European Labour Law Update

COVINGTON

2004-2005

CONTENTS

CZECH REPUBLIC

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In 2004 Czech employment law was significantly amended. We have outlined below the most important changes introduced last year by Act No. 65/1965 Coll., which amended the Labour Code.

The main purpose of the changes was to implement certain EU and international standards in employment law and to resolve some outstanding issues in Czech labour and employment law. From a practical point of view the most significant were the changes relating to (a) fixed-term employment, (b) competition provisions, and (c) discrimination.

Legislation

Fixed-Term Employment. Previously, fixed-term employment contracts were treated under the pertinent Czech legislation as a kind of exceptional contract to be used only when the nature of certain jobs required them. In practice they were over-used by employers trying to establish more flexible employment relationships that evaded the strict protection of employees provided by Czech employment legislation. The major problem was the renewal of fixed-term employment contracts with the same employee, sometimes for many years consecutively.

Legislative changes now limit the total duration of fixed-term employment contracts.

A fixed-term employment contract between the same parties may be negotiated or extended by agreement for a total period of two years from the formation of the employment. If a period longer than six months has elapsed from the termination of the preceding fixed-term employment, the preceding fixed-term employment between the same parties is exempt from the effects of the rules.

There are some exceptions to the two year rule. The general rule does not apply if the fixed-term employment has been negotiated:

- according to special legislation;
- to replace a temporarily absent employee;
- because of operational needs of the employer; or
- because of the special nature of the job.

If any of these reasons apply they need to be defined in detail by the employer in a written agreement with the relevant trade union. Such an agreement may be replaced by a written decision by the employer only if there is no trade union operating in the employer's business.

If the employer has negotiated a fixed-term employment contract with an employee that does not meet new legislative requirements, the employee can insist that the employer continue to employ him beyond the negotiated period. To do so, the employee must notify the employer before the expiration of the fixed term. Thus, the effect of the legislation is that the contract is considered to have been negotiated for an indefinite term.

Competition Clauses. Previously, Czech legislation did not address adequately the implications or enforceability of post-termination non-compete agreements.

Employers may now conclude an agreement with an employee whereby the employee undertakes not to compete with the employer for a certain period following termination. Post-termination non-compete agreements also may be used to prevent the employee from using certain confidential information and know-how acquired during the employment contract, if such use will have a detrimental effect on the employer's business.

The conditions for a non-compete agreement are:

- it cannot apply for longer than one year;
- the employer must compensate the employee for fulfilling the obligation. The compensation should be paid monthly in arrears and amount to an average of the employee's monthly salary during his period of employment;
- such an agreement must be justified by reference to the information and know-how acquired by the employee in the course of employment, the use of which by another business could substantially impede the business activities of the employer; and
- if a probationary period had been negotiated with the employee (usually the first 3 months), the agreement may not be concluded before the expiration of the probationary period.

The employer and employee may agree on a sanction for a breach of the non-compete agreement. Once the sanction has been imposed upon the employee for breaching the agreement, obligations under it will cease.

Anti-Discrimination Provisions. A new, extensive and detailed anti-discrimination provision has been incorporated into the Czech Labour Code. Section 1 of the Labour Code has been significantly amended in order to set out detailed rules regarding discrimination and harassment.

Discrimination on any of the following grounds is now unlawful:

- race or color;
- sex or sexual orientation;
- language;
- religious belief or religion;
- political or other conviction;
- membership or activity in political parties or movements, trade union organisations or other associations;
- nationality or ethnic origin;
- social background or property;
- health or age;
- marital and family status or family obligations.

The Labour Code also now distinguishes between direct and indirect discrimination.

Direct discrimination occurs where an employee is treated less favourably than another on one of the grounds defined by the Labour Code.

Indirect discrimination means an act or omission by the employer that, while apparently neutral, disadvantages one employee over another on prohibited grounds. Indirect discrimination because of the employee's health includes a refusal or omission to take reasonable measures to enable a disabled person to carry out his/her job or to be promoted, or otherwise.

The 2004 legislative changes also set out basic rules regarding harassment. Generally, any harassment on grounds of sex, sexual orientation, racial or ethnic origin, disability, age, religion or faith constitutes unlawful discrimination.

Pursuant to the legal definition, harassment means an act that is perceived by the employee to be unwelcome, inappropriate or offensive, and that results in humiliation of a person or creates an unfriendly, humiliating or disconcerting atmosphere in the workplace.

ESTONIA

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Estonian employment law is going through a period of reform as a result of Estonia joining the EU in 2004.

Legislation

Historically, and by way of background, Estonian labour legislation has been difficult to interpret and created a great amount of uncertainty.

The Structure of Legislation. The main laws governing the employment relationship are:

- Republic of Estonia Employment Contracts Act (*Eesti Vabariigi töölepingu seadus*);
- Wages Act (*Palgaseadus*);
- Holidays Act (*Puhkuseseadus*);
- Working and Rest Time Act (*Töö- ja puhkeaja seadus*);
- Employees Disciplinary Punishments Act (*Töötajate distsiplinaarvastutuse seadus*);
- Occupational Health and Safety Act (*Töötervishoiu ja tööohutuse seadus*);
- Public Service Act (*Avaliku teenistuse seadus*).

In 2004, a number of harmonising amendments were made to labour laws, which should make their interpretation easier and clearer.

Employment Contracts. Several amendments were made in 2004 to the Employment Contracts Act and employers were obliged to effect such changes by 1 January 2005 by incorporating relevant provisions into employment contracts.

The new conditions and information that need to be incorporated into employment contracts include: (i) the parties (name, personal or registration codes, addresses); (ii) the date the contract was signed and the first day of employment; (iii) in the case of a fixed term contract, the term and the reason for such term; (iv) the job position of the employee, necessary qualifications and description of duties and obligations; (v) place or area where the job duties will be executed; (vi) salary; (vii) working hours; (viii) the term of main and additional vacations plus grounds for additional vacation; (ix) termination provisions and grounds; and (x) reference to any collective contracts.

In addition, if the employee is going to work abroad for more than one month, the following conditions and information should be described in the employment contract: (i) the term of the assignment; (ii) the currency in which future salary payments will be made; (iii) additional payments, compensations and benefits related to working abroad; and (iv) conditions for leaving and returning to work in Estonia.

The parties are permitted to agree on additional conditions not mentioned in laws.

Changes in Labour Legislation. Amendments also have been made to the Employment Contracts Act. These amendments were made to harmonize Estonian legislation with EU regulations. The amendments incorporated the following EU Directives into Estonian law:

- EU Directive 94/33/EC on the protection of young people at work;
- EU Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses;
- EU Directive 2000/78/EC on establishing a general framework for equal treatment in employment;
- EU Directive 2000/43/EC on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
- Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions amended with EU Directive 2002/73/EC;
- EU Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship;
- EU Directive 97/81/EC on the Framework Agreement on part-time work; and
- EU Directive 1999/70/EC concerning the framework agreement on fixed-term work.

Case Law

Settlement Payments. On 19 November 2004, the Supreme Court held that an employer had not unlawfully delayed the payment of a final settlement amount to an employee where the employer had ample justification for doing so. The Court indicated that such justifications could include a reasonable belief that the employment in dispute is unlawful or inconsistent with other conditions of contract and could be interpreted in several different ways.

Other. The main issues in 2004 related to collective labour relations and the employment status of management and supervisory board members of companies. The question addressed was whether a management or supervisory board member could be an employee of the company (so that the company has to pay unemployment tax for him/her).

According to Estonian court practice, the employment contract of a managing director of a company is considered terminated after he/she has been elected to the management or supervisory board of the company. As the members of management and supervisory board in Estonia do not enjoy rights arising from the employment relationship, it also means loss of several social guarantees and benefits. Therefore, in practice, the members of management or supervisory boards have continued to work under an employment contract with the same company. The Supreme Court decided that the obligations under employment contracts are similar or identical to those of a member of management or the supervisory board. So, the election of an individual to the management or supervisory board terminates automatically his/her employment. This significant finding caused many management or supervisory board members to resign from the management or supervisory boards and re-establish their employment relationship with the company.

Another issue arose in relation to unemployment taxes of management or supervisory board members. According to the Unemployment Insurance Act, unemployment tax is not deducted from payments to management or supervisory board members. Therefore, these persons could not enjoy the relevant benefits.

FINLAND

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Finnish labour law has undergone essential changes during the past four years. The Reform of Employment Contracts Act and the Collective Agreements Act came into force in June 2001. The Occupational Safety and Health Act was reformed in January 2003. The Non-Discrimination Act came into force a year later and the new Act on the Protection of Privacy in Working Life came into force in September 2004. The Act on Equality between women and men is currently being reformed and is therefore not included in this report.

