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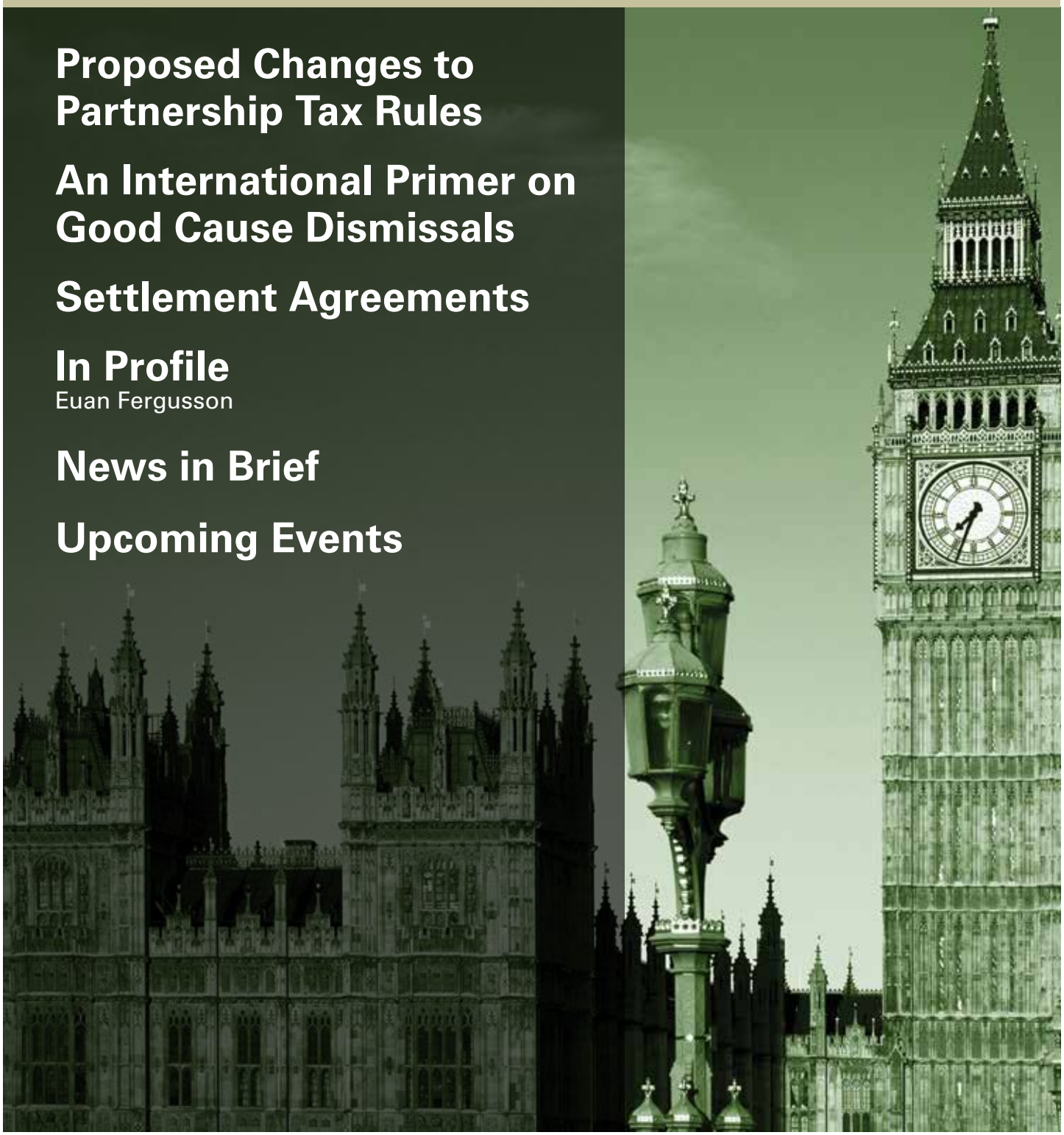

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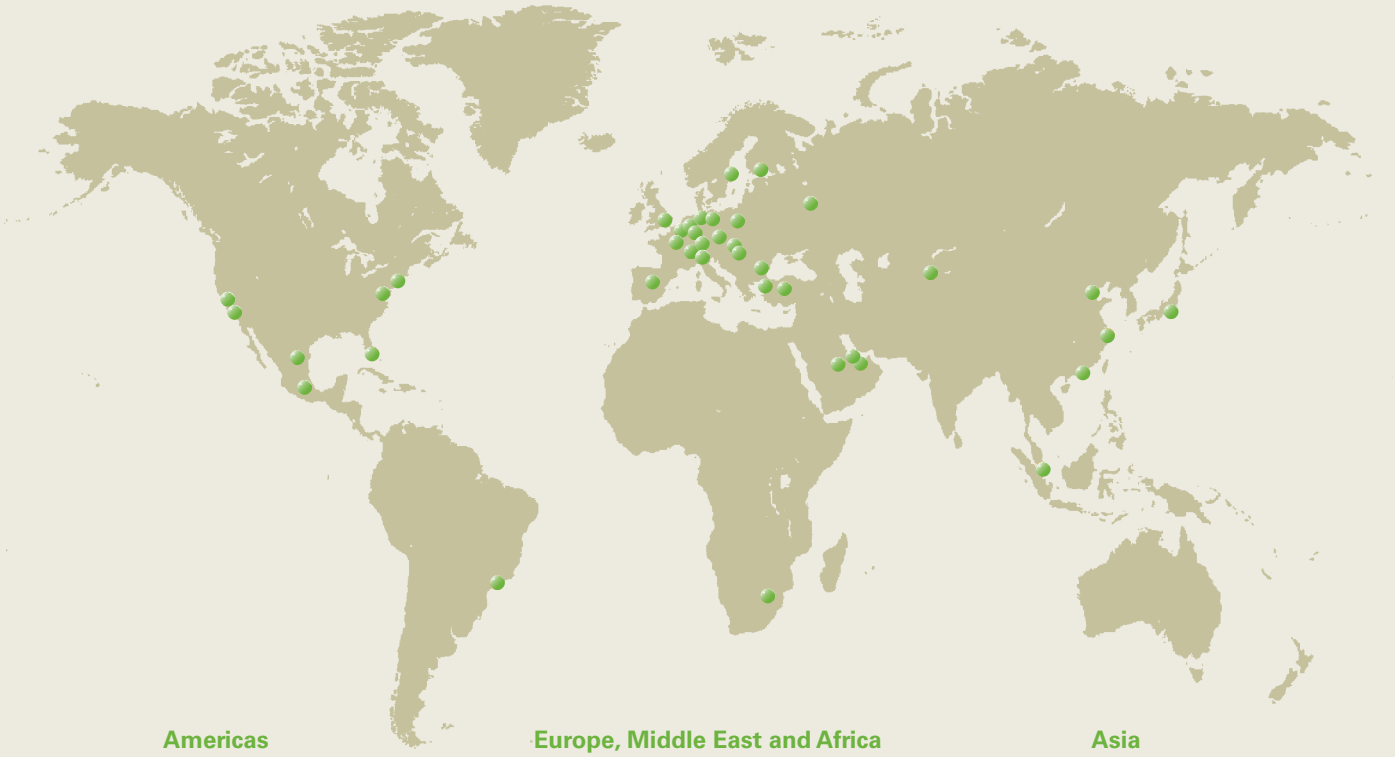

