JONES DAY

VOLUME 4 ▪ ISSUE 2 ▪ JULY 2011

EUROPEAN LABOR & EMPLOYMENT LAW UPDATE

CLARIFICATION OF STANDARDS APPLICABLE TO THE OBLIGATION TO CONSIDER REASSIGNMENT OPPORTUNITIES FOR EMPLOYEES SLATED FOR ECONOMIC DISMISSAL

Under a May 18, 2010, amendment to the French Labor Code, prior to dismissing an employee for economic reasons (as opposed to performance or other personal grounds), an employer in France must review all possible job openings in all of the companies and offices of its group with an eye to determining whether the employee can be reassigned to one of those openings, even if it is abroad (Art. L. 1233-4 of the French Labor Code). In an instruction dated March 15, 2011 (Circ. DGT n° 03), the French Labor Administration provided useful clarification of the reassignment obligation. It is clear that companies belonging to a group established in more than one country have to look for all reassignment opportunities existing within all working sites of the group "whose activities, organization, and location allowed this reassignment." In practice, many companies did so knowing that very few opportunities outside France would in fact match the employee's skills or professional preferences; even though most employees would not want to move and would reject the reassignment opportunity, the inquiry was still legally mandated. As the French Supreme Court (*Cour de cassation*) made clear, companies could not limit the inquiry by asking the affected employees beforehand about their relocation preferences or restrictions. The concern for many French employers was that this legally mandated inquiry clashed with the impression, widely held by employees and trade unions,

CONTENTS

that offers for reassignment in Asia, Africa, South America, or Eastern Europe would be inadequate because of the lower salaries and working standards prevailing in those regions. To avoid these difficulties, many employers did not offer reassignment opportunities in those areas—and consequently were successfully sued by terminated employees for failure to comply with the reassignment obligation.

The May 18, 2010, law sought to avoid these difficulties by requiring that any reassignment should be for "equivalent remuneration" and allowing the employer to inquire into the affected employee's preferences or restrictions. In its March 15, 2011, instruction, the French Labor Administration provided a template questionnaire to be used to survey employees on their relocation preferences. As part of the survey, the employee must be asked whether he or she would be at all interested in reassignment outside France and, if so, what his or her preferences and restrictions would be with regard to location and remuneration; general restrictions regarding employment-contract clauses and working conditions may also be expressed. After the survey is returned by the employee, the employer is to take into account the employee's express wishes in determining the scope of the reassignment opportunities and must tailor any reassignment offers to those wishes. It must be noted that an employee's failure to answer within six working days is treated as a rejection of reassignment opportunities outside French territory.

Despite this helpful clarification, the reassignment survey continues to raise many issues and questions. First, an employee may very well express no restrictions whatsoever, in which case the employer will still have to research available positions in every country where the group is established, even when the level of remuneration associated with the job position identified is clearly unsuitable. Also, it may be very difficult or even impossible for the subsidiary of a large group to identify all the working sites of the other companies of the group in order to list them in the survey, let alone find out whether these companies have vacant positions. Moreover, processing and taking into account all the wishes expressed by employees in order to personalize reassignment offers will, in collective redundancies, make the already extremely complex and burdensome dismissal procedure even more so.

NEW MEASURES AGAINST IRREGULAR WORK IN SPAIN

Spain is taking measures against undeclared, or irregular, work. On May 6, 2011, Royal Decree Law 5/2011 of April 29 ("RDL 5/2011"), relating to measures for the regularization and control of undeclared work (and the promotion of housing renovation), was published in the Official State Bulletin.

The objective of this law is to curb undeclared work in Spain by facilitating the voluntary regularization of workers who are presently providing services with no employment contract and without having been registered with the Social Security authorities. The law grants amnesty to employers that regularize the situation of their employees by July 31, 2011. These employers will not be subject to labor sanctions from the labor inspection authorities, but they will have to fulfill past Social Security obligations (up to four years of Social Security contributions plus a 20 percent surcharge). RDL 5/2011 also increases sanctions for those companies that persist in engaging employees in an irregular manner. These sanctions will be applicable as of August 1, 2011.

RDL 5/2011 does not cover some practical issues. For example, it is not clear what happens if an irregular employee does not want to sign the employment contract. This is a common situation with irregular self-employed workers, because if they become regular employees, their net monthly salaries (not their net annual salaries) decrease. It may be the case that an employee's refusal to sign the employment agreement may be cause for termination of the employment relationship.

U.K. ABOLISHES DEFAULT RETIREMENT AGE

In October 2011, the default retirement age in the U.K. will be abolished. U.K. employers had been able to require employees to retire at age 65 without reason by giving them at least six months' advance notice of the requirement to retire. Employees could request to continue to work beyond age 65, and employers were obliged to consider such requests, but they were not required to justify any refusal. In other words, employees over this age did not have the ability to claim unfair dismissal.

