WILMER CUTLER PICKERING HALE AND DORR LLP

Autumn 2005

H.R. Confidential

Legal news and views for employers and human resource professionals

So You Want to Roll Out Your Code of Conduct in Europe?

Keen to comply with the Sarbanes-Oxley Act of 2002 and related US Securities and Exchange Commission (SEC) and stock exchange rules, large numbers of US companies have been rolling out codes of conduct to their European subsidiaries. There have been a few unwelcome surprises along the way and many companies have had to rethink their strategy.

Problems can sometimes arise when employees, correctly or incorrectly, perceive conflicts between the code provisions and their individual contracts of employment. Employers need to bear in mind that in most European countries, employers are not permitted unilaterally to change employees' contracts. In some countries, including the UK, such concerns can be quite easily overcome by proper communication, making it clear that the Code (or at least most of its provisions) are not contractual but rather have the status of a set of rules of conduct. In other countries, however, even the introduction of such rules will give rise to legal issues.

A second problem that is now coming increasingly to the fore relates to pan-European data protection rules. Lately, the focus has been on anonymous telephone hotlines used to enable employees to report wrongdoing.

In France, the French data protection authority, CNIL, recently blocked attempts by McDonald's and CEAC, a division of Exide Technologies, to establish such hotlines. The objections included the fact that anonymous hotlines create the risk of false accusations and the stigmatising of employees. This was despite the fact that both companies made express provision for the accused person to respond to the allegations.

The French situation puts US companies in a quandary: they are exposed to fines in France if they install anonymous hotlines to comply with US securities laws, and they risk fines and worse in the US if they do not. The SEC and CNIL have already met to try to resolve the impasse and European data protection authorities will be meeting with Federal Trade Commission officials next month. The outcome is eagerly awaited.

In the UK, the Information Commissioner, the officer charged with data protection enforcement, has taken a reasonably relaxed attitude to anonymous hotlines, at least in circumstances where they are not misused to gather inappropriate information. However, it remains the case in the UK and in other European countries that the use of hotlines must still comply with pan-European data protection rules. Therefore, it is recommended that companies introduce clear data protection policies to ensure the basic rules are adhered to.

In Germany, a more specific issue has arisen — namely whether a code of conduct requires the consent of a German company's works council before it can become binding. (German companies with more than five employees have the right to elect a works council.) A German Labour Court has recently held that certain provisions of Wal-Mart's Code of Ethics could

Staff Handbook

WilmerHale has developed an "off-the-shelf" staff handbook, updated to reflect the raft of recent employment legislation and case law in the United Kingdom. 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:

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In-house Training

We provide a variety of tailor-made training courses for line managers and HR professionals. Held at clients' offices, these sessions are interactive, practical and fun. Recent topics include:

- Harassment at Work
- An Overview of UK Employment Law for US HR Professionals
- Handling Disciplinaries
- Workplace Consultation

We have recently added a new topic, Corporate Governance for Non-executive Directors, which uniquely covers both UK requirements and Sarbanes-Oxley.

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not be implemented without first consulting the works council – a process known as "co-determination." Some typical code provisions will require the works council's prior consent; others will not. A third category, dealing with matters such as private and romantic relationships with fellow workers, may be unenforceable if they infringe German employees' so-called personality rights, regardless of whether the works council consents.

Employers also need to consider whether, in transferring data to the US (including reports from anonymous hotlines), they are complying with European data protection rules, which place restrictions on data transfers outside the EU. Transfers to the US are likely to be protected if one of three routes is followed: the employees expressly consent, although in some countries this is not water-tight; or the US parent registers with the safe harbour programme operated by the US Department of Commerce; or the data is transferred between the European subsidiary and the US parent pursuant to an EU model contract.

US companies introducing ethics codes in Europe therefore need to be mindful of the culture and legal system of each member state and of the over-arching data protection rules that apply throughout Europe. We have considerable experience in all our offices dealing with these issues and can assist with the drafting of data protection policies, codes of ethics, and data transfers to the US.

