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Developments in Employment Law Around the World 2005

ERIKA C. COLLINS, MARJORIE R. CULVER, & KENJI HOSOKAWA*

I. Argentina

A. SUSPENSION OF DISMISSALS

In Argentina, since 2002, an employer's ability to dismiss employees without cause has been suspended and such dismissals have been penalized. In December 2005, the government extended the effective period of suspension until the unemployment rate, as published by the National Institute of Statistics and Census (INDEC), is lower than 10 percent.¹ Currently, the unemployment rate published by the INDEC is 10.4 percent.² The penalty assessed on an employer for dismissing an employee without cause is now equal to 50 percent of the employee's severance payment that is considered to be compensation for seniority.³

B. SALARY INCREASES

During the second quarter of 2005, the Labor Ministry approved 110 new collective bargaining agreements, which exceeded the number of approved collective bargaining

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1. See Law No. 25972, § 4, Dec. 17, 2004, B.O. (Arg.), *available at* <http://www.diputados.gov.ar>.

2. See "Employment and Unemployment Rates 2005 and 2006 Quarterly Information," *available at* <http://www.indec.mecon.ar/>.

3. See Law No. 25972, § 4.

agreements for the same period of the previous year. Of the 110 new agreements, about 84 percent included salary increases, the most important of which was for the commerce sector, which employs about 600,000 registered workers.⁴

C. SOCIAL SECURITY CONTRIBUTIONS

In July 2005, the government suspended the gradual re-establishment of mandatory contributions by private sector employees to the Integrated Pension System (SIJP) until July 2006.⁵ The contribution rate for these employees will remain at 7 percent of base salary until July 2006, when it will increase to 9 percent, and the rate will be re-established at 11 percent in October 2006.⁶ The contribution rate for employees in the public pension system, on the other hand, was never reduced from 11 percent of base salary and will remain the same.

In April 2004, the government implemented a regulation that gradually increased employers' contributions to the SIJP.⁷ The regulation removed all caps on employers' contributions as of October 1, 2005.⁸

D. REGISTRATION OF NEW EMPLOYEES

Prior to July 1, 2005, employers were obligated to record certain information regarding each new employee with the tax authority prior to his or her effective start date under the Early Record Key (CAT) system.⁹ In May 2005, however, the CAT system was amended, and the Record of Entry and Exit in Social Security system was created.¹⁰ As a result, since July 1, 2005, employers have been required to record the entry and exit of every employee who is included in or discharged from the employer's payroll. Furthermore, students under trainee programs (*pasantes*) must be included in the record. This new system allows employers to amend certain data after recording the employment or termination of an employee or even to annul an entry record when a hired person fails to report to work. An employer may record employees' data via the Internet at the tax authority's official website or by submitting an affidavit that includes the relevant information to the tax authority's office where the employer is registered.

4. See Ministry of Labour, Employment and Pensions, Under-Secretary of Technical Programming and Labour Studies, *The State of Collective Negotiation*, 2005, available at <http://www.trabajo.gov.ar/left/biblioteca/files/estadisticas/toe4...02negociacion-colectiva.pdf>.

5. See National Decree 788/2005, available at <http://www.diputados.gov.ar> (last visited June 21, 2006).

6. See National Decree 390/2003, National Decree 809/2004, and National Decree 788/2005, available at <http://www.diputados.gov.ar> (last visited June 21, 2006).

7. See National Decree 491/2004 and General Resolution of the General Administration of Public Income (AFIP) 1750/2004, available at <http://www.diputados.gov.ar> (last visited July 6, 2006).

8. *Id.*

9. See General Resolution of the AFIP 899/2000, available at <http://www.diputados.gov.ar> (last visited July 6, 2006).

10. See General Resolution of the AFIP 1891/2000, available at <http://www.diputados.gov.ar> (last visited July 6, 2006).

II. Australia

On December 7, 2005, the Australian Parliament passed the Workplace Relations Amendment (WorkChoices) Act 2005 (Cth) (the Act or WorkChoices).¹¹ The Act, and the regulations made under it, came into full effect on March 27, 2006.¹²

Historically, Australia had a dual system of workplace relations. Employment and industrial laws were made at the federal and state levels. Minimum terms and conditions of employment were also determined by federal and state tribunals via a process known as conciliation and arbitration. In many cases, these minimum terms and conditions were enshrined in industrial instruments known as awards. The key objective of WorkChoices is to move, over time, to a single workplace relations system and a single set of universal minimum terms and conditions.¹³ A greater number of employers (by some measures about 85 percent of all employers) now fall within the ambit of the federal workplace relations system.

The various state governments are currently challenging the validity of WorkChoices before the Australian High Court on the basis that WorkChoices exceeds the federal government's powers under the Australian constitution. It is anticipated that the Australian High Court will hand down its decision in late 2006 or 2007.