This update concentrates on legislative reforms which came into force in 2004, principally the Contracts of Employment Act and the Collective Agreements Act.

Legislation

Employment Contracts Act and Collective Agreements Act

Generally Binding Collective Bargain. Generally binding collective bargains have existed in Finland for a long time. Generally binding collective bargains bind those employers and employees who are members of the organisations concluding the collective bargain. Also those employers who are not members of the above mentioned organisations are bound by the terms of such collective bargains if the majority of the employees in that field belong to the collective bargaining unit. This kind of an agreement is called a "generally binding" collective bargain.

It has not always been clear which organisations are bound by generally binding collective bargains. This means that non-organized employers have not always known whether a collective bargain is binding on them or not. Disputes regarding this question have been referred to the Courts and resolved only following lengthy and expensive trials. The situation has improved slightly since a committee was established to resolve these questions. There is also now a published list of generally binding collective bargains, which can be viewed on-line.

Compensation for Unjustified Termination. Unjustified termination due to personal issues previously resulted in compensation of between 3 and 24 months' salary. The amount of compensation is not related to the actual damage the employee has suffered.

The Employment Contracts Act states only that the employee is entitled to compensation of 3 to 24 months' salary. It is up to the court to decide what part of the compensation is for loss of salary and what part of it is compensation for the actions of the employer. With regards to the loss of salary, 75 % of the amount of any unemployment benefit received by the employee must be reduced from the compensation sum. The employee is then obliged to re-pay that 75% deduction to the unemployment benefits authorities.

On the other hand, if the reasons for termination are economic, the employee is entitled to compensation for the actual loss he/she has suffered. It was debated by the Supreme Court whether the amount of unemployment benefit should be deducted from the sum of compensation that the employee received. The Court has confirmed that the amount of the unemployment benefit does have to be deducted from the compensation amount.

Time Limits. Time limits for claims relating to employment contracts were harmonized by the legislative reforms. Legal proceedings must be taken within two years of the expiry of the employment contract. This time period applies to all claims relating to the employment relationship except claims for personal injury.

The Non-Discrimination Act. The Non-Discrimination Act is a completely new Act which came into force in February 2004. The purpose of the Act is to promote and safeguard the equality of all employees. The Act applies during recruitment and employment.

A separate Act promoting equality between the sexes has been in force for many years in Finland. That Act still applies in cases concerning inequality between the sexes and the Non-Discrimination Act applies in all other situations.

The Non-Discrimination Act provides that nobody may be discriminated against on the basis of age, ethnic or national origin, nationality, language, religion, belief, opinion, health, disability, sexual orientation or other personal characteristics.

Discrimination means:

- the less favourable treatment of one person than another on any of the prohibited grounds (direct discrimination);
- the application by an employer of an apparently neutral provision, criterion or practice which in practice puts a person in a protected class at a particular disadvantage compared with other persons, unless that provision, criterion or practice is intended to meet a reasonable objective and the means used are appropriate and necessary (indirect discrimination);
- the infringement of the dignity and integrity of a person or group of people by the creation of a intimidating, hostile, degrading, humiliating or offensive environment (harassment); and
- an instruction or order to discriminate.

Under the Act, compensation for discrimination shall not exceed €15,000. However, payment of compensation does not preclude an injured party from claiming damages under other legislation. Courts may amend or ignore contractual terms which are contrary to the new prohibitions in the Non-Discrimination Act.

The Protection of Privacy in Working Life

The law on The Protection of Privacy in Working Life came into force in October 2004, repealing the 2001 legislation. General discussion concerning the protection of privacy provided an impetus for reform of the legislation regarding work place privacy.

The law contains provisions on:

- employee information which employers collect and process;
- procedures to be followed when preserving or collecting information;
- technical monitoring at the workplace; and
- procedures concerning electronic messages belonging to the employer.

Collecting Personal Employee Data. The principle is that an employer is only allowed to process personal data which is directly necessary for the employment relationship and concerns management of the rights and obligations of the parties. No exceptions can be made to this provision even with the employee's consent.

The employer shall collect information concerning the employee primarily from the individual employee. Consent is not required when an authority discloses information to an employer to enable the employer to fulfill statutory functions or if the employer is collecting data on the employee's personal credit history to establish the employee's reliability. The employer must give the employee concerned advance notice that the data is going to be collected.

Collecting personal data is governed by the co-operative procedure detailed in the Act on Co-operation within Undertakings.

The key principles are:

(a) *Employee Health*. The employer has the right to process information concerning an employee's state of health only if the purpose is to establish whether there is a justifiable reason for absence, it is necessary in order to pay sick pay, or if the employee expressly wishes his or her ability to work to be assessed.

Information concerning the health of an employee shall only be processed by persons who prepare, make or implement decisions regarding employment relationships using this information. The employer might nominate such persons and/or specify functions involving the processing of health-related information.

(b) *Narcotics Testing*. The provisions above shall also apply to information concerning an employee's use of narcotics. The employer may require and process the results of a narcotic test only when it is legally justified. It may be legally justified when the work requires accuracy, ability to react and responsibility or where being under the influence of narcotics at work may cause considerable danger to others.

As long as this provision is fulfilled, the employer has the right to ask for the results of a narcotic test when recruiting someone. The employee has no obligation to agree to be tested, but the employer may draw adverse inferences from a refusal when making his or her selection.

Before signing the employment contract, the employee must be informed if the work is of a kind that may require the employee to be tested for narcotic use before and potentially during employment.

Before an employer can require employees or applicants to take narcotic tests the employer must have a written policy dealing with such matters. The policy should include the company's general goals and its standard practice on the prevention and use of narcotics and other intoxicants.

(c) *Personality and Aptitude Assessments*. With the employee's consent, personality and aptitude assessments may be administered by the employer. The employer shall provide the employee with a written statement on the assessment free of charge. If the employer receives the results of the assessment orally, the employee must be informed of its content.

(d) *Genetic Testing*. An employer has no right to require an employee to take part in genetic testing and no right to know whether or not the employee has ever taken part in such testing.

Video Monitoring. Video monitoring is an extreme security action and, before carrying it out, the employer must consider all other options. Monitoring must be as unintrusive as possible. Employees must be informed how and when monitoring is to be carried out and how the resulting records will be handled. There must be a visible notice that monitoring is taking place in the relevant places.

Monitoring is not allowed if it is used in order to observe a specific employee or employees, and it is not allowed in 'personal' spaces, such as changing rooms. Monitoring may only be used to secure the safety of personnel property or the production process, if it is essential. Video monitoring can be targeted at to a certain working place if the risks mentioned above are obvious.

Video monitoring must be governed by the co-operative procedure referred to in Act on Cooperation within undertakings.

E-Mails. There is uncertainty in Finland as to whether an employer can open and read e-mails which an employee has received at his or her work e-mail address. E-mail messages are used for both work related and personal messaging, and the distinction is not always clear without opening the message. Where there are problematic situations during an employee's absence or at the end of the employment relationship, or where there is suspected misuse of e-mail, the law provides specific guidance on the procedure which must be followed when opening emails.

The employer has the right to find out who the sender is by using the information available in the recipient and title fields, and whether any messages have been sent or received, immediately before or during the employee's absence. The employer must first ask for the employee's permission, unless permission cannot be obtained within a reasonable time.

Messages can be opened and read with a witness present if it is obvious that the message belongs to the employer and it is essential to access the information contained in it. However, the message sender and recipient cannot be contacted for the purpose of establishing the content of the message or for the purpose of sending it on to an address designated by the employer.

Additionally, it is a requirement that the employer has certain technical and procedural protection in place for e-mail traffic, which is meant to exclude messages sent to or by the employee. Employees must have the option of using an automatic absence notice, whereby the recipient is told of the employee's absence and the person who will be taking care of his/her tasks. Alternatively, the employee must have the option of forwarding messages to another person, who is agreed upon by the employer.

The standard practice of e-mailing must be governed by the co-operative procedure referred to in the Act on Co-operation within Undertakings.

FRANCE

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At the beginning of 2004, the presentation of the "De Virville Report" to the French Employment Minister launched discussion on labour law reform. Following this discourse, several legislative amendments were enacted to simplify procedures.

After discussing the most important legislative and administrative amendments to the Labour Code, we will review some significant related decisions of the French Supreme Court, and briefly discuss the upcoming Reform of the Labour Code.

Legislation

New Procedures. The law of 4 May 2004, provides for new procedures to adopt and notify collective agreements as well as providing new rules for professional training.

Simplification of Procedures. Since 27 June 2004, the procedural time limits for dismissals have changed as well as the procedure for their notification:

- Before deciding to dismiss an employee, the employer must first send a letter, by registered mail, to inform the employee of a meeting during which the employer will explain the reasons for the dismissal. The meeting prior to dismissal must take place at least five days after the employee receives the letter.