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Proposed Changes to Partnership Tax Rules

United Kingdom

The UK Government is concerned that the current partnership tax rules create scope for tax avoidance through the use of the Limited Liability Partnership ("**LLP**") structure to disguise employment relationships and the manipulation of the allocation of profits and losses among partnership members. To address these concerns, on 20 May 2013, the UK Government published a consultation paper setting out proposed changes to the tax rules for partnerships and LLPs. Draft legislation is expected to be published in late 2013, with any changes coming into force on 6 April 2014.

Disguising employment relationships through the LLP structure

Under the current tax rules, there is a presumption that LLP members are self-employed for tax purposes. This allows an LLP to be taxed more favourably on what is, effectively, employment income, as compared to individuals engaged on similar terms but as employees, and both the LLP member and the employer avoid Class 1 national insurance contributions ("**NICs**").

The UK Government is concerned that businesses may use the LLP structure to disguise employment relationships in order to take advantage of this more favourable tax treatment. Of particular concern is the potential for LLPs to grant LLP member status to individuals whose role remains, in practice, tantamount to that of an employee.

By way of illustration, if an LLP member were, in fact, an employee, the business would generally be required to pay 13.8% in employers' secondary Class 1 NICs. This amounts to significant amounts of lost revenue for the Government.

Proposed Changes to Partnership Tax Rules continued

As such, the Government is consulting on proposals to remove the presumption of self-employment from LLP members and establish a test to determine the status of an individual. Under the proposal, an LLP member will be taxed as an employee if either:

- on the assumption that the LLP is carried on as a partnership by two or more members of the LLP, the individual would be regarded as employed by that partnership; or
- the member:
  - suffers no economic loss (in the form of loss of capital or repayment of drawings) if the LLP makes a loss or is wound-up;
  - is not entitled to a share of the LLP profits; and
  - is not entitled to a share of any surplus LLP assets on a winding-up.

If an LLP member is taxed as an employee, he will be liable for income tax and primary Class 1 NICs. The LLP, as the employer, will also be liable for secondary Class 1 NICs, although it will be able to deduct the employment costs from its taxable profits.

Manipulating partnership profit/loss allocations to secure tax advantages

Partners and members are taxed (or obtain tax relief) in accordance with their share of the partnership's profits as allocated to them under the partnership agreement. As such, there is scope for partnerships to manipulate the allocation of profits and losses to secure a tax advantage, particularly through the allocation of profits to a company.

Whilst companies that are partners pay corporation tax at the main rate of 23% of profits, individuals are subject to a higher income tax rate of, at the top rate, 45% of earnings. Partnerships may allocate profits to company partners to exploit the difference between corporation and income tax rates. Individual members indirectly benefit from those profits by having an economic interest in the company. Partnerships may also allocate losses to individual members to allow such members to claim loss relief against their general income, which would otherwise be taxed at the higher income tax rate. In this way, the overall tax liability on the members is minimised.

In response, the Government has proposed that, where it is reasonable to assume that the main purpose, or one of the main purposes, of the partnership arrangement is to secure a tax advantage, the profits allocated to company partners will be re-allocated to members who fall within the income tax charge, and claims for loss relief will be refused.

Partnerships may also manipulate the allocation of profits and losses by taking advantage of members with differing tax attributes. A member may make a payment to another member in return for an increased profit entitlement which, due to their particular tax attributes, will secure a more favourable tax treatment for the profits. This may be on the basis of exploiting the difference between corporation and income tax rates or optimising losses.

In response, the Government has proposed that where it is reasonable to assume that the main purpose, or one of the main purposes, of such an arrangement is to secure a tax advantage, the payment received will be liable to income tax.

Prepare for changes

Although any proposed changes would not come into force until 6 April 2014, it would be prudent for LLPs and other partnerships to start reviewing their existing agreements and business structures, since any necessary changes will take time to implement.

