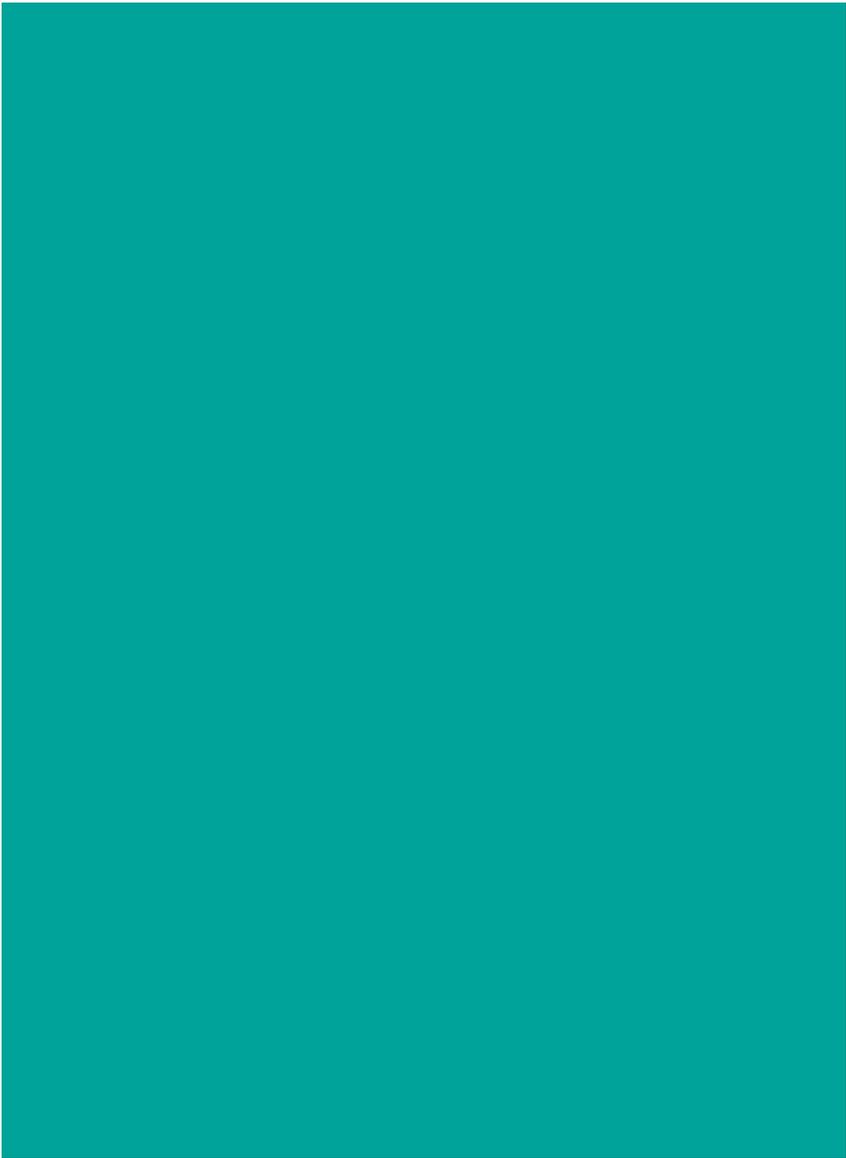




A round-up of [Labour and Employment](#) stories from around our global network

July/August 2013





## French Supreme Court confirms ability of employers to waive non-competition clauses in dismissal letter

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In France, as in many other mainland European countries, if an employer wants to restrict the ability of an employee to compete post-employment, several requirements have to be fulfilled, most notably a payment to the employee of 30% - 100% of his salary for the duration of the restriction.

If it wishes to waive the non-competition clause (e.g. because it no longer perceives the employee to be a threat to the business) and relieve itself from having to pay that sum, it must scrupulously respect the method of removal set out in the contract of employment or the relevant collective bargaining agreement. This will usually involve its sending the employee a separate letter waiving the restriction. If it does not comply with these requirements, it will still be obliged to pay the employee for the duration of the restriction even if it does not in fact hold him to it.