- After the meeting, the employer must observe a waiting period before notifying the employee of its final decision. As a general rule, the employer must wait two business days before sending the letter of dismissal, unless the dismissal is: (i) an individual dismissal for economic reasons (seven business day wait); (ii) an economic collective dismissal concerning up to ten employees (seven business day wait); (iii) an individual dismissal for economic reasons of a member of the professional staff as defined by Article L.513-1 of the Labour Code (fifteen business day wait).

The time limit applicable for collective dismissal for economic reasons remains unchanged, *i.e.*, it depends on the notification of the economic dismissal to the competent administrative authorities.

Measures to Take into Account During Economic Change. The law on "social cohesion" was adopted on 18 January 2005. It contains provisions on dismissals for economic reasons. Articles 74 to 77 reform several aspects of dismissals for economic reasons, including the role of collective bargaining agreements, calculation of the number of employees affected by the economic dismissal, re-deployment of employees, special obligations for companies whose decisions have an impact on an employment area and the consultative role of the works council.

Criminal Law. As from 31 December 2005, legal entities will be held criminally liable for any criminal offences, including labour law matters, for which natural persons can be held liable. As from this date, no text specifically providing for the criminal liability of legal entities will be necessary.

The fines imposed on legal entities are five times more than fines against natural persons.

Unique Official Contact for Foreign Companies Located Outside France. Since October 2004, the local URSSAF (*Union de Recouvrement des cotisatations de Sécurité Sociale et d'Allocations Familiales*) agency located in Strasbourg is the official contact for all companies without any establishment in France. The URSSAF is the public agency responsible for collecting employee and employer social security contributions. It is the employer's duty to pay the relevant amounts to the URSSAF each month.

Case Law

Non-Compete Clauses and the Definition of Unfair Practice. In two decisions, the Supreme Court defined unfair practices that infringe a contractual non-compete clause. Preparatory acts, such as looking for a job, are not acts of competition and thus do not infringe a non-compete clause. On the other hand, signing a contract with a competitor, without the previous employer's authorization, is deemed an act of competition in violation of the clause. (Cass. Soc. May 12, 2004, Dega v. Sté Fouasse et a.; Cass. Soc. May 5, 2004, Gueguen c/ Sté Fouasse.)

Concealed Employment (travail dissimulé). The French Supreme Court ruled that an employee unlawfully occupied, (*i.e.*, salaried but not notified as an employee to the relevant authorities by the employer), is entitled on termination to a severance indemnity equal to six months' salary under Article L.324-11-1 of the Labour Code, even if the employee resigns from his/her position. (Cass. Soc. October 12, 2004, Drela et ac/Sté Beurron.)

Employee Transfer as an Unlawful Modification of the Employment Contract. The Supreme Court decided that the transfer of an employee to another company within the same group of companies, located at the same place, headed by the same director and pursuing the same activity is a modification of the employment contract. To be lawful, such modification must be accepted by the employee. The Supreme Court drew a distinction between the temporary assignment of an employee, which does not need to be accepted, and the transfer of an employee, which constitutes a modification of the employment contract. (Cass. Soc. May 5, 2004, Filali c/ Sté Adislor.)

Limits to the Right to Terminate the Employment Trial Period. According to Article L.122-4 al. 2 of the Labour Code, both the employer and the employee have the right to terminate the employment trial period without having to justify such termination on any grounds. However, in three decisions, the Supreme Court framed this right by referring to the concept of "misuse of law" and analyzing the circumstances surrounding the employer's decision.

In the first case, the Supreme Court ruled that an employer who relies on an employee's breach to terminate the trial period must follow the statutory disciplinary procedure before dismissing the employee. (Cass. Soc. March 10, 2004, Honoré c/ Association Réinsertion Sociale.)

In the second case, the Supreme Court decided that terminating the trial period of a 45 year old employee after only one week of work was a "misuse of law". (Cass. Soc. May 5, 2005, Loxam Location.)

In the third case, the Supreme Court looked for the real motive of the employer who terminated the trial period for lack of performance. It turned out that the employee had in fact been assaulted and the employer did not want to keep him. (Cass. Soc. May 5, 2005, Les Bus de l'Etang.)

Dismissal or Resignation. In two decisions, the Supreme Court confirmed that when an employee breaches his employment contract because of the employer's attitude, the breach constitutes either a dismissal without real and serious cause if the employee had reasons to do so, or, if not, a resignation. (Cass. Soc. 19 October 2004, Sté Ateliers Industriels Pyrénéens AIPSA c/X.; Cass. Soc. 12 October 2004, Caie c/Sté Axe sélection.)

Salary Differences Must be Justified. The Supreme Court applies the rule "same work, same salary" set out in the Articles L.133-5 al. 4 et L.136-2 al. 2 of the Labour Code, and imposes on the employer the burden to prove that differences in compensation between like employments are based on objective reasons. (Cass. Soc. September 28, 2004, STAVS Transport de Voyageurs c/ Hoarau et a.)

Stock-Options and Dismissal Without Real and Serious Cause. Where an employee is dismissed without real and serious cause and before having the opportunity to exert his or her right under stock-option plans, the employee is entitled to damages to compensate for the loss of gains from the stock. The damages to be awarded are decided by the lower courts. (Cass. Soc. 29 September 2004, M. X. c/Sté Ethicon S.A.)

Refusal to Downgrade. Under some circumstances, an employer is entitled to take disciplinary measures, such as transferring or downgrading the status of an employee. However, the transfer of an employee or a downgrading results in a modification of the employment contract which has to be accepted by the employee in order to be effective. If the employee refuses such a modification of the employment contract, the employer can choose another disciplinary measure, such as dismissal for gross negligence if substantiated. (Cass. Soc. 7 July 2004, in Piton c/ Sté Saint-Gobain Vitrage.)

Data Protection. The Supreme Court ruled on the consequences of not registering a company's system of personal data processing with the CNIL (French Data Privacy Authority). In this case, the system allowed for control of the entry and exit of employees, via the use of badges. In the absence of registering the database with the CNIL, the employer could not take action against an employee because he or she did not use his/her badge. (Cass. Soc., April 6, 2004, SA Allied signal industrial Fibers c/Pacheco.)

Legislative Projects

Rapport de Virville. At the beginning of 2004, Mr. de Virville, Chair of the Commission in charge of drafting a report on the Labour Code, presented a report to the Employment Minister. The report contained fifty propositions that would deeply reform the Labour Code. Topics included statutes of limitations, collective bargaining agreements, formalities to ensure the validity of employment contracts and review of procedures for non-economic dismissals, amongst others. The Commission also proposed to modify the rules on working hours, to add new exemptions to the Sunday day rest, and to review the rules on annual holidays and part-time work.

GERMANY

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Reforms to the employment market represent one of the major pillars of Gerhard Schröder's AGENDA 2010 to improve German competitiveness. The main result in 2004 was the Employment Market Reform Act (EMRA, or *Gesetz zu Reformen am Arbeitsmarkt*). The core aspects of the Act are reported in the first section, Legislation, below.

In 2004 the German Federal Labour Court (BAG) clarified the impact of previous legislative reform projects, such as the 2002 Obligations Law Reform Act (*Schuldrechtsmodernisierungsgesetz*) and the 2000 Act on Part-time Work and Fixed-term Contracts (*Teilzeit- und Befristungsgesetz*). These and further interesting rulings are summarized in the second section, Case Law.

The major pending legislative project in the field of employment law is the draft Act Against Discrimination (*Anti-Diskriminierungsgesetz*). The cornerstones of the project are explained in the third section, Legislative Projects.

Legislation

The EMRA came into force on 1 January 2004. In addition to certain changes to the Working Time Act (*Arbeitszeitgesetz*) and the Act on Part-time Work and Fixed-term Contracts (*Teilzeit- und Befristungsgesetz*), the EMRA brought significant changes to the Termination Protection Act (TPA, or *Kündigungsschutzgesetz*):

- *Higher Applicability Threshold*. The TPA applies only to plants in which the employer employs more than 10 employees (for employment contracts concluded after 31 December 2003). For older employment contracts, the former threshold (more than 5 employees) remains in force.

- *Easier Termination for Business Reasons*. The TPA requires employers to select (according to social criteria) the employees it intends to make redundant for business reasons.

    ◊ The new TPA limits the social criteria to: (i) seniority in the affected facility, (ii) age, (iii) maintenance obligations, and (iv) severe disability.

    ◊ Employers are entitled to exclude from this selection employees whose continued employment is in the legitimate operational interest of the business.

    ◊ In the event of a change of operation (*Betriebsänderung*), if the employer and the works council have agreed on a reconciliation of interests and a list of the redundant employees, the judicial control of the selection is limited to manifest errors.

