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European Employment Law Briefing

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CASES

National laws imposing a mandatory retirement age may be within the scope of the Equal Treatment Framework Directive.

In *Palacios de la Villa v Cortefiel Servicios SA* Mr Palacios de la Villa was employed by Cortefiel as an organisational manager. On reaching the age of 65 years, Cortefiel notified Mr Palacios de la Villa that his employment was automatically terminated by reason of compulsory retirement as set out in a collective agreement governing the terms and conditions of his employment.

Mr Palacios de la Villa commenced proceedings in the Spanish courts asking for a declaration that the provision in the collective agreement requiring him to retire was in breach of his right not to be discriminated against on the ground of his age. The Spanish court decided to stay the proceedings and refer to the European Court of Justice ("**ECJ**") for a preliminary ruling on whether Article 13 of the EC Treaty and Article 2(1) of the Equal Treatment Framework Directive prohibit national legislation pursuant to which compulsory retirement clauses are lawful.

The ECJ held that the national legislation in issue was not incompatible with the requirements of the Directive or of European equal treatment principles more generally. The ECJ ruled that national legislation providing for a mandatory retirement age is discriminatory. However, the national legislation will not be in breach of the Directive where the discriminatory legislation can be justified by a legitimate aim and the national measure is an appropriate means of achieving the legitimate aim.

On the facts of the case, the ECJ found that, whilst the Spanish legislation was prima facie

discriminatory, it was justified by the aim of checking unemployment and the provision in the collective agreement was an appropriate and necessary means of achieving that aim.

UK referral to the ECJ

In the UK, the Employment Equality (Age) Regulations 2006 govern age discrimination, and these regulations permit employers to impose a mandatory retirement age of 65 years provided that the employer follows prescribed statutory procedures. A mandatory retirement age below this is discriminatory unless justified by reference to a legitimate aim implemented in a proportionate manner.

There is currently a case on referral to the ECJ from the High Court concerning the incompatibility of the mandatory retirement age in the UK regulations with the Equal Treatment Directive. The ruling in the *Palacios* case indicates that the ECJ is willing to accept that national governments can set a mandatory retirement age. However, the UK has quite a different social and economic environment and different demographic from those in Spain. It therefore remains to be seen whether the ECJ will consider whether there is a legitimate aim underlying the provision, whether the provision is appropriate and necessary for achieving that aim, and whether 65 years is, in fact, the correct age.

What do employers need to consider?

The UK referral is not likely to be heard in the ECJ until 2009. In the meantime, employers should continue to observe the requirements of UK legislation (or other national laws in force across the EU). If the ECJ decides that UK national law is incompatible with the Directive, it will be a matter for the UK government to amend the law, and the employer will not need to be concerned with retroactive claims by employees given compulsory retirement under the UK regulations.

Email and internet use at work falls under the right to private life and correspondence for the purposes of the European Convention on Human Rights

In ***Copland v UK*** Ms Copland was employed as personal assistant to the principal in a state-run college. The college thought that Ms Copland was making excessive personal use of its resources. The college monitored her use of the telephone, internet and email in spite of not having a policy in place alerting employees to the possibility that such monitoring might take place.

Ms Copland claimed that the college interfered with her right to respect for private life and correspondence under the European Convention on Human Rights. The European Court of Human Rights ruled that the collection and storage of personal information relating to the applicant's telephone, email and internet use, without prior warning that the college might collect and store such personal information, amounted to interference with her rights under the Convention. Without the warning, Ms Copland had a reasonable expectation as to privacy.

The UK was in breach of the Convention because it had not, at that time, legislated to regulate covert monitoring.

What do employers need to consider?

Although the case was heard in 2007, the events occurred in the late 1990s. Since then, the UK has introduced, amongst others, the Data Protection Act 1998, the Human Rights Act 1998, the Regulation of Investigatory Powers Act 2000, the Telecommunications (Lawful Business Practice) Regulations 2001 and the Information Commissioner's Code of Practice on Monitoring at Work. The interesting aspect of this case to note is that internet and email use at work fall within the Convention right to private life and correspondence.

The fact that UK law now contains safeguards for employees means that employers who have policies on monitoring telephone, internet and email use which

comply with UK law should be able to continue to monitor employees in accordance with their internal policies. UK law permits covert monitoring in limited circumstances. However, an employer should, in most instances, have a policy in place alerting employees to the possibility that the employer might monitor their use of various of its resources. Any employer who does not have a policy is encouraged to consider implementing such a policy if it thinks that it might want to monitor employees in the future.

Restrictive covenants governed by laws of another country will not be enforced by an English Court unless the employer can show that they pass English law public policy requirements.

In ***Duarte v Black and Decker***, Mr Duarte resigned his job with Black and Decker Europe, a subsidiary of the Black and Decker Corporation, to take up employment with Ryobi Technologies (UK) Limited, a subsidiary of Techtronic Industries Co Inc, both competitors of Black and Decker Corporation. Black and Decker sought to prevent Mr Duarte from taking up employment with Ryobi on the basis that this action would breach two restrictive covenants in the Long-Term Incentive Plan ("**LTIP**") letter agreement he had signed.

The first covenant purported to prevent Mr Duarte from working for or being engaged in or having a specified interest in any of the business of 500 or more named companies anywhere in the world for 2 years after the termination of his employment with Black and Decker, regardless of whether the company was even a competitor. The second covenant prohibited Mr Duarte from soliciting any of the 25,000 employees of Black and Decker.

