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L&E Global's Employment Law Tracker April 2017

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BELGIUM

- **Latest Case Law**

Belgium: Always check whether a person is competent to fire an employee!

An employee was fired for serious cause by the CEO of her company. Although the bylaws of the company determined that a dismissal could only be given by a managing director appointed by the Board of Directors, the dismissal letter was signed by the CEO, who was not a managing director. The employee therefore fought her dismissal in court. During the procedure, the dismissal decision of the CEO was ratified by the Board of Directors of the company.

The Labour Court of Appeal however judged that - in view of the fact that a dismissal for serious cause must be given within a period of three working days after the competent body has taken knowledge of the facts, which form the basis for the dismissal for serious cause - also the ratification of such a decision taken by an incompetent person must be done within that same period.

In this particular case the ratification occurred outside that time period. Moreover, the employee concerned had challenged the competence of the CEO three weeks after the dismissal, which was considered reasonable by the Labour Court. As a consequence, the Court ruled that the dismissal for

serious cause was irregular. The employer was therefore condemned to pay a severance pay to the employee.

- **Impending Changes of Legislation**

Belgium: Unemployment with a Company Allowance: new rules!

'Unemployment with a Company Allowance' (formerly known as "bridging pension") is a system where an employee who is fired at a certain age, is entitled to a fixed unemployment allowance paid by the State, supplemented with a company allowance paid by his former employer. In principle, an employee must reach the age of 62 and have a career of 40 years (male employees) / 33 years (female employees) (in 2017) to be eligible for this system. However, in addition to this general system, there are multiple exceptions for which the age and career requirements are lower (eg. for employees who work in a heavy occupation or for employees who work in a working time regime with night work). Recently, the National Labour Council adopted multiple Collective Bargaining Agreements (CBA's nrs. 120-126) which determine the age- and career conditions for these deviating systems for the years 2017-2018. Now it is up to the Joint Committees to further implement these national CBA's at the sector of industry level.

Belgium: Reintegration of long-term sick employees now sanctioned

As mentioned in our Web Alert of December 2016, long-term sick employees are encouraged to (partially/progressively) return to work by running through a reintegrationpath. This reintegrationpath is a specific procedure aimed at examining whether an adapted position or an altogether different position can be offered to an employee, who is incapable of continuing to perform the initially agreed upon function. In order to ensure the cooperation of the various actors in this reintegration process, the Government has reached an agreement on the sanctions for not complying with the established rules. This agreement must now be put into legislation. In general, the agreement foresees a fine of 800 EUR for an employer who 1) does not promote the reintegration of a long-term sick employee in his company; or 2) does not timely propose a reintegrationplan (when other adapted work is possible); or 3) does not submit (timely) a motivated report (when other work is not possible). An employee who does not comply with his/her obligations regarding his/her reintegration will be sanctioned with a lowering of his/her incapacity benefit.

CANADA

- **Latest Case Law**

Canada: Court dismisses union's application for injunction restraining random drug and alcohol testing

In 2010, the Toronto Transit Commission (the "TTC") implemented a "Fitness for Duty Policy" (the "Policy") that provided for drug and alcohol testing of employees in positions that had been identified as "safety-sensitive", as well as certain management and executive positions. In 2011, the Policy was amended to provide for random drug and alcohol testing for employees in safety-sensitive positions. The TTC sought to implement random testing in 2016.

The Amalgamated Transit Union, Local 113's (the "Union") filed a grievance in 2010 alleging that the Policy violated the Collective Agreement, the Ontario *Human Rights Code*, and the *Canadian Charter of Rights and Freedoms*. When the TTC notified the Union in 2016 that random testing would be

implemented, the Union filed an application with the Court for an interlocutory injunction to prohibit the TTC from implementing random testing pending the resolution of the arbitration hearing. By 2016, the grievance arbitration was in its sixth year of hearing, with no end in sight.