    ◊ In order to limit court actions solely aimed at obtaining severance payments in cases of redundancy for business reasons, the TPA brought in an entitlement to severance payments subject to certain conditions. The employer must explicitly terminate the contract for business reasons and indicate that the employee is entitled to a severance payment once the period for filing suit has elapsed. In this case, the severance payment is limited to half of the monthly salary for each year of employment. The impact of this change on an employee's entitlement to unemployment benefits is unclear.

- *Faster Achievement of Legal Certainty*. The TPA's three-week period to file suit against an allegedly unlawful termination now applies to any claims on which the employee wishes to rely. Under the former TPA, this limitation period applied only to claims based on violations of the TPA.

Case Law

Contractual Penalty Clauses in Employment Contracts. Following a finding by the BAG, contractual penalty clauses in employment contracts are not *per se* unlawful. This question arose because of the 2002 Law of Obligations Reform Act, which prohibits contractual penalty clauses in standard terms and conditions. The BAG clarified that the peculiarities of employment law may permit the use of such clauses, provided that the amount of the contractual penalty does not disproportionately penalise the employee (BAG (8 AZR 196/03) of 4 March 2004).

Immediate Dismissal for Announcement of Illness. In its judgment of 17 June 2004 (2 AZR 123/02), the BAG held that an employer can immediately dismiss an employee, who announces that he/she intends to take sickness absence should the employer refuse requested vacation leave. The Court also clarified that the employer is entitled to dismiss even if the employee subsequently in fact falls ill and can prove this by a medical certificate.

Video Surveillance of Employees. The BAG held that general video surveillance in a centre for mail distribution with 650 employees without concrete suspicion of wrongdoing constitutes a violation of employees' personal rights. The Court came to this conclusion in balancing the employees' rights with the employer's obligation to ensure (1) the security of mail correspondence and (2) the constitutional right to the secrecy of the post (BAG (1 AZR 21/03) of 29 June 2004).

Settlement Receipt Following a Settlement Agreement. The BAG clarified that a clause in a settlement receipt stating that all claims arising out of the employment contract and its termination were settled—regardless of their legal basis—indeed extended to any claims, whether or not the parties had specifically addressed the issue during their settlement negotiations (BAG (10 AZR 661/03) of 28 July 2004).

Fixed-Term Employment Contracts. A failure to comply with the mandatory written form for a fixed-term contract leads to the conclusion that it is an open-ended contract. In its judgment of 1 December 2004 (7 AZR 198/04), the BAG held that the initial oral agreement on the conclusion of a fixed-term contract was void and that even the subsequent written confirmation of the contract's fixed-term status did not affect the conclusion that it was an open-ended contract.

Legislative Projects

The German government plans to transpose the EC Anti-Discrimination Directives 2000/43/EC, 2000/78/EC, and 2002/73 EC into German law by the draft Act Against Discrimination (BT-Ds. 15/4538 of 16 December 2004).

- The Draft Act prohibits discrimination in employment and occupation on grounds of race or ethnic origin, gender, religion, disability, age or sexual identity (which is wider than the Directives).

- The prohibitions are subject to a number of limited reasons permitting differential treatment (for example, if gender is indispensable for the occupation, such as in the case of a model).

- Employees who have been discriminated against are entitled to complain about the discrimination. If the employer fails to undertake appropriate steps to remedy the situation, employees are entitled: (1) to refuse to work but continue to be paid and (2) to damages.

- The Act further provides for a shift in the burden of proof to the employer under specific conditions and establishes a role for non-profit anti-discrimination associations. Employees will be able to assign discrimination claims against employers to these associations, which may then represent employees in court actions and recover damages, if successful.

Germany has already missed the transposition deadline for two of the Directives while the deadline for the third one is approaching. Thus, Germany is under pressure to adopt the draft Act soon. Nevertheless, the future of the Act seems uncertain, as previous legislative projects to transpose the EC Anti-Discrimination Directives have failed. Should this project fail again, Germany risks being fined for infringement of the EC Treaty.

IRELAND

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News

Survey on Workplace Absence. The Irish Business and Employers Confederation (IBEC) recently carried out a study on absence among its member companies. In the study, almost 25% of companies indicated that short-term absence amongst male employees was not due to genuine illness. This compared with 16% for women. Some 8% of companies cited workplace stress as a cause of long term absence for males and females. 12% of companies cited alcohol and alcohol illness as being the cause of short term absence for males and 4% did so for females.

Equality Tribunal Cases have Increased Fourfold. The number of complaints referred to the Equality Tribunal has increased fourfold since 2000. The biggest growth area has been age discrimination. Complaints on the grounds of age increased by 86% in the last four years.

Legislation

Minimum Wage. In February 2004 the minimum wage was increased from €6.35 to €7.00 per hour. This makes Ireland's minimum wage the third highest in the EU.

Smoking Ban. Since March of this year smoking has been banned in all but a limited number of enclosed workplaces. It is a criminal offence to allow smoking in enclosed workplaces and the penalty for an offence is a fine of up to €3,000. The anecdotal evidence is that the ban has largely been complied with. The ban is policed by the Health and Safety Authority Inspectors. The Inspectors say that when they carry out workplace inspections, as well as looking for an organisation's smoke-free workplace policy document, they will examine the organisation's safety statement to see that it sets out the measures the organisation has taken to stop workplace smoking and to protect workers from exposure to environmental tobacco smoke. As they inspect the workplace they check to see that there are no signs of smoking and that ashtrays have been removed.

Industrial Relations. Irish citizens have a constitutional right to join a trade union. However, there is no concurrent obligation on employers to recognise or negotiate with unions.

In 2001 the legislature passed the Industrial Relations (Amendment) Act 2001. This enabled unions to obtain legally binding determinations on issues relating to pay and terms and conditions of employment of their members in the absence of any collective bargaining. Whilst not compelling employers to recognise or negotiate with trade unions, the Act seemed to be moving them in that direction. The Industrial Relations (Miscellaneous Provisions) Act 2004 speeds up the process and plugs some of the loop holes that employers have utilised in the past to avoid enforceable determinations against them.

Some commentators have described the 2004 Act as the most significant piece of employment legislation to be enacted this year, yet it remains to be seen how effectively it will be used by the unions.

Workplace Accidents and the Personal Injuries Assessment Board (PIAB). From 1 June 2004, all personal injury claims arising from workplace accidents have to be referred to PIAB prior to the issue of legal proceedings. PIAB is part of the Irish Government's strategy to drive down the cost of insurance claims for personal injuries by taking a significant number of such claims outside the court/legal system and into the PIAB. PIAB assesses the value of the claim on the basis that liability is not an issue and notifies the parties accordingly. Once an assessment has been made, and if everyone is in agreement, the employer pays the money to the employee and that is the end of the matter. There are no legal fees because there are no lawyers involved in the process. The theory is that the employees will be satisfied because they get what they could have got had they gone to court, but without the delay and additional legal expenses.

Where liability is at issue, the matter still has to go to PIAB in the first instance, but the employer may decide not to consent to an assessment being made in which case the matter is released from PIAB. The employee is then free to pursue his or her claim through the courts. Alternatively, the employer may agree to PIAB assessing the claim. Then, when the claim is assessed, if the employer is not satisfied with the assessment, the employer can exercise a right not to accept the assessment, thereby forcing the employee to pursue the matter in the usual way. The fact that an employer consents to an assessment being made cannot be taken to be an admission of liability at any subsequent court hearing.

An assessment of damages by the PIAB is to be made on the same basis and by reference to the same principles governing the measures of damages in the law of tort, to put the employees in the position they would have been if the tort had not occurred. Assessment should be made within a period of 15 months starting from the date that the employer consents to an assessment. If the PIAB cannot meet this deadline, it must release the claim and allow the employee to bring proceedings in the court.

More Equality Legislation. The Equality Act 2004 came into force in July 2004 and significantly changed the employment equality landscape. Equality legislation has been extended to protect self-employed persons, partners in partnership and domestic workers. It makes it easier for persons to bring discrimination claims and easier for claimants to get an extension of time in which to bring claims. A claimant need only establish a prima facie case before the burden of proof shifts to the respondent. Previously this only applied to sex discrimination claims, now it applies to any discrimination claim. The nine grounds are race, sex, sexual orientation, disability, age, marital status, family status, membership of the travelling community and religious belief.

In addition, employers' obligations to disabled employees have been extended. Before the 2004 Act came into force, an employer was obliged to do all that was reasonable to accommodate the needs of a disabled employee, to make him/her fully capable and competent to undertake the duties attached to his or her position, provided the cost of so doing was no more than a nominal one. An employer is now required to take appropriate measures to ensure that a disabled employee is made fully capable and competent, unless such measures would pose a "disproportionate burden" on the employer.