In a judgment in April 2013, the French Supreme Court demonstrated a degree of flexibility by ruling that an employer was entitled to include notice of the waiver of the non-competition clause in the dismissal letter itself, even though the terms of the relevant collective bargaining agreement stated that the employer could lift the restriction by sending a letter by registered post to the employee, i.e. implicitly suggesting that a separate letter should be sent.

The Supreme Court ruled that: “*the employer’s inclusion of the notification announcing the waiver of the competition clause within the dismissal letter meant that the employee knew immediately the extent of his liberty to work, and thereby fulfilled the purpose of the clause authorising the employer to relieve the employee of his obligations*”. The employer’s statement in the dismissal letter waiving the ban on employment with competing companies was therefore approved.

This decision is helpful for those employers where the employment contract or the relevant collective bargaining agreement is silent or unclear on the procedure to be followed for waiving a non-competition clause. If the relevant documentation expressly requires an employer to send a separate letter by registered post, employers must comply with this requirement if they wish to validly waive a non-competition clause. In the face of such an explicit requirement, the employer cannot rely on the “practical efficacy” arguments used in this case – that was only valid here because the terms for a withdrawal of the restriction were unclear as to what was actually required.

This ruling comes after another notable Supreme Court ruling in March confirming that if an employee is relieved from working during the notice period (whether in cases of dismissal or resignation) then he should be made aware of the lifting of the non-competition obligation on the last effective work day at the latest. Lifting a non-competition obligation during garden leave is therefore no longer possible.

**Pauline Pierce, Of Counsel, Paris**

## “Revolutionary” new parental rights in Poland

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On 17 June 2013 Polish employees gained significant new parental rights in the workplace. So radical are the changes that some Polish newspapers have referred to them as a “revolution”. These new rights have been introduced in an attempt to address a falling birth rate, an issue that Poland has been struggling with for many years. Polish MPs have used the same justification (in part) for a proposed ban on Sunday work in shops – see our 12 July blog post <http://www.employmentlawworldview.com/poles-apart-proposed-ban-on-sunday-retail-work/>.

The amendments to the Polish Labor Code have doubled the amount of time parents can take off work to look after their child immediately following the birth. Under the new rules employees will be able to take up to 52 weeks’ leave, made up as follows:

- Ordinary maternity leave – employees will be able to take up to 20 weeks’ ordinary maternity leave, the first 14 weeks of which must be taken by the mother. The remaining 6 weeks can be taken by the father.
- Additional maternity leave – employees (mothers or fathers) will be able to take up to 6 weeks’ additional maternity leave.
- Parental leave – a further 26 weeks’ parental leave will be available to either mothers or fathers. This is a new concept in Poland.
- Childcare leave – employees (mothers or fathers) will be entitled to take up to 3 years’ leave during the first 5 years of their child’s life.
- Paternity leave - fathers will still be entitled to take 2 weeks’ paternity leave up to 12 months after the birth of the child.

All pregnant employees (regardless of length of service) are entitled to take ordinary and additional maternity leave, as well as parental leave. Any employee with at least 6 months’ service is entitled to childcare leave too.

Employees will be required to make a formal request to take additional maternity leave or parental leave, but provided they comply with the requirements governing such requests then their employer cannot refuse it.

With the exception of childcare leave, parents will be entitled to receive statutory maternity pay (or maternity allowance) for any period of leave taken.

Polish employers should review any policies in place and make any necessary changes. They should also bear in mind that provided employees submit their holiday requests before the end of their maternity/parental leave they can also choose to take annual leave immediately after such leave, thus extending the time spent away from the workplace.

In short, Polish employees now have a great deal more freedom about the amount of time they stay at home with their newborn children and so employers need to ensure they have arrangements in place to be able to deal with their staff being out of the workplace for such long periods of time.

