JONES DAY

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ITALIAN SUPREME COURT FINDS EMPLOYERS COMMITTED CRIME OF EXTORTION BY COMPELLING EMPLOYEES TO AGREE TO UNFAIR CONDITIONS

A recent decision of the Italian Supreme Court (Criminal Division, of October 5, 2007, No. 36642) has taken up again the issues related to the crime of extortion in the workplace. Such a crime is defined by Italian law as conduct consisting of forcing a person, by means of violence or threat, to perform or omit certain actions, with the aim of gaining an unfair advantage, causing detriment to the victim.

In the instant case, employers were criminally charged with compelling their employees, under threat of job termination, to accept working conditions less favorable than those granted by statute and applicable collective bargaining agreements. The Italian Supreme Court held that the defendants were guilty of the crime of extortion.

This decision appears quite expansive. The court stated that the crime of extortion does not require that the violence or threat against the victim be so coercive as to completely overwhelm the decisional power of the victim. Rather, it is sufficient that the violence or threat is "relative," *i.e.*, capable of limiting or restraining one's decision making but still leaving a certain margin of choice. Significantly, the means used can themselves be lawful (such as the right to terminate the employment) but can assume an unlawful dimension when such use has the sole purpose of coercing the will of the victim in order to obtain a personal gain.

In Italy, the crime of extortion can give rise to the penalty of imprisonment for five to 10 years. Also in light of the above decision, employers operating in Italy should carefully avoid abuse of their powers because the crime is quite broadly defined. Caution is advised during negotiations leading to settlement of claims, particularly with reference to the means used to convince the employees to reach agreement; any expression/action that may be suspected of being intimidation or a threat has to be carefully avoided.

BELGIUM INTRODUCES NEW TAX-ADVANTAGED EMPLOYEE BONUSES

In order to promote the competitiveness of the Belgian economy, the Belgian government and the social partners have reached an agreement to allow employers, as of January 1, 2008, to grant bonuses to employees, which are, under certain conditions, free of taxes for the employees (National Collective Bargaining Agreement nr. 90 of December 20, 2007, and Act of December 21, 2007).

Employers are now allowed to grant a bonus to their employees (either all of the employees working for the company or those working in well-defined, nondiscriminatory categories) of a maximum amount of 2,200 EUR per year. This amount is indexed each year. No social security contributions or tax withholdings are due from the employees on this amount. The employer is, however, required to pay a one-time tax of 33 percent for social security contributions on the amount of the bonus. The employer will be able to treat the cost of the bonus, including its taxation, as a deduction from business income.

The law does impose certain procedural and substantive requirements before bonuses may be issued. The bonus-granting procedure and its modalities have to be set forth either in a collective bargaining agreement in companies having workers' representative bodies or in an adherence act for companies that do not have such representation. This collective bargaining agreement or adherence act must, among other things, establish the goals that employees will need to achieve to be entitled to the payment of such bonus. These goals may not be keyed to the individual performance of employees; rather, they must be linked to measures of the company's performance and must be objective and transparent. Furthermore, the constitutive documents must contain the rules to be followed with regard to the granting of the bonus (*e.g.*, methods of follow-up, assessment procedures, the method of calculating the bonus in relation to the goals to be achieved, etc.).

It is unclear what impact this new arrangement for bonuses will have. A similar provision in 2001 was unsuccessful because of the stringent procedure to be followed for its introduction and because individual performance, then too, could not be rewarded. The new provision is an improvement over the 2001 scheme because a fixed amount of 2,200 EUR is allowed, rather than calculating such bonus on the basis of the benefits accrued to the employer.

U.K. HIGH COURT DECISION RAISES DOUBTS WHETHER OVERLY LONG RESTRICTIVE COVENANTS IN INTERNATIONAL BONUS OR SHARE AWARD PLANS WILL BE UPHELD

It is common for multinational companies to have share incentive or bonus schemes governed by the law of the parent company (often the U.S.) but with participants located in different parts of the world.

