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EUROPEAN LABOR & EMPLOYMENT LAW UPDATE

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"EQUAL PAY FOR JOBS OF EQUAL VALUE" IN FRANCE?

Should a human resources manager be paid as much as a chief financial officer? That appears to be the perspective the French Supreme Court is inching towards in view of its decision of July 6, 2010. The Court overruled prior rulings holding the principle of wage parity inapplicable to employees occupying different positions. It thus now concludes that employees not occupying the same positions but performing duties of similar importance for the company should be paid the same wage.

The principle of wage parity derives from the 1957 Treaty of Rome, which created the European Economic Community. Article 119 of the Treaty provides that "men and women should receive equal pay for equal work." Since then, this rule has been substantially extended, from wage parity between men and women to wage parity between employees, and from wage parity between all employees to a broader principle of equality of treatment.

Under French law, two legal means are currently available to employees who wish to challenge wage inequality. The first is the general principle of prohibition of all discrimination based on origin, gender, sexual orientation, age, union membership, political opinion, or other factors that should not be taken into account by employers as they relate to the private lives of employees. The second is the principle of wage parity, which is expressly applied by law to specific groups of employees, such as women compared to men, or employees with definite-term contracts compared to employees with indefinite-term contracts. However, case law has extended this protection to all employees, on the basis of the "equal work, equal pay" principle.

To defend against these challenges, employers can either question the comparability of the work done by employees or provide objective and adequate justification for the challenged wage inequality. The nature of the positions occupied by employees used to be an easy and efficient basis for challenging the comparability of the work performed by them, but the recent decision of the French Supreme Court has limited this defense considerably. Now, positions that refer to different missions in practice can be considered similar by judges because they require the same level of skills, responsibility, or resistance to stress, thus triggering the wage-parity principle.

Notwithstanding this general tendency to enlarge the scope of the wage-parity principle, case law still provides objective criteria to be used to justify differences of compensation between employees. For example, greater length of service or more advanced education may constitute objective and adequate justification for maintaining compensation differences. A ranking system can also constitute such justification, provided that the employees are informed of it and that its criteria reflect measurable performance differences among them.

Thus, recent developments of French case law are not really focused on absolute wage parity between dissimilar jobs; they are more pragmatically focused on the objectivity and transparency of compensation policies.

NEGOTIATING BELOW THE COLLECTIVE BARGAINING MINIMUM IN SPAIN

On September 17, 2010, the Spanish Congress approved Law 35/2010, which allows employers to negotiate salaries that are lower than those established in the relevant collective bargaining agreements ("CBAs"). Under the new law, no approval of a commission is required, only the agreement between the employer and the employees' representatives. The only limitation is that the agreement will be valid only until a new CBA is approved (the life of a CBA is normally between three and four years). But once the new CBA is approved, the parties will be legally able to negotiate again. Another significant measure provided by the reform promotes a more flexible base for companies and workers and an increased possibility to negotiate a different distribution of working time during the year. This measure is also limited in time until a new CBA is approved.

Law 35/2010 also clarifies the concept of dismissal on economic grounds, enabling the employer to carry out this type of dismissal not only when the company has losses, but also when there has been a decrease in profit.

ITALIAN SUPREME COURT RULES EMPLOYEES NEED NOT BE TRANSFERRED TO THE BUYER OF A BRANCH OF THE BUSINESS WITHOUT THEIR CONSENT

The Italian Supreme Court ruled in Decision No. 19364 of September 10, 2010, that in some circumstances employees have the right not to be transferred without their consent to the buyer of a branch of the transferor's business.

Under Article 1406 of the Italian Civil Code, a party can assign a contract to a third entity provided that the other party gives its consent. This general rule is applicable to employment contracts, yet it is subject to an exception in case of the assignation of the entire business or part of the business to a third entity. Thus, Article 2112 of the Italian Civil Code, implementing the European Acquired Rights Directive, sets up a special rule holding that when a business or branch of a business is assigned to a third party, employment agreements are automatically included in the assignment without requiring the employees' consent. This exception applies only to those employees working in the transferred business (or a branch thereof), since they are considered to be a component of that business. For this reason, employees who are not effectively and lawfully included in the transferred branch are entitled to oppose a transfer without their consent.

In the case at issue, a number of employees challenged the transfer of their employment contracts to a new employer upon the transfer of a branch of the business, claiming that they were unlawfully included in such branch. The Italian

Supreme Court ruled that the employees could not be transferred without their consent. In this case, the High Court explained, the employer lacked an objective business justification for transferring the employees. Indeed, there was reason to suspect that the purpose of the transfer was to facilitate termination of those employees' employment agreements. In sum, the Court ruled that the transfer of the employees to the new employer without their consent was not valid and that they had the right to be reinstated to their former employer.

