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Ashurst's World@Work

Welcome to the latest edition of our global bulletin "Ashurst's World@Work", covering new developments and hot topics from around the world of relevance to multinational employers.

We are delighted that Ross Alcock and Pareen Rogers of ENSafrica, Africa's largest law firm, have contributed our feature article which looks at the expansion of discrimination claims by employees in South Africa and in particular what employers need to be aware of when dealing with "equal pay for equal work" claims.

This bumper edition also updates employers on proposed legislation in Australia to prevent "double dipping" by employees in relation to paid parental leave and looks at the scope of non-solicitation clauses following recent case law in Sweden. Our colleagues in Asia then take a look at the impact of the China–Australia Free Trade Agreement; we examine the difficulties which the new minimum wage rules in Germany are presenting for employers; and consider a recent European Court of Justice decision on collective redundancies in Spain.

If you would like to discuss any of the issues raised in this edition, please speak to your usual Ashurst contact or to anyone whose contact details are listed at the end of the bulletin.

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FEATURE ARTICLE

Discrimination claims in South Africa: widening the ambit

by Ross Alcock and Pareen Rogers

Discrimination in a South African context formed the basis of the apartheid doctrine. Accordingly, in post-apartheid South Africa, substantive equality forms the cornerstone of the South African Constitution where the equality clause, as it is generally known, requires national legislation to be enacted to prevent or prohibit unfair discrimination. The 1998 Employment Equity Act (EEA) is one such piece of legislation that has a twofold purpose, namely to: (i) promote affirmative action; and (ii) prevent unfair discrimination in the workplace.

The amended EEA and inclusion of equal pay for equal work claims

Section 5 of the EEA essentially places a positive obligation on employers to eliminate unfair discrimination in the workplace. The so-called "traditional basis" upon which an unfair discrimination claim may be brought under the EEA is to be found in the grounds listed in section 6(1) of the EEA which prohibits discrimination against any employee in any employment policy or practice on any listed ground (see the box below).

Grounds for unfair discrimination claims

The grounds set out in the EEA include race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth, and any arbitrary ground.

These grounds do not expressly mention an unfair discrimination claim based on unequal remuneration. The Labour Courts in South Africa have nevertheless been called upon on occasion to adjudicate such claims and have held that there is no reason why equal pay claims should not be brought under the EEA. In fact, it held definitively in a 2010 case that the prohibition against unfair discrimination in section 6(1) of the EEA incorporates claims of equal remuneration for work of equal value. Amendments to the EEA which came into force on 1 August 2014 have, however, clarified the position and now specifically include what is generally known in other jurisdictions as an "equal pay for equal work" claim or a wage discrimination claim.

Sections 6(4) and 6(5) of the EEA provide as follows:

"*(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) is unfair discrimination.*

(5) The Minister, after consulting the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4)."

Regulations have been enacted by the Minister to give effect to section 6(5) of the EEA. These are discussed below.

Other amendments to the EEA are that if employees earn below the earnings threshold as prescribed by the Minister of Labour, which is currently ZAR205,433.30, they are entitled to refer their unfair discrimination claim to the Commission for Conciliation, Mediation and Arbitration (CCMA) within six months of the alleged discrimination arising. Previously, such claims could only be brought in the Labour Court. This is a significant amendment insofar as it opens the door for litigants who do not have the financial resources to litigate in the Labour Court to seek relief from the

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CCMA where there are no costs associated with legal representation. It is likely that this will result in a substantial number of unfair discrimination disputes being referred to the CCMA. Employers therefore need to prepare themselves for litigating equal pay claims, as the scope for bringing such claims has increased significantly.

Regulations – what is "work of equal value"?

The Regulations give teeth to the amendments to the EEA and, in particular, the interpretation of section 6(4). It obliges employers to take steps to eliminate differences in the terms and conditions of employment, including the remuneration of employees who perform work of equal value, if those differences are based on a listed ground in section 6(1) or any arbitrary ground. Further, employers must ensure that employees are not paid different remuneration for work of equal value based on race, gender or disability. The crux of the Regulations is the interpretation of "work of equal value" and the criteria and methodology prescribed for assessing work of equal value. It is also this aspect that CCMA arbitrators (who have not traditionally dealt with discrimination disputes) will have to come to grips with. If an equal pay claim is lodged with the CCMA, the starting point for the employer in defending such a dispute is to assess whether the work is factually "work of equal value". Such an assessment must take place in accordance with the prescribed Regulations 4 to 7.