In one recent U.K. case, *Duarte v Black and Decker* [2007] EWHC 2720 (QB), such restrictive covenants were put to the test in the English High Court. Duarte had been a senior executive with Black & Decker (B&D), managing an important part of the business across Europe, the Middle East, and Africa. In July 2007 he resigned to take up a post with a competitor organization in the U.K.

Duarte had been a participant in the B&D cash incentive scheme and the long-term incentive plan (LTIP). He had executed a letter in relation to the LTIP, in January 2007, which included restrictive covenants (there were none in his employment contract), and the letter stated that the agreement was subject to the laws of Maryland. B&D had introduced the covenants to address concerns regarding the loss of senior managers to competitors and the attendant risk of confidential information being passed. The restrictions

sought to prevent Mr. Duarte from working for a long list of competitors and poaching B&D employees for a period of two years following termination of employment.

When Duarte took up his employment with a competitor, B&D sought to enforce the restrictions in the LTIP letter. He then sought and ultimately obtained a declaration from the courts that the restrictions were unenforceable in the U.K.

The court held that in accordance with the Rome Convention (regarding jurisdiction), the application of the law of Maryland could only be refused if to apply it would prove manifestly incompatible with public policy of the U.K. Ultimately the court did not have to decide whether the two-year no-compete covenant was manifestly incompatible with the U.K. law, as it determined, on hearing expert evidence, that the covenants would not be enforceable in Maryland. However, the decision makes it clear that there would have been public-policy difficulties under U.K. law even if Maryland would have enforced the covenants. Generally speaking, restrictions in excess of 12 months are unlikely to be enforceable in the U.K. courts, and therefore it seems highly likely Mr. Duarte would have been able to win his case on a public-policy argument if he had been required to.

Multinational employers should be wary of relying on a "one size fits all" approach to restrictive covenants.

JUSTIFIABLE AGE CLASSIFICATIONS: THE FIRST U.K. TRIBUNAL DECISIONS

Following the introduction of anti–age discrimination laws in the U.K. in October 2006, it has taken time for the first decisions to filter through, but now we have some useful and important guidance.

The Age Regulations are unique in U.K. discrimination law in providing that direct, as well as indirect, age discrimination can be justified, where an employer can show that its discriminatory act or omission was a "proportionate means of achieving a legitimate aim." Other strands of discrimination law, by contrast, permit direct discrimination only where there is a "genuine occupational requirement" necessitating the relevant treatment.

The majority of cases to date on age discrimination have centered on justification and have concerned retirement benefits and the compulsory retirement of nonemployees such as partners and officeholders. However, they contain valuable lessons.

- In *Bloxham v Freshfields Bruckhaus Deringer* 2205086/2006 (ET), an ex-partner argued that Freshfields' amendments to its partners' pension scheme, which had been made to provide a more sustainable plan that was fairer to younger partners and which involved certain transitional arrangements for those at or near retirement age (55), put him at a disadvantage. Bloxham had, with the consent of the partnership, taken early retirement at the age of 54 and in doing so received a 20 percent reduction in his pension benefits in accordance with the rules of the scheme at that time. Bloxham argued that had he remained with the firm until he turned 55, new, less beneficial rules would have applied to him and therefore he had effectively been forced to take early retirement so as not to lose even more money (there being a difference to him of approximately 35 percent between a pension under the old and the new scheme rules). The employment tribunal held that while the arrangements employed age classifications that were discriminatory, they were justified. The tribunal was satisfied that Freshfields had "comfortably passed" the hurdle of showing that transitional changes to the pension plan were in pursuit of a legitimate aim—their purpose was to reduce the adverse impact of the wider scheme changes on those partners at or near retirement age, who, in the absence of the transitional arrangements, would immediately have lost their right to take a full pension at age 55 or an actuarially reduced pension between the ages of 50 and 54 on implementation of the new scheme rules. The means used to achieve that aim were proportionate (significantly, the ex-partner could offer no evidence as to what alternative action Freshfields might have taken to achieve the same objective), and further, the aim could not have been achieved in a less discriminatory manner.

