SmartHR E-Newsletter

August 2013 Issue 26

SmartHR
delivering effective solutions

SmartHR provides a wide range of professional and effective outsourced HR solutions tailored to individual needs.

HR Consultancy:

- HR Consultancy and Advice
- Tailored Business Support Packages for a fixed monthly fee
- HR Healthchecks and Planning
- Employment Contracts and Staff Handbooks (IOM and UK)
- HR Policies and Procedures
- Induction Programmes
- Performance Management Frameworks / Appraisal Processes
- Redundancy Support and Outplacement Services
- Ad hoc / Interim HR and Change Management Projects

Training:

- 'Skills Workshops' delivered on a wide range of topics to improve people management skills
- 1-to-1 coaching e.g. managing absence, discipline & grievances
- Bespoke courses created to your needs and delivered internally or externally

Welcome to SmartHR's August 2013 E-Newsletter

We hope you find this e-newsletter of interest and share it with your colleagues. **Gail Yeowell Chartered FCIPD FInstAM(Dip) FCMI FIRP**
Managing Director, Smart HR Solutions Limited

Read our Client Testimonials here: Testimonials

RECENT EMPLOYMENT LAW CHANGES

Since our last newsletter in April 2013, there has been various changes to UK employment legislation, including:

- **Whistleblowing:** from 25 June 2013 the UK Govt has introduced a 'public interest' test. Only concerns which meet the test will give the whistleblower legal protection. The requirement for disclosures to be made in 'good faith' in order to be protected has been removed. Employers can also be found to be vicariously liable (partly responsible) when one employee causes another a detriment on account of a protected disclosure.

- **Political Belief:** from 25 June 2013 when someone is dismissed in the UK for reasons of their 'political opinions or affiliation' the 2 year qualifying period for unfair dismissal does not apply.

- **Unfair Dismissal Cap:** the UK Government has introduced a pay cap of 52 weeks' pay or £74,200 on the compensatory award for unfair dismissal awarded by Employment Tribunals where the effective date of termination falls after 29 July 2013. *Compensation for successful claims of discrimination will remain unlimited.*

- **Settlement Agreements:** with effect from 29 July 2013, Settlement Agreements came into force in the UK (replacing Compromise Agreements). The aim is to make it easier for employers and employees to have a conversation and make a settlement offer to end the employee's employment, without the conversation being admissible as evidence in an unfair dismissal claim (it will still be admissible in other claims such as discrimination, harassment, whistleblowing). ACAS has now published a supporting 'Code of Practice on Settlement Agreements' which is available at: **www.acas.org.uk**

- **Employment Tribunal Fees:** fees for lodging employment tribunal claims in the UK came into force on 29 July 2013.

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IOM: BRIBERY ACT 2013

The Dept of Home Affairs has prepared guidance information to assist companies to do business competitively and fairly, and to put procedures in place to avoid committing an offence under the Bribery Act 2013. The views of the business community and the Manx public are being sought as part of a consultation process on the draft guidance. The guidance document can be found at https://cf.gov.im/dha/ConsultationDetail.gov?id=396
The deadline for responses is 15 Oct.

IOM: EQUALITY BILL

There is no date set yet for the introduction of the new Equality Bill for the IOM. Further updates will be provided once more information is available.

UK: WORKER WINS £27,000 PAYOUT FOR RACIST NICKNAMES AIMED AT A COLLEAGUE

A black employee has been awarded £27k by an Employment Tribunal after winning a constructive dismissal case against a company which allowed his colleague to be subject to racist remarks including 'golliwog Brian'. The Tribunal decided that by having to listen to racist behavior, the claimant's dignity had been 'violated' – even though the employee who the comments were about had not complained to the company. The claimant was awarded £14,286 in lost earnings for constructive dismissal, which is in addition to £13,427 he won in 2011 for racial harassment.

Struggling to keep up to date?

Have your employment documents been reviewed recently?

Need help with HR matters on a flexible basis?