According to Regulation 4, "work of equal value" is:

- **Work that is the same** (this is work that is identical or interchangeable and will require an assessment of the actual duties performed);
- **Work that is substantially the same** (work that is sufficiently similar so that the employees can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable); or
- **Work that is of the same value**.

An assessment of whether work is of the same value requires careful consideration of Regulations 5 to 7.

Regulation 5 prescribes the methodology to be adopted when considering work of equal value and is essentially a two-phase enquiry:

- **Phase 1**: First establish whether the work is in fact work of equal value in accordance with Regulation 6 and whether there is a difference in the terms and conditions of employment, including remuneration.
- **Phase 2**: Does the difference constitute unfair discrimination?

Regulation 6 requires an objective assessment (free from bias) of the relevant jobs, taking into account:

- the responsibility demanded by the work, including responsibility for people, finances and material;
- the skills, qualifications and experience required to perform the job;
- the physical, mental and emotional effort to perform the work;
- the conditions under which the work is performed; and
- any other relevant factor.

An employer may also justify the value assigned to an employee's position by referring to the classification given to a particular job by way of a sectoral determination made under the 1997 Basic Conditions of Employment Act that is binding on the employer. A sectoral determination sets minimum terms and conditions of employment, including remuneration, in particular industries. Accordingly, if jobs are afforded the same value and corresponding remuneration in a sectoral determination, an employer is justified in basing its remuneration levels on that particular classification.

Justification for difference?

Regulation 7 sets out the factors that justify a differentiation in terms and conditions of employment of employees performing work that is of equal value. It provides that a difference in the terms and conditions of employment, including remuneration, is not unfair discrimination if it is based on one or more of the following grounds:

- seniority or length of service;
- qualifications, ability, competence or potential above the minimum requirements for the performance of the job;
- performance, quantity or quality of work, provided that the employees are equally subjected to the employers' performance evaluation systems and this system is applied consistently;
- where an employee is demoted as a result of organisational restructure or any other legitimate reason;
- the existence of a shortage of relevant skills or the market value in a particular job classification; and
- any other relevant factor.

A differentiation on any of the above grounds will only be fair and rational if it can be established that its application is not biased and it is applied in a

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proportionate manner. The grounds for the justification therefore must themselves not be discriminatory, otherwise the justification will not pass muster under Regulation 7.

What must a claimant prove in order to succeed with an equal pay for equal work claim?

The starting point is to find an appropriate comparator in the workplace and then establish that the difference in pay is based on a listed ground. Unless the employer can demonstrate that the differentiation is fair, the claimant will succeed. Essentially the claimant simply needs to make out a prima facie case on the merits to succeed. This is in accordance with the intention of the legislature, when enacting the amendments to the EEA, which is to allow easier access to justice for all and to uphold one of the fundamental tenets of the EEA which is to prevent discrimination.

Importance for employers

The widening of the traditional unfair discrimination claim to specifically now include a pay discrimination dispute certainly brings the issue of remuneration levels and other terms and conditions of employment sharply into the spotlight. There may be a number of reasons (not all of them justifiable) why employers may, for example, be paying men higher salaries than women in the same position. The Regulations will require employers objectively to assess job "worth" as opposed to simply paying remuneration in accordance with occupational levels or traditional job categorisation. Pay equity essentially requires jobs of comparable value to be remunerated on the same basis. Comparing jobs on the basis of equal value means jobs that are entirely different may be used as the basis for equal pay claims. Job comparisons can be made both at occupational level and between different structures or departments. Equal value, from a gender perspective, is likely to be important where men and women are employed by the same employer but do different types of work. An objective assessment and analysis of the two jobs is integral in order to understand whether they can be said to be of equal value. In order to eliminate structural inequalities that relate to past legislated racial discrimination that permeated the labour market and workplace in South Africa, an objective appraisal of the two jobs is essential. A failure to do so will render the amendments to the EEA largely ineffective in redressing past inequalities that still exist in the workplace.

Comparing jobs on the basis of equal value means jobs that are entirely different may be used as the basis for equal pay claims.