- The tribunal in *Seldon v Clarkson Wright and Jakes* 1100275/2007 (ET) found that the compulsory retirement of a partner at the age of 65 was justifiable as being a proportionate means of achieving two legitimate aims: (i) encouraging lawyers to remain with the firm by ensuring that

partnership vacancies were visible and capable of being planned for; and (ii) achieving a supportive culture within the partnership by avoiding confrontation with partners who might be underperforming in the run-up to their retirement.

- However, in *Hampton v Lord Chancellor and Ministry of Justice* 2300835/2007, a policy of compulsorily retiring judges at the age of 65 was found not to be justifiable, though the aim (to ensure a sufficient flow of new appointees to the judiciary) was legitimate. The tribunal held that the policy was disproportionate and not reasonably necessary to achieve the aims of the Ministry of Justice (MOJ). In particular, the MOJ had shown no evidence that would indicate that all judges over the age of 65 would remain in their post until 70. Further, the tribunal felt that a reduction in the judicial vacancies available would more likely intensify competition and lead to an increase in the quality of those appointed and that if the MOJ instead had a policy of removing those judges who failed to sit the minimum 15 days required per year, this would in turn create new vacancies.

The question whether a national default retirement age of 65 (as provided for in the Age Regulations) is compatible with the EC Equal Treatment Framework Directive is being considered by the ECJ in the *Heyday* judicial review application (*R (on the application of the Incorporated Trustees of the National Council on Ageing) v SoS for Business, Enterprise and Regulatory Reform,* July 24, 2007). Heyday argues that mandatory retirement is, by definition, discriminatory and that the Framework Directive does not permit the blanket defense provided by the U.K. government in the Age Regulations. The government argues that it has fully and properly implemented the Directive and that the provision in the Regulations allowing for a default retirement age of 65 is justifiable for workforce planning purposes and in order to avoid any adverse impact on pension benefits. Both of these, the government argues, are legitimate aims, and mandatory retirement (which is only permissible under the Regulations where the employer has given the employee written notice of his or her right to request not to retire and has properly considered any such request) is argued as being a proportionate means of achieving those aims. The government has also indicated that it is committed to reviewing the default retirement age in 2011.

The ECJ ruling in *Heyday* is not expected until next year. If the ECJ agrees with Heyday's arguments, it is likely that the immediate effect will be felt predominantly by public-sector employers, in respect of whom the Framework Directive takes immediate (and retrospective) direct effect. Private-sector employers will remain bound by the Age Regulations until such time as they are amended or repealed, allowing them more time to plan for any changes in their policies that may result from the ruling.

The cases to date have not been brought by older claimants. The recent tribunal decision in *Wilkinson v Springwell Engineering Ltd* ET/2507420/07, in which an 18-year-old employee successfully claimed that her dismissal had been discriminatory on the grounds of her age, gave a salutary warning to employers not to rely on stereotypical assumptions that capability is equivalent to experience (experience being inextricably linked to age). The employer in this case was criticized for not having raised performance issues with the employee before her dismissal, only then to seek to argue that her dismissal had been fair due to her lack of capability. No evidence was put to the tribunal as to the employee's lack of capability, and the tribunal was satisfied therefore that Wilkinson had established primary facts from which it could be concluded that her dismissal must have been by reason of age.

LIVING WITH THE FRENCH 35-HOUR WORKWEEK

Despite the recent labor and employment initiatives of the Sarkozy government, the 35-hour workweek is still alive in France.

However, consistent with Sarkozy's project to allow French employees to "work more in order to earn more," increased flexibility is now being introduced into French labor regulations, with the view to allow employers to improve utilization of their workforce and employees to receive increased compensation.

A first example of this evolution can be found in the recently introduced legislation on overtime. Since October 1, 2007,

overtime is subject to a new tax and social status, the purpose of which is to make it easier for employers to resort to overtime and to make it more attractive for employees to work overtime.