Contact Gail on 478764 or email gail@SmartHR.co.im

Future UK Employment Law Changes

- **Employee Shareholder Status:** legislation regarding employee shareholders comes into force in the UK on 1 September 2013. This gives a new type of employment status whereby an employer can give shares to employees worth between £2k and £50k in exchange for them relinquishing some of their statutory employment rights (unfair dismissal, statutory redundancy pay, right to request flexible working and time off for training). The shares will be exempt from capital gains tax. Women will have to provide 16 weeks' notice of their return from maternity or adoption leave (instead of the usual 8 weeks). There are various safeguards including a right to a statement detailing the shares, a requirement for the employee to take legal advice, and a 7 day cooling off period.

- **Executive Pay:** new rules will apply to UK quoted companies with regard to executive remuneration arrangements for all financial years after October 2013. Shareholders will be given a binding vote on the Company's proposed remuneration policy. No changes can then be made without a further vote and if necessary, these must take place annually. If the policy remains unchanged then it must be voted on once every three years. When reporting on Directors' pay, companies will have to state in one sum what each Director's individual package is worth i.e. what they actually earn in practice, in total.

- **Third Party Harassment:** S.40 of the Equality Act 2010, which covers third-party harassment, whereby an employer could be found liable if an employee is harassed by a third party e.g. a customer, is expected to be repealed from Oct 2013. The questionnaire procedure relating to alleged discriminatory treatment is expected to be removed from April 2014.

- **Compulsory Equal Pay Audits:** Tribunals will be able to require employers (with more than 10 employees) who lose equal pay claims to carry out a compulsory equal pay audit. There will be some restrictions on this power and it is expected to come into force in October 2014.

UK COURT OF APPEAL RULING ON EMPLOYERS' RIGHTS TO ACCESS EMAILS STORED ON HOME COMPUTERS

Fairstar Heavy Transport v Adkins. The Company was incorporated in the Netherlands, but Adkins, the CEO was based in the UK. Company communications were set up so that all emails addressed to the CEO were forwarded to Adkins and then deleted from the Company's system. The emails were stored on Adkins home computer. Adkins had been engaged as a consultant (not an employee) by Fairstar through his own company. After his engagement was terminated he refused to comply with the Company's request to hand over the emails. The High Court had previously ruled that the Company did not have a proprietary claim on the content of the emails held by Adkins. CoA decided that the CEO was an agent of the Company and that Fairstar had a legal right to inspect and copy the emails of the former agent and that the termination of the agency did not terminate the duty binding on Adkins arising out of the agency relationship.

This case shows the importance of ensuring that a contract between employer and employee, or company and consultant, has express provisions dealing with the issue of ownership of emails generated on behalf of the employer, but which may be stored offsite. The ruling shows that an employer may still have a remedy against an employee who refuses to provide access to emails stored offsite where an employment contract is silent on the matter.

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UK: HANDLE SETTLEMENT AGREEMENTS WITH CARE!

In Newbury v Sun Microsystems, a High Court decision held that a binding contract existed when an offer was accepted – even though not all the terms were settled.

Prior to a Court hearing, the defendant's solicitors commenced a dialogue to explore a settlement. The solicitors' letter made a settlement offer with the heading 'terms of offer' and stated terms on which company would be prepared to settle the proceedings for £601,464.98, which included compensation and legal cost contributions. The letter stated the offer was open for acceptance for a fixed period of time and the settlement on the terms proposed was 'to be recorded in a suitably worded agreement'.

Newbury accepted the company's offer and his solicitor put forward a draft document recording the terms that had been put forward by the company. The company rejected the document and put forward its own draft with new terms relating to tax, NI & confidentiality. It also amended the payment terms.

Newbury rejected the new terms and argued that a binding agreement had been made when he accepted the company's written offer.

At High Court, the judge held that a binding contract had been concluded when the offer was made and accepted, even though the parties intended subsequently to record their agreement in a formal document.

It was noted in the judgment that the words 'subject to contract' had not been used by the company when making its offer. The judge referred to case law showing that the absence of this wording can be significant.

Three words can make all the difference...