It is likely that employers will now need to conduct remuneration audits within their different occupational levels or categories and even across these into different departments. In this way, employers can start assessing what, if any, pay differentials exist and identifying the reasons for them. It may be that, historically, a certain category of employees were remunerated on a higher basis than others, not because the work they perform is of a higher value, but simply due to past practice. Identifying whether such practices exist, and whether they will amount to justifiable reasons as required by Regulation 7, will be necessary for employers. Employers will also need to focus on their overall remuneration philosophy and criteria as a result of the amendments to the EEA. In particular, remuneration audits will need to be conducted with the assistance of remuneration experts. In addition, it may be useful for employers to utilise job evaluation systems to grade jobs. However, it must ensure that such a system is transparent and fair and does not in effect discriminate unfairly on any listed or arbitrary ground. Employers will need to ensure that its job profiles are current and in accordance with the operational needs of the business prior to commencing with the evaluation. Monitoring this process and ensuring that it is updated annually is also likely to assist employers.

Conclusion

Not all differences in terms and conditions of employment, including remuneration, are prohibited or will be unfair. Employers are not required to pay all its employees the same remuneration. Only unfair discrimination is prohibited and there are various justifiable grounds for fair differentiation as evidenced above.

Differences in the terms and conditions of employment (including remuneration) of employees of the same employer are not unfair discrimination where the complainant and the comparator do not perform the same or similar work or work of equal value. Accordingly, the assessment of what constitutes "work of equal value" is integral.

A difference in remuneration of employees performing work of equal value will also only be unfair discrimination if the differences are directly or indirectly based on race, sex, gender, disability or any other grounds listed in section 6(1) of the EEA, or any arbitrary ground.

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Australia proposes legislation to prevent employees "double dipping" on paid parental leave

by Jon Lovell, Julie Mills and Hannah Martin

Amid considerable debate, Australia introduced government-funded paid parental leave in 2011. Since its inception, this government scheme of "Parental Leave Pay" has allowed eligible parents to receive Parental Leave Pay at the same time as, and cumulatively with, any paid parental leave offered by the person's employer. But this position may now change.

In May 2015, the Australian Government announced its intention to stop what it described as "double dipping" by workers who receive paid parental leave entitlements from both their employer and the Government. The Government estimates that the measure will save around AU$967m, and has indicated that some of this funding will be redirected into measures to make childcare more available and affordable.

This proposed new approach to paid parental leave is unique to Australia. In other comparable jurisdictions, the issue of "double dipping" does not arise – as, indeed, it did not in Australia until recently. In countries such as Belgium, Britain, France, Germany and Sweden, all of which have statutory paid parental leave schemes funded by their governments, there are no restrictions on "double dipping". In some of those jurisdictions, it is common for employers to "top up" benefits received from the Government or to give additional entitlements.

The Australian debate is also occurring in the context of an international trend towards increasing entitlements to paid parental leave. Across developed countries, the length and availability of paid parental leave has increased considerably in recent decades. According to the OECD, in 2014 the average length of paid leave available to mothers in OECD countries was just over one year. Since 1990, the majority of OECD countries have introduced some form of paid leave for fathers, and in 2014 the average length of paid parental leave available to fathers in OECD countries was just over ten weeks. No figures were published on leave for partners (including same-sex partners).

Paid parental leave in Australia – the current position

Australian employers have long been required to give their employees unpaid parental leave and return employees to their pre-parental leave position or similar position following the leave period. However, there has never been a legislative requirement in Australia for employers to provide paid parental leave.

Nevertheless, many employers choose to offer paid parental leave (through individual contracts, collective agreements or workplace policies). In 2014, 48.1 per cent of Australian organisations which reported to the Workplace Gender Equality Agency (WGEA) (the Australian Government statutory agency charged with promoting and improving gender equality in Australian workplaces) offered paid parental leave for an average length of 9.1 weeks. Of those organisations which paid parental leave, 83.6 per cent did so at an employee's full salary (in addition to the government scheme) and 7.9 per cent "topped up" the government scheme.

The government scheme entitles eligible employees to a total of AU$11,824.20 (being 18 weeks at the minimum wage) during the time that a parent accesses parental leave from their employer. The government scheme also includes "Dad and Partner Pay" (being two weeks' worth of the national minimum wage) payable to fathers and partners (including same-sex partners).

No "double dipping" – proposed changes to eligibility for Government Parental Leave Pay

The Fairer Paid Parental Leave Bill 2015 was introduced into Parliament on 25 June 2015 (2015 Bill).