Maternity. The Maternity Protection (Amendment) Act 2004 came into force in October. This legislation gives recognition to the fact that most women prefer to work to within two to three weeks of their delivery date by reducing the compulsory pre-delivery date period of maternity leave from four weeks to two. It does not affect the existing statutory minimum maternity or additional maternity leave periods which are 18 and 8 weeks respectively. The Act allows a new mother to cancel her additional maternity leave in the event of her sickness. Where this happens the employee's absence will be treated as absence on the grounds of sickness, thereby allowing the employee to qualify for sickness pay or benefit.

Other provisions of the Act include:

- postponement (with the agreement of the employer) of maternity leave or additional maternity leave in the event of the hospitalisation of the child;
- time off work with pay to attend ante-natal classes; and
- entitlement for breastfeeding employees to have the option to take time off to breastfeed in the workplace or, where there are no facilities in place, to a reduction of workings hours in order to breastfeed elsewhere, without loss of pay.

Regulation of Bouncers/Security Guards. The Private Securities Services Act 2004 is also a new piece of legislation with which certain employers will need to be familiar. The Act has not been fully enacted but when it is fully in force it will require that all security services be licensed by the Private Security Authority. Employers who employ security guards will have to check that such staff are licensed. Failure to employ licensed security guards could lead to prosecution. The Act defines "security services" as including door supervisors, suppliers or installers of security equipment, private investigators, security consultants, security guards, providers of armoured car services, locksmiths and suppliers or installers of safes.

Case Law

Gender Discrimination. The highest award in the Equality Tribunal system was made in the recent case of *McGinn v Board of Management of St Anthony's Boys National School*. The Equality Officer ordered the respondent to pay the complainant €10,000 compensation for stress suffered as a result of discriminatory action and two years' salary for victimisation. The Equality Officer also ordered that interest was payable on these awards. The reasons for the large awards were to reflect the level of victimisation, the repeated breaches of procedure by the respondents, the repeated destruction of relevant interview notes and because damaging untruths were told about the complainant to her colleagues and to the Department of Education. Furthermore, the award was intended to have a deterrent effect, as required by EU law. This case is a reflection of the seriousness with which the tribunal views gender discrimination and its willingness to use all the remedies at its disposal to dissuade employers from discriminating against their employees.

Race Discrimination. In *Campbell Catering Limited v Rasaq* the Labour Court said that applying the same procedural standards to a non-national worker as would be applied to an Irish national can amount to the application of the same rules to different situations and can in itself amount to discrimination.

ITALY

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Postponement of Retirement Pension (Superbonus)

The main innovations introduced by Italian Law no. 243 of 23 August 2004, in relation to pension issues, include the so-called "superbonus", which is an incentive paid to those employees in the private sector who are eligible for retirement pension from 31 December 2007 but who decide to continue to work.

For the time being, employees of companies facing a financial crisis may also benefit from the superbonus. However, there is discussion in Parliament as to whether the application of the incentive to such employees is to be excluded or restricted.

The new legal framework on superbonuses applied from 6 October 2004 and any eligible employee may benefit from it until 31 December 2007.

Effects on Employees and Employers. Those employees who decide to continue to work shall receive a tax-free pay increase equal to the social security contribution. The incentive consists of the employer paying to the employee all the contributions which would have been paid as general mandatory insurance for disability, old age and survivors and any substitute insurance.

Thus, the incentive shall not be paid in all cases of absence in relation to which pay is not due but, instead, an indemnity is paid by the social security institute. Employers shall be required to accept the option exercised by employees to be paid the superbonus and to continue to work—and consequently keep them employed.

However, based on a first interpretation of the new legal provisions, employers may terminate the employment relationship with those employees who have opted for the superbonus according to the ordinary rules, since the above provisions fail to provide for any express exception.

Procedures to be Followed to Obtain the Incentive. An employee becomes eligible to apply for the superbonus when the social security institute issues a certificate acknowledging that the retirement requirements have been fulfilled. Subject to the fulfillment of those requirements, the local or provincial office of the competent social security institute shall issue a certificate within 30 days from the relevant application or receipt of the documentation required.

Should the certificate be issued after the option has been exercised, the employer can recover any social security contribution paid to the social security institute from the date of the employee's application to the date of receipt of the certificate. The employer must then transfer the sums recovered to the employee.

"Revocation" of the Superbonus and Pension Treatment. Employees may not "revoke" the option exercised and go back to the ordinary contribution system.

Regardless of any amendments to current legislation, employees who opt for the incentive may be granted the retirement pension, thereby ceasing work since the certificates acknowledging their right to retirement pension have already been issued. Conversely, the option may not be exercised once the retirement pension has been granted.

The pension treatment provided for those employees who opt for the superbonus shall be equal to the amount calculated at the time when the incentive is applied for, based on the contributions paid until then and increased by any rise in the cost of living occuring in the meantime.

Changing the Way Annual Leave is Taken by Workers

Following the publication of Legislative Decree no. 213 of 19 July 2004 (Lgs.D. no. 213/04) on the Italian Gazzetta Ufficiale of 17 August 2004, new rules establishing how paid annual leave must be taken and providing for the related penalties shall apply from 1 September 2004.

Lgs.D. no. 213/04 amended Art. 10 of Legislative Decree no. 66 of 8 April 2003 (Lgs.D. no. 66/03), by introducing a new paragraph 1 that states as follows:

> workers shall be entitled to a period of paid annual leave which is no less than four weeks. Without prejudice to the provisions set forth in the collective agreements or any specific rule and regulation relating to the categories under Art. 2, paragraph 2, at least two of the abovementioned weeks shall be taken, consecutively if the worker so requests, in the year in which they accrue, whereas the remaining two weeks shall be taken within a term not exceeding 18 months following the end of the year in which they have accrued.

Lgs.D. no. 213/04 also introduced a new Article 18-bis in Lgs.D. no. 66/03, which provides for an administrative penalty ranging from €130 to a maximum of €780, to be paid by employers in the event of their failure to comply with the provisions.

Therefore, without prejudice to any different rule provided for by relevant collective agreements, Lgs.D. no. 213/04 imposes an obligation on employers to allow workers to take at least two of the four weeks during the same year in which they accrue and the remaining two weeks in the 18 months following the end of such year. Moreover, while ruling that such entitlement cannot be denied, Lgs.D. no. 213/04 states that the two weeks of annual leave to be taken in the year of accrual need only be consecutive if the worker so requests.

However, the principle set forth in Section 2109 of the Italian Civil Code, based on which the distribution of paid annual leave may be decided by employers taking into account the needs of workers, is still deemed fully applicable. On the other hand, well-established case law which criticises the excessive subdivision of annual leave, on the basis that it deprives workers of the purpose of holiday (*i.e.*, to enable workers to recover the energies spent during the year) will still apply.

With the introduction of the relevant legal provisions and penalties, the Parliament intends to promote the actual use of paid annual leave in the year in which it accrues or within a subsequent period not exceeding 18 months. However, in order to reconcile the workers' entitlement to paid annual leave and employers' organisational needs, the use of annual leave may still be postponed through agreements with the Unions.

In this respect, principles of "collective bargaining" seem to confirm that, in the absence of any additional regulations or administrative practices, both national collective agreements and supplemental agreements entered into at a company level may provide rules governing the postponement of paid annual leave. The only restriction seems to be provided by Art. 1, paragraph 2, let. m) of Lgs.D. no. 66/03, pursuant to which collective agreements are "those agreements entered into by the Unions that, comparatively, are the most representative".

LATVIA

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There were significant political, social and economic developments in Latvia in 2004, which have resulted in substantial changes to employment rights. This has largely been the consequence of the accession of Latvia to the European Union. Free movement of persons and services between the member states of the European Union has opened up numerous possibilities to employers and workers now competing in the common market.

Background

Employment relations in Latvia are subject to the Labour Law, which came into effect on 1 June 2002. Before enactment of the Labour Law, employment relations were governed by the Labour Code 1972. This Code was amended repeatedly, and was largely influenced by Soviet law which meant it was difficult to grasp an overall understanding of its objectives.

In 2004, great attention was paid to updating and co-ordinating Latvian laws and regulations to ensure compliance with European Union requirements and the International Labour Organisation. Latvian employment law largely now follows EU guidelines and the future goal of legislative changes will be the continued harmonisation of Latvian law with European regulations.

News and Legislation

Workers in Latvia. The Latvian labour market is open to European workers. Labour and residence of European workers in Latvia is governed by EU Directives. European workers willing to establish legal labour relations by entering into a contract of employment or any other civil contract (including being a member of the administrative body of a capital company, or being self-employed) are not required to have a labour permit.

If a European worker wants to stay in Latvia for more than 90 days in a six month period he/she should register with the Office of Citizenship and Migration Affairs and obtain a residence permit.