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Tribunals Emphasise Importance of Workplace Training

With effect from 1 October 2005, the UK is introducing a new definition of harassment that includes sexual harassment. Harassment can occur on the grounds of a person's sex, even if it is not sexual in nature. Workplace claims are set to multiply as the boundaries of the new law are tested. It is no defence to a harassment claim that senior management did not know that harassment was taking place. Rather, employers need to have taken such steps as are reasonably practicable to prevent such acts, and in this connection, employment tribunals have repeatedly emphasised the importance of instigating proper workplace training to help staff avoid and deal with harassment. In *Gately v. Sainsbury's Supermarkets plc* (2005), a tribunal took this requirement one step further, stressing that employers keep records of attendance at such training courses in order to be able to show that the alleged harasser was properly trained, and not just the workforce generally.

To assist employers in taking the proper steps to prevent harassment, we run a large number of workplace training courses for line managers, HR professionals and employees generally.

For further information about our training courses please see the call-out box adjacent to this article.

By Henry Clinton-Davis
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Collective Redundancies: When Should Employers Give Notice of Redundancy?

A recent European Court of Justice (ECJ) case, *Junk v. Wolfgang Kühnel* (C-188/03), has thrown into question certain generally accepted practices in the UK and Germany regarding collective redundancies. In this article, Carolyn Baines and Manfred Schmid highlight the significance in each of their respective jurisdictions.

UK Law

Many employers embarking on a collective redundancy process have had to grapple with the statutory consultation requirements. These are triggered when an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. The employer is required to consult about the proposed dismissals with appropriate employee representatives at least 90 days before the first of the dismissals takes effect if 100 or more redundancies are proposed and, otherwise, at least 30 days before the first dismissal takes effect. There is also a requirement within the EU to notify the relevant public authority (the Department of Trade and Industry in the UK) of any proposed collective redundancies.

Until recently the UK courts seemed to accept that employers would be in compliance with the regulations if they served notice of dismissal on employees whom they were proposing to dismiss as redundant before the prescribed consultation periods had expired, provided that the consultation had reached a meaningful state and the notice did not expire before the end of the consultation period.

In the *Junk* case, the ECJ, applying German regulations similar to those in the UK, held that notice of termination can only be given **after** the consultation period has expired and the relevant public authority has been notified. Given that UK courts are meant to try to interpret legislation in line with ECJ decisions, there seems every

prospect that the UK tribunals will follow this approach in the future. Employers are therefore advised to make sure that the 80- or 90-day consultation period has concluded and that notification of the proposed redundancies to the public authority has taken place **before** serving notices of termination on employees.

German Law

German law requires employers to file notice of collective redundancies with the unemployment office at least one month prior to any dismissals. Further, if the workforce is represented by a works council, the employer must inform the works council of the redundancies at least 14 days prior to the filing with the unemployment office. Violation of these requirements leads to invalidity of the dismissals.

Collective redundancy in Germany is triggered if there is a dismissal of a significant number of employees in one establishment. For example, in establishments with more than 20 and less than 60 employees, the dismissal of more than five employees within a period of 30 days will amount to a collective redundancy.

Prior to the *Junk* decision, it was understood by both legal literature and the German courts that "dismissal" (Entlassung) meant the **expiry** of the notice periods of the affected employees. It was therefore possible to (i) serve notice on the employees, and, (ii) later, consult with the works council/file the collective redundancy with the unemployment office, in due time prior to **expiry** of the notice period. This practice resulted in significant flexibility for the employer.

However, the ECJ held in the *Junk* case that the term "dismissal" means the **service of the notice** of termination to the affected employees and not the expiry of the notice period as previously thought. As a result of this decision, the employer must inform the works council at least one-and-one-half months in advance, and file the collective redundancy with the unemployment office at least one month prior to service of the notice of termination.