TENSION IN AGE-DISCRIMINATION RULINGS FROM THE ECJ

On October 12, 2010, the European Court of Justice (the "ECJ") rendered two decisions on discrimination based on age, but the rulings are hardly compatible. In the *Rosenbladt* decision (C-45/09), the court held that the automatic termination of an employment agreement upon the employee's reaching a certain retirement age is not necessarily discriminatory. Specifically, the ECJ confirmed that a fixed retirement age of 65 as provided under a German collective bargaining agreement for the commercial cleaning sector does not violate the EU's Equal Treatment Directive (2000/78).

The *Rosenbladt* matter commenced at the Hamburg Labor Court, where a cleaner contested the automatic termination of her employment; the labor court asked the ECJ for a preliminary ruling on whether automatic termination under the collective bargaining agreement, based on a retirement age that is identical with the statutory retirement age, is consistent with the Directive. At least under the described circumstances, the ECJ did not consider the automatic termination a discriminatory provision.

This decision is remarkable, particularly in light of the Court's ruling published the same day in *Andersen* (C-499/08), which held that Directive 2000/78 would be violated if a Danish employee, upon his dismissal, were denied statutory severance pay because his age entitled him to draw a pension. Danish law under certain circumstances provides for such a severance allowance upon dismissal, but it excludes employees who are entitled to draw an old-age pension, whether or not they actually retire. The facts are special because Ole Andersen wanted to waive the pension and continue to work, and he had also registered as a job seeker after his dismissal. Under those circumstances, the ECJ deemed the exclusion from severance payment unjustified. In this context, the ECJ reasoned that although in general, restricting severance to those workers who are not entitled to an old-age pension may not be unreasonable, Danish law unduly prejudiced the legitimate interests of workers by going beyond what is necessary to attain legitimate social-policy aims.

In Germany, it is standard practice to provide for reduced severance payments in social plans for older employees. Social plans are typically negotiated between employers and their works councils in cases of massive headcount reductions. The rationale for permitting reduced payments for older employees is that they face a potentially shorter unemployment period, since they are closer to the age at which they can begin drawing a state pension. This practice is expressly approved in the German legislation implementing Directive 2000/78 in the General Equal Treatment Act. However, this law does not draw a clear line between eligibility and the actual decision to retire. Employers would be well advised, in light of the *Andersen* decision, to treat as they would any other worker older employees who wish to continue working and are not required to retire.

BELGIUM LIMITS GOLDEN PARACHUTES

Responding to the financial crisis and widespread concern over excessive executive pay, Belgium has enacted an upper limit on severance payments for executive directors, members of management committees, managers dealing with the day-to-day business, and other executives of listed companies.

Under this new law, severance pay for these executives may not exceed 12 months of remuneration. This period may be increased to 18 months in the case of a motivated recommendation by the company's remuneration committee. Moreover, both the 12- and 18-month periods may be exceeded if the higher severance package is explicitly approved at the next shareholders' meeting. In this case, the works council or the employees' representative body must be informed prior to the meeting so that it may provide its views in due time.

The application of these new principles limiting golden parachutes seems relatively easy for self-employed executives, but it might be more difficult for executives of listed companies who are bound by employment contracts and, as such, are subject to Belgian employment law. Indeed, Belgian employment law requires compliance with very specific rules regarding the calculation of the duration of a notice period or of the amount of the indemnity in lieu thereof, which may conflict with the principles set out in the new act to limit golden parachutes. These labor-law rules allow the granting of severance payments that are higher than those provided for in the new act. Some litigation may be needed to clarify how to reconcile traditional labor and employment rules with the new statute.

U.K. REVISES REMUNERATION CODE

The U.K.'s financial regulator, the Financial Services Authority (the "FSA") has published a revised Remuneration Code. The Code has been amended to take into account changes required by the Capital Requirements Directive, which aims to align remuneration principles across the EU.

Under the revised code, which took effect January 1, 2011, coverage of the core requirement "to establish, implement and maintain remuneration policies, practices and procedures that are consistent with and promote effective risk management" will be extended from the 26 largest banks, building societies, and broker-dealers to *all* banks, building societies, and investment firms within the scope of the Capital Adequacy Directive (approximately 2,700 firms in the U.K.). It applies to the global operations of those entities based in the U.K. and to the U.K. operations of those headquartered elsewhere. A tier system (assessed by reference to the risk associated with their activities) has been established, and the extent and timing for implementation of the new requirements will apply to firms differently, depending on which tier they fall into.

The key requirements of the revised Code are as follows:

- The ratio between fixed and variable pay should be "appropriate" (*i.e.*, not too heavily biased towards variable);
- At least 50 percent of variable pay should be non-cash (*i.e.*, shares or instruments);
- At least 40 percent of variable pay should be deferred;
- Firms should retain the right to adjust any invested compensation; and
- Firms will now have to create a paper trail explaining compensation decisions—a significant departure from past practice.

