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

October/November 2012

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Spanish Supreme Court rejects employer's claim for damages to reputation

The Spanish Supreme Court has ruled that an employer was not entitled to compensation for damage to its reputation and public image, after allegations that the owner of the business had harassed another employee were squarely rejected at Tribunal.

This case arose out of earlier proceedings in the Spanish Labour Courts in which Ms Lucia claimed that her ex-boss (and owner of the business), Mr Manuel, was a tyrant and a bully and had forced her "with menaces" to sign her resignation letter. She also claimed that one of the other managers had sexually harassed her. All of her claims were rejected at Tribunal, as there was insufficient evidence to support them. The Tribunal did not, however, go so far as to say the allegations were false.

Unhappy about the damage Ms Lucia's allegations had caused to his personal and professional reputation, Mr Manuel issued proceedings against her in the civil courts claiming compensation for damage to his reputation/and that of his company. His claim was unsuccessful. The Supreme Court held that in this case the right to freedom of speech had to be protected over Mr Manuel's right to protect his personal honour and the public image of his company, especially as the allegations of harassment had not been shown categorically to be false, but simply unproven. It pointed out that the allegations had been made in the protected context of a Tribunal claim, and were not insults for the sake of it.

In practice employers cannot stop employees making such allegations, even if they are subsequently unproven. The important point about this case is that unless the allegations turn out to be false (knowingly), there will be no remedy for employers or other employees who may have suffered damage to their reputations as a result. If, however, the allegations had proved to be false, or if the claim had been made maliciously, Mr Manuel could potentially have had a claim for costs against Ms Lucia in Tribunal.

Ignacio Regojo, Partner, Madrid

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All employment-related documents in France must be in French (with a few exceptions)

English has become the “official working language” for many companies belonging to international groups. But, keen to preserve France’s cultural heritage and to ensure safety is not compromised, French legislators have ruled that employers based in France must use French in their employment documentation.

Under Article L.1321-6 of the French Labour Code, all documents relating to employee obligations must be in French. The only exception is where documents are received from, or sent, abroad. There has been a great deal of case law in this area concerning which documents must be translated into French by employers.

As far back as 2006 the Versailles Court of Appeal ordered a company to provide a French version of any documents dealing with staff training on hygiene and safety regulations, any software and any documents relating to the products manufactured by the company and used by French employees in the performance of their duties. Other recent examples include the insurance company ordered to provide a French version of software used by its French employees and the software company that had to provide a French version of its European management software. Furthermore, bonus documentation has been held to be unenforceable where it was only provided in English.

There has been one notable exception to this general rule. In 2007 the French Courts dismissed a claim for damages from an ex-employee who had been unable to exercise certain stock options as a consequence of his dismissal. His argument that the relevant provision in the stock option scheme was unenforceable because it was drafted in English was rejected, after the Court accepted that he had signed the option grant letter and that he had “unquestionably mastered both written and spoken English”. This decision was probably largely motivated by the fact that the stock option scheme originated from the parent company located abroad and not from the employer directly. Despite the reference to “mastery” on this occasion, the employee’s actual abilities to understand other languages has not generally been seen as material.

More recently, the French Supreme Court has accepted another exception to the general rule that all employment documentation must be in French. In this case an air carrier had provided its pilots with technical documentation (including sheets enabling taxiing, take-off and landing on airports worldwide, technical support documents for the use of devices, a computer training programme and materials on the flight plan) to its pilots in English. The trade union objected and claimed that the documents should be translated into French.

Reversing the Court of Appeal’s decision, the Supreme Court held it was not necessary to provide this documentation in French. It said that “even if, according to Article L.1321-6, documents necessary to employees for the performance of their duties must be translated in French, there is an exception for such documents which are in connection with air carrier

activity, the international nature of which requires the use of shared language and in order to ensure passenger safety, employees (namely pilots) are required as a condition precedent to their employment, to be able to read and understand technical documents drafted in English".

The big question now is whether the Supreme Court will extend this principle to other international workplaces such as international sales or operational management in multinational companies.