A residence permit is not required if:

- the worker has a valid travel document; or
- is a seasonal worker; or
- is employed in Latvia but stays in another Member State, to which he/she returns at least once a week; or
- stays in Latvia up to six months during a twelve month period, if the aim of the stay is to establish legal labour relations in Latvia by entering into a contract of employment or any other civil contract of the type mentioned above.

A European worker may receive a temporary residence permit:

- for the period of the legal labour relationship, on the ground of the contract of employment or any other civil contract, based on which he/she is employed and which lasts for between 90 days and 12 months;
- for a period of five years, if the contract of employment or any other civil contract, exceeds a period of one year;

- for a period of five years, if he/she is a self-employed person in the Republic of Latvia;
- for a period of time, indicated in a contract for rendering or receiving services when he/she is the service provider or receiver, or an employee with a merchant registered in a Member State, who is a service provider.

Settlement of Disputes. A priority has been the introduction of a mechanism for the settlement of labour disputes.

Latvian Labour Law distinguishes between settlement procedures for (1) individual disputes regarding rights (2) collective disputes regarding rights and (3) collective disputes regarding interests.

Individual disputes regarding rights are disagreements between an employee or employees and an employer. Relevant disputes arise at the conclusion, amendment, termination or fulfillment of a contract of employment, or with regards to the interpretation of the provisions of laws and regulations, conditions of a collective agreement or working regulations. For the settlement of individual disputes there are three options:

- settlement by negotiation between the employer and the employee;
- submitting the dispute to a commission of labour conflicts constituted by the company, which settles the conflict if no agreement has been reached in negotiation;
- agreement between the employer and the employee on another procedure for the settlement of the dispute. In any case, the employer and the employee have the right to apply to a court where the individual dispute is not settled or any of the parties are dissatisfied with the decision of the commission of labour conflicts. The fact that the parties have not tried to settle an individual dispute by means of mutual negotiations is not a reason for the court to refuse to accept a claim. In such cases, settlement of the individual dispute can only be achieved by a court of general jurisdiction.

Collective disputes regarding rights are disagreements between employees or representatives of employees and an employer, organisation of the employers or association of the organisations of the employers, or an administrative body of the industry. Relevant disputes are the same as those in individual disputes as mentioned above. Collective disputes are settled by negotiation but, if no agreement is reached, a conciliation commission will try to settle the dispute. The decision of the conciliation commission is binding on both parties and has the validity of a collective agreement. If the conciliation commission does not reach an agreement or no conciliation commission is constituted, both parties have the right to apply to a court of general jurisdiction or a court of arbitration (upon written consent).

Collective disputes regarding interests are disagreements between employees or representatives of employees and an employer, organisation of the employers or association of the organisations of the employers, or an administrative body of the industry. Relevant disputes arise in connection with the process of collective negotiation, establishing new working conditions or employment regulations. The procedure for settlement of disputes is similar to the procedure used in settlement of collective disputes regarding rights except that, in this situation, if no agreement is reached by the conciliation commission, the collective dispute is settled as stated by the collective agreement. If no procedure is stated, the collective dispute should be settled by means of conciliation or in a court of arbitration.

Case Law

Competition and Free Movement of Workers. The most topical problem of late is the free movement of workers in the EU, as illustrated by the services rendered by Latvian company Laval & Partneri Ltd. in Sweden.

Laval & Partneri Ltd. won one of the tenders organised by Swedish municipalities on the renovation of a school and the building of a new extension. The offer submitted by Laval & Partneri Ltd. was recognised as the cheapest and most appropriate in terms of quality.

When Laval & Partneri Ltd. started to carry out the commissioned works Swedish labour unions appeared with an announcement that Laval & Partneri Ltd., using comparatively cheaper workers from Latvia, caused unfair competition in the Swedish construction business and exposed Swedish construction workers to a threat of unemployment. Swedish labour unions demanded that Laval & Partneri Ltd. pay Latvian construction workers the same wages as those paid to Swedish construction workers otherwise the work of Laval & Partneri Ltd. would be blocked.

The Swedish Labour Court found against Laval and the Government of Latvia has addressed José Manuel Barroso, President of the European Commission, with a request to evaluate whether Sweden has implemented all requirements of European Union law on free movement of workers and whether Swedish labour unions acted lawfully by blocking the work of Laval & Partneri Ltd. in Stockholm.

LITHUANIA

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2004 was a significant year for Lithuania, a country in transition after becoming a member of the European Union. This year was appointed for further implementation of the Labour Code (which came into force on 1 January 2003), for adoption of amendments to Lithuanian legislation affecting labour relationships arising between foreign employers and employees who are temporary residents of the Republic of Lithuania and for further development of the practice of the Supreme Court of Lithuania (hereafter "Court practice") on the application and interpretation of the Labour Code.

Legislation

Law on Social Enterprises. On 1 June 2004, Parliament adopted Law No. IX-2251 on "social enterprises". This law came into force on 19 June 2004. The law states that the aim of social enterprises is to employ persons in target groups who have lost their professional and general working capacity and therefore are not able to compete in the labour market under equal conditions. The law promotes the reinstatement (and social integration) of such persons in the labour market. Companies are permitted to receive Government aid for this purpose, such as:

- partial compensation for lost wages and social insurance payments;
- subsidies for the establishment of new working places; and
- subsidies for training people in the target groups.

The Law provides that social enterprise status does not prevent the Company or the legal person from receiving other contributions from the Government or European Union institutions. Furthermore, social enterprises will receive a reduced rate of corporate tax in particular circumstances. However, the total contribution to one enterprise cannot exceed 51,750,000 Lt (approximately €14,987,835) during three consecutive years.

The law on social enterprises implements the following legal acts of the European Union: Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid; Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty on State aid for employment.

Amendments to the Labour Code. Various amendments in July 2004 have increased the scope of Lithuanian labour laws to extend protection to employees who are temporary residents in the country.

Other amendments to the Labour Code:

- allow the non-application of some conditions set by the Government regarding part time work if the issue is already addressed in a collective agreement;
- specify the granting of annual leave for child care until the child turns three years old; and
- set extra guarantees for both employees who are being placed on detached work service for a certain period of time in a foreign country or who are being placed on detached work service for a certain period of time in Lithuania by their foreign employer. These extra guarantees will be applied irrespective of the law applied to their working relationships.

These amendments of the Labour code implement the following legal acts of the European Union: Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC; Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework agreement on part-time work.

The Regulations of the Tripartite Council of the Republic of Lithuania. The regulations of the tripartite council of the Republic of Lithuania were adopted on 29 June 2004. According to the Labour Code of the Republic of Lithuania social partnership is fundamental to the implementation of the labour relationships. Social partnership shall be realized by (among other things) forming bipartite or tripartite councils, or by conducting collective bargaining in order to conclude a collective bargaining agreement.

The Law on Work Councils. On 26 October 2004, the Law on Works Councils was adopted. It entered into force on 11 November 2004. This law outlines the procedure for establishing works councils, their status, activities and the grounds of their termination, the rights and obligations of works councils and their members and the guarantees for their members. The Law on Works Councils confirms that the works council is a body which represents employees and protects the employees' professional, employment, economic and social rights.

Works councils are to be formed in cases when enterprises do not have functioning trade unions and the number of employees exceeds 20. If the number of employees in the enterprise is below 20, the functions of the council may be performed by employee representatives elected at the employees' request. The Law requires that the works council must be comprised of no less than 3 and no more than 15 members depending on the number of employees in a particular enterprise. All eligible employees may be elected as members of the works council.

Case Law

Despite coming into force on 1 January 2003, the Supreme Court is still developing its interpretation of the Labour Code.

Article 136 [part 3 (1) and (2)] of the Labour Code details the circumstances in which an employer is entitled to terminate an employment agreement without giving an employee prior notice, namely:

- when the employee performs his duties negligently or commits other disciplinary violations (provided that disciplinary sanctions were imposed on him at least once during the previous twelve months); or
- when the employee commits an act of gross misconduct as determined by the Code.

By a review of court practice the Supreme Court has highlighted the main issues relating to the practical application of Article 136 (part 3 (1) and (2)) of the Labour Code.

THE NETHERLANDS

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Legislation

Collective Dismissals in The Netherlands. Reorganisations are still the order of the day. Often, reorganisations go hand in hand with the dismissal of employees. When employment agreements in The Netherlands are being terminated for business or economic reasons, various specific legal requirements have to be met. These rules are changing, which is an important development for employers having to re-organise in The Netherlands.