With regard to the removal of the presumption of self-employment for LLP members, LLPs should have particular regard to non-equity "contract" or "salaried" partners. The Government's proposal to treat as employees those LLP members who are not rewarded on the basis of the LLP's profitability, and who are not subject to a significant downside if the LLP makes a loss, is likely to capture predominantly such partners. LLPs should be mindful that HMRC has indicated that it is unlikely to regard any entitlement to a share of the business' profits as being significant if it would never exceed 5% of the individual's fixed entitlement. As such, unless the membership terms for such persons change, many such partners run the risk of being classified as employees.

Interestingly, the Government has taken pains to point out that its proposals are not intended to affect the status of persons who are taken on as members "at an appropriate point in their career in recognition of their professional knowledge and personal skills, and who sacrifice an entitlement to salary in exchange for the opportunity to participate in the business in much the same way as a senior partner, even if as junior partners they are substantially rewarded by a fixed profit share". This seems at odds with the overall principles of the proposals, and it remains to be seen how the Government proposes to isolate such partners from other non-equity "contract" or "salaried" partners who became partners at less "appropriate" points in their career.

An LLP may be minded to include specific terms in their existing agreements in order to prevent its members being classified as employees. Such measures are unlikely to be effective, however, as the Government has proposed that tax-motivated terms are to be disregarded if their sole intention is to disapply the legislation. LLPs should be aware that HMRC will look beyond the written agreement to the substance of the partnership arrangements in order to determine the classification of an LLP member.

In relation to the allocation of profits and losses, LLPs and other partnerships should consider whether they have a mixed membership of certain members who are liable to income tax in respect of partnership profits, and other members who are not so liable. That member may be a company, an individual not chargeable to tax, or a non-UK resident. If relevant, the business should carefully review whether the allocation of profits and losses secures a tax advantage for any individual/entity. Businesses will not be caught by the new proposals if they can demonstrate that their profit sharing arrangements reflect the contribution that their members make to the business. However, businesses should review whether significant amounts of profit are allocated to company members who make nil or negligible contribution to the business' profits, which would be a strong indication that the arrangements are tax-motivated.

Partnerships and LLPs should also be aware that profit deferral and working capital arrangements will be addressed in the same way as other profit sharing allocation arrangements. Profit deferral arrangements occur where a proportion of the partnership profits are required to be retained within the partnership until a deferral period expires, whereupon the member may withdraw such retained profits. During the deferral period, the 'retained' profit is allocated to a company member in order to reduce the upfront tax charge. Working capital arrangements, on the other hand, are where profits are 'retained' in the partnership as additional working capital. As such, the individual members are only liable for income tax on the portion of the profits withdrawn as 'remuneration', while the remainder of the profits are allocated to a company member and taxed at the lower corporation tax rates. Businesses that operate such arrangements should carefully review whether they are (or could be construed as being) tax-motivated.

An uncertain future

Until such time as details of the legislation and its true impact are known, there will be a degree of uncertainty as to partnership taxation in the UK. It can also be expected that the UK Government will not be the only government reviewing partnership taxation as a means of reducing the scope for tax avoidance; partnerships may be seen as a "soft" target when appealing to a cut-weary electorate.

An International Primer on Good Cause Dismissals

United States

In dismissing staff anywhere in the world (except perhaps in the US, which subscribes to employment-at-will), "step one" – always – is determining whether the employer will fire the particular targeted worker for good cause. Where an employer can demonstrate good cause, a dismissal becomes much cheaper. Indeed, in some places (in so-called "lifetime employment" jurisdictions such as Germany, Japan, Korea, Iraq, Romania and Russia), the dismissal becomes possible because these jurisdictions prohibit most no-cause dismissals.

Where a dismissal is for demonstrable good cause, most countries offer employers broad freedom to fire without much or any notice or severance pay. But this principle is far narrower than it sounds because "good cause" is substantially less than a good business reason. After all, employers always have good business reasons for firing employees – no rational employer fires staff whose business needs weigh in favour of retaining. So "good cause" under law necessarily means more than merely a good business reason. Good cause usually means the employer can prove the targeted employee wilfully committed some material misconduct.

Each jurisdiction has its own local notion of which specific acts of employee misconduct constitute good enough cause to justify a no-severance-pay summary dismissal. And, of course, each case turns on its facts. But we might make a simple generalisation: good cause tends to mean egregious misconduct. Few jurisdictions' notions of good cause reach poor performance, imperfect attendance, bad attitude or mismatched skill set. Even jurisdictions such as Korea that recognise poor performance as cause for dismissal tend to accept only well-documented, outrageously bad performance over a sustained period, and proof burdens become exceptionally high. Justifications for dismissal external to the targeted employee himself – business downturn, internal restructuring, sale of business assets – might offer economic justification for a dismissal, but economic necessity is a separate issue usually quite distinct from good cause.

Italy offers a representative concept of good cause. According to employment lawyers in Rome, an Italian employer can fire an employee for good cause *(giusta causa)* only when the employee's act of "misconduct" makes the continuation of the employment relationship impossible. Examples of just cause are theft, riot and insubordination. Italian case law shows a series of sharply contrasting precedents which make it extremely difficult in practice for an employer to invoke good cause as grounds to fire an employee with speed and certainty.

Outside the US, the standard for good cause happens to be closely analogous to a similar concept under domestic US law: the wilful misconduct standard under US state unemployment compensation systems. As a general principle, in order to deny unemployment compensation benefits to an employee, his action must involve a wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behaviour which the employer has the right to expect of his employees, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Speaking broadly, where an outside-US employee commits an act of wilful misconduct that, if committed in the US, would be egregious enough to defeat a US state unemployment benefits claim, then we might expect the relevant local labour court to uphold a firing for good cause. The corollary, though, is that where an overseas employee misbehaves in an innocuous enough way that his actions, if committed in the US, would not offer a defence to his state

unemployment benefits claim, then the relevant local labour court will not likely uphold a firing as for good cause. Embezzling money, vandalising equipment, bribing officials and attacking co-workers, – all are grounds for good-cause dismissal. But short of serious crime, the issue becomes murky.

