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

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French Courts provide useful guidance for employers seeking to enforce post-termination restrictive covenants

Two recent cases from the French *Cour de Cassation* highlight some interesting issues for French employers entering into or seeking to enforce post-termination restrictive covenants.

In France, if an employer wants to restrict the ability of an employee to compete post-employment, several requirements have to be fulfilled, including a payment to the employee of his salary for the duration of the restriction.

If an employer is a few days late in making such a payment, does this render the clause unenforceable? No, said the Cour de Cassation, a slight delay in payment does not necessarily invalidate the clause. In this particular case, the employee had argued that since his employer had not made the payment immediately after termination of his employment, the clause had not been complied with so the restriction was invalid and unenforceable.

The employee also argued that since the non-competition clause said that he could not work as a "Commercial Director" in a competing business, it did not apply where he was going to work in his new role as a "General Manager". The Court disagreed and said that as the activities performed were identical, it did not matter that his role in the competing business had a different title.

This case is helpful for employers, as the Court was prepared in this instance to give a generous interpretation to the construction and application of the post-termination restriction. Having said that, in practice employers should always consider carefully how a post-termination clause should be drafted and they should always seek to comply with the terms of the clause (including any payment terms) so as to avoid any arguments that the clause is invalid. Precision as to the activities covered rather than a generic description of the job title may also be helpful.

In a less helpful decision for employers, the *Cour de Cassation* ruled in a different case that where the employer had paid the non-competition payment during the employment relationship, as opposed to when the employment terminated, it was not entitled to recover any of the sum paid when it agreed to release the employee from the non-competition covenant on his exit. The Court took the view that the payments amounted to salary and the employee was not therefore obliged to reimburse the employer on termination.

Pauline Pierce, Of Counsel, Paris

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French Supreme Court upholds dismissal of employee for excessive personal internet use at work

The French Supreme Court has approved the dismissal of an employee for excessive personal use of the internet at work.

In this particular case, the employee concerned regularly sent emails to his colleagues containing videos – the content of which ranged from humour to sex and sport – during working hours. When one of the employee's colleagues complained about this, the employer investigated the employee's internet use (helped by a bailiff), only to discover that he had sent 178 such videos. The employer dismissed the employee for gross misconduct, on the basis that his personal use of the internet at work to that extent was excessive and inappropriate.

The employee brought a claim, but the Employment Chamber of the Supreme Court ruled that sending 178 videos containing sexual, humorous, political or sports content from the Company's computer amounted to misconduct justifying dismissal. A separate court will now go on to consider whether such conduct amounted to "gross misconduct", justifying immediate dismissal or whether some form of notice pay should be provided. The case raises some questions about how and whether something done within reasonable limits (sending colleagues little video clips) would be unobjectionable but done to excess could become not just misconduct but prospectively gross misconduct.

Sarah Joomun, Associate, Paris

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Spanish Government introduces further measures to promote employment

In February 2014 the Spanish Government introduced new legislation (Royal Decree 3/2014) with the aim of promoting employment, in particular permanent contracts of employment, by offering significant reductions in employers' social security contributions.

The new measures apply to all types of company (irrespective of size) that recruit part-time or full-time permanent staff between 25 February and 31 December 2014. There will be a new flat rate for social security contributions for such staff, ranging from €50 to €100 per month. These reduced contributions will be available for 24 months, with an additional 12 months available for companies with fewer than 10 employees provided they satisfy certain conditions. By way of an example, if an employee has an annual salary of €20,000, the employer will save approximately €7,000 over that 2-year period.

In order to benefit from these reduced rates, companies will have to satisfy certain conditions, including:

(a) be up-to-date with their social security and tax contributions;

(b) have genuinely increased the number of permanent contracts and employment levels in the company (i.e. not dismissed existing staff to make room); and

(c) maintain the increased number of permanent employees in the company for at least 36 months.

The new rates will not apply in certain circumstances, including where:

(a) a company has unfairly dismissed employees during the six-month period prior to entering into the new contracts or if there were any collective dismissals during this period. This would not apply to any dismissals which took place prior to 25 February 2014.