Termination of Employment Generally. Under Dutch law, employment agreements can generally be terminated either by the court or by the employer asking permission from the labour office (the Centre for Work and Income, or CWI), to give notice of termination to the employee or employees involved. Differences between these procedures exist in relation to the award of compensation and to the applicability of the notice period. A court will decide on the termination and set a date from which the employment agreement will actually end, without imposing any obligation on the employer to give notice of termination to the employee. The court can also award compensation to either the employer or the employee for the early termination of the employment agreement. However, while the CWI will grant permission to the employer to give notice of termination to the employee[1] it is not authorized to order compensation to be paid to the employer or to the employee. Employees will remain entitled to regular salary and benefits until the employment agreement has ended, which means that employers giving notice of termination after having received the CWI's permission to terminate have to continue to pay salary and benefits during the notice period until the end of the employment agreement.

Court Formula. When deciding on the compensation to be awarded, the courts usually apply a so-called 'Court Formula' in order to determine the amount of compensation. This formula has not been laid down by statute; rather, it is based on guidelines provided by the courts.

The formula is a simple one: A x B x C, whereby:

- A is the 'weighed' years of service;
- B is a period of salary (which includes gross salary, holiday allowance, 13th month and certain other fixed benefits); and
- C is the correction factor.

The years of service (A) should be rounded up or down to the nearest entire year. So, for example, half a year and one day should be rounded down to one year. B is 1 month of salary for each continuous year of service under the age of 40, 1.5 months' salary for each service year between the age of 40 and 50 and 2 months' salary for each service year after the age of 50.

1 An employee does not need prior permission of the CWI or the court to give notice of termination of the employment agreement but has to take into consideration the applicable statutory or agreed notice period.

In principle, benefits which the employee receives, such as a lease-car, expense allowances and contributions with regard to a pension scheme or health care insurance, are not considered to be "salary" for the purposes of the above calculation. However, bonus payments are usually included if paid on a fairly regular basis and if they can be considered to constitute a fixed or substantial part of the employee's total remuneration.

C, the correction factor, is set at 1 when the termination of the employment agreement is 'neutral'. This means that the Court is of the opinion that there are no circumstances that require a higher or lower amount of compensation. It is difficult to define 'neutral'. In principle, a correction factor of 1 is used when the termination is based, for instance, on a re-organisation or the closing down of a business and no circumstances exist which might suggest that a higher compensation rate is appropriate. Such circumstances may exist when it is very difficult for the employees involved to find other suitable employment.

Settlement Outside the Court or CWI. The court formula can of course be used as a guideline for termination proposals to be offered to employees. In certain cases, employers use a C factor higher than 1 in an initial settlement proposal. This can be done because employees usually claim additional compensation related to the so-called "fictitious notice period" (*fictieve opzegtermijn*). This is the period after the employment agreement has been terminated during which the employee may not receive unemployment benefits.

If an employee has agreed on a settlement, the employment agreement may be terminated by means of a "pro forma" termination procedure with the court, in order to safeguard as far as possible the employee's right to State unemployment benefits. This is a very short procedure - and there is no requirement to show up in court - following which the parties receive a brief statement from the court to the effect that the employment agreement is terminated for 'neutral reasons' (for instance a reorganisation) from a certain date. The CWI also provides a short, informal procedure - although in practice the CWI procedure takes longer. This procedure can be finalized within a number of days.

Dismissal for Business or Economic Reasons and Last In, First Out Principle (LIFO). In case of dismissals for business or economic reasons the CWI will apply LIFO. This means that, within a specific category of interchangeable functions, the employees who were employed last will be dismissed first. Employers in this way have to dismiss young, talented people who might have been hired under difficult circumstances while keeping older employees who might not be performing optimally. Under certain circumstances the employer may deviate from LIFO; for instance if the dismissal of the person with less seniority would be unreasonably burdensome for the business or where the employee to be dismissed has a weak position on the labour market. However, these possibilities are rarely used in practice.

More important is that an employer wishing to dismiss 10 or more employees can use the so-called 'age bracket' principle (afspiegelingsbeginsel), which means that LIFO can be applied to the workforce (to identify the persons who should be dismissed first) in each of the specific age brackets. When an employer chooses to apply the age bracket principle the workforce of the company will first be divided into age brackets, following which it will be established per age bracket how many employees have to be dismissed. Within each of the age brackets LIFO will be applied.

There are important developments in the Netherlands in relation to LIFO and the age bracket principle. Employers have over the years complained that there should be greater flexibility when reorganizing their business. In practice employers were actually trying to find ways around the legal structures and were—for instance—stretching the notion of 'interchangeable functions' in order to be able to dismiss employees who could not be dismissed under LIFO. The government has finally indicated in 2004 that it will become possible for employers, when

they have to dismiss part of the workforce, to better safeguard a solid age structure within the organisation. Employers will be allowed to apply the age bracket principle within each of the groups of functions where dismissals will have to be carried out, instead of to the workforce as a whole. Furthermore, it should be possible for employers to agree, with the unions in a collective bargaining agreement, tailor made dismissal selection criteria not based solely on LIFO. The government also felt that an additional advantage to the new regime would be that certain groups of employees—like maternity leave returners and foreign employees—who are now the first victims in collective dismissal situations because of their low seniority, could be kept on the payroll more often. The Dutch government has spent considerable time lately trying to bring these groups back to the labour market.

On the whole, these new measures should give employers the flexibility they have requested. It is not yet known when the new measures will become applicable.[2] In the meantime, some courts reluctantly anticipate the coming new rules. Larger employers, like ABN AMRO bank, have agreed with the unions alternative selection criteria in the case of collective dismissals, such as the quality of the employees involved. In practice the importance of LIFO (and the age bracket principle) as a selection criteria is diminishing.

Dismissals for Business or Economic Reasons: Court or CWI? Both the court and CWI can deal with dismissals for business-economic reasons except in cases of dismissal of 20 or more employees. These cases fall under the scope of the Collective Dismissals Act and have to be handled by the CWI. Strictly speaking, the courts are not bound by LIFO (nor by the age bracket principle) which was laid down in the Dismissal Decree of the CWI. The courts will (only) look at whether or not the requested termination is substantiated by important reasons (such as a change in circumstances which means that the employment has to be terminated immediately, or as soon as possible). In practice, the courts deal with dismissal cases in largely the same way as the CWI does. However, certain differences remain.

Whereas the CWI is required to verify in each case the need for the dismissal, the application of LIFO and possibilities to offer the employee other suitable work within the employer's business the courts will not always carry out these verifications strictly, but may make them dependent on the defence of the employee. This means that as far as this aspect is concerned the court procedure is more favourable to the employer.

In most court cases the judge verifies whether LIFO has been properly applied so the Dismissal Decree can be said to have after effects in court procedures. In general, however, the courts are less strict in applying LIFO than the CWI. It is certainly true that the court dismissal procedure is in certain ways more favourable to the employer than the CWI procedure. The court will only check the reasons for dismissal for business-economic grounds to a limited extent and this is even more so when the employee does not have a strong defence. Further, because of the fact that the court can award compensation to the employee (and the CWI cannot) the court is more easily inclined to terminate the employment agreement even in 'weaker' cases by awarding higher compensation to the employee.

Conclusion. Whereas LIFO has made it difficult in the past for Dutch employers to reshape their businesses in such a way that they can compete effectively in economically challenging times, the strict Dutch regime is now becoming more flexible.

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2 Advice still has to be received from CWI and the Labour Foundation (*Stichting van de Arbeid*)

SPAIN

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Legislation

New Discrimination Laws. The National Annual Budget Act for 2004, passed with a view to implementing the EU Directives 2000/43/EC of 29 June and 2000/78/EC of 27 November, has incorporated new grounds of discrimination into Spanish employment law. It provides that, in addition to the existing prohibited grounds, there should be no discrimination on the basis of race or ethnic origin, religion or religious convictions, sexual orientation, age or disability.

Anti-discrimination legislation is applicable to job applicants and existing employees. Both direct and indirect discrimination are covered by the new legislation.

As regards judicial procedure, in discrimination claims the burden of proof has been reversed so that the employer is the one obliged to disprove a *prima facie* case of discrimination.

New Insolvency Law and Collective Redundancies. The new Insolvency Law came into force on 1 September 2004. Under this legislation, if a company in insolvency decides to carry out collective redundancies, the commercial court will be responsible for authorising the redundancies. Previously, the labour authority had to approve the redundancies even if the company was clearly subject to insolvency proceedings.

New Employment Act. On 16 December 2003, a new Employment Act came into force. This Act has increased the relevance of private employment agencies, which will in future place them at almost the same level of importance as the public employment services.

Although the content of the Act is more theoretical than practical, there is no doubt about the importance of a declaration of this nature in increasing the participation of the private sector in the development of employment services.

Recent Developments in Health & Safety at Work. Employers must guarantee the right to a safe working environment by taking necessary preventive action and adopting and updating appropriate health and safety measures in the workplace.