CONDUCTING DISCIPLINARY HEARINGS WHEN WITNESSES ARE TOO FRIGHTENED TO ATTEND

A recent UK tribunal case has provided advice on what makes a fair hearing. In **Duffy v George**, George alleged that Duffy (a work colleague) had sent her a sex toy and text messages containing sexually offensive comments. George lodged sexual harassment claims against her employer and Duffy. The claim against her employer was settled, but the claim against Duffy progressed to a full tribunal hearing. Duffy admitted sending the sex toy and texts, but he argued that the acts were not unwanted, that it was 'banter' and George 'gave as good as she got'.

Prior to the hearing, Duffy sent George a letter inferring that she had made up the allegations and would suffer for making a claim. George was then too scared to attend the tribunal. She was told she was under no obligation to attend, and her case would be assessed on her written evidence (although the weight given to it would not be as much as if she had been subjected to cross-examination).

Having heard Duffy's evidence the tribunal decided that, viewed objectively, Duffy had committed sexual harassment acts but it did not award compensation as no assessment could be made of George's injury to feelings.

Duffy appealed to the EAT arguing that the tribunal was not entitled to find against him when George had not given oral evidence and had not been cross-examined. The EAT rejected his appeal, stating the tribunal rules could allow for judgements on written evidence alone.

Duffy lodged a further appeal to the Court of Appeal (CA), which was upheld. The CA held that the tribunal should have held a preliminary hearing to consider how a full hearing could be fair and just given that George was too frightened to attend. In particular, the tribunal should have considered whether it:

- was satisfied that George had grounds for being fearful of cross-examination by Duffy
- should hold separate hearings at which the parties could give their evidence separately
- should require both claimant and respondent to submit questions in advance, to put the other person at the hearing

The tribunal could also have considered the use of screens to prevent a line of sight between George and Duffy, and accepted a video recording of the evidence, or there could have been a live link between the tribunal and the witness.

The guidance for dealing with a witness who is too frightened to attend a hearing above is useful for employers whose disciplinary and grievance proceedings allow for the 'accused' to question the evidence of the complainant, or witnesses, directly. Employers should consider whether the fear of giving evidence is genuine and ensure the individual knows that they will be protected from victimisation. Where the individual is still reluctant to attend, the employer should consider other methods of giving evidence such as questions in writing, use of a video link between different locations. The overall objective should be for the hearing to be fair and the complainant and accused to be on an equal footing as far as possible, allowing evidence to be scrutinised where facts are challenged.

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Employees' rights over choice of grievance companion

Workers have the right to reasonably request to be accompanied at a disciplinary or grievance hearing. The categories of companions permitted include a trade union official or another of the employer's workers.

In **Toal and another v GB Oils Ltd**, the employees made a claim against their employer for failing to allow them to be accompanied by their chosen companion. The employer refused requests to be accompanied at a grievance hearing by a particular trade union official – although the employer did permit a work colleague and another trade union official to act as companions.

The Employment Tribunal rejected the claim on the grounds that the workers had waived their right to be accompanied by their first choice trade union official when they accepted the employer's offer of alternative companions. Toal and Hughes appealed, arguing it was not open to the ET to find they had waived their right to be accompanied by their preferred official.

The Employment Appeal Tribunal rejected the employer's argument that the word 'reasonably' used in the ACAS Code of Practice on Disciplinary and Grievance Procedures applied to the choice of companion as well as to the request to be accompanied. The EAT also ruled that where employees choose another companion after the first has been rejected, that does not mean those employees have waived their right to be accompanied by their first choice.

SmartHR delivers a range of 'Skills Workshops' in order to enhance people management performance, including:

- Essential HR for Line Managers
- Effective Recruitment & Selection
- Effective Appraisals & Objective Setting
- Managing Performance
- Negotiating & Influencing
- Coaching & Feedback Skills
- Managing Performance Problems
- Managing Discipline & Grievances
- Managing Absence
- Effective Team Meetings
- Effective Time Management
- Delegation Skills
- Managing Stress
- Customer Care, Telephone & Time Management Techniques
- Train The Trainer

Visit the Training page of our website at www.SmartHR.co.im for details of all of our training workshops. Click on the workshop name for course outline.

For a *cost effective quote* to deliver any of our courses internally, please email gail@SmartHR.co.im

We can also create bespoke courses & deliver employment law presentations