At the same time, the FSA has published new rules implementing the Capital Requirements Directive's requirements for firms to disclose information on their remuneration policies and payouts at least once per year. Firms are required to make the first disclosure as soon as practicable and in any event no later than December 31, 2011.

U.K. Enacts Bribery Act 2010

All businesses in the U.K. should also be aware of the new Bribery Act 2010, which will come into force in April 2011. The Act will replace the fragmented and complex anti-bribery offenses at common law and statute, making U.K. legislation consistent with the OECD Anti-Bribery Convention, which the U.K. ratified in 1998. In particular, the Act will:

- Introduce a corporate criminal offense of failing to prevent bribery by persons working on behalf of a business. A business can avoid conviction only if it can show that it has "adequate procedures" in place to prevent bribery;
- Make it a criminal offense to give, promise, or offer a bribe and to request, agree to receive, or accept a bribe either at home or abroad. The measures cover bribery of a foreign public official; and
- Increase the maximum penalty for bribery from seven to 10 years' imprisonment with an unlimited fine. A company guilty of these offenses also may face an unlimited fine.

To defend itself against an allegation of failing to prevent bribery by an employee, agent, or subsidiary—a provision likely to cause concern for many employers—a business will need to show that it has "adequate procedures" in place. This has not been defined in the Act, but guidance from the Serious Fraud Office has indicated that it will consider the adequacy of any procedures, such as a code of ethics or a whistleblower helpline, in mitigating the risk of bribery and corruption.

Unlike the U.S. Foreign Corrupt Practices Act, the U.K. law provides no exemption for "facilitated payments." Further, there is considerable uncertainty over the extent to which corporate hospitality will fall foul of the Act. Excessive and lavish entertaining is likely to be scrutinized.

The Bribery Act applies to all businesses operating in the U.K. as well as any overseas activities of a subsidiary of a U.K.-based business. Businesses are now looking closely at introducing detailed, prescriptive policies on expenses and entertaining, training for staff, and policies for monitoring relevant activity.

U.K. Hikes Caps on Unfair-Dismissal Awards

The U.K. employment tribunal compensation limits increased on February 1, 2011, applying when the effective date of termination is on or after that date. The key increases to note include a rise in the maximum limit on a week's pay (used to calculate the basic award for unfair dismissal) from £380 to £400 and an increase in the maximum compensatory award for unfair dismissal from £65,300 to £68,400.

U.K. Employee Consultation Requirements

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") oblige an employer to inform and potentially consult with its staff when a relevant transfer is proposed. A "relevant transfer" can be either a traditional sale of a business (or part of a business) or a service provision change (usually first- or subsequent-generation outsourcing).

The legislation provides that an employer must inform staff (through unions or elected representatives) of the following:

- The proposed transfer, including the planned date and the basic rationale therefor;
- The legal, economic, and social implications of the proposed transfer; and
- Any measures planned to be taken with respect to the employees ("measures" means any planned redundancies, pension changes, or other changes impacting the employees).

EUROPEAN OVERVIEW

An ever-increasing amount of labor and employment legislation in Europe means that labor and employment issues have become vital parameters for all businesses. Now more than ever, it is critical to receive fast, accurate, and commercial advice to solve employment-related issues before they escalate into major problems. Jones Day's European Labor & Employment Practice provides companies that have operations in Europe with experienced, practical, and cost-effective legal advice on all employment-related matters.

The European Labor & Employment Practice operates in an intellectually demanding field but always in the context of the commercial demands of your business. Our teams of labor and employment lawyers in the Firm's offices in Brussels, Frankfurt, London, Madrid, Milan, Munich, and Paris have wide-ranging experience providing practical solutions to employment problems, and they offer advice on all issues surrounding the relationships between employers and employees, including transactional support, advisory work, and litigation. Where appropriate, our lawyers draw on the experience and knowledge of other lawyers across the Firm through a tradition of close collaboration and cooperation. We are experienced in the following areas:

- Employment documentation
- Employment benefits and employment rights
- Litigation
- Workforce restructuring and change management
- Transactional support
- Noncompete covenants and confidentiality issues
- Employee representation
- International employment
- Claims prevention training

Having informed its staff, the employer must consult them in relation to the measures. All of this must take place far enough ahead of the planned transfer to provide a meaningful opportunity for effective consultation. Breach of the obligation can lead to a punitive award of up to 13 weeks' pay for each employee.

Where no measures—or where merely administrative changes—are anticipated, it has long been commonplace for employers to inform staff only very shortly before the transfer. Two recent decisions from the Employment Appeal Tribunal (the "EAT") suggest that employers may have to engage staff earlier, and in relation to a wider range of matters, than had previously been thought.