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The 2015 Bill proposes that when an employee applies for Government Parental Leave Pay, the employee will be required to inform the Department of Human Services of any "primary carer pay" to which they are entitled from their employer. "Primary carer pay" is defined to mean "an amount that an employer is legally obliged to pay an employee, under the terms of the employee's employment, because the employee is on primary carer leave for the child".

An employee will only be able to claim Parental Leave Pay if the total amount of primary carer pay offered by their employer is less than the total amount payable under the government scheme.

The Government will "top up" the primary carer pay offered by an employer if the total offered is less than the total amount offered by the Government, but will not pay anything if the employer pays the same as, or more than, the amount offered by the Government.

The other key change proposed in the 2015 Bill is that employers will no longer be responsible for making Parental Leave payments on behalf of the Government (unless the employer opts to do so and their employee agrees). Rather, employees will receive government payments directly from the Department of Human Services.

How may Australian employers respond to the proposed changes?

While it might seem that there is a reduced incentive for employers to offer their own paid parental leave if the 2015 Bill passes, any changes to employer parental leave schemes may affect their eligibility for a citation as an Employer of Choice for Gender Equality, as issued by WGEA.

An Employer of Choice citation is a public acknowledgement awarded to organisations which demonstrate strong commitment to providing equal opportunities in the workplace. It is currently a prerequisite for a citation that an organisation provides employer-funded paid parental leave for primary carers that equates to a minimum of eight weeks at full pay.

Employers may wish to consider whether there are alternative strategies which would allow their employees to receive both government- and employer-funded paid parental leave benefits (or similar benefits) if the 2015 Bill becomes law.

It remains to be seen exactly which types of employer payments would affect an eligible employee's entitlement to Government Parental Leave Pay. It seems an entitlement to employer-funded paid parental leave under an enterprise agreement would affect an employee's entitlement to Government Parental Leave Pay. It is less clear (and will depend on the yet-to-be-released revised Paid Parental Leave Rules) whether payments which have their source in employer policies, and which are expressed to be discretionary in nature, will count as "primary carer pay".

Non-solicitation clauses in Sweden

by Jenny Jilmstad

Swedish employment law provides that an employee, after ending his or her employment, is free to undertake competitive business elsewhere. This right may be restricted by agreement between the employee and the employer, provided that any non-solicitation clauses included are reasonable. Non-solicitation clauses which do not provide for compensation for the employee may also be reasonable, provided that they only marginally restrict the employee's opportunities to undertake business elsewhere.

The reasonableness of non-solicitation clauses was discussed in a recent judgment of the Swedish Labour

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Court regarding compensation for breaches of a non-solicitation clause included in an agreement between an accountant and his former employer. The clause in question obliged the accountant, for two years after the end of his employment, to pay his former employer 35 per cent of any profits that he made from those clients for which he had been account manager in his previous employment. The reasonableness of a non-solicitation clause has to be assessed in the overall circumstances and, in order to determine whether the clause was reasonable, the Court examined:

- whether the employer had a justified reason for the restriction;
- the impact of the restriction on the accountant's opportunities to undertake competitive business;
- whether the accountant received any compensation; and
- whether the clause had been negotiated between the accountant and the former employer.

The Court found that the clause was motivated by a justified reason: to protect the former employer's existing customer relations. However, the clause was not limited to the customers already in existence when the accountant joined the company but also included those who were taken on during his employment. A majority of the customers covered by the clause had chosen the accountant personally rather than the company in general. The Court further found that the clause did more than marginally limit the employee's opportunities to work as an accountant, since he had been working in the rather small geographical area for 23 years and would have difficulty in continuing as an accountant without work from his existing clients. Further, the accountant did not receive any compensation for agreeing to the restrictions, and the clause was taken from a standard contract and had not been negotiated between the parties. Taking these factors into consideration, the Court concluded that the clause was unfair and declared it invalid.

This judgment is particularly interesting when compared with a judgment given by the Court in 1992. In its earlier judgment, the Court found a similar non-solicitation clause to be reasonable, even though the employee was obliged to pay to his previous employer 50 per cent of the income received from clients of his previous employer. The clause in the earlier judgment only applied to customers already existing at the time the accountant joined the company, unlike the clause in the latest judgment.

In light of the latest judgment, it is now less clear how wide non-solicitation clauses in the accounting industry, as well as in similar industries, may be in order to fulfil the reasonableness requirement.