In the meantime, employers, employees, unions, tribunals, governments, and other interested parties are now dealing with a complex set of transitional arrangements to give effect to the new WorkChoices system.¹⁴ Some of the key changes are the following:

1. *Most of the state systems have been subsumed into the new federal system.* Awards and other industrial instruments made before WorkChoices under state employment and industrial laws are now treated as federal transitional agreements. For the most part, they will continue to apply to the relevant employees although with some modification.
2. *Conciliation and arbitration is no longer the cornerstone of the system.* The emphasis is now on employers, unions, and employees to determine their own arrangements without the involvement of tribunals such as the Australian Industrial Relations Commission.
3. *Australian Industrial Relations Commission's role is reduced.* Its powers to make new or modify existing awards is now limited. Its main role is as a provider of dispute resolution services. It also will deal with some industrial disputes, will be involved in simplifying federal awards, and will hear and determine claims by certain employees alleging unfair dismissals.
4. *Awards will progressively become less relevant.* Awards do not apply to employers with workplace agreements made under WorkChoices, and the award system will be simplified and greatly rationalized. The award rationalization process is expected to result in a dramatic reduction of the number of awards. At the most extreme, some 4,000 federal and state awards may be reduced to as few as twenty federal awards.
5. *Minimum entitlements under WorkChoices constitute the Australian Fair Pay and Conditions Standard.* The Australian Fair Pay and Conditions Standard guarantees a maximum working week of thirty-eight hours (which may be averaged by agreement over a period

11. Workplace Relations Amendment (WorkChoices) Act, 2005, (Austl.).

12. *Id.*

13. *Id.*

14. *Id.*

up to twelve months) for many employees, plus reasonable additional overtime pay, a minimum wage, minimum entitlements to annual, parental, personal (sick person's and carer's), and compassionate leave, and minimum entitlements with respect to loadings for casual employment.

6. *Two classes of workplace agreement can be made more easily—collective agreements (between employers and multiple employees) and Australian Workplace Agreements (between an employer and a single employee).* These agreements existed in similar forms prior to WorkChoices, but are now easier to make and register. Collective agreements will operate to the exclusion of awards, and Australian Workplace Agreements will operate to the exclusion of collective agreements and awards.
7. *Industrial action is harder to take.* The laws prohibiting industrial action, and regulating when it may legally be taken, are now much stronger.
8. *Rights of entry to workplaces have changed.* A union official's right to enter a workplace has been further restricted.
9. *Availability of unfair dismissal and other claims has been limited.* For example, claims alleging unfair dismissal may not be brought by employees of employers with less than 100 employees (which includes employees of related entities). Nor, in most cases, may they be brought by an employee employed for less than six months. Also, employees arguably cannot make claims under state laws against employers to which WorkChoices applies, alleging that their employment contracts were unfair.

III. Canada

A. COURT AWARDS PUNITIVE DAMAGES FOR FAILURE TO ACCOMMODATE DISABLED EMPLOYEE

In *Keays v. Honda Canada Inc.*, a judge of the Ontario Superior Court of Justice awarded twenty-four months' notice and \$500,000 (Canadian) in punitive damages to an employee suffering from Chronic Fatigue Syndrome in a wrongful dismissal case, the largest sum ever awarded in a Canadian wrongful dismissal action.¹⁵ Honda has applied for leave to appeal the decision in *Keays*. Whatever the outcome, it remains clear that the courts in Canada are prepared to punish employers for mistreating their chronically ill employees. Discrimination on the basis of disability will not be tolerated, and the failure of an employer to properly discharge its duty to accommodate to the point of undue hardship will have ramifications for employers.

B. B.C. LABOUR RELATIONS BOARD DECLARES FORCED LISTENING VIOLATES LABOUR CODE

The British Columbia Labour Relations Board's (the Board) long-awaited decision in *RMH Teleservices International Inc. and the B.C. Government and Services Employees' Union* was, after one year of waiting, finally rendered.¹⁶ The decision was expected to clarify the permitted scope of employer expression allowed under the British Columbia Labour Relations

15. *Keays v. Honda Canada Inc.*, No. 00-B1968, 138 A.C.W.S. (3d) (O.S.C.J. Mar. 17, 2005), available at 2005 A.C.W.S.J. LEXIS 1899.

16. *RMH Teleservices Int'l Inc. and British Columbia Gov't and Servs. Employees' Union*, B280/2005, [2005] B.C.L.R.B.D. 280 QUICKLAW (B.C.L.R.B. Oct. 13, 2005).

Code (the Code). One of the first changes that the Liberal government made in British Columbia was to amend the Code in 2002, to allow as follows:

Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.¹⁷

The Board found that in order to determine whether an expression of views falls within the scope of the above section 8 or is excluded by virtue of being coercive or intimidating, it was not sufficient to merely consider the words expressed.¹⁸ The Board held that the entire context must be considered and that, where the context is an organizing drive and the employer is expressing its views about unionization to its employees, the concern about protecting free choice of the employees from coercion or intimidation is particularly strong.¹⁹ It remains to be seen whether the *RMH* decision will be considered an anomalous interpretation of section 8, or whether this decision will have long-term ramifications for labor relations decisions both in British Columbia and Canada as a whole.

C. SUPREME COURT OF CANADA ENDORSES WHISTLE BLOWING

In its recent decision in *Merk v. International Ass'n of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*,²⁰ the Canadian Supreme Court held that a union's dismissal of its bookkeeper after she reported her supervisors' financial misconduct to representatives of the union was retaliation for whistle blowing that violated section 74(1)(a) of the Saskatchewan Labour Standards Act.²¹ This section protects employees from retaliation for reporting to a lawful authority any activity that is likely to result in an offence under an Act of the province or Parliament.²² The Court held that reporting to a lawful authority includes not only the police or other agents of the state, but also individuals within the employer's organization who exercise lawful authority over the employee(s) complained about or the matter that may give rise to an offence.²³ While the case is specific to a particular statute, it also marks a clear endorsement from the highest Court that whistle blowing ought to be encouraged as a matter of public policy, and employees ought to be protected from any adverse consequences that may flow from blowing the whistle. The Supreme Court specifically endorses an "up-the-ladder" approach as a way of best reconciling an employee's duty of loyalty with the public's interest in whistle blowing on the basis that internal reporting allows for internal resolution of alleged misconduct.²⁴

17. Labour Relations Code, R.S.B.C., ch. 244, § 8 (1996) (Can.).

18. *RMH Teleservices Int'l Inc.*, *supra* note 17.