Henceforth overtime entails:
(i) A fixed withholding of the employer's share of social charges;
(ii) A reduction of the employee's share of social charges; and
(iii) An income tax exemption for the employee.

A second example of this evolution relates to the provision allowing employees to give up some of their accrued rest days in exchange for employers' paying them for these days. This possibility is offered to employees for rest days accrued through December 31, 2009. It is, however, subject to the employer's consent.

This rest-day provision concerns (i) employees whose working time is computed in hours (the rest days worked must then be paid as overtime), (ii) employees whose working time is computed in days (the rest days worked must then entail a remuneration increase of 10 percent minimum), and (iii) employees who have allocated rest days to a holiday savings account (*Compte Épargne Temps*).

ALLOWING AMICABLE TERMINATION IN FRANCE

A simplified and business-friendly French Labor Law? This seems to be one of the goals of the French government, which is implementing a new set of employment regulations in accordance with this theme.

The French Labor Code is under recodification, in order to improve its coherence and make it easier to use. This "new" Labor Code will come into force on May 1, 2008, at the latest. This recodification will mainly relate to the overall organization and numbering of the current Labor Code and will have no significant impact on its contents.

Similarly, last January, French national employee unions entered into a National Inter-Professional Agreement on Modernization of the Labor Market with employer organizations. Among various provisions, the Agreement offers the possibility for employers and employees to terminate employment contracts by mutual agreement.

This type of termination is in addition to the other existing methods of termination (*i.e.*, resignation, dismissal). It was seldom used because, pursuant to this method of termination, employees do not receive termination payments and are not eligible for unemployment benefits, and employers would not receive valid releases and waivers. Under the new provisions, employers and employees can now terminate employment contracts by mutual agreement with certain guarantees. Subject to further clarification with codification of the National Agreement, these guarantees should be as follows: Employees will be entitled to a termination indemnity equal at least to the minimum severance indemnity owed in case of dismissal and will be eligible for unemployment benefits. The possibility of legal recourse against employers should be very limited because the National Agreement establishes a specific review and approval process by the competent local labor authorities. However, in order to be enforceable, most provisions of the Agreement (notably this amicable termination) still need to be included in a law, to come into force this summer.

To be continued . . .

SPANISH HIGH COURT ALLOWS EMPLOYER REGULATION OF USE OF COMPUTER EQUIPMENT UPON PROVISION OF PRIOR NOTICE

In a recent judgment, the Spanish Supreme Court (STS September 26, 2007, rec. 966/2006) has established the requirements that employers will have to follow to control the use of their computer equipment by their employees.

Spanish courts have spent the last decade debating whether the employer is entitled to control and monitor the use of its computer equipment by its employees or if such control is an invasion of the employees' privacy rights. There have been three different tendencies: (i) decisions holding

that the employer is entitled to control the employees' use of computer equipment at any time without observing any other requirement, because such equipment is the employer's property; (ii) decisions holding that such employer control implicates privacy rights of employees and may occur only in the presence of the employees' representatives and only when the employer has well-founded suspicions of a nonpermitted use of the equipment; and (iii) decisions holding that the employer is entitled to control the use of its computer equipment at any time, provided that employees are previously made aware of the possibility of such employer regulation. The Spanish Supreme Court, considering on one hand that the computer equipment is the employer's property and on the other hand that the tolerated use of that equipment for personal purposes is common, has concluded that employer regulation of the use of the computer equipment is fair, provided that the employee has been previously informed of the possibility of such regulation. Basically, the Supreme Court reasons that since it is company property, the employer is entitled to control such equipment, but considers that the employee has to be aware that he/she may be subject to such control.

Taking into account this recent judgment, it is advisable for those companies that do not have an explicit policy in this regard to issue an internal communication informing their employees that office computers (and any other electronic devices) are company property and, as such, may be subject to the company's control. It is also advisable to include this policy in new employment contracts, to be able to prove that the employee was made aware of this policy.