The Union argued that random drug and alcohol testing would cause psychological harm and reputational damage, and that it would permanently damage the relationship between employees and management. However, the Court found that the Union had failed to demonstrate that bargaining unit members would suffer "irreparable harm" in respect of their privacy rights if the injunction was not granted. In support of this finding, the Court concluded that:

1. bargaining unit members' expectation of privacy concerning drug and alcohol consumption was reasonably diminished, as they would expect that steps would be taken to ensure that individuals in safety-sensitive positions were fit for duty;
2. the procedures and methods the TTC had chosen to randomly test for drugs and alcohol were both minimally invasive and reliable, relative to other available methods of testing;
3. the Policy was reasonably tailored to achieve its stated health and safety purpose; and
4. any contraventions of the Collective Agreement or the *Human Rights Code* pursuant to the Policy could be remedied by the payment of monetary damages to affected employees.

The Court also found that the "balance of convenience" favoured refusing the injunction. In assessing the "balance of convenience", a court must determine which of the two parties will suffer the greater harm from the granting or refusal of the injunction. After reviewing the evidence, including extensive expert evidence regarding the efficacy of the proposed alcohol and drug testing methods, the Court found that random testing would enhance public safety by increasing the likelihood that employees in safety-sensitive positions prone to drug or alcohol use would either be detected or deterred by the prospect of being randomly tested. Weighing this benefit against the potential invasion of employees' reasonable expectation of privacy, the Court concluded that the balance of convenience favoured the TTC.

The injunction was dismissed and the Union's challenge to the TTC's Policy will continue to proceed at arbitration.

- **Impending Changes of Legislation**

Canada: Bill *to prohibit and prevent genetic discrimination* expected to receive Royal Assent

Upon receiving Royal Assent and coming into force, federal Bill S-201 would prohibit employers from requiring employees to undergo a genetic test or disclose the results of a genetic test. Bill S-201 would also prohibit discrimination on the ground of genetic characteristics.

Bill S-201 includes broad prohibitions against requiring genetic testing as a condition of providing goods or services, entering into contracts or continuing a contract, or entering into or continuing specific provisions in a contract. Limited exceptions would apply to healthcare practitioners and researchers.

Employers should note that, as per Bill S-201, every person who requires an individual to undergo a genetic test as (a) a condition of providing goods or services to that individual, (b) entering into or continuing a contract or agreement with that individual, or (c) offering or continuing specific terms or conditions in a contract or agreement with that individual, would be liable for fines of up to $1,000,000 upon conviction on indictment or up to $300,000 on a summary conviction, to imprisonment, or both.

Concerns have been raised regarding the constitutionality of this bill. Once it receives Royal Assent, Bill S-201 will likely be referred to the Supreme Court of Canada.

- **Other Observations**

Canada: Federal Government announces extension to parental leave

In its March 2017 Federal Budget, the Government of Canada addressed Employment Insurance ("EI") Parental Leave and Maternity Leave Benefits.

The good news for pregnant women is that the number of weeks for which they can claim EI Maternity Benefits before their due date could be bumped up to twelve (12) weeks from the current eight (8).

The Budget also proposes to allow parents to choose to receive EI Parental Benefits for a period of up to 18 months instead of the 12 months presently available. While this sounds positive, there is a catch. Currently, EI Parental Benefits are available to employees while off work at a rate of 55% of the employee's average weekly earnings. The proposed changes would reduce that rate to 33% of average weekly earnings.

So, while these changes would see benefits extended over a longer period of time, individuals would receive a lower rate of compensation over the entire 18-month period.

It remains to be seen how many people will be able to take advantage of the extended period of leave given that no additional compensation will be available.

Notably, the Government of Canada is proposing amendments to the *Employment Insurance Act* and the *Canada Labour Code* to reflect these changes. It is not yet clear whether there will be any corresponding changes to the job-protected leaves available provincially.