Pauline Pierce, Of Counsel, Paris

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Italy passes labour law reforms – Part 2 – Dismissals

As mentioned in our August/September newsletter, in July 2012 the Italian Government introduced a package of labour law reforms in a bid to boost employment and promote growth. New rules on dismissals have been introduced, mainly addressed at employers with 15 or more employees. The main changes affect the remedy for unfair dismissal, depending on the reason for the dismissal.

Individual dismissal for "economic" reasons

The reforms introduce a new conciliation procedure for employers to follow in conjunction with the relevant Local Labour Office. The aim is to encourage employers to settle cases before issuing dismissal notices. This is likely to mean it will take longer to dismiss employees for "economic" reasons, i.e. in redundancy situations.

Under the new rules, if a Judge finds that there is no "justified objective reason" for the dismissal then the employer will be required to pay compensation to the employee of between 12 - 24 months' gross salary (depending on such factors as the size of the business and the parties' behaviour). The big change here is that employees will no longer be able to claim reinstatement so (even though at a high price) employers will now be able to terminate the employment and know that it will stay terminated.

The only situation in which an employee will remain entitled to be reinstated is where the reasons given by the Company as grounds for dismissal are "patently non-existent", in which case the employer will also be ordered to pay the employee up to 12 months' salary. An employee may choose to receive a payment of 15 months' salary instead of being reinstated.

Dismissals for "subjective reasons" (disciplinary reasons)

The new rules introduce some changes to disciplinary dismissals.

If a Court finds that an employee did not commit the alleged disciplinary offence or if the offence warranted only a lesser disciplinary sanction (such as a fine or suspension from work) as set out in the relevant Collective Bargaining Agreement, the employer will be required to reinstate the employee (or alternatively make a payment representing 15 months' pay if the employee opts for this alternative), and pay compensation for loss of salary from termination to reinstatement, up to a maximum of 12 months' salary.

In all other cases, the employer must pay compensation of between 12 and 24 months' gross salary. In these circumstances, the employee is not automatically entitled to have his old job back.

Dismissals for discriminatory reasons

An employee who successfully claims that his dismissal was unlawful on discriminatory grounds will be entitled to reinstatement in his old job and compensation for loss of salary from

termination to reinstatement. The employee can, however, ask for 15 months' salary instead of being reinstated.

Breach of dismissal procedure

If an employer has a valid reason for dismissal, but fails to follow the relevant procedure (e.g. not setting out the statement of reasons for dismissal in the relevant notices to the employee, breaching the relevant disciplinary procedure or failing to follow the conciliation procedure) it can be ordered to pay compensation to the employee of between 6 and 12 months' salary.

Vittorio Torazzi, Partner, VTCS – Studio Legale *

* *An independent and unconnected law firm*

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Possible increase of Hong Kong's statutory minimum wage

Hong Kong's statutory minimum wage came into force on 1 May 2011 and the current rate is HK$28 per hour (US$3.59). In the past month the Minimum Wage Commission together with employer and employee representatives have engaged in discussions and tentatively agreed to increase the rate to HK$30 per hour (US$3.85). The Minimum Wage Commission will prepare its report to Hong Kong's Chief Executive before the end of October and many expect the new rate to come into force in May 2013, at the earliest.

Since the introduction of the Statutory Minimum Wage, average wages in the Hong Kong retail industry have increased by 13%. Concerns have been expressed that another increase in the minimum wage is likely to push wages up further, possibly by as much as 10%, and that this could have a detrimental impact on the economy.

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

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US: Latest guidance for developing a social media policy

Although there has not been much attention or guidance in State or Federal case law, the topic of social media has received almost unprecedented attention by the National Labor Relations Board (NLRB). The Acting General Counsel, Lafe Solomon, has issued three reports on social media in the past year. The first report detailed the outcome of the Board's investigations into fourteen cases involving the use of social media and employers' social and general media policies. The focus in each of these cases was whether the online communications between employees about working conditions constituted "concerted activity" (when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment). If a communication constitutes "concerted activity", it means an employer cannot discipline the employee for such conduct.