The LTIP letter agreement containing the restrictive covenants were governed by the laws of the State of Maryland, but the letter agreement was performed in England and Black and Decker sought to enforce the covenant in England. Mr Duarte sought a declaration that the restrictive covenants were void and unenforceable. Black and Decker counterclaimed for an injunction to enforce the restrictive covenants.

The High Court held that the enforceability of the covenants had to be assessed against English law and that, as they were invalid and unenforceable under English law, Mr Duarte's declaration would be granted. The Contracts (Applicable Law) Act 1990 states that where there is a conflict of laws, resolution of the conflict is determined in accordance with the Rome Convention. The court decided the issue under the Convention.

Amongst other arguments, counsel for Mr Duarte submitted that Article 16 of the Convention applied to the case. Article 16 states that the application of the rule of law of any country specified by the Convention may be refused if such application is manifestly incompatible with the public policy of the forum. The Court agreed with this submission. It held that, if the covenants are valid and enforceable under Maryland law but invalid and unenforceable under English law, the Court could not hold the covenants valid and enforceable.

The Court went on to rule on the particular covenants in the case, finding that the covenants were neither valid nor enforceable under either Maryland law or English law.

What do employers need to consider?

The decision will have important practical implications for the drafting of restrictive covenants and the enforceability of those already contained in contracts of employment. Companies must consider whether clauses in contracts governed by laws other than the laws of England and Wales would also be enforceable under the laws of England and Wales if that is the jurisdiction in which they seek to enforce the covenants. The case serves also as a reminder of the parameters of enforceable covenants.

TUPE can apply to transfers of a business from the UK to a non-EU entity where the undertaking does not remain in the UK after the transfer has taken place.

In *Holis Metal Industries v GMB and Newell Limited* Holis was a company based in Israel and Newell was a company in the business of track, pole and blind manufacturing, which operated from a factory in the UK. Newell employed 180 workers, of whom 76 were represented by the GMB. The GMB was recognised by Newell for collective bargaining purposes. Holis bought the track and pole part of Newell's business, announced the closure of that part of the business in the UK and informed the 107 affected employees that they could either relocate to Israel or accept redundancy. None of the employees chose to relocate and shortly after the transfer of the business to Israel, Holis dismissed the UK employees.

The GMB and Newell brought a claim against Holis for unfair dismissal of the employees claiming that Holis had breached its duty to consult the employees under regulation 13 of TUPE and section 188 of TULRCA. The EAT looked at both the wording of regulation 3 of TUPE and at Article 1 of Acquired Rights Directive and the purpose behind the legislation in reaching its decision. Upholding the decision of the ET, the EAT ruled that the wording of regulation 3 is precise in setting its application to transfers of undertakings situated in the UK immediately before the transfer. The EAT stated that this interpretation is substantiated by the argument that the purpose of the legislation is to protect the rights of workers in the event of a change of employer and that this protection should not be lost simply because the business is transferred beyond the borders of the EU.

What do employers need to consider?

This case suggests that companies which intend transferring outside the EU a business or part of a business situated in the UK should consider the application of TUPE to that transfer. Employers might be required to consult affected employees and their representatives before the transfer takes place and before making any redundancies. Enforcement of TUPE outside of the UK might pose practical difficulties, something the EAT recognised in the case. However the EAT failed to address this issue. It only opined on the theoretical aspect of the case and did not apply its findings to the facts of the case.

Employers in France are not required to translate share option agreements from English into French if the employee understands the agreement and does not object to signing the English version.

In *M.Soustiel v Intuitive Surgical*, Mr Soustiel was employed as a director of Intuitive Surgical, an affiliate of the American company Intuitive Surgical Inc. Mr Soustiel entered into a share option agreement with the company, which was presented to him for signature in English. Mr Soustiel was fluent in oral and written English. He did not complain or request that the agreement be translated into French. He signed the agreement as it was presented. Mr Soustiel was later made redundant.

Mr Soustiel claimed damages for the loss of his rights over unexercised share options. The Cour de Cassation upheld the decision of a lower court, ruling that as Mr Soustiel had signed the English version of the share option agreement without objection and as he understood the agreement and could have objected to its terms, the agreement was enforceable against him. The Cour de Cassation did not give reasons for its decision.

What do employers need to consider?

Although this decision suggests that employers are not required to translate share option agreements in French, it is worth noting that this decision has been criticised in France. Under Article L121-1 of the *Code du Travail* a written employment contract, and any documents dependent on that contract, should be presented to the employee in the French language for signature. The Code also states that any employment provisions

which contravene this rule are unenforceable against the employee. The Cour de Cassation had previously ruled that documents allocating options are dependent on the employment contract. Critics of the decision therefore suggest that they should fall within Article L121-1.

It is therefore prudent for US and UK employers with French subsidiaries to translate all such documents into French.

NEWS

Temporary Agency Workers Directive

Employment Ministers from across the EU have failed to reach agreement on a draft directive to establish a common legal framework to regulate the working conditions of temporary agency workers. The main outstanding issues going into the meeting involved:

- prohibitions and restrictions on temporary agency work; and
- the principle of equal treatment, possible exceptions to that principle and the maximum length of assignments to which such exceptions can apply.

This failure will be met with relief by many employers in the UK.

Supplementary pension rights

The EU failed to reach agreement on a common position in relation to a draft Directive to set minimum requirements for enhancing worker mobility. The Directive intends to achieve this by improving the acquisition and preservation of supplementary pension rights. Efforts will continue through 2008 to reach agreement and various studies have been commissioned in order to assist the EU in understanding supplementary pension schemes.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our EU Employment Group:

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