Since 30 January 2004, where employees from two or more separate organisations work together (for example, in the context of outsourcing or subcontracting in the construction industry), all relevant employers have an obligation to communicate and co-operate between them to identify risks and ensure that preventive measures are taken.

New Employment Related Protection for Employees Suffering Domestic Violence. The Act of December 2004 containing measures to protect women against domestic violence has modified the Spanish Workers' Statute Act in several respects. The measures now put labour rights of women affected by domestic violence on an equal footing with those of pregnant employees, especially those affecting dismissal, geographical mobility and/or suspension of employment.

Case Law

Restrictive Covenants: Interpretation of the Employer's Option Rights. One of the most important rulings of the Spanish Supreme Court in 2004 was the decision of 5 April 2004 dealing with the question of whether a restrictive covenant which allowed the employer to decide whether or not to enforce a non-compete clause was valid under Spanish law.

The Court held that the employer's option to implement the restrictive covenant was not enforceable under Spanish law and that consequently the non-compete clause, together with the obligation to pay adequate compensation in consideration for the restriction, remained in full effect, unless otherwise agreed between the parties.

Transfer of an Undertaking—No Material Assets Transferred. According to three of the last rulings of the Spanish Supreme Court (dated 20, 21 and 27 October 2004), where an outsourcing contract passes to a successor and where no material assets are transferred but part of the workforce is hired by the transferee company, there is no transfer of an undertaking (as understood by Section 44 of the Spanish Workers' Statute and the acquired rights Directive), since there is no transfer of an economic entity which retains its identity.

Nevertheless, decisions of the European Court of Justice tend to suggest that any transfer of a contract can amount to the transfer of an undertaking and so this decision may be incompatible to some extent with European trends.

Further rulings are expected.

Recent Developments on Stock Options. Some controversy has emerged out of the grant and exercise of stock options in recent months. First, employment courts held that the benefit arising from the exercise of stock options within the last 12 months of employment may be included in the salary to be taken into consideration when calculating severance or redundancy payments due on termination of employment (especially if the termination is held to be unfair). Conversely, the courts held that if no exercise has taken place there is no benefit for the employee and no impact on the calculation of the severance payment.

The second issue relates to the possibility of exercising stock options following an unfair dismissal of the employee. Some rulings suggest that employees who are unfairly terminated can still exercise outstanding stock options, even after the termination of employment, by relying on other provisions dealing with non-voluntary termination on retirement, death and disability. Other rulings suggest that the terms of the stock option plans should prevail.

Unfair Dismissal and Accrual of Back-Pay. In Spain, in order to minimize the effects of a finding of unfair dismissal - which normally results in an award of accrued salary from the date of termination to the date of the Court decision (back-pay) - the employer is entitled to recognize the unfairness of the termination and to lodge the amount of severance pay before the court. Back pay may then not be payable where the employee refuses to accept the severance payment offered at the time of dismissal and the court subsequently makes an award.

Recent rulings of Spanish courts have held that any mistake in the calculation of the severance payment which may lead to the lodging of an incorrect amount would not stop accrual of back-pay, unless the Company could prove that the mistake was not substantial and not intentional.

UNITED KINGDOM

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2004 was another busy year for UK employers and employment advisers. We have outlined below the new dispute resolution procedures introduced last year by the Employment Act 2002, and highlighted the key amendments to the Disability Discrimination Act 1995. It is also worth mentioning that the first draft Regulations implementing the EU Information and Consultation Directive were published in 2004 and are due to come into force in April 2005. This is an issue that will have a special impact on UK employers, since employee representation in the UK is relatively under-developed when compared with much of mainland Europe.

News

Review of Working Time "Opt-Out". The use of the opt out, permitting employees to work in excess of the 48-hour averaged working week in the UK is currently the subject of review and consultation within Europe. The European Commission has made a number of proposals in relation to the opt-out, ranging from retaining the opt-out, with tighter conditions, to gradually phasing out its use altogether. The UK Government held a consultation on this issue in Autumn 2004 and will report on its findings shortly.

Commission for Equality and Human Rights. Discussions continue in relation to the Government's proposed commission, tentatively named the "Commission for Equality and Human Rights", which would act as a single authority overseeing all strands of discrimination legislation (thus replacing the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission as well as integrating the "new" discrimination rights in relation to religion and religious belief, sexual orientation and age).

In May 2004, a UK Department for Trade and Industry White Paper on the proposed new commission was published and responses to the Government's proposals have been received throughout the year. It is anticipated that the new commission will become effective some time during 2006.

Legislation

Statutory Dismissal, Disciplinary and Grievance Procedures. Since 1 October 2004, new statutory dismissal, disciplinary and grievance procedures have been in operation. Failure by an employer to follow any of the statutory procedures can increase awards for breach of related statutory employment rights (such as unfair dismissal) by up to 50%.

The statutory dismissal and disciplinary procedure ('DDP') applies when the employer is contemplating dismissal; this excludes constructive dismissal, but includes redundancy and ill health terminations as well as non-renewal of a fixed term contract. The DDP also applies to any disciplinary actions short of dismissal relating wholly or mainly to an employee's capability or conduct (excluding, curiously, disciplinary warnings).

The DDP involves three steps. The employer must:

- set down in writing the employee's conduct, capability or other circumstance that may result in dismissal or discipline;
- invite the employee to a hearing to discuss the concerns, following which the employee must be informed of the resulting decision; and
- inform the employee of the right to appeal the decision and hold an appeal meeting, if required. The outcome of an appeal must be communicated to the employee.

The DDP includes a two step, "modified" procedure that is applicable in very limited cases involving instances of gross misconduct.

The statutory grievance procedure ('GP') applies in relation to "a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him". Again, there is a standard three-step procedure and a "modified" procedure, which can apply when employment already has ended. The standard GP involves the following steps:

- the employee sets out in writing the nature of the alleged grievance;
- the employer invites the employee to a hearing to discuss the grievance and, following the meeting, informs the employee of any decision; and
- the employer informs the employee of the right to appeal any decision and to hold an appeal meeting if required. The outcome of an appeal must be communicated to the employee.

Employers should be aware that in most cases, meetings held under the DDP or GP will trigger the statutory right to be accompanied by either a colleague or a certified trade union representative. Employers also should note that, when a DDP or GP is on-going, applicable time-limits for bringing legal challenges at the Employment Tribunal generally will be extended by up to 3 months.

Amendments to the Disability Discrimination Act. Since 1 October 2004, a number of changes to the Disability Discrimination Act 1995 have come into force:

- two new types of disability discrimination have been introduced; direct disability discrimination and a free-standing claim of harassment;
- the exclusion for small businesses (those with less than 15 employees) has been removed;
- the duty to make reasonable adjustments has been extended to cover any provision, criterion or practice that places a disabled persons at a disadvantage; and
- failure to make reasonable adjustments can no longer be justified.

Case Law

Disability Discrimination and the Duty to Make Reasonable Adjustments. In *Archibald v Fife Council* the House of Lords confirmed that the duty under the Disability Discrimination Act 1995 to make "reasonable adjustments" can include giving preferential treatment in the provision of alternative employment to disabled candidates - even if they are not better qualified than other candidates.

In *Meikle v Nottinghamshire County Council* the Court of Appeal indicated that blanket policies reducing company sick pay after a certain period of absence on grounds of sickness or injury can place disabled employees at a disadvantage and may be discriminatory.

"Without Prejudice" Negotiations. Following the Employment Appeal Tribunal's (EAT) decision in *BNP Paribas v Mezzotero*, employers can no longer just assume that off the record (or "without prejudice") discussions for the purposes of negotiating severance packages can be withheld on the grounds of privilege from a Court or Tribunal in any subsequent hearings.

Duty of Trust and Confidence. The EAT decided in *Visa International Services Association v Paul* that a failure to notify an employee absent on maternity leave of a possible vacancy in a part of the business which interested her amounted to a breach of the implied contractual term of trust and confidence and thus constituted constructive dismissal.

Personal Data. Following the Court of Appeal decision in *Durant v Financial Services Authority*, the UK Information Commissioner has produced important guidance on the definition of "personal data" and the nature of manual records that constitute "relevant filing systems" for the purposes of the UK Data Protection Act 1998. The effect of this guidance is to limit the scope for abusive subject access requests under the Act.

Acquired Rights Directive - Pensions. The Transfer of Undertakings (Protection of Employment) Regulations 1981, which implement the EU Acquired Rights Directive, operate to protect (among other things) existing terms and conditions of employment in the event of the transfer of an economic entity from one employer to another. However, "old age, survivors' and invalidity" benefits are excluded. In *Martin v South Bank University*, however, it was confirmed that this exclusion does not cover early retirement benefits under an occupational pension scheme.

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