SQUIRE SANDERS

A round-up of Labour and Employment stories from around our global network

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Saudi Arabia: Correction of the Labour Market

As highlighted in a previous edition of Worldview, the Saudi Government has launched a number of regulatory reforms of labour legislation, often collectively referred to as the "Labour Correction". The Labour Correction is aimed at eliminating the problem of illegal workers, improving working conditions and mainly enhancing the nationalization of jobs and improving the employability of Saudi nationals within the private sector.

In June 2011, the Ministry of Labour introduced an incentive programme known as the "Nitaqat Program" ("ranges" or "scopes" in Arabic) to create greater employment levels amongst Saudi nationals. In our October Worldview newsletter we provided an introduction to the Nitaqat Program. In this month's newsletter we provide further details.

What is the Nitaqat Program?

The Nitaqat Program is a classification system introduced to help the employment of Saudi nationals and to address the obstacles faced under the previous Saudization System. This applied one fixed percentage for employment of Saudi nationals, regardless of the particular circumstances of each activity, such as the availability of qualified Saudi manpower for certain activities. The previous Saudization program required entities to achieve at least 30% Saudi employees for all business activities except for contracting, set at 10%.

The Nitaqat Program applies variable nationalisation rates. It encourages entities registered in Saudi Arabia by offering incentives and rewards to those achieving more than 40% local employment rates and it penalises those with low rates.

How does it work?

Under the Nitaqat Program, private companies are classified into four distinct categories: Premium, Green, Yellow and Red, with each providing a sliding scale of benefits and privileges. Companies achieving a high level of Saudization will fall into the Premium or Green categories of Nitaqat and are rewarded for doing so, whilst those who do not achieve the required rates are penalised.

The Ministry of Labour divided the labor market into 41 commercial activities and categorised businesses into five sizes according to the size of their workforce. The boundaries vary from 0-9 employees being classified as "very small", to 3,000 plus employees being "giant". The applicable Saudization percentage required will vary depending on the number of employees the company employs and the type of business activity it is carrying out.

Below is an example illustrating how the Nitaqat Program actually works in the case of contracting/construction companies.

The Premium category rewards companies with the ability to hire employees from the Red and Yellow zones and transfer the Iqamas (work permits) of those employees without the prior

consent of their employer. Additionally, companies under the Premium category have no limitations with regards to the recruitment of foreign workers. They are also granted a one year grace period for the renewal of their municipality and business licenses or commercial registrations.

NUMBER OF EMPLOYEES	CATEGORY RED	CATEGORY YELLOW	CATEGORY GREEN	CATEGORY PREMIUM
Small company (10-49 employees)	0 - 1% SAUDIS	2 - 4 % SAUDIS	5 - 24 % SAUDIS	More than 25% SAUDIS
Medium company (50-499 employees)	0 - 1% SAUDIS	2 - 5 % SAUDIS	6 - 27 % SAUDIS	More than 28% SAUDIS
Big company (500-2999 employees)	0 - 3% SAUDIS	4 - 6% SAUDIS	7 - 30 % SAUDIS	More than 31% SAUDIS
Giant company (more than 3000 employees)	0 - 4% SAUDIS	5 - 7% SAUDIS	8 - 30 % SAUDIS	More than 31% SAUDIS

The benefits of a Green ranking are still substantial and generate the targeted levels of nationalisation. Companies under the Green category can apply for new visas once every two months and are entitled to one visa for every two expatriates gone on exit-only visas. They are also granted a six-month grace period for the renewal of their municipality or business licenses or commercial registrations. The benefits of this category allow as well for the recruitment of employees, from Red and Yellow category companies, without the employer's consent and for a change in the profession of foreign employees as per the Premium category.

Companies classified in the Yellow category cannot apply for new visas and are allowed to get only one visa after the departure of two employees/expatriates. They cannot prevent their employees from transferring their Iqamas to the sponsorship of companies from the Premium and Green category. However, they will be allowed to renew the work permits of their current workers provided that their workers have not completed more than six years in the Kingdom.

In practice, it is now far more difficult for a company under the Yellow category to operate in Saudi Arabia effectively.