**Katarzyna Witkowska-Pertkiewicz, Associate, Warsaw**

## New Czech Civil Code – implications for employment law

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On 1 January 2014 a new Civil Code and a new Act on Corporations will come into force in the Czech Republic. This significant change in Czech law will have implications for employment relations and corporate officers. The key changes for employers are:

- **Remuneration for corporate officers:** As the law currently stands, unless a written agreement has been entered into between a corporation and the corporate officer, the officer is entitled to so-called “regular market remuneration”. Once the Code comes into force, if the corporate officer’s remuneration is not stipulated in a written agreement approved by a general meeting or the Supervisory Board of the corporation, then the corporate officer will be deemed to be performing his office for no remuneration. There are a limited number of circumstances in which this general rule will not apply. For example, if the agreement is not approved within a reasonable time after the appointment of the officer, the officer will be entitled to be paid such remuneration as is usual at the time the agreement was entered into or, if an agreement was not entered into at all, such remuneration as is normally paid to someone undertaking a similar activity at the time of appointment.
- **Juvenile employees:** Juveniles are currently allowed to enter into employment contracts once they reach 15 years of age, provided that this is not before completion of their mandatory school attendance. Under the Code, employers will not be able to enter into employment contracts with young people prior to completion of their mandatory basic schooling, with a few notable exceptions for certain sporting, artistic and cultural activities.
- **Deductions from wages:** Under the Code, the maximum amount that employers (or third parties) will be able to deduct from an employee’s pay, even under an agreement, will be half the employee’s wages or salary.
- **Set-off:** There will be new provisions governing the sums that can be set off against an employee’s wages or salary in relation to existing debts. For example, employers will be able to set off sums due to the employer for damage caused by an employee, provided again that these do not exceed half the employee’s wages or salary.

**Karin Konstantinová, Partner, and Hana Machýčková, Associate, Prague**

## UK court moves the goalposts for collective redundancies

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Employers operating in the UK should exercise caution if they are proposing redundancies, as the duty to consult collectively with appropriate representatives may be triggered even if they are making less than 20 employees redundant at any one location.

This decision represents a significant change to the law and it means that if an employer is proposing to dismiss 20 or more employees as redundant within a period of 90 days or less, irrespective of where those employees are based, then it must ensure it complies with its collective consultation obligations, or run the risk of a protective award (up to 90 days' actual pay per affected employee) being made against it.

The joint appeals of **(1) USDAW v Ethel Austin Ltd (In administration) and (2) USDAW & ors v WW 1 Realisation Ltd & ors** (better known as the "Woolworths case") came out of the demise of Ethel Austin and Woolworths, both retail businesses. In both cases significant redundancies were made when the businesses collapsed. Trade union and employee representatives brought proceedings in the Employment Tribunal claiming that the employers had failed to comply properly with their duty to consult the appropriate representatives about the proposed redundancies, as required under s.188 of TULR(C)A 1992. The claims were successful, but the Tribunals only made protective awards in respect of employees who worked at stores with 20 or more employees, on the basis that the duty to consult collectively did not apply in the smaller stores. This is because according to s.188 the statutory duty to consult collectively is only triggered where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. In the Tribunal's view each store constituted a single establishment and so the duty to consult only applied to those stores with 20 or more employees. The representatives challenged that decision and the EAT has now upheld their appeals.

According to the EAT, the current wording of s.188(1) of TULR(C)A 1992 does not implement properly the corresponding provisions in the EU Collective Redundancies Directive, notwithstanding very long-held practice in the UK. In its view the Directive requires the UK legislation to provide protection for employees where the number of proposed redundancies by an employer is at least 20 overall (i.e. irrespective of where they work) over a period of 90 days and not merely where the number being proposed at any one location exceeds that number. To achieve this result the EAT has said that the words "at one establishment" in s.188(1) should simply be "disregarded", being a qualification not found in the Directive.