A common conundrum in good cause analysis is the employer that thinks it has a legal justification to fire an employee who broke a posted work rule, a human resources policy or code of conduct provision. Imagine, for example, an overseas salesman who "entertains" clients at a strip club at his employer's expense. Imagine this employer can make a strong case that these acts violated a standing employer work rule, HR policy or code of conduct provision on business entertainment, use of expense accounts, bribery/improper payments or sexual harassment. Can the employer fire this executive for good cause? Perhaps not. By anyone's definition, intentionally breaking a work rule is wilful misconduct. But, the analysis becomes more nuanced. Being able to prove someone broke a posted rule/policy/code is not necessarily good cause, particularly if the infraction is innocuous or the rule is a technicality. Countries such as Costa Rica, the Czech Republic, Indonesia, Malawi, Peru, Philippines, Russia, Saudi Arabia, Ukraine, Vietnam and others list dischargeable infractions in their labour codes. We might call these "statutory list" jurisdictions. In them, an employer has no grounds to fire a rule-breaker unless the breached rule happens to reflect one of the grounds for dismissal on the country's statutory list. The statutory lists in these countries might not include an infraction that fits this particular employee's misdeeds.

As another example of how these statutory lists work in practice, imagine a manufacturing multinational that posts on its intranet a globally applicable work rule instructing factory workers to shut down their machines at the end of their shifts, and saying that violators are subject to dismissal for a first offense. Imagine that excellent business reasons support this rule: safety, plant security, machine maintenance, power conservation. And imagine that all workers in the company's factories worldwide have signed acknowledgements agreeing to comply with this particular rule. Having globally implemented the rule and having collected these employee acknowledgements, the US-based headquarters may assume it can fire, for good cause, any worker who intentionally clocks out and leaves his machine running. But this assumption is wrong. In what we are calling "statutory list" jurisdictions, firing someone for breaking this rule will not likely be for good cause because "leaving machine running" will not likely appear on those countries' lists of statutory dismissal grounds.

This said, an employer overseas is usually well advised to articulate comprehensive rules that set out grounds for good-cause dismissal, particularly in countries such as Bahrain, Colombia, France, Japan, Korea, Oman and Russia that affirmatively require written work rules. An employer's argument that a misdeed amounts to good cause is always stronger where the infraction violates a posted work rule that purports to subject violators to dismissal.

Sometimes local law prohibits employers from dismissing for good cause even workers who commit infractions that do appear on a country's statutory list of for-cause dismissible infractions. For example, most countries will recognise theft as grounds for a good-cause firing, but labour courts abroad often excuse proven theft of small change and cheap goods. German Civil Code § 626 includes "theft" as grounds for dismissal without any express de minimus exception, but in 2009 Germany's highest labour court held otherwise in its widely publicised Emmely case involving an employee (known across Germany both as "Barbara E." and "Emmely") who had pocketed a handful of employer coupons worth €1.30. As another example, many countries impose laws expressly banning workplace harassment, but many court cases in those countries often hold dismissal too severe a punishment for proven harassers. Canadian courts apply a "proportionality" test that makes every dismissal a fact question; a Canadian employer firing someone for proven theft or harassment might not have good cause if dismissal is disproportionate to the employee's specific misdeed.

All this said, though, employers overseas sometimes do have demonstrable good cause justifying a dismissal. At that point the question becomes: what does demonstrating

good cause mean for an employer? The answer differs depending on whether the employer is in a so-called "lifetime employment" jurisdiction such as Germany, Iraq, Japan, Korea, Romania, Russia. In lifetime employment jurisdictions, no-cause firings are flatly illegal, so the only legal way to fire someone who refuses to leave is for the employer to demonstrate good cause (or economic necessity, discussed below). No good cause means no dismissal. Indeed, in these lifetime employment jurisdictions, statutory severance pay tends not to come into play, and in countries such as Japan does not even exist: a worker either gets fired for good cause and gets no severance pay or else that worker is the victim of a wrongful dismissal and so is entitled to a court award of reinstatement and back pay – but no severance pay.

Outside lifetime employment jurisdictions, good cause for dismissal is not necessary to fire anyone, but being able to prove good cause makes a big difference. In the words of Argentine lawyers explaining the rule in Argentina (a typical no-lifetime-employment jurisdiction), the "general principle in force is private sector employers can freely dismiss their employees without just cause by paying severance pay based on the salary and seniority of the employee." Employers in these jurisdictions can usually fire staff unilaterally without good cause, but subject to separation pay liability – notice pay, severance pay and the payments due in any dismissal such as final pay check proportional accrued vacation, proportional bonus, proportional "thirteenth month pay" and other accrued benefits. Further, having good cause tends not to excuse obligations under statutory dismissal procedures such as dismissal communication requirements, grievance resolution procedures and notice to employee representatives and government labour agencies. Indeed, because countries impose these procedures to probe employer grounds for dismissal, countries have a policy reason to enforce their procedural requirements even where an employer obviously has good cause. For example, in a highly publicised 2008 case, Parisian rogue trader Jérôme Kerviel singlehandedly lost his bank employer, Société Générale, US$7.2 billion in unauthorised trades. Even though French police arrested and incarcerated Kerviel, French dismissal procedure laws blocked a quick firing. In a front-page article, the Wall Street Journal chronicled why French dismissal procedures forced Société Générale to retain Kerviel on its "headcount" for over a month.