The same penalties applied for companies under the Yellow category would apply to the Reds. Additionally, companies operating under the Red category will not be able to renew employee Iqamas, change an employee's profession or open a new branch office or any new facility. This will make succeeding in business in the Kingdom very tough.

To whom it applies

The Nitaqat Program generally applies to all private companies registered and operating in Saudi Arabia irrespective of whether such companies are owned by Saudi nationals or by foreigners (or jointly by Saudis and foreigners) and irrespective of whether such companies are operating on a temporary or permanent basis in the Saudi market.

More specifically, the programme applies to private companies employing more than nine employees. Private companies with less than nine employees qualify under the "white category" but are still required to hire at least one Saudi national who must be employed for at least three months following which the company will be allowed to hire non-Saudi employees. There are penalties imposed if companies in the white category do not hire a Saudi national, but more importantly this shows that irrespective of its size, any company wishing to operate in Saudi Arabia must comply with the Saudization policy.

What is the impact of Nitaqat?

The effect and results of the Nitaqat Program in 2012 show that over 50% of firms were ranked in the Premium or Green category. However these companies can and are still penalised despite achieving the required levels of Saudization. This is because the Ministry of Labour imposes a financial penalty on any company that employs more non-Saudi nationals than Saudis. Therefore, even with a 45% compliance rating and a Premium categorisation, a company is required to pay a fine of SAR200 per month for each non-Saudi employee it employs.

Although the Program has achieved some early success by generating more jobs for the Saudi population, it is still to be tested in the long run and its application has already raised a lot of questions in terms of its negative impact on the business of private companies in Saudi Arabia.

The lack of specific skills among the Saudi population and the reluctance of Saudi nationals to work in low level jobs, not to forget the high cost of Saudi employees as compared to expatriates, may in fact be challenging factors which would prevent private companies from complying with the programme.

When entering the Saudi market, foreign businesses must carefully consider this programme and its impact on their operational costs, human resources and commercial objectives.

Kevin Connor, Partner, and Wissam Hachem, Partner, Riyadh

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Hong Kong: Employer's "irrational" summary dismissal ends up costing it millions

In Hong Kong, it used to be the understanding that even if an employer wrongfully terminated an employee on the grounds of summary dismissal, the only damages that would be payable would be the "terminal payments" that would have been payable if the employee had been terminated lawfully without cause (i.e. notice monies or a payment in lieu of notice). Some employers were, therefore, tempted to summarily dismiss employees even if they did not have good grounds for doing so, as the potential damages were low. In light of a recent High Court judgment, this may no longer be the case.

In ***Grant David Vincent Williams v Jefferies Hong Kong Limited***, an employee successfully claimed substantial damages (amounting to two years' salary and benefits) from his former employer for wrongful summary dismissal after it was found that his employer had breached the implied duty of mutual trust and confidence.

The facts

Grant Williams was employed by Jefferies as its Head of Equity Trading Asia. He was responsible for preparing a daily newsletter for clients. In accordance with the vetting protocol, the newsletter required approval from London before being published to about 900 subscribers of the New York office.

In December 2010, Mr Williams prepared a draft newsletter and emailed it to New York to await approval from London for distribution. However, a personal assistant of the New York office mistakenly distributed the newsletter without approval from London. The personal assistant later acknowledged that she was at fault for distributing the newsletter without authorisation.

The newsletter made a passing reference to a link of a "Hitler video" although without making any comment and promoted a joke about the CEO of JP Morgan. Finding the reference to Hitler and the video inappropriate, Jefferies summarily dismissed Williams for "unacceptable and entirely inappropriate misconduct". This all took place within 21 hours of his having sent the draft newsletter to New York for approval.

The Court's decision

Jefferies was ruled to have acted irrationally in summarily dismissing Williams in a number of respects:

First, it had blamed him for a human error by the personal assistant, who had already admitted that she was at fault.