Easy for the EAT to say, but this decision is not good news for UK employers. It means they need to look again at how they handle any redundancies, especially those businesses contemplating redundancies across multiple sites. They can no longer assume that each site will be treated as a separate location. Take the following example: Employer A is proposing 5 redundancies at site A, 10 at site B and 10 at site C, all within a period of 90 days. Prior to this decision the employer would probably not have had to concern itself with collective consultation at all since at none of its establishments is it proposing 20 or more job losses. Going forward,

the fact that the business is proposing 20 or more redundancies overall within a period of 90 days means the collective consultation obligations will be triggered. This is likely to be extremely confusing for multi-sited employers who may need to keep a running total across their business of where changes are taking place, with a constant totting-up process, or potentially face a claim for a 90-day protective award. On the very limited bright side, this does not mean that our employer above also needs to inform and consult staff in site D where no redundancies are proposed (since then it is presumed that staff there would not be “affected”). However, if it is looking at even just one redundancy there, that will be enough to engage the collective consultation procedures for the affected staff there.

Unionised organisations will need to be particularly cautious, as the unions will be alive to this change in the law. The wide definition of “redundancy” for collective consultation purposes means that this decision will also affect dismissals following a failure to agree changes to terms and conditions across different sites.

It is not yet clear whether there will be any further appeal. The new judgment does produce some odd practical consequences, but even if the last 20-something years’ practice has genuinely been based on a mis-construction of the Directive, that will not make this ruling wrong at law.

**David Whincup, Partner, London**

## Slovakia introduces new data protection law

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A new Act on the Protection of Personal Data has recently been adopted by the Slovakian Parliament. It came into force on 1 July and imposes new requirements on data controllers and data processors, some of which must be implemented within 6 months. The Act brings Slovakian data protection law increasingly into line with existing EU practice.

The key changes for employers are:

- Data processors (e.g. external payroll and benefits administrators) will only be able to process personal data on behalf of data controllers (e.g. employers) if there is a written agreement between the parties. Data processors will no longer be able to process personal data based solely on unilateral authorisation from the data controller, as has been the case up until now.
- Data processors will now only be permitted to use third parties (referred to as “subcontractors” in the Act) to process personal data on their behalf if this has been agreed in advance in the written agreement between the data processor and the data controller.
- If whilst processing personal data it discovers that the data controller has breached the law, the data processor must notify the data controller in writing and must then only perform those data operations which cannot be delayed. If the controller fails to remedy the situation within one month of being notified of the breach, the data processor must inform the Office for Personal Data Protection of the Slovak Republic (the DPA) of this fact. If it does not do this, it risks being held jointly liable with the controller for the breach of the data protection obligations and for any damage caused by such a breach.
- Under the new Act it is no longer necessary for a data controller to obtain the approval of the DPA before transferring data to countries which are not deemed in advance by the EU to ensure an adequate level of protection of personal data if the controller adopts adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals as they result from the standard contractual clauses or from the controller’s binding internal rules. So far as personal data about employees is concerned, the new Act allows an obligation on employers to transfer personal data to third countries which do not have adequate protection in place only in accordance with contracts containing EU standard contractual clauses or binding internal rules. Where the data controller or processor is a US-based Safe Harbour company, the essentials of the contract for transfer of personal data are introduced by the new Act. Consent from the DPA will now only be required if the contract for the transfer of personal data contains clauses that are different from the standard EU contractual clauses or inconsistent with them.
- Employers may find it interesting to hear that under the new Act they are allowed to make certain information about their employees public, even without the data subject’s consent. This includes the data subject’s title, name, surname and work telephone number, but only provided that this is necessary for the performance of the data subject’s work duties and

does not violate the data subject's dignity and security. This might include cases where the employee might be the subject of harassing calls because of the highly political or sensitive nature of his work, e.g. animal testing or armaments.

- The new Act introduces changes regarding the processing of biometric data, security measures and the registration of filing systems.
- Finally, in cases where the DPA can impose a fine for a breach of the Act it will no longer be able to exercise its discretion whether to impose a fine or not. Under the new Act, in such circumstances, the DPA will be obliged to impose a fine. The size and adverse consequences of the breach will dictate the size of that fine (together with any mitigation or aggravating features).

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