China–Australia Free Trade Agreement: investment through immigration

by Jennifer Goedhuys and Andrew Valerio

On 17 June 2015, Australia and China signed the much-anticipated China–Australia Free Trade Agreement (ChAFTA). ChAFTA commits the two countries to reducing barriers to labour mobility and facilitating temporary entry access by their respective nationals for business and investment purposes. Both countries have now initiated their domestic treaty-making processes to bring the agreement into force.

China–Australia trade relations

ChAFTA reflects the increasing importance of trade relations between China and Australia. Currently, China accounts for around 24 per cent of Australia's total trade, with imports and exports between the two countries amounting to AU$159.6bn in 2013-14. Unsurprisingly, four of the top five exports from Australia to China are resources (iron ores and concentrates, coal, gold and copper) along with education-related travel services. By contrast, consumer goods, telecommunications equipment and computers feature heavily in the top five imports from China.

ChAFTA is part of a wider endeavour by Australia to build closer economic partnerships with its regional neighbours. It is the third free trade agreement signed

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by the current Australian Government since it took power, after agreements with Japan and South Korea which took effect on 15 January 2015 and 12 December 2014 respectively. These join Australian agreements with each of Singapore, Malaysia and Thailand.

What does this mean for labour mobility?

Both China and Australia have committed to process visa applications expeditiously, provide timely information on application progress, and ensure transparent procedures and requirements relating to the movement of natural persons of each country.

Australian employers will no longer be required to demonstrate that they have attempted to fill vacancies from the local labour market before employing Chinese nationals. Additionally, both countries have agreed not to apply quotas on the total numbers of visas granted under ChAFTA, except as described below.

Business visitors
Entry rules for business visitors have been relaxed, with China committing to grant entry to Australians for a maximum period of 180 days and Australia agreeing to entry by Chinese business visitors for up to 90 days or, where the business visitor is a service seller, six months with the possibility of a further stay.

Intra-corporate transferees
In recognition of the importance to companies of moving their executives from one country to another, ChAFTA seeks to facilitate easier entry arrangements for intra-corporate transferees (ICTs). ICTs who meet the relevant visa eligibility criteria will now be granted entry as follows:

- Australian ICTs entering China: initial stay of three years; and
- Chinese ICTs entering Australia: up to four years with the possibility of a further stay.

Australia and China apply different definitions of ICTs. Most notably, Australia requires Chinese ICTs who are "specialists" to have been employed by the employer for not less than two years immediately before the date of application for temporary entry.

Unlike the free trade agreements between Australia and each of Singapore, Malaysia and Thailand, ChAFTA does not prescribe a maximum overall duration of stay for ICTs.

Independent executives
Specific rules have been introduced to make it easier for Chinese companies to open an office in Australia for the first time. Australia has committed to granting entry for up to four years to "independent executives". This includes executives of Chinese enterprises who are establishing a branch or subsidiary in Australia and who will be responsible for the entire, or a substantial part of, the enterprise's operations there.

There is no reciprocal arrangement for independent executives of Australian enterprises establishing a presence in China.

Contractual service suppliers
Both countries have committed to increasing market access for service suppliers in various industries and facilitating entry for a broad category of employees of certain companies that provide services in the other country. These employees are known as contractual service suppliers (CSSs).

Australian CSSs will be granted an initial stay of one year in China (or longer if stipulated under the relevant contract) provided they work in the following service sectors:

- medical and dental;
- architectural;
- engineering;
- urban planning (except general urban planning);
- integrated engineering;
- computer;
- construction and related engineering;
- education (with eligibility requirements);
- tourism; and
- accounting.

Chinese CSSs working in any sector can enter Australia for up to four years with the possibility of a further stay. Additionally, there will be access for up to a combined total of 1,800 CSSs per year in the following occupations:

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- Chinese chefs;
- Wushu martial arts coaches;
- traditional Chinese medicine practitioners; and
- Mandarin-language tutors.

Installers and maintainers
Australian installers and maintainers/servicers of machinery or equipment will be granted entry into China for 180 days and those from China will be allowed into Australia for up to three months.

Spouses and dependants
For the first time in any free trade agreement, China will grant equivalent entry and stay rights to dependants and spouses of Australian ICTs and CSSs who have been granted entry for longer than 12 months.

Australia already provides equivalent entry and stay rights to dependants and spouses of all natural persons granted entry for longer than twelve months, not just in respect of ICTS and CSSs.