CHINA

- **Latest Case Law**

China: Employees would be liable for breaching the non-disclosure of remuneration information clause agreed upon by both parties

Mr. Chen signed an employment contract and a Confidentiality Agreement with Company A on January 26, 2015. According to the Confidentiality Agreement, the information about an employee's remuneration and benefits was confidential and should not be directly or indirectly disclosed to any third party or any irrelevant employees of Company A. In January 2016, Mr. Chen was reported to have discussed remuneration information with other employees and disclosed the remuneration information of other employees through on-line chat tools. Company A thought Mr. Chen's behavior had breached the Confidentiality Agreement and adversely influenced the normal business operations of the company, so it sent a notice to Mr. Chen to terminate his employment contract as of January 15, 2016. Eventually, the case was brought to the court. The judges opined that the Confidentiality Agreement was concluded based on the real intention of both parties, and its content was valid without contravention of any law and regulation, so Mr. Chen should perform his confidentiality obligation and should not disclose the remuneration information. As a result, Company A's termination of Mr. Chen's employment was determined to be justified. In view of the above, in the judicial practice, the non-disclosure of a remuneration information clause agreed based on both parties' real intention shall be valid, and the employee violating such clause shall assume corresponding responsibilities.

- **Impending Changes of Legislation**

China: The new work permit system for foreigners working in China has been implemented across China as of April 1, 2017

On March 28, 2017, the State Administration of Foreign Experts Affairs and three other ministries of China released the Circular on the Full Implementation of the Work Permit System for Foreigners Working in China (the "**Circular**"). According to the Circular, since the pilot work related to the implementation of the new work permit system for foreigners working in china has been carried out in Beijing, Tianjin, Hebei, Shanghai, Anhui, Shandong, Guangdong, Sichuan, Yunnan, Ningxia and other regions and made remarkable progress, the new work permit system for foreigners working in China shall be implemented across China as of April 1, 2017. From April 1, foreigners shall apply for the Circular of the People's Republic of China on the Work Permit for Foreigners (the "Circular on the Work Permit for Foreigners") and the Work Permit of the People's Republic of China for Foreigners (the "Work Permit for Foreigners") before working in China. The relevant visa and residence permit shall be issued to foreign workers based on the aforementioned Circular on the Work Permit for Foreigners and the Work Permit for Foreigners.

FRANCE

- **Latest Case Law**

France: A fixed-term contract may include a suspensive condition

The Labor Code provides that a fixed-term employment contract may be terminated only if the parties have agreed, or if there was serious misconduct, force majeure or unfitness ascertained by the occupational physician. However, the contract may provide for a suspensive condition on which its execution depends. Such a clause is valid if the contract has not yet started. For example, a collective bargaining agreement may stipulate that an employee's employment contract should only come into effect after a medical examination, which must be carried out with the employer's diligence within 72 hours. To the extent that the employee had not taken up his duties, the Court of Cassation held that this clause was valid.

- **Impending Changes of Legislation**

France: European Data Protection Regulation enters into force on 24 May 2018

On 25 May 2018, the European Data Protection Regulation will go into effect. Many formalities with the body that manages the protection of personal data in France (the CNIL) will disappear. In exchange though, the responsibility of employers will be strengthened. They will have to ensure optimal data protection at every moment and be able to demonstrate it by documenting their compliance. They will also have to manage the risks and put in place internal procedures to protect employees' personal data. In order to help companies prepare for this deadline, the CNIL has published a practical fact sheet on its website, detailing the various obligations that employers must comply with, through 6 handy steps.

GERMANY

- **Latest Case Law**

Germany: Customer request does not justify a "headscarf ban"

The female plaintiff of Muslim faith was working as a software designer for a private employer. After a customer complained that she was wearing an Islamic headscarf in the workplace, the employer reaffirmed the principle of necessary neutrality with regard to his customers and asked the plaintiff not to wear the headscarf anymore. The plaintiff did not fulfill that request and was therefore dismissed.

The European Court of Justice ruled that the willingness of an Employer to take account of the wishes of a customer to no longer have the services of that employer provided by a worker wearing an Islamic headscarf, cannot be considered a genuine and determining occupational requirement within the meaning of that provision (Article 4 Para. (1) of Council Directive 2000/78/EC). The request of the customer can therefore not be used to justify the difference in treatment of the employee. Furthermore, the Court has emphasised that it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.

The verdict of the European Court of Justice is based on a case before the local courts in Belgium, but will have to be considered in all European jurisdictions, including Germany.

