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GREATER U.K. RECEPTIVITY TO ENFORCING NONCOMPETE CLAUSES?

Enforcing restrictive covenants (*e.g.,* noncompete, nondeal clauses) in the U.K. has traditionally been an uphill task for employers. In the last 12 months, however, there have been signs that the restrictive approach taken by U.K. courts for many years is softening, as employers have achieved some notable successes:

- In one recent case, *Thomas v Farr plc*, [2007] EWCA CIV 118, the managing director of an insurance broker specializing in a particular market sector resigned from his employment and wished to accept new employment with a company that intended to break into the same market sector. However, his employment contract contained a 12-month noncompete, which prevented him from operating as an insurance broker in the sector. Generally speaking, courts have been reluctant to enforce noncompete clauses, given the impact on a person's ability to earn a living – particularly where periods of 12 months or more are involved. In this case, however, given the former managing director's senior position, the court agreed that the only way to ensure that he would not misuse the high-level, strategically important, confidential information to which he had been privy was to enforce the 12-month noncompete.

- In another case, *Allan James LLP v Johus*, [2006] EWHC 286 CH, a lawyer with prospects of partnership resigned to set up in a practice with another lawyer. Her contract of employment contained a clause preventing her from acting as a lawyer for anyone who had been a client of her former law firm in the previous 12 months. Her ex-employer sought to enforce the restriction. However, the lawyer argued that the scope of the restrictive covenant was too broad, since it covered *all* of the firm's

clients and not just the 9 to 10 percent with whom she had direct dealings. In the past, such a flaw would have proved fatal from the employer's perspective. Here, however, the court upheld the restriction as reasonable. Of particular relevance was the fact that the lawyer was likely to be made partner and had been a key member of the law firm. This illustrates the importance of highlighting the responsibilities of the individual who is the subject of a restrictive clause and demonstrating a real risk of harm to the business if the restriction is not upheld.

■ In *Beckett Investment Management Group Limited v Hall*, [2007] EWCA CIV 613, the Court of Appeal upheld a restriction that was drafted in favor of a holding company, even though the ex-employees had carried out their duties for subsidiary companies. Initially, the High Court ruled that, as the restrictions were in favor of a holding company that had no business interests to protect, they could not be enforced to prevent the ex-employees' post-termination activities. However, the Court of Appeal refused to construe the restriction in such a way as would deprive it of its clear intention, where all the parties were familiar with the background to and aim of the restriction. Again, we have a triumph for the employer and for a common-sense approach to the interpretation of employment contracts.

"MOBBING": ITALY RECOGNIZES YET ANOTHER LEGAL THEORY FOR SUING EMPLOYERS

A recent decision of the Italian Supreme Court (see No. 33624/07, Criminal Division, of July 9, 2007) has revived the debate regarding "mobbing" — an increasingly popular legal theory in Europe.

Italian law does not provide a clear definition of "mobbing." Lower courts and scholars suggest that it is conduct engaged in for the purpose of damaging the employee, making normal work performance almost impossible. The essential elements are:

- Acts of aggression or persecution by the employer or its employees toward other employees;
- The frequency and systematic nature of such acts; and
- Damage to the health and psychological welfare of the injured employees.

Italian courts have held that the employer has a duty to prevent "mobbing" conduct as part of its general obligation to provide a safe workplace, as required by Article 2087 of the Italian Civil Code. Where the employer fails to perform this duty, it is liable for damages to the health of the victimized employees.

A practical effect of recognizing a cause of action for "mobbing" is that employers now will be held responsible for "roughhouse" behavior of employees that may be difficult to monitor and stop.

FRANCE'S NEW BUSINESS REVOLUTION: CORPORATE OFFICERS' COMPENSATION MUST NOW REFLECT COMPANY PERFORMANCE

Being a corporate officer of a listed company may not be the quickest way to get rich in the upcoming years!

Over the last few years, the French Parliament has expanded disclosure obligations in connection with corporate officers' compensation. In 2001, executive compensation agreements had to be referenced in the company's annual report. In 2005, the legislature deemed executive compensation to be a "regulated agreement," *i.e.*, subject to a specific authorization process involving prior approval from the company's board of directors or supervisory board as well as a vote at the general meeting of the shareholders.

With a 2007 law, France has just passed a new milestone. From now on, corporate officers' compensation will be tied to the individual officer's performance. With the law's new "compensation track," the company's board of directors or supervisory board is responsible for setting the corporate officer's "compensation package" along with associated performance criteria. The shareholders' meeting will then have to vote and approve the proposed criteria and ensure that they are fulfilled before any actual payment is made to the officer. Increased posting obligations are also imposed on the company, the exact details of which should soon be specified through a government decree. Any payment made in violation of these regulations will be considered null and void.

The law is vague as to some of its most significant points. For instance, it does not expressly specify whether the "listed companies" it refers to are companies listed on French exchanges only, or companies listed on other exchanges but having facilities in France as well. It also gives no definition of the performance criteria on which the compensation will depend.

