WILMER CUTLER PICKERING
HALE AND DORR LLP

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H.R. Confidential

Legal news and views for employers and human resource professionals

Welcome to the latest edition of HR Confidential – our first edition since the merger of Hale and Dorr LLP with Wilmer Cutler Pickering LLP

We are now over a thousand lawyers operating in five countries. For us this is a very exciting time and the expanded employment department now benefits from the addition of three lawyers in the Berlin office: Anja Mengel, Thilo Ulrich and Susanne Schaar. To celebrate our merger, we are running employment seminars this month in London, Oxford, Washington and Boston, bringing clients up to date with the latest developments in employment law from the UK, Germany and the US. Our global employee benefits team has likewise grown, providing expert advice relating to stock options, restricted shares and other share schemes.

In the UK, developments continue apace: just this month changes include new statutory grievance and disciplinary procedures – with the sanction that dismissals will be automatically unfair if they are not followed; the removal of the exemption for small companies from disability legislation – everyone is now covered; and new procedures for handling cases in the employment tribunals. The employment team is on hand to advise clients on how to amend their internal policies and procedures to keep apace with these developments and of course, as always, we are happy to run tailor-made training programmes for line managers and staff on subjects as varied as handling disciplinaries, workplace harassment and employee consultation.

Our approach is pragmatic, commercial and solution-driven. We do not believe in giving clients endless options and no clear steers. If you would like to find out more about the services we can offer your company, please contact us.

– Henry Clinton-Davis
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Maternity: Employers to Inform of Vacancies

The recent case of *Visa International Services Association v. Paul* serves as a warning to employers of the need to ensure that women on maternity leave are informed of any internal vacancies that arise during their period of maternity leave.

The case concerned Mrs. Paul, an administrator, who had been employed by Visa. Whilst Mrs. Paul was on maternity leave, Visa decided to undergo an internal departmental reorganisation, which resulted in the creation of two new posts, both of which were advertised internally and externally. Mrs Paul learned about one of the posts in December 2000, after it had already been filled.

Mrs. Paul felt she should have been informed of this vacancy and given a chance to apply for it. She raised a grievance and was told by Visa that she was considered unsuitable for the role as they felt she lacked the necessary experience. Mrs. Paul resigned and brought proceedings for unfair dismissal, wrongful dismissal, pregnancy-related detriment, pregnancy-related dismissal and sex discrimination.

Staff Handbook

Wilmer Cutler Pickering Hale and Dorr has developed an "off-the-shelf" staff handbook, updated to reflect the raft of recent employment legislation and case law in the UK. The handbook provides HR professionals with the know-how and procedures to assist employers in maintaining compliance with the law. If you would like further details, contact Henry Clinton-Davis (henry.clinton-davis@wilmerhale.com) on +44 20 7645 2507.

The Employment Appeal Tribunal held that Visa should have informed her about the vacancy and that this failure amounted to a fundamental breach of the implied term of mutual trust and confidence. Visa argued that it could not have committed a fundamental breach of this term because she was not even suitable to be short-listed. The EAT said that this argument missed the point, which was that Mrs. Paul believed that she was suitable for the post and that Visa's failure to tell her about it after 12 years' service completely undermined her trust and confidence. Her case did not depend on showing that she would have had a chance of obtaining the job.

Advice: Err on the Side of Caution!

It is important that employers err on the side of caution and notify any employee who is absent on leave for family or domestic reasons of any job vacancy for which the employee might wish to apply, even if it is the employer's belief that the absent employee would be neither suitable nor qualified for the job in question. The principle could also apply to employees on other forms of long-term leave, such as long-term sick or secondment.

By Carolyn Baines
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The Dangers of the "Without Prejudice" Dismissal

Faced with an underperforming employee, a tactic commonly used by employers is to have a frank discussion with the employee, aimed at securing the employee's departure from the company on agreed terms. The employee is offered a favourable package to leave without the need to go through a disciplinary procedure. However, employers need to proceed with caution. If the employee does not accept the deal, he or she may be able to argue that the suggestion to leave the company actually amounts to a "loss of confidence vote" in his or her abilities and a possible breach by the employer of the implied term of trust and confidence, justifying the employee resigning and claiming constructive dismissal. This is precisely what happened in the recent case of *Billington v. Michael Hunter and Sons Ltd [2004]*.

Employers may be tempted to get round this problem by having the conversation with the employee on a "without prejudice" basis. The idea behind the without prejudice rule is to allow the parties to any civil dispute to speak openly about settlement, without fear that their words will be used against them in litigation. However, in *BNP Paribas v. Mezzotero [2004]*, the Employment Appeals Tribunal (EAT) held that the rule only applies where a genuine dispute between the parties has arisen. On the facts of this case, the raising of a grievance did not in itself give rise to such a dispute. By extension, it could be argued, neither does the holding of a disciplinary hearing. Further, given the unequal relationship and the vulnerable position of the employee in that case, the EAT also thought that the employee had not genuinely consented to speak on a without prejudice basis in any event. Although this case concerned a without prejudice discussion in the context of grievance procedures, it highlights the risk of the "without prejudice" dismissal in any situation.

Discussions between solicitors once a claim has reached the Employment Tribunal remain clearly within the scope of the without prejudice rule. However, there is a risk that discussions between the employee and employer at earlier stages will not be and so the following points should be borne in mind:

- Think carefully about when to have the without prejudice discussion: if before the disciplinary process has started, there is perhaps more leverage for the company to present the employee with a choice between doing a deal and the employee taking his chances in a disciplinary. If, however, the employer waits until after the disciplinary process has been instituted, it may be easier to argue that a dispute has arisen and that the contents of the discussion should be regarded as truly without prejudice.