Having said all this about good cause dismissals around the world, in real life it may only be the exceptional situation where an employer invokes good cause for dismissal to fire an employee who, in turn, goes on to sue in court, challenging the grounds for dismissal. In practice, employers everywhere, particularly in "lifetime employment" jurisdictions, often negotiate an agreed separation with a release of claims – that is, a resignation and waiver in exchange for a cash pay-out. Employers and employees negotiate these settlements against the backdrop of the issues discussed in this article.

Settlement Agreements

United Kingdom

On 29 July 2013, new rules relating to settlement agreements, formerly known as compromise agreements, took effect. Under the new section 111A of the Employment Rights Act 1996 (the "**ERA**"), any offers or discussions regarding settlement agreements will be inadmissible in any subsequent unfair dismissal proceedings unless the employer or the employee has engaged in "improper behaviour".

ACAS has published the Code of Practice on Settlement Agreements (the "**Code**"), which came into force alongside section 111A. The Code provides guidance on how settlement agreements will work in practice and, so far as possible, assures employers that provided they follow the guidance, they should benefit from the confidentiality protection afforded by section 111A.

What are Settlement Agreements?

Settlement agreements are legally binding contracts which can be used to terminate an employee's contract on agreed terms. In exchange for waiving the right to bring certain legal claims, the employee will usually receive payment and/or an agreed reference from the employer.

The Code stipulates that certain requirements must be met in order for the settlement agreement to be legally valid:

- the agreement must be in writing;
- the agreement must relate to a "particular complaint or proceedings"; and
- the employee must have received advice from an independent legal advisor.

Pre-termination Negotiations

Section 111A prevents the offer of a settlement, and all negotiations and communications relating to that offer, from being used as evidence in unfair dismissal proceedings unless the employer or the employee has engaged in "improper behaviour".

Section 111A does not, however, extend to claims on grounds other than unfair dismissal, such as claims of discrimination or breach of contract. When determining claims which fall outside the remit of the section 111A confidentiality protection, a tribunal *will* be able to consider discussions regarding settlement agreements.

Previous Position: the 'Without Prejudice' Rule

Settlement agreements appear, at first glance, to be identical to its predecessor, the compromise agreement; the same requirements must be met in order for the agreement to be legally valid, and they have the same effect of ending the employment relationship and waiving an employee's right to bring certain tribunal proceedings.

The difference between settlement agreements and compromise agreements lies in the introduction of confidential pre-termination negotiations. Section 111A provides an employer with some additional confidentiality protection in situations where there is no formal dispute.

The 'without prejudice' rule prevents written or oral statements made in a genuine attempt to settle an existing dispute, from being brought before a court or tribunal as evidence against the interest of the party which made them. As such, if the settlement agreement is being discussed as a means of settling an *existing dispute*, the negotiations can be conducted on a without prejudice basis and so are inadmissible in relevant proceedings.

Settlement discussions will not, however, benefit from the 'without prejudice' protection in the *absence of an existing dispute* between the parties, or if one of the parties is unaware that there is an employment problem. Prior to the introduction of section 111A, in such a situation, if the negotiations were to break down and the employee was later dismissed, the settlement offer, and all discussions relating to it, would be admissible in any subsequent unfair

Settlement Agreements continued

dismissal proceedings. In particular, the employee may argue that the settlement offer is of itself evidence that the dismissal was unfair, for example, on the basis that the employer had already decided to dismiss the employee before taking the required steps to dismiss fairly.

In light of the fact that an employer or an employee will often wish to enter into pre-termination negotiations in situations where there is no formal dispute, section 111A has been enacted. By offering protection similar to the 'without prejudice' principle in situations where there is no existing employment dispute, the parties will enjoy greater flexibility in using settlement agreements to terminate the employment relationship.

"Improper Behaviour"

The confidentiality protection in section 111A will not apply if the employer or the employee has engaged in "improper behaviour". In the event that a tribunal finds there to have been improper behaviour, any offer of a settlement agreement, or discussions relating to it, will be admissible to the extent that the tribunal considers it just.

What constitutes improper behaviour is ultimately for the tribunal to decide on the facts and circumstances of each case. The Code sets out a non-exhaustive list of examples of improper behaviour, including:

- all forms of harassment, bullying and intimidation, including the use of offensive words or aggressive behaviour;
- physical assault or the threat of physical assault or other criminal behaviour;
- all forms of victimisation;
- discrimination on the grounds of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy, maternity, marriage or civil partnership; and
- putting undue pressure on a party, for example:
  - an employer not giving the employee reasonable time to consider the settlement proposal;
  - an employer threatening that the employee will be dismissed if a settlement proposal is rejected; or
  - an employee threatening to undermine the employer's reputation if they do not sign the agreement.

Practical Suggestions

Noting that section 111A confidentiality protection only extends to unfair dismissal claims, it is prudent for an employer to enter into 'without prejudice' discussions where there is an existing dispute to cover other types of cases such as discrimination, unlawful detriment, and breach of contract (including wrongful dismissal).

In order to avoid a finding of "improper behaviour", employees should be given a reasonable period of time to consider the settlement proposal. The Code suggests that employees are given a minimum period of ten days to consider the agreement and to receive independent advice, unless the parties agree otherwise.

Whilst not a legal requirement, the Code also suggests that employees should be entitled to be accompanied during any negotiations or discussions by a colleague or trade union representative. From an employer's perspective, it may be difficult to allow employees to be accompanied as the employer will usually wish to keep any negotiation terms confidential.

