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Employment Matters

Welcome to Employment Matters: a round-up of the key UK employment law issues affecting your business and our recommendations for managing those issues. Employment Matters is a new regular update from Katten's Employment practice in our London office.

If you have any questions about this update or would like to know more about how we can help you, please feel free to contact Christopher Hitchins at +44 (0) 207 776 7663 or Sarah Bull at +44 (0) 207 776 5222.

Holiday Pay Calculation Includes Commission

On 22 February, the Employment Appeal Tribunal (EAT) rejected the appeal against *Lock v. British Gas*, with the consequence that results-based commission should now be included in normal pay when calculating holiday pay. This follows the decision in *Bear Scotland v. Fulton* last year, which added non-guaranteed overtime payments to the calculation of normal pay for holiday pay purposes. British Gas has asked for permission to appeal to the Court of Appeal, which could mean a further year or more of limbo for employers who have collectively had thousands of claims hinging on the *Lock* decision.

What should employers do next?

For now, employers should wait and see. Any claims made on the basis of this judgment will be stayed if British Gas does appeal. Any appeal must be made within 42 days of the EAT's judgment being sent to the parties.

Gender Pay Gap Reporting—Get Ready for April 2018

Gender pay gap reporting has long been on the horizon, with expectations being that reporting would start as early as this year. Last week the government published the draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016, which will take effect on October 2016. Under the draft Regulations, the first reports (reflecting data for April 2017) will not need to be published until April 2018, a timetable that has aroused anger in some quarters.

Both private and voluntary sector employers of more than 250 employees (workers are not included in this number) will need to report annually, on their own website and to the government, the overall mean and median difference in hourly rates of pay between male and female employees, as well as information on the difference in mean bonus, the proportion of male and female employees receiving a bonus and the number of males and females in each salary quartile of the employer. Calculations will be based on a pay period in April of each year, rather than across the year. One issue that is likely to cause problems for employers is that maternity pay is included in the definition of 'pay', meaning that employers with a high proportion of the workforce on maternity leave are likely to appear discriminatory.

The government will publish league tables using the information gathered, but has decided not to impose penalties (such as fines) for non-compliance with the reporting requirements, making the Regulations something of a toothless animal. Employers may well choose not to comply with reporting requirements rather than publish statistics which do not cast them in a favourable light.

What should employers do next?

Employers caught by the Regulations should consider using the lead in period to gather the data they will be required to disclose (if possible using April 2016 as the data collection marker) and assess what it reveals and how it is best presented.

Bringing Clarity to Transatlantic Data Transfers—the EU-US Privacy Shield

After the confusion and relative panic caused by the Safe Harbour framework for transfer of personal data between the European Union and the United States being held to be invalid by the European Court of Justice, the European Commission and the United States have announced that they have reached a new transatlantic data transfer agreement. The 'EU-US Privacy Shield' arrangement will include stronger obligations on US entities and safeguards for European citizens, designed to address the failings of the previous regime. Such measures will include requirements on US companies handling human resources data from Europe to comply with decisions by European data protection authorities, several avenues of redress for citizens who consider that their data has been misused and an annual joint review by the European Union and the United States. Further details of the agreement are expected to be disclosed over the coming weeks and months as the arrangements are finalised.

What should employers do next?

No immediate action is required or desirable; a draft agreement and full guidance from the Information Commissioner's Office will be issued in due course.

The Boundaries of Privacy in the Workplace

In the recent case of *Barbulescu v. Romania*, the claimant employee alleged to the European Court of Human Rights that his rights under Article 8 of the Convention relating to respect for private life had been violated by his employer monitoring his private emails at work. The court, however, held that his rights had not been violated. On the face of it (and if you've seen the newspaper headlines of an impending 'Big Brother' workplace), this judgment seems quite broad, but it is instead quite limited to the specific facts of the case. The employee had been asked by his employer to set up a yahoo email account to respond to queries from clients but had used it for personal purposes, in contravention of a blanket ban on personal correspondence. He also had stated when questioned that he was using the account solely for work, rather than chatting to his friends and family. The employer was said to be proportionate in its monitoring, only accessing the email account on the presumption that it was just used for work.

What should employers do next?

Check that you have appropriate monitoring rights under your IT and Email Policy.

For more information about these issues or if you would like to discuss an employment related matter, please contact: Christopher Hitchins at +44 (0) 207 776 7663 or Sarah Bull at +44 (0) 207 776 5222.

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