- Above all be cautious in what is said. Try to be consistent with your "open" position, for instance, by emphasising that taking a package is just one option and that the outcome of the disciplinary procedure has not been decided. If a settlement is not reached and the disciplinary process takes its course, the employer has not said anything which could be used at a future Employment Tribunal to suggest that the employer has prejudged the outcome.

- Finally, give the employee a real choice of whether or not to have a without prejudice discussion. For instance, write or email the employee in advance indicating your request for a without prejudice, meeting. That will be good evidence that the discussion was intended to be without prejudice and if the employee attends without demur, it will be hard for him or her to argue that he or she did not consent.

By Daniel Pollard
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Non-Competes – A View from Germany

In the UK, non-compete agreements are commonly used by employers to deter former employees from working for a competitor. When working internationally, however, it is important for UK companies to be aware of the different approaches countries take to the enforcement of such restrictions. In this article we focus on the position in Germany.

German law places heavy restrictions on the ability of employers to enforce non-compete clauses.

The maximum enforceable term of a non-compete is two years. Any covenant exceeding this term will not be enforceable beyond that period. However, it is open to an employee to agree to abide by the terms of a non-compete that exceeds the two-year enforceable period.

Under German law, to be valid, a non-compete must be in writing and signed by both the employer and the employee. In addition, an original of the document must be provided to the employee.

Under German law, the employee must be given compensation amounting to at least 50 percent of his or her contractual "remuneration", paid on a monthly basis during the term of the non-compete.

"Remuneration" is construed in the employee's favour and typically includes not only the employee's basic salary, but also all other kinds of compensation, such as commission, bonus, the monetary value of the use of a company car for private purposes, and any other benefits in kind.

A non-compete that provides for no compensation payment whatsoever is invalid and unenforceable. If an agreement provides for too little compensation, the employee has a choice whether or not to abide by it. Compensation must therefore be calculated very carefully.

The geographical scope of a non-compete must be determined with great precision, according to the individual circumstances of each case. As a general rule, a non-compete should not extend to geographical areas where the employer is not carrying on business. Any covenant exceeding the acceptable geographical scope is not enforceable by the employer, although the employee may elect to abide by the non-compete.

The employer may only unilaterally waive a non-compete by giving the employee one year's prior notice. During the notice period, the employer must still make the compensation payments to the employee, but the employee is immediately free to compete. Different rules apply in the event that the employment is terminated for cause.

On account of the financial burden that a non-compete places on the employer, non-competes are not that commonplace in Germany. German employers tend to conclude non-competes selectively, and then only with employees who could cause real harm to the employer by working for a competitor after they leave. An employer must weigh the benefits and disadvantages carefully. In particular, a non-compete clause should be drafted so that it comes into effect only upon the employee's successful completion of any probationary period (maximum of six months), since employers generally do not want to pay compensation to employees who did not meet their standards for continued employment. Although German law permits non-competes to run for up to two years, employers should consider whether they are in fact better served by a non-compete period of between six and twelve months, in order to reduce the compensation otherwise payable to the employee.

By Anja Mengel and Manfred Schmid (anja.mengel@wilmerhale.com and manfred.schmid@wilmerhale.com)

New Consultation Requirements – Employers Beware!

From April 2005, the Information and Consultation Regulations 2004 (ICER) will increase employers' obligations to consult with and involve workers in key decisions affecting their businesses. The new law is set to come into force on 6 April 2005 for undertakings with 150 or more employees, on 6 April 2007 for undertakings with 100 or more employees and on 6 April 2008 for undertakings with 50 or more employees.

This requirement to inform and consult is triggered either by a formal request from employees for an information and consultation agreement (I&C) or by employers starting the process themselves.

Employee Request

An employer's obligations under ICER are triggered when it receives a valid request made by at least 10 percent of the employees (subject

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A number of changes come into effect on 1 October 2004:

- New Statutory Grievance and Disciplinary Procedures
- New Employment Tribunal regulations and rules of procedure, which seek to modernise the tribunal system and render it more efficient
- Both applicants and respondents will be required to use new forms when dealing with an Employment Tribunal case
- The National Minimum Wage for adults increases to £4.85 per hour
- The Disability Discrimination Act now applies to all employers

to a minimum of 15 and a maximum of 2,500 employees). As the legislation specifies neither the subject matter, nor the method, frequency or timing of the information and consultation, it is left to the employer and the negotiating representatives to agree these points between them.

Voluntary I&C Agreements

Individual organisations are also free to draw up whatever arrangements and structures they want (as long as they satisfy certain ICER provisions and have been agreed by all the employees).

By putting in place a voluntary agreement before April 2005, the employer can make it harder for the employees to request a new agreement on different terms.

Standard Information and Consultation Provisions

Where an employer fails to initiate negotiations for an I&C agreement as required, or where negotiations collapse, the employer must set up I&C structures which comply with certain standard provisions. These will include requirements to inform and consult about pending redundancies and other threats to employment, significant changes to work organisation and employment terms, and recent or probable development of the business.

Start Thinking Now

Employers who consider that employees are likely to make a request for an I&C agreement, and who object to the standard provisions in ICER, may well be advised to pre-empt such a request and start negotiating now for a voluntary agreement more to their liking.

By Carolyn Baines
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In-house Training

We provide a variety of tailor-made training courses for line managers and HR professionals. These are held at clients' offices and are inter-active, practical and fun. Recent topics include:

- harassment at work
- handling disciplinaries
- workplace consultation

We have recently added a new topic: – corporate governance for non-executive directors – uniquely covering both UK requirements and Sarbanes Oxley.

For more information, contact Henry Clinton-Davis (henry.clinton-davis@wilmerhale.com)

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