19. *Id.*

20. *Merk v. Int'l Ass'n of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425.

21. The Labour Standards Act, S.S. ch. L-1, § 74 (1978), amended by S.S., ch. 39, § 41 (1994) (Can.).

22. *Id.*

23. See generally *Merk*, [2005] 3 S.C.R. 425.

24. *Id.*

IV. China

A. INCREASED PRESSURES ON FOREIGN INVESTED ENTITIES TO ESTABLISH TRADE UNIONS

Since the end of 2004, China has been pressuring private entities, especially foreign invested entities (FIEs), to establish trade unions.²⁵ China's Trade Union Law stipulates that all employees in China relying on wages as a main source of income have the right to participate in and form trade unions.²⁶ Higher level trade unions (i.e., the state-run All China Federation of Trade Unions (ACFTU) and its local branches), may assign delegates to assist and guide the employees of an enterprise in establishing a trade union, and companies are not permitted to obstruct such efforts.²⁷

At the end of 2004, the Standing Committee of the National People's Congress (SCNPC) released a national survey report regarding the enforcement of the Trade Union Law, which pointed out that most private enterprises (including FIEs) have not established trade unions. ACFTU also publicly criticized certain FIEs sponsored by large multinational companies by claiming that they had resisted the establishment of trade unions despite ACFTU's repeated requests.²⁸

After the SCNPC's national survey, the General Office of the State Council issued a new circular requesting local governments support the work of trade unions.²⁹ The ACFTU also indicated that it would take measures to request all FIEs in China to establish trade unions, including drafting a blacklist of uncooperative FIEs, assigning delegates to the FIEs to help establish trade unions, exerting pressure through local labor authorities and other government agencies, and even bringing legal action against FIEs that violate the Trade Union Law.³⁰ Local governments in Jiangsu, Shandong, and Fujian provinces also have indicated that they will begin enforcing local rules that require FIEs, even if they fail to establish a trade union within a prescribed period, to contribute 2 percent of the total employee payroll to a trade union preparation fund. Such contribution is to be withheld by the tax bureau and then transferred to the local branch of ACFTU.³¹

Although a large number of FIEs in China have yet to establish trade unions, some FIEs already have taken the initiative to establish trade unions under pressure from the enforcement campaign.³² Others have agreed to form a trade union upon employees' requests.

B. "SEXUAL HARASSMENT" CONCEPT RECOGNIZED BY LAW

On August 28, 2005, the SCNPC amended the Law on Protection of Women's Rights to prohibit sexual harassment against women and to enable victims to file complaints with

25. See Information Office of the State Council of the People's Republic of China, *China's Progress in Human Rights in 2004*, Apr. 25, 2005, available at <http://members.aol.com/junmanew/cover.htm>.

26. See Trade Union Law (P.R.C.), Oct. 27, 2001, art. 2, available at http://english.gov.cn/laws/2005-10/11/content_75948.htm.

27. See Trade Union Law (P.R.C.), art. 11.

28. See Xinhuanet, "Globalization an Ordeal to Workers' Rights Protection in Developing Countries," available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN018790.htm>.

29. See Circular Number: Guo Fa Ban [2004] No. 90, available at http://www.gov.cn/gongbao/content/2005/content_63301.htm.

30. See People's Daily, May 10, 2005, "Foreign Invested Enterprises are also Required to Establish Trade Unions," available online in Chinese at <http://opinion.people.com.cn/GB/40604/3375323.html>.

31. See Circular on Withholding Trade Union Funds before Tax, Circular Number: ACFTU [2005] No. 9; see also Jiangsu Province Implementing Rules on PRC Trade Union Law [2002], art. 28.

32. Carrefour's subsidiary in Harbin has established its first trade union in China consisting of 160 members. See HARBIN DAILY NEWS, Dec. 28, 2004, available at <http://www.harbindaily.com/>.

relevant government units and other authorities.³³ If sexual harassment constitutes a violation of relevant public security administration regulations, the victims are entitled to request the public security bureau to impose administrative penalties on the violators or directly bring civil legal action against the violators.³⁴

This law represents China's first effort at addressing sexual harassment in a legal context, although it is still limited to female victims. Prior to such amendment, the victims of sexual harassment could make claims only based on the General Principals of Civil Code, which vaguely states that no one should infringe upon another's reputation or personal dignity by insulting or labelling them.³⁵ The Supreme People's Court allows damages for emotional distress in cases of injury to an individual's body or personal dignity rights.³⁶

Out of approximately ten sexual harassment lawsuits brought prior to the new law's enactment, only one victim won her case, receiving a minuscule amount approximately equal to \$210 (US) as emotional distress damages.³⁷ Since the new law became effective on December 1, 2005, it is expected that an increasing number of sexual harassment victims will pursue legal action.

V. Costa Rica

The Second Chamber of the Supreme Court of Justice recently issued a resolution, Vote No. 2004-00481 (the Resolution), which laid the foundation to modify the line of cases with regard to compensation for moral damages, or emotional distress, caused by employment termination.³⁸

Prior to the Resolution, under the Labor Code, an employee who suffered an unjustified termination was entitled to payment in an amount equivalent to six months of salary, granted upon meeting certain conditions. No distinction was drawn between material and moral damages. Following the Resolution, an employee may seek all damages arising from the unjustified termination, regardless of whether they are inflicted directly on the individual or on his or her property, interests, or emotions. Through the regular labor proceedings, such employee may now seek a severance payment, prior notice of termination, vacation, mandatory Christmas bonus (*aguinaldo*), and any other accrued compensation that can be claimed at the time of the unjustified termination, as well as any moral damages if he or she suffered emotional distress at the time of the dismissal.