Second, it was illogical ("hypersensitive" and "irrational") for the senior executives of Jefferies to believe that the CEO of JP Morgan would think that the reference to him constituted criticism of him by Williams in the financial world. Also, the mere mention of "Hitler" and the reference to

the video in a marketing publication was not sufficient to denote a “racist or anti-Semitic connotation”, as Jefferies had concluded.

Third, in an email to the subscribers clarifying the unapproved distribution, Jefferies wrongfully described the newsletter as “Grant William’s… Edition” while the newsletter was clearly its publication, not his.

Fourth, the termination letter was evasive and possibly drafted deliberately without articulating the reason for dismissal. The dismissal meeting lasted for less than three minutes without giving Williams an opportunity to enquire about his dismissal and defend himself.

The Court ruled that it was unreasonable to “tar” Williams with overall responsibility for the mistaken distribution simply because he was the editor and author of the draft newsletter. Jefferies irrational behaviour was a clear breach of the implied duty of mutual trust and confidence.

Damages

Williams was awarded close to HK$7 million for contractual loss of earnings and benefits (i.e. what he would have been entitled to if he had been terminated with proper notice) plus a further HK$ 7.7 million damages for two years’ loss of salary and contractual benefits due to the nature of the breach and the stigma it had attached to his unfair dismissal, a total of some US$1.86m. Jefferies was also ordered to pay his costs on an indemnity basis.

Lessons to learn

- **Think before you fire**: The Jefferies case demonstrates the importance of having a valid reason for summary dismissal. Wrongful summary dismissal may bring negative publicity for the employer and increased compensation for the employee, as the unfair dismissal will affect the employee’s ability to secure an alternative job.

- **Equal treatment:** Every employee should be treated equally. The judge in the Jefferies case highlighted an instance where another employee had received more lenient treatment and retained his employment despite committing an offence of violence. The different treatment created an unwarranted impression that Williams must have acted particularly heinously.

- **Explain:** Employers should give themselves adequate time for explaining the reasons for dismissal and for the employee to defend himself and persuade his employer. The Court criticised Jefferies for depriving Williams of the opportunity to understand and discuss the reasons for his dismissal.

- **Maintain mutual trust and confidence:** Employers should not conduct themselves in a way calculated to destroy the relationship of confidence and trust between them and their employees, especially when they consider dismissing an employee. Irrational behaviour, as illustrated by the Jefferies case, can give rise to a cause of action by the employee for breach of mutual trust and confidence which will go way beyond just the length of his notice period.

Nick Chan, Partner, Hong Kong and Charles To, Associate, Hong Kong

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Spanish Labour Reforms Continue

Further to the reforms carried out by the Spanish Government in 2012, a new Royal Decree was passed in December 2013 which includes further changes to the Spanish labour market.

The new Royal Decree came into force on 22 December 2013 and addresses a number of different topics, including:

Part-time employment

- Under the new legislation, part-time employees are prevented from working overtime, i.e. in excess of the maximum number of annual working hours (generally an average of 40 hours per week).
- Any additional hours must be agreed in writing. Furthermore, any additional hours agreed cannot be less than 30% or more than 60% of the employee's contracted hours.
- Additional hours are always voluntary and must be offered only to permanent part-timers, i.e. not those who are on fixed-term contracts.
- Employees can opt out of any voluntary extra hours by serving 15 days' notice once one year has elapsed from the additional hours initially being agreed.
- Employers must register any contracted working hours for monitoring purposes.
- Employers can use a so-called "entrepreneur's contract" (which importantly includes a one-year probationary period) for part-time employees. This new type of contract has, however, been challenged before the Spanish Constitutional Court on the basis that it is unconstitutional, so we will have to wait and see.

Probationary periods

- Following the introduction of new regulations, the probationary period for fixed-term contracts of less than 6 months cannot exceed one month, unless the applicable Collective Bargaining Agreement states otherwise.
- Provided there is an agreement between the parties, the agreed probationary period will be suspended during any periods of maternity or paternity leave, in addition to certain sick leave situations.

Extended special protection

Under existing employment regulations, employees on maternity or paternity leave have special protection against dismissal. They also have the right to request a reduction in their normal working hours on returning to work of between one eighth and half of their normal working time (with a concomitant reduction in salary). The period during which employees can request such a change in their hours has been changed. Such a request can now be made until the employee's child reaches 12 years of age (it was previously 8).

