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This month's round-up of labour and employment stories from around our global network

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French employers urged to proceed with caution when making redundancies

Two very recent Court of Appeal rulings mean that French employers carrying out redundancy exercises need to be careful to ensure the process is not rendered unlawful for the lack of an "economic motive".

According to the Courts of Appeal in Paris and Reims, if the economic motive provided by the employer to the Works Council to justify the proposed redundancies is unfounded then the consultation process will not comply with the requirements of the French Labour Code and the entire redundancy procedure should be "cancelled". In the case in Reims, a report prepared by chartered accountants on behalf of the Works Council which concluded that the employer's economic motive was artificial was sufficient to persuade the Judges of this fact.

These cases are controversial, as they do not sit neatly with previous case law in this area. This said that the Courts are not allowed to interfere with the management decisions of an employer and that the relevance of the economic reason should only be judged at the date of dismissal. Furthermore, the French Labour Code provides that a redundancy procedure is only "cancelled" if a redeployment plan is not presented by the employer to the employee representatives, who must then meet and be informed and consulted with. In this case the redundancy procedure was found to be void for the lack of an economic motive, which is not one of the invalidating reasons set out in the Code.

The Paris decision has already been appealed to the Supreme Court. In the meantime French employers should be aware of the uncertainty in this area and exercise extreme caution to justify their rationale when implementing a redundancy procedure, as the judicial voiding of redundancies has become a significant risk in France.

Pauline Pierce, Of Counsel and Mia Catanzano, Associate, Paris

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German employers should notify Employment Agency of all job vacancies

The German Federal Labour Court has ordered an employer to pay compensation to a job applicant who claimed that he had been turned down for a job because of his disability. In support of his claim, the plaintiff relied on the employer's failure to notify the German Employment Agency about the vacancy, contrary to Section 81 of Social Security Code IX.

Every employer in Germany is obliged to contact the Employment Agency before advertising a new job vacancy in order to check whether the vacant position could be filled by a disabled unemployed candidate. Employers must also inform the Works Council about any job applications made by disabled individuals immediately upon receiving them.

In this recent Federal Labour Court decision a severely disabled plaintiff applied without success for a vacant position. The company did not notify the Employment Agency of the vacant position or conduct an interview process. When his application was rejected, the plaintiff brought a claim for compensation under the Equal Treatment Act. As evidence to support his claim of discrimination the plaintiff referred the Court to the company's failure to fulfil its obligation under Section 81 to notify the Employment Agency of the vacancy. The Court upheld his claim. It rejected the employer's argument that it was not clear from the plaintiff's job application that he was disabled and said that employers are required to notify the Employment Agency of all job vacancies, irrespective of whether a disabled job applicant has applied for the job or disclosed his disabled status in the application form. Furthermore, if an employer fails to comply with its obligations under Section 81 this in itself constitutes sufficient evidence to support a prima facie case of discrimination. It is then up to the employer to show that it did not discriminate, usually by pointing to a clear alternative reasoning for the rejection. In this case the employer could not deny that it had failed to notify the Employment Agency and was unable to rebut sufficiently convincingly the assumption that it had discriminated against the job applicant. His claim for compensation was upheld.

German employers are advised to contact the Employment Agency before posting any new job vacancy in order to fulfil their obligations under Section 81. Many employers overlook this requirement, as was demonstrated in this case by the fact the plaintiff had brought 27 other claims for compensation against different companies on the same basis. This did not prevent the Federal Labour Court from deciding in favour of the plaintiff one more time!

Sebastian Dücker, Associate, Berlin

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Monitoring at work : Spanish employer did not breach employee's right to privacy

The Spanish Supreme Court has ruled that the dismissal of an employee for using her work computer for personal purposes was lawful.

Ms Milagros was dismissed after she was found to be spending hours at work “chatting” and shopping on the internet. Her employer, Lingerie de Nuit, had a policy in place which made it clear that employees were not allowed to use their computers for personal purposes. When this matter came before the Supreme Court, it held that the dismissal was fair because LdN’s policy made it clear that it would not tolerate personal use of its computers. It could not therefore be said that M had any reasonable expectation of privacy in respect of her use of its IT systems.

