argue that they contribute the same “comparable worth/equal value” as its secretaries, and therefore deserve the same pay). Ontario’s Pay Equity Act requires employers affirmatively to run comparable worth/equal value analyses, and Ontario’s increasingly-proactive Pay Equity Commission launches unannounced enforcement audits.

Local citizenship: Beyond gender, another specific group subject to special protection under some countries’ pay-specific discrimination laws is local citizenship. Some developing countries prohibit compensating aliens more generously (the policy here is to keep multinationals from rewarding their expatriates more than comparable locals). For example, Bahrain labor law art. 44 mandates that “wages and remuneration” of “foreign workers” not exceed pay for local “citizens” with “equal skills” and “qualifications” unless necessary for “recruitment,” and Brazil labor code art. 358 requires that “salary” of a local citizen not be “smaller” than the pay of a “foreign employee perform[ing] an analogous function.” Watch for these laws in structuring expatriate packages.

USA

Compliance with Pay Discrimination Laws - Continued

“Job Category” Pay Discrimination

Beyond these protected-group discrimination laws, many countries outside the United States impose separate “job category” pay discrimination laws by which every employee enjoys a legal right to be rewarded equally to co-workers in equivalent jobs—even if everyone concerned is in the same protected-group. As applied to a single job, these laws are conceptually simple: Two people doing the same work have a right to the same pay, even if both are white Christian men or even if both are black Muslim women. Where job-category discrimination laws get tricky is where they enter the realm of “comparable worth/equal value”—equating different jobs that purportedly contribute equal value to an organization.

For example, France’s job-category pay discrimination law allows for comparable worth/equal value theories, subject to employer defenses based on different length of service, performance, responsibilities, and affirmative action/“positive discrimination” for nationality. See 15 Employees v. Renault, Cour de Cassation chamber social (France) [CCCs] case # 92-42.291 (10/29/96); Meier v. Alain Bensoussan, CCcs case # 05-45.601 (2/20/08); Pain v. DHL, CCcs case # 07-42.675 (7/1/09); Cour d’appel de Montpellier chamber social case # 09/01816; Fornasier v. Sermo Montaigu, CCcs case # 06-46.204 (6/26/08).

Other countries that impose job category discrimination rules include:

- Brazil: Brazil labor code article 461 mandates equal pay among employees who perform “identical” work of the “same value.” Article 461 appears to link this mandate to protected group status. *Fisch v. Unibanco*, 2d App. Trib. #00530-2007-201-02-00-4.
- China: China’s recent Employment Contract Law, at articles 11 and 18, mandates that “the principle of equal pay for equal work shall be observed” (absent a union agreement to the contrary), and does not link “equal pay” to gender or other protected group status. Implementing regulations are silent on equal pay; Chinese law on this point remains undeveloped.
- Finland: In a June 2009 decision under the Finnish Employment Contracts Act 2001, Finland’s Supreme Court mandated equalizing employee benefits across two very different job categories. See Finland Sup. Ct. case # KKO:2009:52.

A special type of job-category discrimination law addresses irregular—temporary/part time/contingent—status. European Union member states expressly prohibit pay discrimination on irregular status, meaning that (contrary to a practice widespread across the United States) European employers cannot deny temporary/part-time/contingent workers benefits under insurance and retirement plans. See EU Directive 97/81/EC. These same laws can also require European employers to credit part-time service as full time for years-of-service requirements.



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Calendar of events

2 - 6 November 2010

Fall Meeting
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Editorial

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