To be granted moral damages, an employee must demonstrate the existence of an immediate and direct causal relationship between the dismissal and the emotional distress. It is also necessary to take into account the magnitude of the injury, intensity of the distress, trajectory of the distress, repercussion on the emotional health, hospitalization period, side effects, and medical treatment. All such factors must be analyzed from the subjective perspective of the victim, in light of his or her personality, employment situation, social, family,

33. See Law on Protection of Women's Rights (P.R.C.) art. 40 & 58.

34. *Id.*

35. See General Principals of Civil Code (P.R.C.) [1987], art. 101.

36. See Supreme People's Court, *Judicial Interpretations on Several Issues: the Determination of Compensation Liabilities on Emotional Distress*, Feb. 26, 2001.

37. See *Victim Won First Trial of "Sexual Harassment" Case in Wuhan*, CHINA WOMEN NEWS, June 11, 2003, available at <http://china-woman.com>.

38. See *Reynier Ramírez Arroyo vrs Banco Cooperativo Costarricense R.L. and the State*. Labor Process. File No. 98-004058-166-LA. Juzgado de Trabajo del Segundo Circuito Judicial de San José.

and financial situation, physical and emotional sensibility, and other relevant circumstances. Faced with a case of moral damages, a judge must establish objectively the amount of the compensation to be granted to the employee by applying the principles of proportionality, equality, and reasonableness.

The employee has the burden of proof as to the existence and amount of the damages and is required to demonstrate the alleged facts, including their gravity. For this purpose, an employee is allowed to produce all types of evidence, including presumptions or indicia sufficient to infer the damages.

VI. Denmark

A. EMPLOYEE STOCK OPTIONS

The Danish government enacted the Stock Option Act, which covers most financial instruments granted to employees that enable them to buy or subscribe to shares in the future.³⁹ Under the Stock Option Act, an employee is entitled to retain granted stock options in case of termination for any reason other than breach of contract regardless of the relevant plan language, except that forfeiture clauses in the plan, if any, are valid if the employee resigns. The Stock Option Act was enacted in response to recent Supreme Court cases holding that stock options were considered to be salary, and that employees had acquired a final right to the stock options on the grant date, invalidating forfeiture clauses in stock option plans.

In the beginning of 2006, the Maritime and Commercial Court will decide whether the employees who have been granted stock options prior to the Stock Option Act are entitled to holiday allowance and/or severance pay based on the value of the stock options. Stock options granted under the Stock Option Act will not be subject to holiday allowance or severance pay.

B. OUTSOURCING OF SERVICES AS A TRANSFER OF UNDERTAKINGS

Courts have interpreted the Act on Transfer of Undertakings (the Transfer Act) broadly.⁴⁰ In a recent decision by the Labour Court, however, the transfer of garbage collection activities in an outsourcing agreement did not qualify as a transfer of undertaking within the meaning of the Transfer Act.⁴¹ Based on a previous European Union judgment defining the transfer of business (*liikenne*), the Labour Court found that the transfer of the garbage collection activity from a business primarily characterized by its physical assets did not constitute a transfer of a going concern under the Transfer Act.⁴²

C. ELECTRONIC MAIL

In a judgment rendered by the Western High Court, the Court held that an employee's disloyal comment in a private email to a former colleague, in which the employee referred

39. See Stock Option Act (Den.) no. 309 of 5 May 2004.

40. See Consolidated Act (Den.) no. 710 of 20 Aug. 2002 (implementing the Acquired Rights Directive 77/187/EEC).

41. See Landsorganisationen i Danmark acting for Specialarbejderforbundet i Danmark v. Dansk Arbejdsgiverforening / ATL acting for Nord-Ren A/S, case A2004.244, Labour Court Decision, Mar. 25, 2005.

42. Oy Liikenne Ab v. Pekka Liskojärvi, Pentti Junnunen, ECJ Decision, Jan. 25, 2001 (C-172/99).

to a manager as a “bitch,” did not justify the employer’s dismissal of that employee.⁴³ The High Court also held that the employer did not violate the employee’s right to privacy by reading the private e-mail.⁴⁴

D. FREEDOM OF RELIGION IN EMPLOYMENT

In the beginning of 2005, a unanimous Supreme Court upheld the Eastern High Court’s judgment that a large Danish retail chain was entitled to summarily dismiss an employee who, in violation of the employer’s dress code, announced that she intended to wear a headscarf because of her Muslim faith.⁴⁵ The Supreme Court found that the purpose of the prohibition against wearing headgear in the dress code was to signal to the customers that it was a politically and religiously neutral company.⁴⁶ On this ground, the Supreme Court found that the prohibition against wearing headgear did not violate the Anti Discrimination Act and was not a violation of the European Convention on Human Rights.⁴⁷

VII. France

A. MAJOR LEGISLATIVE REFORMS

The passage of Act 2005-32⁴⁸ relating to social cohesion has made the following changes to redundancy procedures:

1. An employer may conclude agreements with its majority trade union to establish conditions for drafting a collective redundancy plan. Such “method agreements” (*accords de méthode*) can be concluded at company, group, or branch level.
2. A personalized redeployment agreement (*convention de reclassement personnalisé*) is mandatory in a company of fewer than 1,000 employees. Employees may elect benefits ranging from psychological support, to orientation, to coaching and training, to assessment of professional skills, all of which are designed to aid their redeployment.
3. When collective redundancies are likely to have a negative impact on the local employment market, the company must contribute to the development of business in the area, based on the number of redundancies and its financial capacity.