It should be noted, however, that the Supreme Court's judgment involved unfair use of the internet by an employee. The Court has not yet issued a judgment regarding employer regulation of employee use of the email system. It is conceivable that the Court may find a stronger employee privacy interest in the use of email and thus be more willing to restrict employer regulation of such use.

SPAIN CONSIDERING AMENDMENTS TO RETIREMENT SYSTEM ENCOURAGING EMPLOYEES TO DELAY RETIREMENT

For a few years now, experts have been predicting the collapse of the Spanish social security system. One of the basic proposals being offered is to delay the retirement age, which will entail two main consequences: (i) on the one hand, the public treasury will save money, as it will have to pay lower retirement allowances; and (ii) on the other hand, employees will contribute to the public system for longer periods of time, which will also imply an increase of the public resources.

The Spanish government has begun a slow movement towards this final achievement through Law 40/2007, which was recently approved by the Spanish Parliament. This law, which has been negotiated and agreed with the principal trade unions and companies, introduces numerous reforms in the social security system—some of them very innovative, as they modify the terms and conditions of a system unaltered over several generations. In this sense, while the former legislation has historically allowed employees to partially retire at the age of 60, the new law now establishes the minimum partial retirement age at 61. In addition, while the employees previously had no economic motivation to continue working once they reached the retirement age of 65, the new Law 40/2007 authorizes a higher retirement allowance for each additional year of service. It is a way of motivating employees to voluntarily extend their working years before establishing it as a mandatory rule.

From a practical point of view, early retirement agreements will become more expensive. For many years, such agreements were commonly used as a way of decreasing salary costs. But nowadays, the employee will face a lower retirement allowance if he retires at the same age; therefore, employers will have to make higher payments to encourage employees to retire early.

UPDATE: MOVEMENT TOWARD GERMAN MINIMUM WAGE LAW?

A red-hot decision of the Berlin administrative court has provoked—once more—debates about the need for a statutory minimum wage law. Today, Germany does not have one. In our last edition, we wrote about the newest initiative of the Social Democratic Party (SPD) to implement such a law. This approach contradicts the existing policy under constitutional law, which is to grant autonomy to labor unions to negotiate wage provisions in labor agreements. Without a change in the German Constitution, it is unlikely that a general minimum wage act will be implemented.

The highly protected right of a union to negotiate an industrywide minimum wage has now been confirmed and highlighted by a decision of the Berlin administrative court of March 7, 2008 (Verwaltungsgericht Berlin, VG 4 A 439.07). The claimants in that case were several companies organized in an employers' association that were competitors to the German postal service company (Deutsche Post AG). They had been previously bound to a minimum wage agreed to with the union of the new mail and delivery services, GNBZ (*Gewerkschaft der neuen Brief- und Zustelldienste*). This GNBZ minimum wage was fixed at a lower level than the one in the labor agreement for the German postal service negotiated with the combined-services union, Ver.di (*Vereinte Dienstleistungsgewerkschaft*). Thus, two different minimum wages set in different collective bargaining agreements purported to cover the same industry and the same abstract groups of employees. In December, the German Federal Ministry for Labour and Social Affairs decided to enforce an ordinance to extend the German postal service labor agreement regarding minimum wage to the entire mailing industry. This measure was based on new law establishing government authority to extend the compulsory applicability of labor agreements on minimum wage to the respective industry. Because this extension measure is intended to protect employees of nonunion companies, the Berlin court ruled that it may not be used to implement a minimum wage in union-represented companies bound to a different labor agreement, even if that means a lower minimum wage. The Ministry for Labour and Social Affairs appealed. There is uncertainty in the German mail service industry because the applicability of the extension measure to employers under a rival union's collective bargaining agreement remains an open question. Some employers have notified employees that any increase in wages is subject to the effectiveness of the governmental ordinance. A competitor of the German mail service company has announced the intention to file damage claim litigation against the Federal Ministry for Labour and Social Affairs if the extending ordinance is not annulled. The minimum wage remains highly contested terrain in Germany. We will report further.

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