Germany: Burden of proof in a court proceeding regarding payment for overtime

In the case at hand, an employee claimed remuneration for overtime work. As a rule, an employee claiming payment for overtime work must demonstrate in a court proceeding that he/she actually worked the overtime as claimed and that this was instructed or tolerated by the employer. In the present case, the employee was employed as a vehicle operator and obliged to work overtime within the framework of the law. His truck was equipped with a digital trip recorder. Times apart from the driving period needed to be manually recorded as “other working time” or “break”. The employee calculated his overtime with his driver card. In his writs submitted to the court, he explained which days he drove, for what period of time and for which tour.

The German Federal Labour Court ruled that the explanations of the employee in his writs were sufficient for demonstrating the overtime worked in a first step. Based on these explanations, the employer was obliged to demonstrate which tasks he assigned to the employee and when and to what extent the employee fulfilled these tasks. In particular, the employer must demonstrate that the assigned tasks could be completed within the employee's regular working time. If the employer is not able to fulfill these requirements, the court will base its ruling on the data submitted by the employee. Therefore, this judgment will likely make it easier for employees to enforce claims for overtime payment in the future.

- **Impending Changes of Legislation**

Germany: Amended Law on Temporary Agency Work (AÜG) has come into force as of 1 April 2017

The German Law on Temporary Agency Work (AÜG) has been subject to amendments. The reformed version of the law came into force on 1 April 2017. It should also be considered for existing contracts on personnel leasing.

NETHERLANDS

- **Latest Case Law**

Netherlands: Is an employee bound by a business relations clause that is included in a staff handbook?

This case involved a dispute between the parties as to whether the employee was bound to a business relations clause that had been included in the staff handbook. For a business relations clause to be valid, the clause must be agreed to in writing. Based on a previous ruling of the High Court, a business relations clause can be included in a staff handbook, if one of the following two requirements have been met:

1) the employee signed a document (mostly the employment contract) in which a reference to the staff handbook has been made, and the staff handbook has been provided to the employee together with the employment contract; or
2) the employee signed a document in which he explicitly agrees to the business relations clause.

In this particular case, the employee had signed the employment contract, in which a reference had been made to the staff handbook. However, the staff handbook had not been provided to the employee together with the employment contract. The employee had received the staff handbook some time later during his employment. The High Court ruled that the requirements mentioned above must be applied strictly in order to ensure that the employee has had the opportunity to carefully consider the consequences before agreeing to such a clause. The same requirements would apply to a non-competition clause.

SPAIN

- **Latest Case Law**

Spain: Relief contracts terminate when the relieved employee reaches the ordinary age for retirement

In Spain, there is a special contractual form called a "relief contract". This occurs when an employee decides to opt for the partial retirement instead of the ordinary retirement (the Relieved) and a new employee is hired by the Company to substitute the Relieved (the Reliever). The Reliever must be an unemployed person or an employee who has a fixed-term contract with the company.

This contract however, is subject to a term, that is, the contract finishes when the Relieved acquires the ordinary retirement.

A recent Spanish Supreme Court (SSC) ruling addressed what would happen if the Relieved opts for the early retirement instead of the ordinary retirement. Should the contract be extinguished by the company? In this particular case, the company decided to terminate the relief contract and to hire another employee to fill the functions of the Relieved, arguing that the relief contract had come to an end due to the retirement of the Relieved.

However, the SSC set that the relief contract ends when the Relieved acquire the ordinary age for retirement, which was not the case here, since the early retirement was acquired by the employee before reaching the ordinary age for retirement. Thus, the relief contract cannot be terminated until the

Relieved reaches the ordinary age for retirement and not before, even if such employee has opted for the early retirement and, from a legal and administrative point of view, appears as a retired employee.

UK

- **Latest Case Law**

UK: Lock decision holds the key for calculating holiday pay

In December 2016, the Court of Appeal in British Gas Trading Ltd v Lock decided that contractual results-based commission must be included in the calculation of holiday pay. As the Supreme Court has refused to hear an appeal against this decision, the position remains then that when employees take the 'European' element of their holiday (that is the first 4 weeks out of the UK 5.6 weeks of statutory allowance), he/she should not be placed in a worse position in terms of the pay that they receive.

