Katten

KattenMuchinRosenman UK LLP

Employment Matters

Brexit: Implications of Brexit for Employment Law in the UK

In our previous Brexit update, we looked at what employers might expect following the 'leave' vote. Now, with a new prime minister and a new cabinet in place, has anything changed? In brief, the message is that it's still 'business as usual': EU law will continue to be influential on UK employment law for some time. The new 'Minister for Brexit', David Davis, has made it clear that he has no desire to reduce the impact of EU employment law in the UK. The repeal of laws that have promoted equality and diversity is unlikely; however, there are areas of EU-derived employment law that could be on the agenda for repeal, in the years to come:

- certain aspects of the Working Time Regulations 1998, possibly those involving holiday rights for workers on long-term sick leave and inclusion of commission and overtime payments in holiday pay;
- the Agency Workers Regulations 2010, which gives equal treatment to agency staff who have been with the hirer for 12 continuous weeks in a given job; and
- caps on bonuses in the financial services sector, which the UK unsuccessfully attempted to challenge in 2014.

However, this is all subject to negotiation with the EU; any agreement with the European Union involving access to the single market or free trade is likely to require the continued adherence to key EU employment rights.

What Should Employers Do Next?

We'll keep you updated with relevant developments as negotiations take place over what form the UK's exit from the European Union will take.

Data Privacy: Information Commissioner's Office (ICO) Statement on the General Data Protection Regulation (GDPR) Following Brexit Vote

We do not expect much change to data protection obligations following the UK's decision to leave the EU, and businesses should assume that regardless of when we exit or what exit looks like, they will need to comply with the new GDPR. As a reminder, the GDPR is EU-wide legislation proposing large changes to the data privacy regime, to come into force by May 2018. Whilst the GDPR will not directly apply to the United Kingdom when it leaves the EU, we expect that if the UK wishes to continue to trade with the EU's single market, the European Union would require the UK to prove that it provides adequate security of personal data by reference to the GDPR. The ICO made it clear throughout the referendum process that businesses should continue to ensure that their arrangements comply with the GDPR, even in the event of a 'leave' vote. Further communication is awaited from the ICO following the result.

What Should Employers Do Next?

It is too early to predict the form of what the UK's 'adequacy' of security ought to look like, but we will keep you abreast of developments including updates from the ICO.

EU-U.S. Privacy Shield

The U.S. Department of Commerce formally approved the EU-U.S. 'Privacy Shield' on the 12 July. The Privacy Shield replaces the Safe Harbor framework, which was removed in October 2015, and offers U.S. organisations who collect and process personal data of EU citizens a straightforward mechanism to legally transfer EU personal data to the U.S. The Privacy Shield is a binding data transfer framework, and compared to the Safe Harbor, it imposes stricter and more comprehensive data protection obligations on U.S. organisations that handle personal data. U.S. organisations wishing to take advantage of the Privacy Shield will need to apply to the U.S. Department of Commerce. The date on which applications are first being accepted is 1 August 2016.

What Should Employers Do Next?

Companies will need to assess the risks associated with a failure to comply with the EU's data privacy laws, and consider whether the Privacy Shield is the best course of action for compliance with this legislation.

For further information to enable you to undertake this assessment, please read our partner, Doron Goldstein's commentary, available here.

Confidential Information: High Court Grants Order for Destruction of Confidential Information on Former Employee's Electronic Devices

The availability of orders to protect employers against suspected breaches of employers' confidentiality has been extended by the High Court in the decision of *Arthur J Gallagher Services Ltd V Skriptchenkov*.

The case focussed on the alleged misuse of confidential information belonging to the insurance group, Arthur J Gallagher, by former employees, including Mr Skriptchenkov, who had moved to a competing company. Following the disclosure of approximately 4,000 documents, it was revealed that the competitor company was widely misusing the insurance group's information and a draft defence was filed admitting a 'limited extent' of misuse.

The insurance groups sought an interim order to allow them to inspect and take images from all computers and electronic devices and to delete any confidential information that was found on them.

