SmartHR e-Newsletter

January 2014 Issue 28

Welcome to SmartHR's January 2014 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**
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IOM LEGISLATION CHANGES

IOM: Bribery Act 2013: Appointed on 16 December 2013, it aims to keep the Island at the forefront of international standards. The main difference between the Bribery Act 2013 and the legislation it replaces, the Corruption Act 2008, is the introduction of a new offence – a commercial organisation will be liable to be prosecuted for failing to prevent bribery if a person associated with it commits a bribery offence anywhere in the world for the benefit of that organisation. As in the UK, an organisation will have a defense if it can prove that it had in place adequate procedures to prevent bribery. Further details can be found at:
http://www.legislation.gov.im/cms/images/phocadownload/Acts_of_Tynwald/Primary_2013/briberyact2013.pdf

IOM: Control of Employment Bill 2013: the Bill will be debated by the House of Keys on 28 January 2014 and proposes to replace the Control of Employment Act 1975, modernising the existing system or controls. The changes include:

- changing the definition of an IOM worker to someone who has at any time been ordinarily resident in the IOM for an unbroken period of 5 years.
- more flexibility to grant exemptions or to remove existing exemptions.
- the spouse or civil partner of a permit holder or exempt person will be able to apply for a 1 year permit themselves with the permit not being limited to any particular employment.
- a person with a relevant criminal conviction will no longer be entitled to use any exemption. Similarly the spouse of a permit holder or of an exempt person will no longer have an automatic entitlement to a permit if he or she has such a conviction.
- the matters to be taken into consideration in granting a work permit will be increased from 5 to 9, with further matters taken into consideration increasing from 11 to 17.
- discretionary powers are also included to take into account the ability of the person in respect of whom a permit is sought and any relevant person to speak English.
- maximum penalties for offences are increased from £2.5k to £5k and for aggravated offences from £5k to £7.5k. A £1k fixed penalty may be applied as an alternative to prosecution.

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UK: EUROPEAN PARLIAMENT APPROVES FEMALE QUOTA FOR CORPORATE BOARDS

The EU Parliament has overwhelmingly endorsed a European Commission draft directive that would require listed companies with over 250 workers to appoint women to 40% of non-executive director posts by 2020. The European Council will negotiate a final draft with the Commission and Parliament.

CIPD LAUNCHES GUIDE TO VETTING CANDIDATES ON SOCIAL MEDIA

The CIPD has released a guidance document for employers on what constitutes good practice when conducting pre-employment checks on job applicants. It offers advice around checking Facebook, Twitter and LinkedIn profiles – distinguishing between using social media for mainly private purposes and professional purposes. The guide also states that employment references should only be sought once a job offer has been made, and that employers should apply the same level of care in avoiding unconscious bias and discrimination when online checks are being completed, as they would when conducting face-to-face interviews.

The guide can be found at: http://www.cipd.co.uk/hr-resources/guides/pre-employment-checks.aspx

UK: GOVT CONSULTATION LAUNCHED ON ZERO-HOURS CONTRACTS

A formal consultation has commenced regarding zero-hours contracts which is open until 13 March 2014, which includes considering banning the use of exclusivity clauses. A private member's bill (Zero Hours Contract Bill) will have its second reading on 24 January 2014.

UK: EU STATES HOLIDAY PAY SHOULD INCLUDE COMMISSION

An opinion on the **Lock v British Gas Trading** (BGT) case could have huge implications for UK employers. The opinion of an Advocate General of the Court of Justice of the European Union (CJEU) is that holiday pay should include an amount that reflects average commission previously earned by workers over a prior period of months.

In the UK, under the Working Time Regulations 1998, workers have a right to paid annual leave. However, until this case, holiday pay was not required to include commission that would have been earned by a worker had s/he not taken a holiday.

In this case, Lock was a sales consultant who earned a fluctuating amount of commission, paid monthly, on top of his basic pay. His commission equated to c60% of his total remuneration. He took 2 weeks' paid leave at the end of Dec 2011. During this time his remuneration consisted of his basic pay and commission he had earned during the preceding weeks. In the following months after his December annual leave he suffered financially as his pay was reduced by his inability to generate commission whilst being on holiday.