(b) there are special categories of employee, e.g. senior managers.

(c) the employees had previously worked for the same company on a permanent contract of employment during the six-month period prior to entering into the latest "cheap" contract.

(d) employees had previously worked for other group companies if the contracts were terminated for objective or disciplinary reasons.

This latest legislative change is an incentive for employers to hire permanent staff, and any employers considering recruitment during 2014 should consider whether they may be eligible for reduced social security contributions.

Ignacio Regojo, Partner, Madrid

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Germany: No entitlement to free use of a parking space based on company practice

Do employees have a claim against their employer for the provision of a free parking space after using a company space free of charge for years? No, according to the State Labour Court of Baden-Württemberg .

In this case, the employee argued that his rights had been violated after he had to start paying to park his car following the reconstruction and conversion of the old parking lot he used which belonged to a medical clinic. Prior to the reconstruction, employees had not been required to pay any fees for parking. During the reconstruction, however, the previous parking space was removed and was not replaced, and new paid parking spaces were introduced to help pay for the reconstruction.

The employee who brought the claim argued that he was entitled to a free parking space on the basis of previous custom and practice. A company custom and practice term in a contract can be established where there is the regular repetition of certain uniform behaviour on the part of the employer which enables the employee to infer that he should be granted a certain benefit or privilege on a permanent basis.

The State Labour Court of Baden-Württemberg rejected the arguments for a company practice sufficient to grant a contractual right and decided that the employer was not obliged to provide the employee with a free parking space. The employee could not justifiably assume that his employer would allow him to use the clinic's parking lot free of charge in the future. The Court further stated that the employer was not obliged to provide its employees with parking spaces at all. In this respect, this is no different to the provision of company social facilities such as cafeterias, nursery schools or support funds. Neither individual employees nor works councils can compel the establishment of such facilities by the employer. Due to the costly redesign of the parking lot, the employees of the clinic reasonably had to assume that when the employer was creating new parking options, request for payment was to be expected, particularly in light of the fact that the parking spaces had become an "expensive commodity."

Dr. Sebastian Buder, Partner, and Dr. Jan Grawe, Associate, Frankfurt

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Czech Republic: Must employees make up for any time lost due to smoking breaks?

Generally yes, employees must make up for any time spent on cigarette breaks, but the issues are not straightforward.

It is not performance of work: Employees are obliged to work during their working hours and may only take a break for the purposes of having a meal or resting or taking a safety break. Employees can smoke during permitted breaks, but only in any premises which have been designated for such purposes, and only during their break times.

No right to wages: As smoking does not constitute the performance of work, any time spent smoking (outside official break times) is not included for the purposes of calculating the hours worked and an employer is not obliged to pay any wages for the time spent smoking. If after normal working hours the employees make up for their smoking time, this will not be considered as overtime.

Breach of obligations: An employee may not take a smoking break any time he wants. Leaving the workplace without employer's consent may be considered a minor breach in some circumstances, but it could also be considered a serious breach of an employee's obligations, depending on the potential consequences, risks, type of workplace, etc. **If an employee takes a smoking break without obtaining his employer's prior consent, this may justify the termination of the contract without any severance pay (sometimes even with immediate effect).**

In practice, it will all depend on the employer's pragmatism and benevolence - where and when the employer allows employees to smoke. In some organisations smoking is not possible at all for health and safety reasons. Equally it may not be possible to make up for any smoking breaks due to shift work, etc.

Where should employees smoke? Employees should think about where they go to smoke – they should not smoke in the workplace or at any other premises where non-smokers would be exposed to the effects of smoking or where smoking is prohibited.

Penalties and damage: An employer may not impose penalties for the mere fact of smoking during working hours, but it may demand compensation for any losses incurred, which may be up to 4.5 x the employee's average monthly earnings in the case of negligence, and for the entire damage caused, including any lost profits, in the case of intentional damage.

Criminal liability: In certain circumstances, criminal sanctions may apply, for example if as a result of authorised absence from work another person is injured or if the employee causes damage to property.

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