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Jurisdiction of courts with respect to disloyal activity of former employees: criteria to be taken into account

At an interval of barely a fortnight the eighth chamber of the Court of Appeal handed down two rulings on the jurisdiction of courts with respect to post-contractual obligations incumbent on former employees, more particularly with respect to so-called disloyal activity.

The first case, which gave rise to the ruling of 5 December 2013[1], concerned a bank employee who had been engaged on the basis of an employment contract concluded on 6 August 2001 as a "sales network and client acquisition facilitator" within the Private Banking division of a bank operating in the Luxembourg financial sector. By virtue of his duties, the former employee had knowledge of the client file of his employer, or at least, of the file relating to the client accounts which he had managed personally. On 28 June 2007 the employee tendered his resignation in order to take up employment with another bank within the Luxembourg financial sector.

Up to this point this matter had not aroused any particular interest with respect to labour law. However, this changed when the initial employer claimed that his former employer was guilty of actions which were *a priori* disloyal to his previous employer and to the latter's clients.

Indeed, the initial employer criticised his former employee for having approached, after his resignation, a substantial number of clients with whom he was in contact within the framework of his working relationship with his previous employer. As a result, some days after the departure of the employee, the initial employer claimed to have received a substantial, even suspicious, number of letters from clients requesting the closure of their accounts and the subsequent transfer of their assets to accounts opened with the new employer of the employee in question. According to the initial employer, he had at his disposal certain indications suggesting that actions undertaken by the said former employee had incited clients of the former employer to follow the employee concerned to the new employer bank. The near totality, for example, of letters requesting the transfer of assets were allegedly presented and drafted in a similar manner, if not identically, and were posted from the same location in Luxembourg city, with the registered letters bearing successive numbers, despite the fact that the majority of the clients were foreign residents. In addition, the same handwriting was supposedly found in a substantial number of letters and on nearly all of the envelopes.

[1] Court of Appeal, 8th Chamber, 5 December 2013, no. 38616 of the docket

As a result, the initial employer considered that his former employee was responsible for these numerous requests for transfers through the use of the data of clients with whom he was in contact during his time of employment with this same bank and through contact with these clients in order to incite them to transfer the assets which they held with the initial employer to accounts opened with his new employer.

The initial employer then maintained that his former employee had breached the various obligations arising from his working relationship, *i.e.* the obligation of good faith, of loyalty and of faithfulness set forth in Article 1134 of the Civil Code, the obligation to respect banking secrecy as provided for in Article 41 of the amended law of 5 April 1993 on the financial sector, the obligations arising from the circulars issued by the *Commission de Surveillance du Secteur Financier* (Commission for the Surveillance of the Financial Sector) and the obligations deriving from Article 8[2] of the former employment contract of the employee in question.

It is of interest to note that the labour court ruled that the former employer's claim was unfounded[3]. The employer then launched an appeal against the ruling. During the appeal proceedings, the former employer in question raised, *inter alia*, the lack of subject matter jurisdiction of the labour courts.

The second case[4] before the eighth chamber of the Court of Appeal concerned an accounting and tax office which had been taken over with all its staff following a sale agreement of 1 August 2007 concluded between the former operator and a buyer.

On 27 April 2009, the accounting and tax office in question, under the management of the abovementioned buyer, dismissed with immediate effect an employee employed within the framework of the abovementioned sale agreement.

This employee found new employment on 15 May 2009 as an accountant within an accounting firm which was a direct competitor of the initial employer. Subsequent to the commencement of this employee's new functions, the initial employer claimed that the employee had solicited a substantial number of its clients and in particular those which had been subject to the abovementioned own funds takeover agreement of the accounting and tax office.

Within the framework of the first instance judgment[5], the labour court stated that it had no subject matter jurisdiction to hear the claim for damages as a result of the prejudice suffered which had been brought by the former employer. The argument of subject matter jurisdiction was once again raised on appeal.

The respective rulings rendered at second instance resulted in solutions which were substantially different with respect to subject matter jurisdiction. As a result, within the context of the first ruling of 5 December 2013, the Appeal Court confirmed its jurisdiction *rationae materiae* in order to hear the claim brought by the initial employer while in the second affair of 19 December 2013, the

[2] It should be noted that according to the ruling in question this clause had the following wording:
"*Any information that the employee shall receive relating to the clientele of the bank (including their names and addresses) shall remain strictly confidential and no use may be made of this information on a personal basis, either during the duration of employment or subsequently. After the termination of the employment contract between the employee and the bank, the employee shall remain bound by the legal provisions relating to banking secrecy. Furthermore, he may not contact the client of the bank whom he knew by reason of the employment with the bank in order to invite them to enter into a business relation with him or his new employer. Any breach of this provision is susceptible to be sanctioned by damages*."
[3] Judgment of the Labour Court of Luxembourg, 22 March 2012
[4] Court of Appeal, 8th Chamber, 19 December 2013, no 37739 of the docket
[5] Judgment of the labour court of Esch-sur-Alzette, 12 July 2011

Appeal Court declined jurisdiction, despite the obvious similarity of the facts at the basis of these two cases. The question therefore arises as to where this difference of jurisdiction originates if not in the facts underlying the case.