Comment

The Government's intention is that section 111A of the ERA will encourage pre-termination negotiations and increase the use of settlement agreements. Resolving employment disputes by way of a settlement agreement can often provide the most mutually beneficial outcome for the employer and the employee. Employers eliminate the risk of facing tribunal proceedings on any of the grounds covered by the agreement, and can avoid potentially time-consuming disciplinary and capability procedures. At the same time, employees will often receive a payment and an agreed reference from the employer, and will avoid a dismissal in their employment history.

The new rules make it easier for parties to engage in open discussions and explore settlement offers, even in the absence of a formal dispute. By reducing the risk that such discussions may be used as evidence against them in any subsequent unfair dismissal proceedings, employers should feel more confident to engage in pre-termination negotiations and use settlement agreements.

It is questionable, however, whether section 111A will in practice increase the use of settlement agreements. If the parties engage in pre-termination negotiations but a settlement agreement is not ultimately signed, an employer will continue to face the risk of such discussions being admissible in subsequent tribunal proceedings (unlike the continuing application of the 'without prejudice' rule where there are failed negotiations relating to an existing dispute).

In addition, the confidentiality protection only extends to ordinary unfair dismissal claims. To the extent that there are any potential issues involving, for example, whistleblowing, trade unions or discrimination, it would be unwise to expect the offer of a settlement, and all negotiations and communications relating to that offer, to be confidential unless otherwise covered by the 'without prejudice' rule. It will be difficult for an employer, when embarking on pre-termination negotiations, to foresee whether an employee will wish to bring a claim on grounds other than ordinary unfair dismissal if settlement is not reached and the employee is dismissed. As such, the use of settlement agreements is likely to be limited to cases of straightforward dismissals where the employer is confident that any potential claims will fall strictly within the remit of section 111A.

A further limitation is that the confidentiality protection may be lifted to the extent that a tribunal considers the parties to have engaged in "improper behaviour". The tribunals' wide discretion to determine whether the exception has been engaged, coupled with the lack of statutory definition and the non-exhaustive list of examples of such behaviour in the Code, has created uncertainty over what constitutes improper behaviour. It remains to be seen how broadly or narrowly the tribunals interpret the concept of improper behaviour. If they adopt a broad interpretation, section 111A is likely to have little practical impact in meeting the Government's intention of increasing the use of settlement agreements.

In Profile


"My second job was even more enduring:...
...I was a zookeeper, in charge of the monkey house!"
2013
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Euan Fergusson

From playing the trumpet as a child to running marathons as an adult, Euan Fergusson breathes easy when facing new challenges.

Born in Edinburgh, Euan was raised in Penicuik, a little town that lies on the west bank of the River North Esk in Scotland. During Euan's childhood, the town was well known for its paper mills. Euan launched his early career by supporting local industry as a newspaper boy working every morning before school, but more diverse opportunities presented themselves as time went on.

"My second job was even more enduring: I was a zookeeper, in charge of the monkey house!" Euan explains. The working with animals theme was further developed during the course of his first degree at Edinburgh University, where he commenced studying biology but ended up with a degree in agriculture! It wasn't until many years later that Euan confirmed his decision to become a lawyer.

During the interim years, Euan served as an officer in the British Army's Parachute Regiment and then later qualified as a company secretary, working in the Lloyd's insurance and banking sectors.

"Being an army officer was a very important step in my life," says Euan. "The experiences and skills that I gained during those five years have proven invaluable to me during my subsequent career when working often in testing and pressurised circumstances."

Rolling forward to 2001, the first years of Euan's legal career were marked by various important encounters. As a budding lawyer commencing training at Linklaters, he met Nicholas Greenacre, now Head of the White & Case Global Employment & Benefits practice. Having the opportunity to work with Nicholas again was one of the reasons for Euan joining White & Case a few years later.

As Counsel, Euan plays a key role in White & Case's Employment & Benefits practice in London, specialising in all aspects of executive remuneration and reward and employee benefits. One very important role performed by the London office is to routinely work with legal and tax counsel in many other countries overseas, usually geared towards the production of client reports analysing key local issues. He is proud of the Firm and the international reputation of his practice. Euan considers White & Case to have a distinctly unique Employment & Benefits offering, with a London employment team active on cross-border matters governed by a combination of UK domestic and US law. He was largely attracted to White & Case as the Firm is particularly skilled in devising creative solutions for its clients.

We asked him what marks out his team from their competitors?

"In my view, we are unique in that we have genuine global capabilities in both developed and emerging markets. This strength is further supported by an underlying objective to provide our clients always with constructive legal advice which specifically addresses their commercial needs."

What is Euan proud of?

Euan is most proud of the mutual confidence he has instilled in his client relationships. "I have forged close professional relationships with some clients that have lasted over ten years."

What makes his job fascinating?

The range of cases, the Firm's UK and international clientele, and the intrinsic human aspect of employment and benefits matters are all significant factors that appeal to Euan as Counsel.

What is Euan's best tip?

Reflecting on his career, Euan asserts, "The more you practice, the better you evaluate the financial and commercial risks facing clients, and the better you can help the client make his or her own decisions."

Outside of the office, when he is not spending time with his two grown sons, Euan is an accomplished long-distance runner. He is particularly keen on sport and especially enjoys running along the Thames at the end of a working day, when lights are shining on the City of London. Indeed, he has already completed seven London marathons. No stranger to self-discipline and challenge, Euan's best record involves running 42.195 km in less than 3 hours.

Euan also admits that he is secretly in love with France, where he spends most of his holidays and as much time as he can find on the ski slopes. "I wish London could be a one hour drive from the Alps…skiing is my *péché mignon*."

When Euan is not traversing the Alps, he is steadily learning French and enjoys each opportunity to practice. "J'adore parler français!"

