

# Euroview

## Employment



### Germany: service-related statutory notice provision held to be discriminatory

The notice periods to be given by employers terminating an employee's employment under German law are regulated in Paragraph 622(2) of the German Civil Code. This stipulates that the length of the notice period to be given by the employer is calculated on the basis of the employee's length of service. According to Paragraph 622(2), however, any service **preceding the employee's 25th birthday** should not be taken into account when making the calculation.

On 19 January 2010, in *Kücükdeveci v Swedex GmbH & Co. KG Case C-577/07* the European Court of Justice ruled that Paragraph 622(2) violates the European Equal Treatment Directive relating to age discrimination. As a result, contrary to the statutory provision, periods of employment before an employee reaches 25 must now be taken into account when calculating the notice period the employer must give.

The Court held that the statutory provision was discriminatory on the grounds of age because staff who start working for a company at a young age would be disadvantaged in comparison to other employees of the same length of service in notice terms because service before 25 is excluded.

The Equal Treatment Directive allows for unequal treatment on the basis of age only under certain conditions – if it is justified by a legitimate aim and if the means of attaining this legitimate aim are appropriate and necessary.

Paragraph 622(2) is intended to provide employers with greater flexibility as younger employees are perceived to have greater occupational and personal mobility. In the Court's opinion however, the provision did not represent an appropriate means for achieving this broadly legitimate aim because it applies irrespective of the age of the employee **at the time of termination**, the point where that mobility is actually most important.

The ECJ's decision will not only have to be observed by the German Courts and employers in the future but, in our opinion, also by any collective bargaining parties anywhere in Europe who have included such a mechanism for calculating notice in their collective bargaining agreements.

#### Spain: new measure to ease taxation of redundancy severance payments

In Spain, one way to terminate employment contracts is via collective redundancy proceedings based on economic, technical, organisational or production reasons (known in Spain as 'ERE').

In order for the redundancy dismissals to be classified as "collective", the process must within a period of 90 days affect at least:

- a) 10 employees in companies with less than 100 staff;
- b) 10% of the total workforce in companies with between 100 and 300 employees; or
- c) 30 staff in companies with more than 300 all told.

A redundancy dismissal will also be classified as "collective" where there are more than 5 affected employees and they represent the total of the company workforce.

Collective redundancy dismissals of this nature require an Administrative Proceeding as set out in Article 51 of the Workers Statute. This is the only means by which an employer can lawfully carry out collective redundancy dismissals.

The first stage of the Proceeding is to submit a formal written application to the appropriate Labour Authority seeking authorisation to terminate the employment relationships. It is easier to obtain the Labour Authority authorization if prior agreement can be reached with the affected employees.

“Periods of employment before an employee reaches 25 must now be taken into account.”

Where the dismissal is based on objective reasons, the employee is entitled to receive a severance payment of 20 days' gross salary for each year of service up to a maximum amount of one year's salary. However, in order to reach agreement with employees, employers normally offer higher severance payments, e.g. 60 days gross salary for each year.

Until recently, employees affected by an ERE were subject to a severance payment tax exemption of 20 days' salary per year of service, with a limit of 12 monthly payments. Therefore if the parties reached a 60 day severance payment agreement, only 20 days would be tax-free and the remaining 40 days' pay would be subject to Personal Income Tax ('IRPF').

However, under the 'Act 27/2009 concerning urgent measures for the maintenance and promotion of the employment and for the protection of unemployed persons' passed on 30 December 2009, all ERE severance payments up to the limits established for unfair dismissal (i.e. 45 days' salary for each year of service, with a limit of 42 monthly payments) will be exempt from tax. This measure has been introduced to benefit employees being made redundant because of the current global economic situation, though is obviously pretty irritating for those made redundant outside the collective context.

#### **France: revised maternity leave allowance and national minimum wage rates from 1 January**

From 1 January 2010 the maximum daily allowance for pay during maternity leave was increased to €96.17 from €76.54. Any change to the minimum daily allowance for pay during maternity leave – currently €8.64 – has yet to be decided and will, if appropriate, come into effect on 1 April 2010.

The French national minimum wage ('Salaire Minimum de Croissance' or 'SMIC') was also increased at the beginning of the year. The 2010 rate is €8.86 gross per hour (equivalent to €1,344 gross per month for a 35-hour week).

#### **EU ECONOMIC GROWTH RESUMES**

According to the European Commission's 'EU Employment Situation and Social Outlook' monthly monitor for February 2010, economic growth has resumed in the European Union, although the recovery remains fragile. The EU emerged from recession in the second half of 2009 as GDP returned to positive growth in the third quarter (0.3%), although the growth slowed to 0.1% in Q4. Of the larger Member States, Spain was the only country where the economy continued to weaken in both quarters, although in the fourth quarter growth was negative in Italy and output remained flat in Germany.

Unemployment continued to rise in most Member States, particularly Latvia and Estonia, although there are signs that unemployment rates are stabilising in several EU countries and even declining in some of them. Unemployment across the EU rose by 163,000 in December 2009 (the smallest rise since mid-2008), giving an overall total of approximately 23 million – up 4.6 million since December 2008 (an increase of 25% over the year) and 7 million since March 2008 (an increase of 44%) when EU unemployment was at a relative low.

#### **FURTHER INFORMATION**

For more information relating to this newsletter, please contact:

##### **Caroline Noblet**

International Head of Employment  
E: caroline.noblet@hammonds.com

##### **Matthew Lewis**

Partner & Head of Employment - Leeds  
E: matthew.lewis@hammonds.com

##### **David Whincup**

Partner & Head of Employment - London  
E: david.whincup@hammonds.com

##### **Nick Jones**

Partner & Head of Employment - Manchester  
E: nick.jones@hammonds.com

##### **Teresa Dolan**

Partner & Head of Employment - Birmingham  
E: teresa.dolan@hammonds.com

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