The decision arose out of a case brought by Mr Lock, a British Gas salesman, whose remuneration package included basic salary and commission. When he took annual leave, he received basic pay (excluding his commission), which was considerably less than his usual salary. He complained and argued that he should receive his usual salary whilst taking holiday.

As the case involved consideration of EU law (the Working Time Directive), Lock's case was referred to the Court of Justice of the European Union, which held that commission should be taken into account when calculating holiday pay.

Now that the Supreme Court has refused to grant an appeal of this decision, the case will return to the employment tribunal to consider a number of outstanding issues, including what losses Mr Lock suffered, but the reference period employers must use to calculate holiday pay is yet to be clarified, and this has been held as a matter for national courts. The Employment Tribunal will now decide how such calculations are to be made and whether claims can be backdated.

This is significant for employers in sectors such as retail where employees tend to receive sales-based commission.

- **Impending Changes of Legislation**

UK: Employers to auto-enroll workers in pension schemes

Auto-enrollment has been phased in over a number of years (depending on the employer's size) but from 2018, all workers have to be automatically enrolled in their employer's pension scheme.

For anyone that is eligible, employers will have to make contributions to their workers' pensions every pay period. This will apply to all workers and employees aged over 22 and of State Pension age, earning at least £10,000 and working in the UK. Workers will have a month to choose not to join the workplace pension, known as an "opt out". Employers must be careful not to unfairly dismiss or discriminate against employees for being in a workplace pension scheme and cannot encourage their workers, or force them, to opt out.

If the worker takes no action, they will be enrolled in the workplace pension scheme. Workers will then continue to make contributions to their retirement pot from their pay for as long as they are employed or until they take their money out.

If an individual pays income tax and pays into a personal or workplace pension, then the government will also add money to a worker's workplace pension in the form of tax relief.

- **Other Observations**

UK: Apprenticeship Levy begins

Companies with a wage bill of over £3 million (or that are connected to other companies or agencies that together have a total annual pay bill of more than £3 million) will now have to pay a 0.5% payroll tax, which is to be used for investment in training for apprentices. The levy must be reported and paid to HMRC through the employment tax (PAYE) process. Records of information used to calculate the levy must be kept for at least 3 years. Employers in England will then be able to access funding through a new digital apprenticeship service account, available after their final declaration to HMRC after 22 May 2017. The funding can be used towards funding training and post apprenticeship vacancies. The Government also automatically adds 10% to the funds in the digital apprenticeship service account on a monthly basis. Funds that are not used expire after 24 months of entering the employer's account. The plan is to give all employers access to the account service by 2020.

USA

- **Other Observations**

USA: President Trump Signs Legislation and Issues Order Ending Obama-Era Fair Pay and Safe Workplaces Executive Order

The nearly three-year journey of Executive Order 13673: Fair Pay and Safe Workplaces, which President Barack Obama signed in July 2014, is officially over. Federal contractors will not be required to report alleged labor violations to federal agencies as part of the bid process or implement measures to foster pay transparency. They also will not be prohibited from entering into mandatory arbitration agreements concerning employee Title VII claims.

President Donald Trump signed into law H.J. Resolution 37, which "disapproves" the Federal Acquisition Regulatory (FAR) Council regulations implementing the Executive Order, on March 27, 2017. To seal the deal, Trump also signed his own Executive Order revoking the Obama-era Order, known as the "Blacklisting" Executive Order. Trump's Order directs the Department of Labor and other executive agencies to "consider promptly rescinding any orders, rules, regulations, guidance, guidelines, or policies implementing or enforcing the revoked Executive Orders." This spells the end for the Executive Order as well as the DOL Guidance and the FAR implementing provisions.

For additional information, see http://www.jacksonlewis.com/publication/trump-signs-legislation-and-issues-order-ending-obama-era-fair-pay-and-safe-workplaces-executive-order.

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