Investment Facilitation Arrangements

It will now be easier for Chinese-owned companies registered in Australia to negotiate with the Department of Immigration and Border Protection for labour flexibilities relating to specific projects. These Investment Facilitation Arrangements (IFAs) will apply to certain large infrastructure development projects with expected capital expenditures of AU$150m. The areas that can be subject to negotiation include:

- the occupations covered by the IFA project agreement;
- English-language proficiency requirements;
- qualifications and experience requirements; and
- calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold (TSMIT). The TSMIT is the minimum salary rate for which a position can be nominated under Australia's temporary skilled work visa programme.

Although the TSMIT will be subject to Australian minimum wages and conditions legislation, it need not conform to actual market rates paid to Australian workers in the industry in question.

There is no equivalent provision for IFAs for Australian companies in China.

Work and holiday visas

Australia has agreed to grant up to 5,000 work and holiday visas annually to Chinese nationals between 18 and 30 years of age. The visas will be valid for temporary stays of up to 12 months. These measures are intended to increase understanding between the two countries' young people and to develop and strengthen Australia's tourism industry, particularly in rural areas. The tourism industry has been identified as one of five "super-growth" sectors within the Australian economy with the potential to be the fastest-growing industries over the next three decades.

The German Minimum Wage Act – an overview

by Alexander Schumacher

With the German Minimum Wage Act (Act) coming into effect, there has been a nationwide, cross-sector statutory minimum wage of €8.50 per hour in Germany since 1 January 2015. Germany is following a European trend, as 22 of the 28 Member States of the European Union now have a statutory minimum wage. The implementation of the Act is, however, causing considerable difficulties. Even in the first few weeks following the introduction of the minimum wage, there were numerous practical problems with its application. In this article, we look briefly at the most important issues.

The main provisions

The minimum wage of €8.50 (gross) per hour applies to anyone employed in Germany, regardless of the country in which the employer is based.

Excluded from the minimum wage are freelancers, trainees and young people without a professional

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qualification, as well as individuals undergoing compulsory practical training within the framework of a traineeship or degree course. The long-term unemployed who have been out of work for at least a year may only claim the minimum wage six months after they have started a new job.

The minimum wage is mandatory. Claims by an employee to arrears of the minimum wage can only be waived by means of a court settlement.

***Note**: Employers should take this point into consideration when they negotiate with employees in relation to pay claims. A non-court waiver is only effective with respect to contractual claims which exceed the minimum wage but not with respect to a statutory minimum wage claim.*

Calculation

The minimum wage is calculated per hour. Employers should be aware that a minimum wage claim may also accrue for overtime worked. It is permissible to include overtime within a fixed monthly salary provided the total hours worked (both fixed and overtime) are paid at an average rate at least equal to the minimum wage.

For example, if an employment agreement provides for 160 hours of work per month at an hourly rate of €9 (€1,440 in total), then the minimum wage level would be breached in the tenth hour of unpaid overtime within a month (€1,440 ÷ 170 = €8.47).

It is currently unclear which components of remuneration have to be included in calculating the minimum wage. The Act does not contain a provision dealing with this issue. It remains to be seen, therefore, how court rulings will develop in this area. It can be gleaned from the explanatory memorandum to the Act, however, that variable remuneration components can only be taken into account if they are paid as consideration for the regular activities of the employee. Remuneration elements which have another purpose are not taken into account. This includes, for example, overtime payments, night shift, weekend and public holiday surcharges, "danger" money and "dirty work" bonuses. Bonus payments, such as Christmas and holiday allowances, are problematic in this context. The purpose of the payments must be determined in each individual case.

***Note**: Existing employment agreements must be urgently reviewed to determine whether the agreed hourly rate and working hours need to be adjusted. In addition, it is advisable to convert as many components of remuneration as possible into fixed remuneration.*

Record-keeping

The Act contains extensive record-keeping obligations. As of 2015, it is compulsory that employers and hirers (of workers) record the daily working hours of specific employees and retain them for at least two years. The employer must specifically record the beginning and end, as well as the length, of the working hours of marginal or short-term employees (mini-jobbers), as well as employees who work in the construction industry, gastronomy, the meat industry, cleaning services and shipping companies. This creates an enormous additional administrative burden for the employer and complicates the comparatively unbureaucratic mini-job.