Crucial to answering this question is the legislation governing the issue of jurisdiction *rationae materiae*.

It should be pointed out that the New Code of Civil Procedure provides the following:

"In civil and commercial matters, the district court is the common law judge and hears all affairs for which jurisdiction is not expressly attributed to another jurisdiction, as a result of the nature or amount of the claim."[6]

"*The labour court has jurisdiction to hear disputes relating to employment contracts, apprenticeship contracts and supplementary pension regimes which are concluded between employers, on the one hand, and their employees, on the other hand, including those occurring after the termination of the engagement. (…)*"[7]

As a result, the New Code of Civil Procedure clearly provides that any given dispute must derive from an employment contract in order to fall within the subject matter jurisdiction of the employment jurisdictions.

With respect to the first dispute, which involved a bank and a former employee, the employment contract in question contained, as mentioned above, a clause imposing post-contractual obligations on the employee. In particular, this contractual clause related to the obligation of loyalty and fidelity of the employee as set forth in Article 1134 of the Civil Code which stipulates that contracts must be performed in good faith.

As a consequence, the Appeal Court held in this regard that "*SOC1.) SA's claim would require that its former employee pay it the sum of € 254,000 in damages as a result of the prejudice suffered subsequent to A's breach of the obligations to which he was subject as a result of its employment relationship, i.e. the obligation to observe banking secrecy as provided for in Article 41 of the Law of 5 April 1993 on the financial sector as well as the obligations deriving from the CSSF circulars and Article 8 of the employment contract. The case therefore has its origins in the employment contract which linked the two parties. It is therefore with good reason that the labour court declared that it had jurisdiction to hear the case (…)"*.

In the example of the second case, for which both the labour court and the eighth chamber of the Appeal Court ruled that they did not have jurisdiction *ratione materiae*, the employment contract which bound the parties did not contain any clause concerning the post-contractual obligations incumbent on the employee in question. Despite the argument of the initial employer that (i) even disregarding any non-competition clause, all employees, and all contracting parties, must comply with Article 1134, sub-paragraph 3 of the Civil Code according to which agreements must be performed in good faith and (ii) that this obligation of loyalty would extend beyond the duration of the employment contract and would prohibit the employee from soliciting the clients of his former employee, the eighth chamber of the Appeal Court confirmed the first instance judgment rejecting its subject matter jurisdiction.

As a result, the Appeal Court held that: "*(…) the non-competition clause is a post-contractual obligation which prohibits the employee, during a fixed period after the conclusion of the working*

[6] Article 20 of the New Code of Civil Procedure
[7] Article 21 of the New Code of Civil Procedure

relationship, to enter into relations, directly or indirectly, with the clientele of its employer. It is therefore distinct from the obligation of loyalty which exists during the period of performance of the contract and which is based on the idea of good faith inherent to all contracts. The obligation of loyalty resulting from the working relationship only survives the termination of the employment contract in certain exceptional cases, such as those of the non-competition clause or the breach of professional secrecy (…). It arises from the claim instituting proceedings (…), in which SOC1.) claims that Mme. 1.) "had just solicited" a substantial number of clients, that the proceedings seek to sanction facts which occurred subsequent to the termination of the employment relationship (…). SOC1.) has neither proved nor produced any proof that the alleged acts of client solicitation had commenced when the employment contract was still being performed. The claim made against Mme A therefore does not derive from a breach of a contractual provision governing the employee-employer relationship, but from the behaviour of the latter after the termination of the employment contract. The analysis of the validity of SOC1.)'s claim is subject therefore to the attribution of jurisdiction by the common law judges (…)".

It follows therefore from these two rulings that subject matter jurisdiction in the case of (allegedly) disloyal post-contractual actions is determined on the basis of the existence or absence of adequate contractual clauses in the contested employment contract. The mere obligation of loyalty resulting from Article 1134, paragraph 3 of the Civil Code is not sufficient to assert the subject matter jurisdiction of labour courts for facts which occurred after the termination of the contractual relation, given that this obligation is terminated with the employment contract in question, in the absence of contractual provisions to the contrary.

The lessons to be drawn from these two rulings concern primarily employers wishing to limit the vagaries associated with attributing matter jurisdiction within the framework of disputes with former employees. As a result, employers are advised to specify the post-contractual obligations applicable to their employees in the employment contract in order to avoid any discussions with regard to the subject matter jurisdiction of the court to hear the dispute in the case of litigation. These types of clauses, often wrongly denigrated as mere stylistic clauses, therefore have a real impact in practice and in no way duplicate Article 1134 of the Civil Code.

Furthermore, as an accessory fact resulting from the two rulings analysed above, it is essential for employers considering themselves victims of disloyal actions perpetrated by former employees to gather objective evidence of these actions. Indeed, it follows from the rulings in question that if jurisdictional competence is one thing, the damages suffered by employers as a result of such actions is quite another. As a consequence, it is interesting to note that the above analysed ruling of 5 December 2013, which confirmed the jurisdiction of the labour courts, dismissed the action brought by the employer in question because the employer was unable to provide evidence of any fact likely to prove that the former employee was soliciting, never mind systematically soliciting, the clientele of his former employer.

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