This case is interesting and is clearly helpful to employers. Up until now most of the decisions in this area have gone the other way, even where employees have been accessing pornography at work or watching television during business hours. This is because the Courts had concluded that employees are entitled to privacy, even at work, and that employers were not allowed to “spy” on their employees’ online activities because this would constitute a breach of their fundamental right to privacy. The difference here was that the employer had made it expressly clear to its employees that they were not entitled to use their work computers for personal use and they did not therefore have any legitimate expectation of privacy. Furthermore, it said that if the personal use of the computer is actually illegal, employers are entitled to stop it.

In light of this case, employers should ensure they have a policy in place which makes it clear what employees can and cannot do when it comes to using their internet access, computers, emails, telephones, etc. for personal use, and that the policy is consistently and robustly enforced.

Antonio Elcarte, Associate, Madrid

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US Supreme Court confirms that Ministers cannot bring discrimination claims

The First Amendment to the United States Constitution provides the freedom to engage in religious activity without interference from the government. This raises the question: Is the First Amendment offended if anti-discrimination laws are applied to religious organizations' employment of Ministers? In its unanimous decision the United States Supreme Court has definitively answered "yes" to that question.

On 11 January 2012, the Supreme Court held that a "ministerial exception" precluded employment discrimination claims being brought by Ministers against their churches (***Hosanna-Tabor Evangelical Lutheran Church and School v EEOC***). This was the first time the Supreme Court had had occasion to consider whether a religious organization's freedom to select its own Minister prevented it being charged with employment discrimination. Even though the ministerial exception had been uniformly recognized by the United States Courts of Appeal, until now the Supreme Court had not weighed in on the topic.

Ms Perich was employed as a "called teacher." The Church regarded called teachers as being led into the vocation by God, as opposed to "lay teachers" who were regarded as contracted teachers. In order to become a called teacher specific academic requirements must be met, including theological study, and the teacher must receive a "call" from a congregation. When a teacher is called by a congregation that teacher is given the formal title "Minister of Religion, Commissioned." Ms Perich was called by the congregation at Hosanna-Tabor in Redford, Michigan.

Ms Perich became ill and was eventually diagnosed with narcolepsy. Eventually she informed the School Principal that she was able to return to work. Instead of allowing her to return, however, the congregation offered to pay a portion of Ms Perich's health insurance premiums in return for her resignation. Ms Perich refused the congregation's offer and reported to work after receiving a full medical release. Upon her arrival at the school, Ms Perich was asked to leave and was later informed that she would likely be fired. The congregation later voted to rescind her call, thereby terminating her employment. She claimed under the Americans with Disabilities Act, arguing that she was a teacher, not a Minister, and so should be protected against disability discrimination.

The Supreme Court unanimously held that the First Amendment gave the Church the ability to select its Ministers free from government interference, which included anti-discrimination laws. Specifically, the Court stated that "[r]equiring a church to accept or retain an unwanted minister, or punishing a

church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church control over the selection of those who will personify its beliefs." The Court also stated that anti-discrimination laws violated the Establishment Clause of the Constitution by impermissibly allowing the State to determine which individuals will minister to the Church.

The Court then turned to what is perhaps the most interesting question raised by the decision: just who is a "Minister" within the meaning of the exception?

Unhelpfully the Court refused to answer this question directly and effectively limited its holding to the specific facts of this case. The Court stated "[w]e are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a Minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment."

Not as useful as it might have been but the decision does take issue with three specific areas of the Sixth Circuit's decision and these areas may nonetheless provide some guidance for determining whether a specific employee is a "minister." The Supreme Court believed the Court of Appeal:

(a) improperly failed to see the relevance in Ms Perich's title as a commissioned minister;

(b) gave too much weight to the fact that lay teachers at the school performed the same duties as Ms Perich; and

(c) placed too much emphasis on Ms Perich's performance of secular duties, noting that the issue presented "is not one that can be resolved by a stopwatch."

Thus it appears that the Court will likely focus on the totality of the job performed by the individual as opposed to focusing its attention on one factor in determining if the employee is a Minister.

What is clear from this decision is that for the first time the Supreme Court has formally recognized the ministerial exception, effectively giving religious organizations the right to select their own Ministers without interference from anti-discrimination laws. It is difficult to determine just how far-reaching this decision will turn out to be. Further litigation helping to define more clearly who is a Minister seems likely.

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