Transit traffic

The question of whether the minimum wage applies to workers transporting persons and goods by way of purely transit traffic through Germany remains undetermined. According to the legislators, the statutory minimum wage also applies to lorry drivers of foreign employers, even if they use Germany only as a transit route. Several Member States have lodged complaints with the EU Commission about this. The Commission has already reacted and has temporarily suspended the punishment of breaches of the Act for pure transit traffic until the European law issues are clarified.

Principal liability

The biggest problem in practice has been created by the new principal liability.

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According to that principle, a company is liable as a guarantor for any failure by a subcontractor instructed by it to pay its employees the statutory minimum wage. This liability extends to all employees of the subcontractor. It includes, however, not only the direct subcontractor but also further service providers who are instructed by the subcontractor itself. Liability is without fault, i.e. the principal is also liable when unaware of breaches by the subcontractor.

Liability risks which are hard to ascertain may be triggered in the future for many companies by this provision.

***Note**: Companies who use subcontractors should pay attention to minimising these far-reaching liability risks by means of protective mechanisms within contractual arrangements. This is possible via a retention right when paying subcontractors. In addition, the principal should be indemnified by subcontractors in respect of minimum wage claims and be granted preventative control rights such as the right to receive wage records. Engaging further subcontractors should be dependent on the consent of the principal. Companies should be given proof at regular intervals, particularly in the case of suspicion, of their subcontractors observing the minimum wage.*

Summary

In light of the numerous issues which may arise under the Act, companies should make preparations to avoid, or at least reduce, risks in connection with the statutory minimum wage. Companies should ensure they comply with the provisions of the Act, since breaches may not only lead to claims for back payments but also may be punished by a fine of up to €500,000 in individual cases. Finally, a breach may also lead to exclusion from public tenders.

In order to guarantee compliance with the minimum wage, companies should do the following:

- analyse existing subcontractors in respect of minimum wage risks;
- revise agreements with subcontractors in light of the principal liability;
- integrate the minimum wage into internal compliance systems and guidelines;
- check remuneration systems for components of remuneration which are potentially not relevant to the minimum wage; and
- check intern and trainee programmes, as well as the existing conditions of other activities which are job-related, to determine whether there is a need for adjustment as a result of the Act.

Determining the threshold for a collective redundancy consultation in Spain

by Diana Rodríguez Redondo

In a case heard by the European Court of Justice in May this year, the Court considered what the appropriate reference unit is when determining whether the threshold has been reached for a collective redundancy consultation, according to the number of workers affected.

The relevant European Directive provides that a collective redundancy means the dismissal by an employer, for one or more reasons not related to the individual workers concerned, of a certain number of workers in an "establishment" over a certain period.

On the other hand, under Spanish legislation, a collective redundancy means the termination of employment contracts on economic, technical, organisational or production grounds, where, over a certain period, the termination affects at least a certain number of workers in an "undertaking". The thresholds are:

- in undertakings with fewer than 100 workers – ten workers;
- in undertakings with between 100 and 300 workers – ten per cent of the workers; and

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- in undertakings with more than 300 workers – 30 workers.

Therefore, whereas the Directive states that the reference unit used for the definition of collective redundancy is an "establishment", Spanish law uses an "undertaking" as the only unit of reference.

The Court ruled that the terms "undertaking" and "establishment" are different. An "establishment" is a distinct entity and must be interpreted as designating the unit to which the workers made redundant are assigned to carry out their duties. An "undertaking" comprises several entities and the "establishment" normally constitutes a part of an "undertaking".

This apparent contradiction has been viewed by the Court as a deficient transposition of the Directive into national law. It declared that the Directive must be interpreted as precluding national legislation that refers to the "undertaking" and not the "establishment" as the sole reference unit, where the effect of that is to exclude the information and consultation procedure provided for in the Directive, when the dismissals in question would have been considered a "collective redundancy" had the "establishment" been used as the reference unit.

Consequently, in order to determine when a collective redundancy arises according to Spanish legislation, a twofold analysis should be carried out:

- firstly, the undertaking should be taken as the reference unit and, in the event that the statutory thresholds for the number of workers affected are not reached, the establishment where the affected employees perform their services should be taken as the reference unit; and
- secondly, if the thresholds are reached using the establishment as the reference unit, there would be a collective redundancy and, therefore, the requirements of Spanish law in relation to consultation would apply.

This doctrine has already been applied by the Spanish courts, in particular in a judgment of the High Court of Justice of the Basque Country of 21 May 2015.

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