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EMPLOYERS ARE NOT OBLIGATED TO NOTIFY EMPLOYEES OF NON-RESTRICTIVE EMPLOYMENT CLAUSES

On 6 October 2011, the Danish Supreme Court gave judgment in a case regarding whether an employee ("the Employee") was entitled to compensation under the Danish Consolidation Act on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Employment Relationship. The Employee argued that his future job opportunities where limited because of an employment clause contained in an agreement concluded between the Employee's employer ("the Company") and another company.

The Company argued that the Employee was not subject to any employment clause.

If the Supreme Court ruled that the Employee was subject to the employment clause, the Company maintained that the Danish Consolidation Act on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Employment Relationship did not apply to legal matters between the Company and the Employee, seeing as the agreement that had been concluded between the Company and a third party only had an indirect impact on the Employee.

Furthermore, in the Company's opinion, there were no conditions in the agreement actually restricting the Employee.

The Case in Brief

The Employee was employed in the Company and, during the course of his employment, became aware that the Company had concluded employment clauses with 400 key executives worldwide which implied that the key employees after the end of their employment were not allowed to take steps to employ former colleagues.

Based on past experiences of not being able to find employment due to employment clauses concluded between former employers and other companies, the Employee argued that the agreements concluded by the Company restricted the Employee's future job opportunities.

In that connection, the Employee argued that this was a material condition to his employment which should be included in his employment contract and therefore applied for a compensation of DKK 75,000.

Legal Basis

According to Section 2 of law no. 460 of 17 June 2008 regarding employers' use of employment clauses ("the Act on Employers' Use of Non-Solicitation and No-Hire Clauses"), the Act applies to employment clauses, which is to say to (i) agreements concluded by an employer with other companies with a view to prevent or restrict an employee's opportunities of finding employment in another company and to (ii) agreements concluded by an employer with an employee with a view to prevent or restrict other employees' opportunities of finding employment with another company.

Furthermore, it appears from Section 3 of the Act on Employers' Use of Non-Solicitation and No-Hire Clauses that an employer may invoke an employment clause on an employee if the employer has concluded a written agreement in this regard with the employee. The agreement must contain information on how the job opportunities of the employee are actually restricted by the employment clause and on the employee's right to compensation.

According to Section 2(1) of the consolidation act no. 240 of 17 March 2010 regarding employers' obligation to inform employees of the conditions to the employment ("the Consolidation Act"), employers must inform employees of material conditions to the employment.

Violations of Section 2 of the Consolidation Act entail that the employer must pay compensation corresponding to up to 12 weeks' pay (20 weeks in particularly serious cases), cf. Section 6(1) of the Consolidation Act.

The Supreme Court's Ruling

The Supreme Court stated that it was undisputed that the Employee was not subject to the employment clause in the mentioned agreement between the Company and a third party.

Because the Employee was not subject to any employment clauses concluded between the Company and another business, the Company was not obligated to inform the Employee of these employment clauses.

Although the Supreme Court concluded that the Employee was not covered by the employment clause, the Supreme Court found it relevant to specify that an employer, in principle, is not obligated to inform an employee of indirect restrictions to the employment emanating by the Employer's legal relationship with third parties pursuant to the Consolidation Act. Therefore, such relationships are not covered by Section 2 of the Consolidation Act.

Furthermore, the Supreme Court specified that the Consolidation Act is to be construed in the light of the underlying EU directive, and especially article 2 (The Council's directive of 14 October 1991, 91/533/EEC).

Consequences of the Ruling

Initially, it is noted that the ruling of the Supreme Court does not affect employers' option to conclude employment clauses according to the provisions of the Act on Employers' Use of Non-Solicitation and No-Hire Clauses.

However, it may be concluded by the Supreme Court's ruling that an employer, in principle, does not violate the Consolidation Act if the employer concludes employment clauses with third parties and does not inform the relevant employees of this fact.

Therefore, in principle, an employee will not be entitled to receive compensation pursuant to Section 6(1) of the Consolidation Act with reference to the conclusion of a secret employment clause between the employer and a third party.

It is worth noting that the Supreme Court commented on the question if employers are obligated to inform employees of agreements with third parties under the Consolidation Act, even though it was not necessary to answer this question in the specific case.

However, a conclusive clarification as to whether an employee may be awarded compensation for the lacking indication of an employment clause in his employment contract will have to await submission to the EU Court of Justice.

If you have any questions or require additional information on the judgment or employment law in general, please contact Partner Thomas Weitemeyer (twe@mwblaw.dk), Junior Associate Pinar Gökcen (pgo@mwblaw.dk).

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