The second major legislative development in French employment law has been Ordinance 2005-893, which introduced new hiring contracts (*contrat nouvelles embauches*, or CNE).⁴⁹ A company with fewer than twenty employees may offer a new employee a contract that allows the company to unilaterally terminate employment during the first two years

43. See Scan-Pot ApS v. HK Danmark acting for F, Western High Court Judgment, Feb. 23, 2005.

44. *Id.*

45. See HK i Danmark acting for Najla Ainouz v. Føtex A/S, Supreme Court Judgment, Jan. 21, 2005, (UfR.2005.1265H).

46. *Id.*

47. *Id.*; see also Anti Discrimination Act (Den.) no. 459 of 12 June 1996.

48. See Act No. 2005-32 (Fr.) of Jan. 18, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan 19, 2005, p. 864.

49. See Ordinance No. 2005-893 of Aug. 2, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 3, 2005, p. 12,689.

without presenting grounds for termination.⁵⁰ After two years, the CNE becomes a standard indefinite-term employment contract.⁵¹

B. CASE LAW DEVELOPMENTS

According to the *Cour de Cassation's* (France's highest court) decision of May 17, 2005, an employer can open employee computer files identified as personal and saved on company computers only in the employee's presence or when he or she has been duly summoned, in the event that there is no risk or particular incident justifying such access.⁵²

In its decision of June 15, 2005, the *Cour de Cassation* ruled that, even if a redundancy is found null and void for failing to meet the statutory requirements, the employees' reinstatement is not compulsory if it has become impossible due to the relevant site's closure.⁵³

C. WHISTLE BLOWING AND FRENCH DATA PROTECTION ISSUES

On May 26, 2005, the French Data Protection Authority, *Commission Nationale de L'Informatique et des Libertés* (CNIL), issued an opinion on two notifications made by the French affiliates of Exide Technologies Inc. and McDonald's Corporation regarding whistle blowing hotlines.⁵⁴ In both opinions, the CNIL ruled that these hotlines (i) were subject to prior authorization from the CNIL and (ii) did not comply with the data protection principles set out under French law.

On December 8, 2005, the CNIL issued guidelines for the self-certification of whistle blowing hotlines.⁵⁵ The CNIL's main requirements include the following:

1. The hotline should complement other regular means of internal control, without being compulsory and with a limited scope (covering mainly financial offenses).
2. The whistle blowers should be identified so as to make them aware of their responsibilities, while guaranteeing their confidentiality (*i.e.*, generally no anonymous calls).
3. Employees should be clearly and thoroughly informed about the hotline. An employee who is the subject of a whistle blowing report must be informed not only about the complaints issued against him or her, but also of his or her rights and the way to exercise them—notably the possibility to ask for the rectification or elimination of data concerning the employee.
4. Data should be retained for a limited period of time. It must be (i) destroyed at once if the report proves to be groundless or after a maximum of two months following the end of the investigation procedure, unless litigation or a disciplinary procedure has been launched; or (ii) securely archived for a period consistent with the applicable statute of limitations.

50. *Id.*

51. *Id.*

52. See Cass. soc., May 17, 2005, Bull. civ. V, No.03-40673.

53. See Cass. soc., June 15, 2005, Bull. civ. V, No.03-43919.

54. See La Commission Nationale de L'Informatique et des Libertés, Decision, May 26, 2005, available at <http://www.cnil.fr/>.

55. See Commission Nationale de L'Informatique et des Libertés, Decision, Dec. 28, 2005, available at <http://www.cnil.fr/>.

VIII. Germany

A. NEW FEDERAL GOVERNMENT IN GERMANY

The new coalition federal government (Grand Coalition), comprising the Christian Democratic Union (CDU), Christian Social Union (CSU), and Social Democratic Party (SDP), has declared that its primary aim is to strengthen Germany's economy. To generate economic growth and employment in Germany, the Grand Coalition aims to enact drastic changes to the legislation on protection against dismissal and fixed-term contracts of employment.

Under section 14 II of the existing provisions of the Part-Time and Fixed Term Contract Act in Germany, it is possible to limit an employment contract to a fixed term of up to two years without stating any reasons.⁵⁶ Currently, section 14 I sets out a non-exhaustive list of circumstances where this limitation is permitted beyond two years. Under the proposed changes, any limitation on duration of a contract will have to be made for the reasons currently stated under section 14 I. Such circumstances include (i) where the operational requirement for the job in question is only temporary; (ii) where an employee is covering for another employee; or (iii) where the limitation is pursuant to a legal agreement. The most important exception to this rule is available to employers setting up new businesses. During the first four years following the establishment of a new business, an employer may grant fixed-term contracts of up to forty-eight months without providing any reason, pursuant to section 14 II a.

The existing provisions of section 622 II of the German Civil Code allow for a probationary period of up to six months.⁵⁷ The proposed regulations will greatly expand this provision by permitting employers to have the option of agreeing to a probationary period of twenty-four months with a newly hired employee.⁵⁸ A contract of employment during this probationary period is a genuine and valid indefinite-term contract but may be terminated more easily during this time. This option will also be available to an employer who re-employs the same employee, provided at least six months have elapsed since the end of the earlier contract of employment.