The High Court granted the destruction order, and gave its opinion that the former employees could not be trusted to seek out and delete such material themselves. As a result, therefore, the destruction of the relevant material was overseen by an external computer expert and assurances were given that copies would be kept for restoration if information was found at trial to have been wrongly removed.

What Should Employers Do Next?

This case illustrates the continuing developing landscape regarding the Court's approach towards assisting employers to protect their confidential information, and enforce any breaches of it. Whilst the Court is showing more willingness to use invasive methods to protect confidential information, employers should continue to take practical steps themselves, for example ensuring that confidential information is only available to employees who need to have access to it, that they have an obligation to keep it confidential and not to keep copies, and an obligation to destroy it and/or deliver up a copy of what they have destroyed on termination.

Paid Annual Leave: Carrying Over When Sick

The European Court of Justice (the CJEU) has confirmed that where sickness prevents a worker from taking annual leave, leave can be carried forward.

In *Sobczyszyn V Skola Podstawowa w Rzeplinie*, a teacher took "convalescence" leave (the Polish equivalent to UK "sick leave"), which was provided by a Teachers' Charter, and she was unable to take her annual leave during this time. The school argued that her holiday had been used during

convalescence, but it the CJEU held that workers must be able to use annual leave at a later date where sickness has prevented leave.

EU legislation provides for four weeks' annual leave for every worker (as opposed to the UK's 5.6 weeks' leave minimum). The purpose of paid leave is rest and relaxation, whereas sick leave is for recovery from illness. Annual leave can, therefore, be rescheduled on recovery, even if that means rolling it over to another holiday year.

What Should Employers Do Next?

Employers may need to consider their existing practices regarding sickness absence where this prevents an employee from taking holiday, particularly if this results in a shortfall of holiday taken during the holiday year. Employers should also review their holiday policies to ensure that they are in line with this decision of the CJEU.

ACAS Code Does Not Apply to SOSR Dismissals for Breakdown in Working Relationship

The Employment Appeal Tribunal (EAT) has held that the 25% uplift for non-compliance with the Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on Disciplinary and Grievance Procedures does not apply to 'some other substantial reason' (SOSR) dismissals for a breakdown in the working relationship.

The case involved the dismissal of an employee following a period of acrimony, during which she had brought an unsuccessful grievance against a fellow employee. An Employment Tribunal upheld her unfair dismissal claim as well as finding procedural deficiencies, with the result that any compensation awarded could be increased by up to 25%.

The EAT upheld the Tribunal's finding that the dismissal was procedurally and substantively unfair, but rejected the finding that the ACAS Code—specifically the 25% uplift—applied. It ruled that whilst elements of the Code are applicable, the Code does not apply to SOSR dismissals. To impose a sanction for failure to comply with the Code to the letter, therefore, was not what Parliament had in mind.

The decision in *Phoenix House Ltd V Stockman* closely follows that in *Holmes V QinetiQ Ltd Eat 0206/15*, which held that the Code did not apply to ill-health dismissals. The ACAS Code applies in cases where alleged acts or omissions involve culpable conduct or performance that requires correction; ill-health was not considered to fall in to this category.

What Should Employers Do Next?

For any employee termination, employers will need to make a decision on a case-by-case basis as to how to manage the exit discussions and procedure, taking into account the ACAS Code and their own disciplinary and performance management procedures. Employers should review their policies to ensure that they do not contradict the developing body of case law regarding the applicability of the ACAS Code.

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.

Katten Muchin Rosenman LLP Offices

AUSTIN | CENTURY CITY | CHARLOTTE | CHICAGO | HOUSTON | IRVING | LOS ANGELES
NEW YORK | ORANGE COUNTY | SAN FRANCISCO BAY AREA | SHANGHAI | WASHINGTON, DC

Reply Address: Paternoster House, 65 St Paul's Churchyard, London EC4M 8AB

Tel: +44 (0) 20 7776 7620
Fax: +44 (0) 20 7776 7621
Website: www.kattenlaw.com/london
Email: info@kattenlaw.co.uk