With the same confidence and tenacity he applies to each endeavor in both personal life and career, Euan is sure to become a veritable Francophone *tout de suite*!

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News in Brief

Czech Republic

New rules for continuous rest between shifts

On 1 August 2013, the Czech Parliament passed a new amendment to the Labour Code, which brought a number of changes to fixed-term employment relationships and continuous rest periods.

Regarding continuous rest periods between shifts, an employer was previously obliged to manage working hours so that each employee had a minimum rest period of 12 hours between the end of one shift and the start of a subsequent shift within 24 consecutive hours. The amendment to the Labour Code has now reduced this mandatory rest period to 11 hours. For employees who are under 18 years, the minimum rest period of 12 hours will remain.

This new amendment to the Labour Code aims to make it easier for employers to plan shift patterns and for employees who spend more than 12 hours a day at work to be able to report back to work at the same time the next day.

Renewal of fixed-term employment contracts

An amended Labour Code reintroducing the linking or renewal of employment contracts for certain groups of employees under specific conditions came into force on 1 August 2013. The Amendment is designed to render the labour market more flexible and increase corporate competitiveness.

The Amendment provides for the repeated (more than twice) execution of a fixed-term employment contract with an employee where serious operational reasons of the employer or reasons arising from the nature of the employee's work exist (typically, seasonal work in agriculture or construction). Examples of serious operational reasons include but are not limited to: major reorganisational changes affecting the employer or its manufacturing processes and one-off customer orders that require a substantial increase in the number of workers.

The above procedure is conditional upon the execution of an agreement with a trade union that details the reasons and rules for negotiating fixed-term employment contracts, the type of employees to whom the procedure will apply, and the period for which the agreement with the trade union is negotiated. If there is no trade union, the above agreement may be replaced by an internal employer regulation.

If the relevant conditions are met by an employer then it is possible for it to repeatedly renew a fixed-term employment contract with its employees. This new amendment is likely to become particularly popular among those employers whose business makes use of seasonal workers in the agriculture, construction or tourism industry.

Germany

Labour Court Specifies Rules for Fictitious Service Agreements

The laws governing temporary agency work *(Arbeitnehmerüberlassungsrecht)* have become stricter in Germany as a result of recent developments in legislation and case law. Consequently, there has been a recent trend for employers to enter into service agreements with temporary agency workers in order to avoid the stringent laws governing temporary agency work. The following decision by the Regional Labour Court Baden-Wurttemberg has provided useful guidance for those German employers who are considering such an approach.

Two computer experts worked for an IT system vendor as freelancers under specific service contracts *(Werkverträge)*. The IT system vendor was engaged by a service provider which provided services to the leading German car manufacturer, Daimler. For a period of 11 years the two computer experts performed certain duties for Daimler which included the provision of general IT services, ensuring that all of Daimler's computer workstations functioned properly, troubleshooting and following any instructions issued by Daimler.

The Regional Labour Court held therefore that an employment relationship had been established between Daimler and the two computer experts. Accordingly, it held that the two computer experts were to be regarded as employees who had been employed by Daimler under fictitious service agreements and as such Daimler could face substantial legal sanctions as fictitious service contracting is prohibited in Germany.

This decision is expected to have consequences for those German companies who wish to avoid the strict laws governing temporary agency work by engaging temporary agency workers under service agreements. This decision reminds employers to be careful when seeking to avoid the laws governing temporary agency work by entering into service agreements with any temporary agency workers.

Reduction of statutory limitation period

The standard limitation period in Germany, within which a party must bring a claim, or give notice of a claim to the other party is three years. Parties entering into contracts of employment often take the view that this limitation period is too long. It is therefore quite usual for parties in Germany to agree a different limitation period in a contract of employment although this agreed limitation period must not be shorter than three months *(exclusionary time limit)*.

Until recently, it was generally agreed that an exclusionary time-limit of this kind would effectively bar any claims being brought by an employer or employee unless such claims were made in writing within the three-month period. A recent judgment handed down by the Federal Labour Court *(Bundesarbeitsgericht)* on 20 June 2013 has modified this general rule such that, although it will be possible to contractually agree an exclusionary time-limit which reduces the limitation period from three years to just three months, this rule will not apply to claims arising from intentional acts.

Discrimination because of a 'world view'

If an employee in Germany suffers discrimination because of his 'world view' *(Weltanschauung)* or because of his supposed 'world view', he has a statutory right to claim compensation and damages from the perpetrator. In its ruling of 20 June 2013, the Federal Labour Court has now made it clear that personal preferences, sympathies or attitudes do not amount to a 'world view' within the meaning of the statutory provisions. It went on to say that claims for compensation and damages are not justified simply because the employee concerned is of the opinion that the employer has disadvantaged him because of an – incorrect – assumption that he has a particular 'world view'. In the case at hand the employer suspected the employee of having *"sympathy for the People's Republic of China" and "thus of supporting the Chinese Communist Party".* In that respect the Federal Labour Court noted that sympathy for a country is not the same thing as sympathy for a ruling party, and that one certainly cannot make any assumption based on general experience that if such a party has a fundamental 'world view' that view is shared by persons sympathising with the party.

Japan

Fixed-term employment contracts

On 1 April 2013, an amendment to the Japanese Labour Code came into force and introduced new rules regarding fixed-term employment contracts in Japan. It will now be possible for a fixed-term worker in Japan to become a permanent employee provided that he or she has been in fixed-term employment for more than five years and has made a formal request to his or her employer to become a permanent employee.

One of the biggest risks for Japanese employers is that, once a fixed-term employee becomes a permanent employee, that employee will acquire certain rights on termination and as such an employer will need to comply with strict legal requirements (e.g., the test of reasonableness) when considering how and when to terminate an employee.