German policy makers hope to encourage employers to actively recruit employees. In allowing employees to be dismissed during an agreed probationary period without giving reasons, this new regulation should help the policy makers achieve their purpose.⁵⁹

IX. Hong Kong

A. CONTINUITY OF SERVICE

Courts in Hong Kong frequently confront cases regarding the extent to which employment undertaken with a former employer should be taken into account in calculating an employee's severance or long service payment to be paid by an employer related to the

56. See Bürgerliches Gesetzbuch [BGB] [Civil Code] § 14 (F.R.G.).

57. See BGB [Civil Code] § 622.

58. According to the Coalition Agreement, however, the circumstances in which an employer is exempt from dismissal protection rules during the probationary period will not be codified.

59. See Gregor Thüsing, *Neue Balance im Arbeitsrecht*, NJW 2005, 3477 (2005), available at <http://www.uni-regensburg.de>.

former employer. In *Law Shu Fat v. Ng Kwong Yiu (trading as Ng Yiu Kee Transportation Co.)*, the court held that, where the son had continued operating the business of his deceased father under a separate entity, that entity was required to calculate the statutory entitlements of staff by taking into consideration the combined employment service of staff who had worked for both the son and his deceased father.⁶⁰

B. CALCULATING STATUTORY PAYMENTS

The calculation of different types of statutory entitlements continues to create uncertainty under the existing law. In *Wong Yin Fong & 97 Ors. v. ISS Hong Kong Services Ltd.*, the court held that the employer could not refuse to pay an attendance bonus to an employee because the employee concerned had taken annual leave.⁶¹ In *Laing Agnes & Ors v. Lisbeth Enterprises Ltd.* (trading as Phillip Wain International), the question arose as to whether an employee was entitled to be paid statutory holiday pay and annual leave pay at rates that included substantial commissions that the employee was entitled to receive had annual leave not been taken.⁶² In declaring that the term wages within the meaning of the relevant statute included all commissions, the court held that the employee was entitled to be paid both holiday pay and annual leave inclusive of the hypothetical commissions that the employee would have earned had she not taken leave.⁶³ This decision of the High Court was upheld on appeal to the Court of Appeal by a majority.⁶⁴

C. FIXED-TERM EMPLOYMENT

Even the most technical failure to comply with a statutory requirement sometimes can result in unexpected and even far-reaching consequences. In *Elizabeth Harrington v. Cap Gemini Ernst & Young Hong Kong Ltd.*, a very senior executive claimed that she had entered into a contract for a fixed term of two years that could not be terminated prior to the expiration of the fixed term.⁶⁵ The executive's claim for substantial damages for wrongful termination was dismissed by reason that the parties had failed to sign the employment agreement as required by law.⁶⁶ As a consequence of this failure, the executive was held to

60. *Law Shu Fat v. Ng Kwong Yiu*, Court of First Instance, Labour Tribunal Appeal No.126 of 2003, available at <http://legalref.judiciary.gov.hk/> (follow "High Court" hyperlink; then follow "Labour Tribunal Appeal" hyperlink; then follow "2003" hyperlink; then follow "HCLA126/2003" hyperlink).

61. *Wong Yin Fong v. ISS Hong Kong Servs. Ltd.*, Court of First Instance, Labour Tribunal Appeal No. 56 of 2003, available at <http://legalref.judiciary.gov.hk/> (follow "High Court" hyperlink; then follow "Labour Tribunal Appeal" hyperlink; then follow "2003" hyperlink; then follow "HCLA56/2003" hyperlink).

62. *Laing Agnes v. Lisbeth Enter. Ltd.*, Court of First Instance, Labour Tribunal Appeal No. 133 of 2003, available at <http://legalref.judiciary.gov.hk/> (follow "High Court" hyperlink; then follow "Labour Tribunal Appeal" hyperlink; then follow "2003" hyperlink; then follow "HCLA133/2003" hyperlink).

63. *Id.*

64. *Laing Agnes v. Lisbeth Enter. Ltd.*, Court of Appeal, Civil Appeal No. 204 of 2004, available at <http://legalref.judiciary.gov.hk/> (follow "Court of Appeal of the High Court" hyperlink; then follow "Civil Appeal" hyperlink; then follow "2004" hyperlink; then follow hyperlink for "Page 4," then follow "CACV204/2004" hyperlink).

65. *Lynch v. Cap Gemini Ernst & Young Hong Kong Ltd.*, Court of First Instance, Commercial Action No. 10 and No. 61 of 2002, available at <http://legalref.judiciary.gov.hk/> (follow "High Court" hyperlink; then follow "Commercial Action" hyperlink; then follow "2002" hyperlink; then follow "HCCL 10/2004" hyperlinks or "HCCL61/2002" hyperlinks).

66. *Id.*

have entered into a default employment contract that could be terminated by either party giving the other party one month's notice of termination.⁶⁷

D. UNREASONABLE DISMISSAL

The circumstances in which an employee might be regarded as unreasonably dismissed in accordance with Part VIA of the Employment Ordinance has created confusion since it first was enacted.⁶⁸ In *Thomas Vincent v. South China Morning Post Publishers Ltd.*, Hong Kong's highest appellate court held that a journalist whose employment had been terminated for plagiarism could not consider himself to have been unreasonably dismissed simply because he lost his entitlement to a long service payment.⁶⁹ The Court of Final Appeal held that, as long as the reason provided by an employer for the termination is true, and as long as the conduct that provided the reason for termination is relevant and not trivial, then an employee cannot be regarded as having been unreasonably dismissed.⁷⁰