In *Cable Realisations Ltd v GMB Northern* UKEAT/0538/08, the sequence of events was as follows:

- June 29 – Announcement made to all staff.
- July 3 – Seller met the union informally.
- July 25 – Buyer and seller met the union—said the transfer was "weeks away."
- August 15 – Buyer sent a measures letter announcing no planned measures.
- August 15 – Seller sent a formal TUPE letter to the union.
- August 17 – Q&A with the union.
- August 20–31 – Traditional two-week plant shutdown.
- September 3 – Sale completed.

The union said the process did not meet the requirements of TUPE in that the information was provided so late (*i.e.*, just before the shutdown, when everyone went on holiday) that there was no opportunity for staff to ask questions and be reassured about the transaction. The union's claim succeeded. The key points to emerge from the decision were: (1) that a process of TUPE information and consultation was triggered only when the formal letter was sent—earlier informal briefings counted for nothing; and (2) there has to be an opportunity for "voluntary" consultation, even if no measures are anticipated. Here, since the process could not lawfully begin before August 15, and the plant was closed from August 20 until the Friday before the sale closed, there was no opportunity. The award was reduced to take into account the fact that there were no measures, but the employees still received a windfall of three weeks' pay.

In *Todd v Strain & Ors* UKEATS/0057/09, the seller felt there were no measures and so merely informed staff of the upcoming transfer without consulting them. However, there was an administrative change in the payroll date proposed by the buyer. The EAT found that this amounted to a "measure" because it was something about which staff would be concerned, given that they might have to adjust direct debits, etc. Staff were awarded seven weeks' pay for the failure to consult.

Together, these two decisions mean that employers will need to be prepared to announce transfers earlier than has often been the case in the past, ensure that the announcement is effective under TUPE, and also be prepared to consult about minor matters that historically were not on the radar. Otherwise, the penalties for apparently insignificant shortcomings in process are stiff.

OFFICE INFORMATION

BRUSSELS

Since its establishment in 1989, Jones Day's Brussels Office has grown to more than 30 lawyers. Strategically located in the heart of the European Union, the Brussels Office advises clients on a wide range of regulatory, corporate/commercial, tax, and labor law issues relevant to corporations doing business in Belgium, the EU, and worldwide.

FRANKFURT

When Jones Day opened its Frankfurt Office in 1991, it was one of the first U.S. law firms with an office in Germany. Since then, the Frankfurt Office has developed from a small operation focusing on mergers and acquisitions into a full-service office with more than 35 professionals practicing in all areas of law relevant to businesses. Situated in one of Europe's main business and financial centers, the Frankfurt Office, jointly with the Firm's Munich Office (which opened in 2003), serves the entire German market. Our lawyers also work closely with a network of law firms in the countries of Eastern Europe and Scandinavia to serve our clients' needs in those jurisdictions.

LONDON

The London Office was founded in 1986 and expanded significantly in 2003, when Jones Day merged with long-established City of London firm Gouldens. With 175 fee earners in the center of the City, the London Office is an integral part of the global Firm. Our lawyers have extensive U.K. and international experience and provide domestic and global clients with high-quality advice across the full range of legal services.

MADRID

The Madrid Office of Jones Day, opened in January 2000, is a full-service office that now has about 30 locally qualified Spanish lawyers, all of whom have significant experience handling a wide variety of corporate transactions and commercial law matters. We also have U.S. law capability within the office, and many of our lawyers are fluent not only in English and Spanish, but also in French and German.

MILAN

Jones Day's Milan Office, opened in 2001, has more than 25 professionals. We are strategically located in the commercial and financial center of Italy and advise Italian and international clients on a comprehensive range of legal matters.

MUNICH

With the opening of Jones Day's Munich Office in 2003, the Firm significantly expanded its capabilities and reach in Germany. The Munich Office has grown steadily and is now a full-service operation with more than 30 professionals. Our attorneys, in collaboration with lawyers in our Frankfurt Office, advise the Firm's international and German clients on the full range of matters relevant to leading corporations doing business in Germany, Austria, and Switzerland. The Munich Office also coordinates multijurisdictional matters, including cross-border transactions involving targets in jurisdictions around the globe.

PARIS

The Paris Office of Jones Day opened in 1970. Our lawyers advise a wide range of French, U.S., and other multinational clients on domestic and cross-border matters. Our clients include major corporate groups as well as banks and financial institutions; private equity, real estate, and venture capital funds; public agencies and entities; and other institutional clients. The Paris Office has more than 80 lawyers, including 19 partners. All Paris Office lawyers are fluent in French and English, and many are fluent in other languages as well.

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