Poland

Amended Polish Labour Code

The following amendments to the Polish Labour Code came into force on 23 August 2013:

1. **Introduction of flexible working hours:** the amended Polish Labour Code expressly provides for the possibility of employees starting work at various times on individual days, in which case commencing work during the same "employment day" (i.e., before the end of the 24-hour period after work began the preceding day) would not be classed as overtime, as was previously the case.

2. **Extension of the reference period from four to twelve months:** the amended Polish Labour Code provides for the possibility to extend the "employment" reference period from four months to twelve months.

3. **Introduction of an interrupted working time system in the workplace:** under the interrupted working time system, an employee may take no more than one break of up to five hours during the working day. This break does not form part of the employee's daily working hours. Previously, this interrupted working time system could only be introduced on the basis of a collective bargaining agreement (save for a few exceptions). Under the amended Polish Labour Code, it will now be possible to implement the interrupted working time system under an agreement with a trade union or employee representative.

4. **Family friendly rights:** parents of children born in 2013 will now be entitled to 12 months' paid parental leave. The amended Polish Labour Code extends a parent's right to paid parental leave after childbirth from six to twelve months. This was achieved by extending additional maternity leave from four to six weeks and introducing new parental leave (of up to 26 weeks) so that parents can share the parental leave between themselves. The amended Polish Labour Code also introduces changes to parental leave allowance which will vary from 60% to 100% of a parent's salary depending on the duration of the parental leave in question. These new regulations aim to combine working life and family life. For example, a parent will now be able to request to work no more than half of the time assigned for a full-time job in exchange for an allowance equal to 50% of his or her salary.

News in Brief continued

Romania

Romanian Tax Code

The Romanian Government recently issued an amendment to the Romanian Tax Code whereby severance payments or compensation received in connection with the termination of employment will be subject to a 85%. income tax rate (as opposed to the regular 16%. income tax rate). This rule is applicable to all employees occupying executive positions, as well as the members of the management and supervisory boards.

The measure was initially intended to apply only to public sector and state-owned companies, but, as currently drafted, it now extends its scope to all types of company. The measure has been heavily criticised, since it unjustifiably discriminates between employees occupying executive positions and other employees. Further, the measure places an additional burden on employers, in case the termination is mutually agreed between the parties, and may generate confusion, since the list of executive positions is usually approved by each employer through the organisational chart. The measure has been regarded as a potential precedent for future derogations from the flat tax rate principle, governing the Romanian income taxation system.

Upcoming Events

21st Annual NASPP Conference

23 – 26 September 2013, Washington, DC

The 21st Annual NASPP Conference will be held in Washington, DC, from 23 – 26 September 2013. Highlights from this year's program include:

- The full picture of how current economic conditions, regulatory reforms, and Say-on-Pay are reshaping stock and executive compensation – and the real-world, practical solutions you need to respond to this rapidly changing landscape.
- All the current hot topics in stock and executive compensation, including an update on Dodd-Frank rulemaking projects and a round-up of regulatory developments over the past year.
- The latest news in tax developments, straight from the IRS and Treasury.
- What to expect for the 2014 proxy season and best practices for executive compensation disclosures.
- Critical accounting developments and advanced financial reporting considerations.

3rd Global Congress on Travel Risk Management,

30 September 2013, Houston

Don Dowling will co-present on *"Defining Our Global Duty of Care to Mobile Employees"* at the 3rd Global Congress on Travel Risk Management, hosted by HospitalityLawyer.com and the Greater Houston Convention & Visitors Bureau. This session will cover the global duty of care and employer strategies for minimizing exposure to personal injury claims of mobile employees.

International Employment Law CLE Webinar Series
Bloomberg BNA Webinar Series
Online

Don Dowling will present the following webinars on international employment law topics as part of the Bloomberg BNA webinar series. The session on 29 October will be co-presented with Stephen Ravenscroft of White & Case, London.

Thursday 3 October 2013:

Expatriate Postings and Secondments

Tuesday 29 October 2013:

Employment Law in Europe

Thursday 7 November 2013:

Global HRIS/Data Privacy in Cross-Border Employment

International Bar Association Annual Conference

7 October 2013, Boston

Don Dowling will co-moderate a panel discussion on *"Bullying and Harassment in the Workplace – An International Perspective"* at the 2013 International Bar Association's Annual Conference in Boston.

Lexis Nexis Annual Conference "Employment Law for In-House Legal Advisors"

17 October 2013, London

Stephen Ravenscroft, Oliver Brettle and Nicholas Greenacre will be presenting at the Lexis Nexis Annual Conference. Primarily aimed at in-house legal advisors, this conference will address the latest developments in employment law and analyse the legal challenges ahead.

Handelsblatt Annual Meeting "Personal 2013"

22 – 23 October 2013, Munich

Karl-Dietmar Cohnen will be speaking on *"Voluntary Leave Programs (VLP)".* Further speakers at the conference will be several top-level representatives of major German companies such as Allianz, Siemens, Telekom and Henkel.

2013 NACUBO Global Operations Support and Compliance Forum

23 October 2013, St. Louis

Don Dowling will co-present, with university counsel from Washington University in St. Louis, on *"How to Employ Faculty, Researchers, Administrators and Foreign Locals Overseas"* at the 2013 Global Operations Support and Compliance Forum hosted by the National Association of College and University Business Officers.

Employer Healthcare and Benefits Congress

3 November 2013, Las Vegas

Don Dowling will present on "International Assignments – What Benefits Professionals Should Know", offering benefits professionals a toolkit for resolving international assignment problems.

For further information on these upcoming events, please contact Stephen Ravenscroft or Sarah Clarke.

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