COLLECTIVE CONSULTATION OVER THE REASONS FOR LAYOFFS IN THE U.K.

Like other EU member states, the U.K. has statutory rules that apply when 20 or more people are proposed to be made redundant. Where an employer is proposing to dismiss 20 or more employees at one establishment in a 90-day period and the reason is redundancy, the employer is under an obligation to consult "appropriate representatives" of the "affected employees" (the "collective consultation" process). The "affected employee" category includes not only those individuals who may be dismissed, but also those employees who may be affected by the proposed dismissals and/or by any measures taken in connection with those dismissals.

Where an employer is proposing to make between 20 and 99 such redundancies, it must begin the collective consultation process at least 30 days before the first dismissal takes effect (*i.e.*, the employer must comply with these consultation obligations before giving individuals notices of dismissal). If 100 or more redundancies are proposed, the process must begin 90 days before the first dismissal. Although the employer is obligated only to consult with the representatives, and is under no obligation to adopt any of the views expressed by the representatives, the employer must consider the representatives' views properly and genuinely. The process must also be genuinely undertaken with a view to reaching agreement. Failure to consult with appropriate representatives, or failure to do so within the required time when it was reasonably practicable to do so, may result in the employer being held liable to pay a protective award to each of the affected employees of up to 90 days' pay (which, given the affected-employee concept, could amount to a quarter of the annual pay bill).

Until very recently, case law provided that employers were under an obligation to consult with the appropriate representatives on the possible ways of (i) avoiding the dismissals; (ii) reducing the number of dismissals; and (iii) mitigating the consequences of the dismissals. However, in the recent case of *UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area) and the British Association of Colliery Management*, UKEAT/0397/06/RN & UKEAT/0141/07/RN, the highest U.K. employment tribunal, the EAT, held that employers are also under an obligation to consult over the *reason* for the layoffs, previously an area into which employment tribunals would not inquire.

Practically, this latest decision has overturned conventional wisdom and now means that employee representatives will be able to challenge employers' decisions to close a branch/office rather than just accepting them. Collective consultation will no doubt need to start earlier, and more information will need to be provided to representatives than was previously required to facilitate meaningful consultation on well-thought-out, rational alternatives to the closure as well as dismissals generally.

SARKOZY GOVERNMENT INTRODUCES RELAXED RULES ON OVERTIME

Additional initiatives by the Sarkozy government relate to reductions of tax and social security contributions paid on overtime. They reflect President Sarkozy's "work more in order to earn more" concept.

The new regulations, as from October 1, 2007, can be summarized as follows:

> Employers will benefit from a standard reduction of their share of social security contributions paid on overtime. For example, for employees working a fixed number of 35 hours per week (*i.e.*, the majority of French employees), this reduction amounts to 0.50€ per overtime hour in companies having more than 20 employees, and 1.50€ in companies having 20 or more employees.
>
> Employees also will benefit from a commensurate reduction of their share of social security contributions paid on overtime. In addition, the compensation received by employees as a result of overtime will not be subject to income tax.

A GERMAN MINIMUM WAGE LAW?

At present, Germany does not have a minimum wage law. A major reason for the absence of such a law is a policy in favor of allowing labor unions to negotiate wage provisions in collective agreements. Once a collective bargaining agreement covers a certain percentage of an industry, it is possible in Germany, as in France and some other Continental European countries, to petition the government to extend the labor agreement to nonunion companies in the industry. A labor agreement so extended serves to stipulate minimum terms for the entire industry.

Partly out of recognition that union representation is declining in the private sector, Germany is considering a statutory minimum wage. On September 4, 2007, the Social Democratic Party (SPD) proposed a law on minimum wages (*Mindestlohngesetz*), which would involve the establishment of a commission comprised of union and management representatives that would set an annual minimum wage for adoption by government authorities. A similar approach has been used in the U.K. in introducing a minimum wage. The German measure is still being debated in Parliament, and its adoption remains uncertain.

EMPLOYMENT RIGHTS FOR THE SELF-EMPLOYED IN SPAIN

On October 12, 2007, Spain's Self-Employed Workers' Statute went into effect – the first time a comprehensive regulation for this type of worker has been implemented in a member state of the European Union.

The new law establishes subsidies for self-employed people in the event of illness or work-related injury, and the Spanish government has indicated a commitment to advance social security arrangements comparable to those for ordinary employees. The law also allows the self-employed to stop working in case of maternity/paternity and sick leave, without it being considered a breach of the contract with their clients.

The statute also creates a new concept in Spanish labor law — the economically dependent self-employed worker who renders services most of the time for only one client. For these individuals, the legislation grants holidays (18 working days per year) and the right to receive severance payment in case of unfair termination of the contract. The law also recognizes the authority of the labor courts to resolve disputes between economically dependent self-employed workers and their clients and reaffirms the rights of such workers to form labor unions and to adopt collective agreements with their clients through those unions.

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