Subject to transitional provisions, as of April 6, 2011, U.K. employers are no longer able to give notice to compulsorily retire staff at 65 or any other age without breaching U.K. age-discrimination legislation unless the age chosen can objectively be justified. Employers seeking to do so risk claims of age discrimination and unfair dismissal.

It is intended that retirement at an age mutually agreed upon by the employer and employee will become the norm, but there will still be situations where employers can lawfully require employees to retire if the employers can show that the retirement age is objectively justified. An example would be a position that has physical requirements which an older person either cannot meet or finds harder to meet than a younger person would.

A large volume of case law is expected to develop surrounding the question of what can be objectively justified. Employers will need to give careful consideration to any fixed retirement ages and assemble evidence in order to be able to defend any claims of direct age discrimination brought in the employment tribunal—the evidential burden on employers will be high.

In order for any "retirement" dismissal to be fair under unfair-dismissal laws, the usual rules requiring an employer to follow a fair procedure will apply. Employees should therefore be consulted, and employers should consider employee requests to stay on (where feasible), even possibly considering phased retirement through a move to part-time work.

In situations where employers are unable objectively to justify compulsory retirement, performance-based evaluation and, in appropriate cases, dismissal of employees regardless of age will continue to be lawful. In order for the procedure to be fair at law, the employee would need to be formally put on notice as to the employer's concerns and given proper opportunities to improve before being eventually dismissed. In practice, this could take six months or more and is likely to lead to disputes and discord, since in many cases judgments about performance will be subjective and disputed. Standards and judgments about performance will have to be applied consistently to all staff to avoid allegations of age discrimination. Introducing/applying more rigorous processes of evaluation selectively for older employees would itself be an act of age discrimination, so employers will need to take care to avoid potential claims. With an aging population, these issues are likely to figure heavily in employment litigation over the years to come.

AGE-DISCRIMINATION REVIEW OF SOCIAL-PLAN PROVISIONS IN GERMANY

The Federal Labor Court of Germany ("FLC") decided on April 12, 2011 (1 AZR 764/09), that generally, the severance claim resulting from a social plan may be calculated on the basis of factors which are determined or influenced by the age and/or years of service of the individual affected employee, at least when the calculation favors older workers.

In this particular case, the claimant employee was 38 years old when she was terminated. Her severance was calculated as follows: "age-range factor x years of service x monthly salary." The respective factor was determined in the social plan with 80 percent of the monthly salary for employees up to the age of 29, 90 percent for employees aged 30 through 39, and 100 percent for employees 40 years of age and older. The plaintiff claimed the 100 percent factor by arguing that the reduced factor linked to her lower age constituted a case of age discrimination in accordance with the European directives.

Although the FLC rejected this claim on its particular facts, any age-related differences used to calculate severance claims require careful consideration.

The German Equal Treatment Act includes several exceptions that justify age-related decisions and measures based on objective reasons, including age-related differences in a social plan in connection with the calculation of severance. This is in accordance with the European directive that allows the implementation of local-law exceptions if they are based on legal targets in the areas of employment politics, employment markets, and professional education. In light of the *Andersen* decision of the European Court of Justice (October 12, 2010; C-499/08), which was discussed in the previous *European Labor & Employment Law Update*, in each particular case it is necessary to analyze whether the specific measure is necessary to reach the legal target and

whether the interests of the individual are sufficiently taken into consideration. The courts are likely to focus on two questions: (1) Is the local-law exception in accordance with the European directive allowing an age-related difference? (2) Is the particular measure necessary and reasonable within the sense of this approved legal exception?

The answer to the second question requires a case-by-case analysis. The FLC decided in the case opening this article that the reduction of the factor for younger employees (those under 40) did not amount to age discrimination in relation to the calculation of severance owed in connection with the loss of employment, because younger employees generally have better chances on the employment market. This will not always be the case; for example, employment chances may vary by region and/or professional category. Therefore, it is advisable to review age-related market conditions in more detail and reflect them correctly in the social plan.

NEW TERMINATION RULING ON EMPLOYMENT CONTRACTS UNDER BELGIAN LAW

In Belgium—perhaps the only country in Europe where this is the case—an employee's termination notice period or pay in lieu of notice varies depending on whether the employee is a blue-collar or a white-collar worker.

Notice periods for blue-collar workers are based on years of past service and can total up to 217 days.

