Welcome to Employment Matters: a round-up of the key UK employment law issues affecting your business and our recommendations for managing those issues.

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.

ICO Takes Action Against Data Thieves

Among calls for stronger sentences for 'data thieves', the Information Commissioner's Office (ICO) has prosecuted employees who unlawfully obtained (and attempted to obtain) personal data from their ex-employers. In the first case, a waste management company employee was leaving to join a rival company, but not before emailing the details of 957 clients to his personal email address. He was fined £300 and ordered to pay a victim surcharge of £30 and £405.98 costs. In the second case, an ex-insurance company employee tried to get a former colleague to sell him customer data and was fined £300 and ordered to pay £614.40 costs and a £30 victim surcharge. Both of them were charged with unlawfully obtaining or accessing personal data under section 55 of the Data Protection Act 1998, which is a criminal offence. However, the offence is punishable by a fine only, which will be reduced depending on the circumstances that the data thief finds themselves in—often they'll lose their current job and be unable to pay a high fine, a factor that the courts have to take into account. Information Commissioner Christopher Graham has said, "We'd like to see the courts given more options: suspended sentences, community service, and even prison in the most serious cases."

Meanwhile, in contrast to the low level of fines for individuals, the ICO has the power to impose a monetary policy on a data controller of up to £500,000. The highest fine imposed was £350,000 in February of this year for a company behind 46 million nuisance calls. However, when the General Data Protection Regulation comes into force in 2018, the highest possible fine will be up to 4% of worldwide annual turnover, which could see staggeringly large fines for the biggest and worst offenders.

What should employers do next?

Consider whether your company data is adequately protected, as you can't necessarily rely on the ICO and the courts to compensate you appropriately in the event of a data breach. Forms of protection include practical steps such as restricting employee access, preventing mass downloads and shutting off access and remote access when an employee is exited. Contractual protections are another option, where confidentiality provisions, delivery-up obligations and clawback clauses (if relevant/appropriate depending on how your employees are paid) are present in the employment contract.

The Trade Secrets Directive—Keep It Secret, Keep It Safe

The European Council has formally adopted a new Trade Secrets Directive. The new directive seeks to harmonise the treatment of trade secrets across the European Union and will need to be implemented in Member States within two years. Broadly, under the Directive a party can be sued for the acquisition of a trade secret through unlawful means or any other conduct which goes against "honest commercial practices". The directive has three main elements:

- a consistent definition of what constitutes a "trade secret";

- the remedies available for the misuse of a trade secret, which includes injunctions and destruction of infringing goods; and
- the protection of trade secrets during legal proceedings.

It's difficult to tell how much of an effect the Directive will have on the United Kingdom (assuming we remain in the European Union of course) given the strong body of case law that we already have in this area. It should however make it easier to enforce trade secrets across the EU.

What should employers do next?

Consider what trade secrets your company possesses and whether these are currently adequately protected. Are they known on a need-to-know basis? Also, consider whether your post-termination restrictive covenants (if any) are fit for purpose and provide your business with the protection that it needs.

ACAS Reports on Early Conciliation Figures

The number of Employment Tribunal (ET) claims in the United Kingdom has dropped considerably in the last few years. This is due in part to the introduction of fees before a claim can be brought, and partly due to mandatory early conciliation through the Advisory, Conciliation and Arbitration Service (ACAS). ACAS has recently published a paper with results from interviews with claimants and respondents on the effect of its conciliation processes on employment tribunal claims. And the survey says? The survey data shows that 71% of claims involving ACAS did not proceed to a hearing. Of this:

- 31% of cases were settled at the early conciliation stage;
- in 17% of cases, ACAS conciliation at the early conciliation stage was credited as important by claimants in their decision to not proceed to an ET hearing;
- 22% of cases were settled at the post-claim stage; and
- in 1% of cases, ACAS conciliation at the post-claim stage was credited as important by claimants in their decision to not proceed to an ET hearing.

Furthermore, 54% of claimants stated that early conciliation made it quicker to resolve their employment tribunal claim.

What should employers do next?

Don't underestimate the important role that ACAS can play helping you to avoid the drain on time, fees and stress involved in an employment tribunal claim. Often claimants think that by threatening to bring a claim, they will get a settlement. Employers can take comfort that if they are prepared to wait it out, even if an employee brings a claim, there is a good chance that that claim will not proceed beyond the early conciliation stage.

When Does an Expectation of Working Late Become a Requirement?

In the recent case of *Carreras v United First Partnership Research*, the Employment Appeal Tribunal (EAT) considered the duty to make reasonable adjustments where an employer's provision, criterion or practice (PCP) puts a disabled employee at a substantial disadvantage compared to able-bodied employees. Mr Carreras worked long hours as an analyst at an independent brokerage firm. He then had a serious bicycle accident which made it difficult for him to continue to do extended hours. He would experience dizziness and headaches and would find it difficult to concentrate in the evenings. After returning to work, Mr Carreras' hours were originally limited. He then began to work longer hours, which resulted in his employer expecting him to work late, asking which nights he would work late rather than asking him if he could work late at all. After telling his employer that he was struggling with the hours, he was told that he could either work the hours or leave. He resigned, claiming constructive dismissal and disability discrimination for failure to make reasonable adjustments.

In his claim Mr Carreras argued that there was a requirement of long hours, which was rejected by the Employment Tribunal as he had stayed late voluntarily. The EAT disagreed and decided that the

expectation or assumption that Mr Carreras would work late could be a PCP, and that a narrow interpretation of 'requirement' shouldn't have been used. He felt obliged to work late, with the belief that his bonus and career progression would have suffered had he not put the hours in. Being unable to do this put him at a disadvantage, and entitled him to an award for disability discrimination.

What should employers do next?

The definition of a PCP can be very wide, so consider the working environment and necessary reasonable adjustments for disabled employees. Follow the advice of occupational health to ensure that employees are not placed at a disadvantage.

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.

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