X. Japan

A. NEW PERSONAL INFORMATION PROTECTION LAW

On April 1, 2005, the Personal Information Protection Law of Japan (PIP Law) came into full effect.⁷¹ The PIP Law applies to business entities, whether corporate or individual, whose business activities include the use of personal information databases or comparable systems. The PIP Law does not apply to business entities that have handled personal information of fewer than 5,000 individuals in the past six-month period. Under the PIP Law, personal information means information concerning a living person, based on which such person may be identified.⁷²

A business entity covered by the PIP Law must specify, to the greatest extent possible, the purpose for using personal information when obtaining and handling the information. It also must handle personal information securely, confidentially, accurately, and reasonably only to the extent necessary to achieve the intended purpose. In addition, such business entity is prohibited from obtaining personal information falsely or otherwise by wrongful means. Generally, such a business entity may not provide any third party with personal data without the consent of the individual to which the data relates.⁷³ Consent may be obtained in advance by stipulating how the personal information may be used in work rules or in a pledge letter from the employee.

67. *Id.*

68. The Employment Ordinance (H.K.) is Hong Kong's principle employment statute. See Employment Ordinance, 1997, Ch. 57, available at http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc?OpenView&Start=55&Count=30&Expand=57#57 (last visited July 6, 2006).

69. *Vincent v. S. China Morning Post Publishers Ltd.*, Court of Final Appeal, Final Appeal No. 2 of 2005, available at <http://legalref.judiciary.gov.hk/> (follow "Court of Final Appeal" hyperlink; then follow "Final Appeal (Civil)" hyperlink; then follow "2005" hyperlink; then follow "FACV2/2005" hyperlink).

70. *Id.*

71. *Kojin Joho no Hogo ni Kansuru ho* [Personal Information Protection Law], Law No. 57 of 2003, translated at http://www.cs-trans.biz/Personal_Information.htm.

72. See *id.* art. 3, ¶¶ 1, 3; Personal Information Protection Law Enforcement Order art. 2.

73. Personal Information Protection Law arts. 15–17, 19–20, 23.

B. AMENDMENT OF THE PATENT LAW

On April 1, 2005, the amendment to article 35 of the Japanese Patent Law (the Amendment) concerning employees' inventions went into effect.⁷⁴ Prior to the Amendment, when an employer patented an employee's invention, the employee was entitled to reasonable remuneration, determined based on expected profits attributable to the invention and the extent of the employee's contribution to the invention. Following court decisions that awarded large amounts of compensation to certain employees who claimed they were not adequately compensated for their inventions,⁷⁵ the Diet passed the Amendment, which is intended to address the uncertainty in the reasonable remuneration standard as interpreted by these courts.

Pursuant to the Amendment, the remuneration payable to the employee when the employer patents an employee's invention is now generally determined by voluntary agreement between the employer and employee. If the relevant work rules stipulate the method of calculating the remuneration, the method is presumed to be appropriate and reasonable. Due to the disparity in the bargaining power of employers and employees, however, certain employers may force their employees to agree to unreasonable remuneration systems. In light of this risk, the amended Patent Law grants the court the authority to test the reasonableness of remuneration paid to an employee on a case-by-case basis. The court may examine the reasonableness of the remuneration by reviewing the facts and circumstances, including whether the employer considered an opinion from the employee regarding the remuneration. If the court considers the remuneration to be unreasonable, then it must determine the reasonable amount of remuneration. Many companies amended their work rules following the passage of the Amendment, and these work rules sometimes set the remuneration in an amount up to several hundred million yen, depending on the profits generated by the invention.

XI. United Kingdom

A. INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS 2004

The Information and Consultation of Employees Regulations 2004 (ICE), which came into force on April 6, 2005, establish a general framework of minimum requirements that employers must follow for providing information to and consultation with employees.⁷⁶

The ICE regulations require employers to establish works councils or similar employee representative bodies, and an employer generally has six months in which to negotiate an ICE agreement before a default model is put in place. If an employer adopts the works council model, a single, national level works council is not required. Works councils can exist for different sites or business units, and there may be a hierarchy of consultative bodies

74. See Tokkyo Ho [Patent Law], Law No. 121 of 1959, amended by Law No. 79 of 2004.

75. One such case was that of *Shuji Nakamura v. Nichia Kagaku* (Tokyo Dis. Ct., Jan. 30, 2003), in which the Tokyo District Court granted ¥20 billion to an employee as additional compensation for a patented invention. Following the conclusion of this case on January 30, 2005 (which involved an appeal), ¥600 million often is considered to be the largest amount of remuneration that a Japanese court would consider to be reasonable. See http://www.tokyoeiwa.com/index_e.html (last visited July 6, 2006), for details of the *Nakamura* case.

76. See Information and Consultation of Employees Regulations, 2004, S.I. 2004/3426 (U.K.), available at <http://www.opsi.gov.uk/si/si2004/20043426.htm>.

or works councils for selected parts of the business, while less formal arrangements apply to other parts of the business.

Although all employees in an undertaking must be covered by some information and consultation arrangement, a group of companies considered to be comprised of several undertakings for the purpose of the ICE regulations need not all be covered by one information and consultation arrangement. Each company within the group may be treated differently and either be covered by a separate arrangement or be part of one arrangement applicable to the entire group. A European works council operating at a pan-European level, however, is not sufficient for the purpose of the ICE regulations.