In contrast, white-collar workers whose earnings do not exceed €30,535[1] gross/year receive three months' notice for every five years of past service. For white-collar workers earning more than €30,535 gross/year, the parties must agree on the notice period; if no agreement can be reached, the matter can then be filed in labor court. Such agreements are generally concluded by taking into consideration the white-collar employee's salary,[2] seniority, age, and position within the company and his or her prospects for finding a new job. Various formulas have been developed in an attempt to predict the outcome of these court cases.

White-collar workers earning more than €61,071[3] gross/year are allowed to conclude agreements on termination notice at the moment of execution of the employment contract, but such agreements may not provide less than three months' notice for every five years of past service.

The Belgian government has now taken the first step in trying to reduce the differences in notice periods for blue- and white-collar workers. As of January 1, 2012, the notice periods for blue-collar workers will, in general, be increased by 15 percent. For white-collar workers, the notice periods will be reduced by 3 percent as of January 1, 2012, and by 6 percent as of January 1, 2014. Moreover, tax-free measures will apply to parts of these notice periods or the pay in lieu of such notice. White-collar workers earning more than €61,071[4] gross/year will still be allowed to conclude agreements on termination notice at the moment of execution of the employment contract.

It should be stressed, however, that this new ruling on the termination of employment contracts under Belgian law is only the first step in an attempt to harmonize the notice periods of blue- and white-collar workers. Complete equalization will be longer in coming, given the resistance of some of the affected workers.

1 This threshold applies for the year 2011; it is adjusted each year by the Ministry of Labor on the basis of the consumer price index.

2 "Salary" includes not only the monthly base salary, but also all benefits that are granted: company car, luncheon vouchers, occupational pension plan, etc.

3 This threshold applies for the year 2011; it is adjusted each year by the Ministry of Labor on the basis of the consumer price index.

4 This threshold applies for the year 2011; it is adjusted each year by the Ministry of Labor on the basis of the consumer price index.

OFFICE INFORMATION

BRUSSELS

Founded in 1989, Jones Day's Brussels Office has grown to approximately 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, in 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 approximately 40 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 the long-established City of London firm Gouldens. With 160 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 2000, is a full-service office that now has nearly 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 almost 30 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 the 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 22 partners. All Paris Office lawyers are fluent in French and English, and many are fluent in other languages as well.

LAWYER CONTACTS

BRUSSELS
+32.2.645.14.11
Chantal Biernaux
cbiernaux@jonesday.com

CHICAGO
+1.312.782.3939
Lawrence C. DiNardo
Practice Chair
lcdinardo@jonesday.com

Michael J. Gray
mjgray@jonesday.com

CLEVELAND
+1.216.586.3939
Stanley Weiner
sweiner@jonesday.com

DALLAS
+1.214.220.3939
Matthew W. Ray
mwray@jonesday.com

FRANKFURT
+49.69.9726.3939
Georg Mikes
gmikes@jonesday.com

LONDON
+44.20.7039.5959
Mark Taylor
marktaylor@jonesday.com

LOS ANGELES
+1.213.489.3939
Deborah C. Saxe
dsaxe@jonesday.com

MADRID
+34.91.520.3939
Jesús Gimeno
jgimeno@jonesday.com

Javier Gutiérrez Ponce
javiergutierrez@jonesday.com

MILAN
+39.02.7645.4001
Adelio Riva
ariva@jonesday.com

MUNICH
+49.89.20.60.42.200
Friederike Göbbels
fgoebbels@jonesday.com

NEW YORK
+1.212.326.3939
Samuel Estreicher
sestreicher@jonesday.com

Willis J. Goldsmith
wgoldsmith@jonesday.com

Matthew W. Lampe
mwlampe@jonesday.com

PARIS
+33.1.56.59.39.39
Anne C. Boileau
acboileau@jonesday.com

Emmanuelle Rivez-Domont
earivez@jonesday.com

SAN DIEGO
+1.858.314.1200
Rick Bergstrom
rjbergstrom@jonesday.com

WASHINGTON
+1.202.879.3939
Andrew M. Kramer
akramer@jonesday.com

Alison B. Marshall
abmarshall@jonesday.com

JONES DAY GLOBAL LOCATIONS

ATLANTA
BEIJING
BOSTON
BRUSSELS
CHICAGO
CLEVELAND
COLUMBUS
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
IRVINE
LONDON
LOS ANGELES
MADRID
MEXICO CITY
MILAN
MOSCOW
MUNICH
NEW DELHI
NEW YORK
PARIS
PITTSBURGH
RIYADH
SAN DIEGO
SAN FRANCISCO
SÃO PAULO
SHANGHAI
SILICON VALLEY
SINGAPORE
SYDNEY
TAIPEI
TOKYO
WASHINGTON