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Disability Update

Last year's amendments to the Disability Discrimination Act (DDA), coupled with recent case law, have significantly increased the protection offered to workers who are disabled, with yet further changes on the way. To recap, the following are the key employment-related changes introduced in 2004:

- Abolishing the exception that previously applied to small employers with 15 or fewer workers.
- Introducing a new form of "direct" discrimination, where a disabled person is treated less favourably than other persons on the **grounds** of his/her disability. What is the difference between this and the other form of discrimination based on less favourable treatment for **a reason connected** with a worker's disability? In essence, discrimination "on grounds of" disability is focused upon less favourable treatment because of the disability itself, and is aimed at protecting a disabled worker who is able to do his or her job as well as an able-bodied person. This type of "direct" discrimination can never be justified. By contrast, less favourable treatment "related to" a person's disability is focused on the consequences of the disability and provides protection to a disabled worker whose disability prevents them from performing a significant part of their duties. In such a case, it **is** open to the employer to justify the less favourable treatment, provided of course, that reasonable adjustments would not have overcome the problem. Bear in mind however that the circumstances giving rise to the justification defence must be "material" and "substantial" and will require cogent evidence in support.
- Reversing the burden of proof, making it easier to sue for disability discrimination. Once a worker establishes facts which **could** amount to discrimination, in the absence of any explanation, the employer must prove that he did not discriminate. This makes the documentation of recruitment and promotion processes more important than ever.
- Abolishing the defence of justification when an employer fails to make "reasonable adjustments" to accommodate a disabled worker. Instead factors such as the size of the employer and a cost benefit analysis of the adjustment will determine if the adjustment is a reasonable one.

It now appears that the duty to make adjustments may involve a measure of **positive discrimination.** In *Archibald v. Fife Council* (2004), the House of Lords held that appointing a disabled road-sweeper to a more senior desk job for which she was qualified, but without competitive interview, was capable of being a reasonable adjustment. This was notwithstanding the fact that there were other candidates who the employer felt were better suited to the job. This will have a significant impact when deciding what adjustments to offer as part of a return to work strategy.

Are you looking for HR support?

From time to time HR professionals approach us to see if we have any clients who are looking to appoint HR managers or HR directors in the UK. If you are a company looking to make appointments in your HR department, please feel free to contact us in case we know of any candidates wishing to make a move. Please understand, however, that this is the limit of our involvement. We do not charge fees for making introductions, nor do we recommend candidates, assess their suitability or vet their CVs. However an informal introduction may save you the expense of engaging a recruiter. We will not introduce HR staff working for any client without the client's permission.

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From 4 December 2005:

- HIV, cancer and MS will be disabilities from the point of diagnosis, rather than from the point the illness impacts the worker's ability to function normally. There will be a number of exceptions for "minor" cancers.
- The old requirement that where a mental impairment arises from a mental illness, the mental illness must be "clinically well recognised" will be abolished. Previously, mental conditions with few externally discernable symptoms would be the subject of, often conflicting, expert medical evidence. Instead, there will be an increased focus upon whether the impairment has a substantial and long-term adverse impact upon day-to-day activities. This will increase the scope for DDA claims to be brought on a dismissal on health grounds where the underlying condition lacks physical symptoms and is medically unexplained.

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STOP PRESS:

Some significant changes to watch out for:

- The new Employment Tribunal claim and response forms must be used from 1 October 2005. Employers not complying risk being struck out.
- From 1 October 2005, unions balloting for industrial action must notify the employer prior to both the ballot and any follow-on industrial action.
- From 1 October 2005, the National Minimum Wage rises to £5.05 per hour for workers over 21 years old.
- The Employment Equality (Sex Discrimination) Regulations 2005, effective 1 October 2005, introduce a new definition of harassment related to a person's sex but not sexual in nature, facilitate rights of overseas workers to sue, give employers eight weeks to respond to SDA questionnaires and contain a revised definition of indirect discrimination in line with other discrimination regulations.
- From 5 December 2005, the Disability Discrimination Act 2005 will extend disability protection to sufferers of HIV, cancer and MS from the date the condition is diagnosed, even if there is not an immediate loss of function.
- New TUPE regulations will come into force from 6 April 2006. Contracting out is much more likely to be caught going forward and new rules apply in relation to changing contracts.
- Age discrimination will become unlawful from 1 October 2006. This will bring up significant changes in unfair dismissal, redundancy and retirement law. This will also be in this quarter's edition of *HR Confidential* and will be one of the subjects tackled in our upcoming employment update seminars on 29 and 30 November 2005.

For more information about our forthcoming seminars, please contact Margaret Charlton at margaret.charlton@wilmerhale.com or tel: +44 (0) 20 7645 2705.

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