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Group companies

When carrying out a collective redundancy exercise, in addition to severance pay and Social Security contributions, Spanish companies are required to make a substantial contribution (calculated by reference to the unemployment benefits and Social Security contributions payable in connection with the redundancies) in the following circumstances:

- where there are employees affected by the collective dismissals who are aged 50 or over;
- the company or group of companies made a profit during both of the previous 2 years; and
- the company or group of companies has more than 500 employees.

There has been some uncertainty about the meaning of "group of companies". This point has, however, now been made clear by making reference to the Spanish Commercial Code. As a result, there will now be a "group of companies" when a company (the parent company) has control, directly or indirectly, of another company (the subsidiary).

A parent company is treated as having control of a subsidiary company when:

- the parent company has the majority of the voting rights of the subsidiary.
- the parent company is entitled to appoint or remove the majority of the members of the managing body of the subsidiary.
- the parent company is able to obtain the majority of the voting rights of the subsidiary by means of agreements with third parties.
- the parent company has appointed the majority of the Board which is in position when the consolidated accounts have to be formulated and during the previous two fiscal years. This will be assumed when the majority of the members of the Board of the subsidiary are also members of the Board or similar of the parent company, or of another subsidiary of the parent.

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No duty under German employment law to offer alternative work abroad

In Germany the dismissal of an employee with service of longer than six months by a company with 10 employees or more, will be invalid if the dismissal is socially unjustified, i.e. it was not for urgent operational reasons or for reasons related to the person or the conduct of the employee. If such reasons exist in principle, a dismissal for operational reasons can nevertheless be invalid if the employee could have been employed in an alternative vacant position or on less favourable terms in a different "operation" of the company.

It has always been unclear whether this duty to offer alternative work could apply to operations of the company located outside Germany. This is because the German Protection Against Dismissal Act only mentions the criterion "operation", without reference to where that operation is located. It is clear, however, that the question of a vacant job only applies to operations of that particular company – it would not cover vacant positions in a different company, e.g. at a foreign subsidiary.

On 29 August 2013 the Federal Labour Court (File no. 2 AZR 809/12) clarified the position, ruling that an employee does not generally have to be offered a vacant job position at an operation of the employer located in a different country if the job position located in Germany is eliminated. In other words, if an employee is made redundant in Germany, his employer does not generally have to offer him alternative work that exists abroad.

In this case the defendant company had initially relocated parts of its permanent establishment to the Czech Republic. It then decided as a second step to transfer all of its production there. Only commercial and administrative positions continued to exist in Germany. As a result of this, the company dismissed all the production employees in Germany, including the plaintiff. The plaintiff brought proceedings in the Labour Court, claiming that her dismissal was socially unjustified and that she should have been offered a vacant position at the company's operation in the Czech Republic, with the option of altered conditions of employment so that she could at least have considered moving there.

The lawsuit was unsuccessful. The Federal Labour Court decided that the Protection Against Dismissal Act only covers operations located in Germany. If a company also maintains an operation in a foreign country, vacant job positions existing there do not generally have to be offered to employees who have been put at risk of redundancy in Germany. The employer's obligation to offer an employee the opportunity to be employed abroad (if necessary, also under less favorable conditions) can only come into consideration under special circumstances.

The decision of the Federal Labour Court has clarified an important question. In recent years many production companies in Germany have moved to different (European) countries with more favorable cost structures. In times of high unemployment, it is not unusual to see a tendency in these cases for employees to accept longer travel times in order to maintain their employment if necessary. It is not uncommon for this argument to at least emerge – possibly also only as a pretext – in protection against dismissal lawsuits in order to motivate the employer if possible to pay a higher severance in the case of a dismissal for operational

reasons. The Federal Labour Court has now put an end to this potential argument of employees. As long as special circumstances do not exist – e.g. a local relocation clause in the employee's employment contract also for foreign operations – employers need not therefore generally offer vacant job positions abroad before terminating the employment relationship.

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