Since then, Solomon has issued two further reports regarding dismissal of employees pursuant to company policies on social media. The main lessons for employers from these reports are:

(a) social media policies should not be so broad that they prohibit or deter the kinds of activity protected by the National Labor Relations Act, such as a genuine discussion of work conditions; and

(b) an employee's comments or postings on social media sites are generally not protected if they are individual complaints not made in furtherance of generating group discussion among employees.

On September 7 2012, the NLRB issued its first opinion invalidating an employer's electronic posting rules in ***Costco Wholesale Corp***. Although the ***Costco*** decision's legal reasoning is consistent with Solomon's prior guidance discussed in the three reports, the difference is that the guidance now has teeth. The decision held that Costco's rule prohibiting employees from making statements that "damage the Company … or damage any person's reputation" was overly broad and invalid because it could "chill the exercise [of an employee's] Section 7 right" to engage in "protected, concerted activity".

Unfortunately, much like the NLRB's guidance on social media thus far, the decision fails to outline acceptable methods of deterring employees from potentially illegal and damaging public statements. So, the question looms: what is an acceptable social media policy?

An analysis of the NLRB's three reports and its most recent decision dictates first and foremost that a policy cannot prohibit a wide range of conduct such as a general statement "prohibiting disclosure of the company's trade secrets" without providing specific examples. Further, the earlier reports found the following types of language in policies to be too broad:

(a) general language prohibiting the release of confidential information;

(b) general language prohibiting any commentary on legal issues at the company;

(c) requiring employees to respect the privacy of others;

(d) requiring employees to exercise personal responsibility; and

(e) requiring that employees treat co-workers with respect or use a friendly tone.

As with the language in the Costco policy, the problem with these statements is that an employee could interpret them as limiting their ability to discuss workplace conditions with co-workers. However, what the NLRB ***Costco*** decision confirms is that broad language providing specific examples of what is and is not permissible is acceptable. For example, language in a social media policy prohibiting employees from inappropriate postings which include "discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" passes muster because it identifies only plainly egregious conduct and thus would not be considered to be deterring employees from engaging in protected activity.

In sum, although employers are usually counseled to draft broad policies that cover a range of conduct, here, the opposite is true and there is no "one size fits all" policy. As a result, employers should examine their policies in light of what specific issues their business face and draft a policy with those specifics in mind.

Traci Martinez, Associate, Columbus

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Australia: Changes to taxation of Living Away From Home benefits

Since 1 October 2012, most living away from home benefits provided to Australian employees have become taxable to the employer.

The previous position

In the past, Living Away From Home (LAFH) allowances and related benefits for accommodation and extra food costs have been a common element of employee remuneration packages due to their exemption from both income and fringe benefits tax. In most cases, these benefits will now become taxable. Employers may need to restructure their remuneration arrangements to avoid this adverse tax impact.

A LAFH allowance is an allowance paid by an employer to an employee to compensate for additional expenses incurred and any disadvantages suffered because the employee is required to live away from his usual place of residence in order to perform his employment duties. The allowance is intended to cover reasonable accommodation and additional food and drink expenses. The Australian government has become concerned that the concessionary tax treatment was being abused, which was causing a significant and growing drain on government revenues.

The new position

Since 1 October 2012, most LAFH allowances and benefits have become taxable as a fringe benefit. There will be limited circumstances in which tax concessions will still apply. These will essentially be limited to “fly-in, fly-out” (or “drive-in, drive-out”) workers, or where employees are maintaining two homes in Australia for a period of up to 12 months. The increased tax burden may fall on the employer where packages are not able to be restructured.

Transitional provisions

There are limited transitional arrangements until 1 July 2014 for arrangements existing at 8 May 2012, but these transitional concessions may be lost if the employment arrangements are altered prior to 1 July 2014. Further, these transitional arrangements only apply to permanent residents of Australia or temporary residents maintaining a home in Australia. For many expatriates, the new rules will apply from 1 October 2012.

What this means for employers

Many employers and employees may need to restructure their employment arrangements urgently to take account of the new rules. Employers should also be aware of making changes to existing employment arrangements which are able to utilise the transitional arrangements, as any changes could jeopardise the on-going availability of the transitional concessions.

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