B. EMPLOYMENT EQUALITY (SEX DISCRIMINATION) REGULATIONS 2005

The Employment Equality (Sex Discrimination) Regulations 2005 came into effect on October 1, 2005, and prohibit sex-based harassment (harassment of a sexual nature) and harassment on the grounds of gender reassignment (an employee's change of gender).⁷⁷ Previously, individuals who complained about harassment at work had to pursue claims for direct sex discrimination. New regulations, however, outlaw harassment-related victimization and provide a new definition of indirect discrimination that states that a person now discriminates against a woman if:

he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but—(i) which puts or would put women at a particular disadvantage when compared with men, (ii) which puts her at that disadvantage, and (iii) which he cannot show to be a proportionate means of achieving a legitimate aim.⁷⁸

This new indirect discrimination definition also applies to discriminatory treatment against married people, but does not apply to gender reassignment cases (currently only direct discrimination on grounds of gender reassignment is prohibited). Also, the new regulations underscore the fact that treating a woman less favorably on the grounds of pregnancy or maternity leave constitutes sex discrimination.

C. DISABILITY DISCRIMINATION ACT 2005

The Disability Discrimination Act 2005 (DDA) makes several amendments to the employment-related provisions of the Disability Discrimination Act 1995, the most significant of which are that (i) the definition of disability is extended to cover HIV, cancer, and Multiple Sclerosis from the point of diagnosis, and (ii) there no longer is a requirement that a type of mental illness must be clinically well-recognized to amount to an impairment.⁷⁹

D. CIVIL PARTNERSHIP ACT 2004

The introduction of the Civil Partnership Act 2004 (CPA) has enabled two people of the same sex to gain legal recognition of their relationship by entering into a "civil partnership"

77. See Employment Equality (Sex Discrimination) Regulations, 2005, S.I. 2005/2467 (U.K.), available at <http://www.opsi.gov.uk/si/si2005/20052467.htm>.

78. *Id.*

79. See Disability Discrimination Act, 2005, c. 13 (U.K.), available at <http://www.opsi.gov.uk/acts/acts2005/20050013.htm>.

in the United Kingdom, in effect from December 5, 2005.⁸⁰ The CPA provides for rights between the civil partners and third parties, including employers, and amended legislation so as to create employment rights for civil partners with respect to discrimination on the grounds of marital status and sexual orientation; paternity and adoption leave and pay (including adoption from overseas); the right to request flexible working; and the right to pensions and other benefits.

XII. United States⁸¹

A. SUPREME COURT EMPLOYMENT CASE LAW

In March 2005, the United States Supreme Court resolved a split in the federal appellate courts regarding the Age Discrimination in Employment Act of 1967 (ADEA). In *Smith v. City of Jackson, Mississippi*, a 5-3 decision (former Chief Justice Rehnquist did not take part in the decision), the Supreme Court clarified that a covered individual (*i.e.*, a present or former employee or a job applicant who is age forty or older) may bring a disparate impact claim against an employer under the ADEA.⁸² Under *Smith*, a covered individual does not need to establish that the employer engaged in intentional discrimination in order to prevail. Rather, a covered individual may now prove his or her claim by showing that an employer's facially neutral policy, when applied, adversely affects employees age forty or older more than it does employees under forty years of age. In reaching this decision, the Court relied on the language of the ADEA that closely mirrors that of Title VII of the Civil Rights Act of 1967 (Title VII), which the Court previously held authorizes a disparate impact theory of recovery.⁸³ The Court further distinguished a disparate impact claim under the ADEA from Title VII and narrowed the scope of claims available under the former. Under language unique to the ADEA, an "otherwise prohibited" action of an employer is lawful if the employer based the action on "reasonable factors other than age."⁸⁴ The Court ultimately affirmed the Court of Appeals decision and rejected the plaintiffs' claims because they failed to isolate and point out any specific employment practice that was allegedly responsible for any statistical disparity based on age.

In November 2005, the Supreme Court resolved another split among the Circuit Courts in the wage and hour context. In *IBP, Inc. v. Alvarez*, the Supreme Court held that, when the donning and doffing of unique or specialized clothing or other gear are so integral to the employee's principal activity that they are themselves principal activities, then the time an employee spends walking between the clothes changing area and the work production

80. See Civil Partnership Act, 2004, c. 33 (U.K.), available at <http://www.opsi.gov.uk/acts/acts2004/40033--v.htm>.

81. For the calendar year 2005, the National Labor Relations Board (NLRB) operated with only three members after two of the members' terms expired in 2004. Although the short-staffed NLRB managed to decide many cases, the NLRB did not decide significant pending cases such as *Dana Corporation* and *Metaldyne Corporation*, involving the use of neutrality and card-check agreements, which could have sweeping effects on the organizing efforts of unions.

82. *Smith v. City of Jackson, Mississippi*, 544 U.S. 228, 240 (2005). This decision is consistent with the interpretation of the ADEA by the United States Department of Labor and the Equal Employment Opportunity Commission (EEOC). See *id.*

83. *Id.* at 235 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

84. *Id.* at 240.

area is compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.⁸⁵ The Court further held that pre-donning waiting time is not compensable, but pre-doffing waiting time is compensable. The Court reasoned that “any activity that is ‘integral and indispensable’ to a ‘principal activity’ [in the workplace] is itself a ‘principal activity’” for which an employer must compensate non-exempt employees.⁸⁶

B. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

In October 2005, the Office of Federal Contract Compliance Programs (OFCCP) issued new rules, which took effect on February 6, 2006, concerning the tracking of internet job applicants.⁸⁷ The new rules require employers who are federal contractors and subcontractors to take affirmative action to ensure that they do not discriminate unlawfully in their employment processes. The new rules provide guidance as to when employers who use the Internet and electronic data processing technologies in their recruitment efforts must collect and maintain data about a job applicant.

85. *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005).

86. *Id.*

87. 41 CFR 60-1.12.