Lock brought a claim for outstanding pay. The ET referred the case to the ECJ.

Advocate General Bot concluded that Lock should be compensated for not being able to make sales and earn commission during his leave. Although his commission was variable per month, it was permanent enough for him to regard it as forming part of his normal pay ("a constant component of his remuneration").

BGT defended that the amount of commission paid took into account that workers would not be able to generate commission during their periods of annual leave. This was rejected.

The EU opinion was that commission should be included as part of a worker's remuneration when calculating what that worker should receive as holiday pay. The Advocate General suggested averaging the commission received by the worker over a period of time e.g. the previous 12 months, in order to calculate the commission that should be payable.

The Advocate General's opinion is not binding on the CJEU. Although, if the Court follows this opinion when it hears the case next year, the decision will set a binding precedent requiring employers to include commission when calculating a worker's holiday pay. This opinion is an extension of a ruling in the **Williams v British Airways** case, where the European Court ruled that payments "intrinsically linked" to an employee's job should be included in the calculation of holiday pay (this case concerned payment for flying hours).

The outcome of this case will be eagerly awaited...

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UK: SHARED PARENTAL LEAVE TO BE INTRODUCTED FROM APRIL 2015

The UK Govt has confirmed its proposals to introduce shared parental leave for new mothers and fathers from April 2015. Parents will be able to take shared parental leave until a child's first birthday.

The first 2 weeks of leave after the birth of a child will be reserved for the mother, but the remaining 50 weeks can be shared between the mother and father and will not have to be taken in one continuous block.

Employees will have to give 8 weeks' notice to 'opt in' to the SPL scheme, and will be expected to give at least 8 weeks' notice of any leave.

When a couple first opt-in to the system they will have to tell their employers how they are intending to use their leave. This notification will not be binding, but it will give employers an indication of how and when the leave is expected to be taken.

It will only be possible to make three requests for shared parental leave, or changes to leave.

Employees will have the right to return to the same job if they take a total of 26 weeks' leave or less (including any time on maternity, paternity or adoption leave), and parents will also be entitled to 20 'keeping in touch' days whilst on shared parental leave.

Eligible couples could also take up to 39 weeks' of shared parental pay.

UK: RIGHT TO REQUEST FLEXIBLE WORKING TO B BE EXTENDED TO ALL EMPLOYEES FROM APRIL 2014

The UK Government has pledged to extend the right to request flexible working to all employees from April 2014.

The TUC is calling on the Government to give working grandparents a greater entitlement to paid leave.

UK: UNFAIR DISMISSAL AND THE RELEVANCE OF PREVIOUS WARNINGS

In the case Rooney v Dundee City Council, the Employment Appeal Tribunal (EAT) held that an Employment Tribunal could decide that it was within the range of reasonable responses for an employer to dismiss an employee taking into account a final written warning when an appeal against it remained outstanding.

Rooney had a final written warning for failing to follow a reasonable management instruction, which she appealed. The appeal hearing was rearranged on a number of occasions but it was not heard.

A separate disciplinary issue then arose due to Rooney's inappropriate behaviour (whilst the final written warning was still 'live' against her).

The Disciplinary Officer upheld the allegations. In isolation they would normally have only justified a final written warning. However, as the incident had similarities to the circumstances in which the first written warning was sanctioned, when the incidents were taken together they justified dismissal.

Rooney appealed against the decision to dismiss her. As part of the appeals process, the nature and circumstances of the first written warning were reviewed.

The result of the appeal was that the dismissal was upheld. It was considered that the warning was justified, so there was no reason to ignore it.

The matter ultimately progressed to EAT who reviewed the reasonableness of the dismissal where a valid / 'live' warning was in place, including whether there had been an appeal held internally within the company.

The EAT upheld the Employment Tribunal's decision that the dismissal was fair, as it was within the range of reasonable decisions an employer might take, and that a final written warning implies that any further misconduct will usually result in dismissal.

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UK: High Court ruling on 12 months' garden leave: In **JM Finn & Co Ltd v Holliday**, Holliday had been employed as an Investment Adviser for JM Finn since 1999 and had built up significant client relationships. In 2008, he signed new terms and conditions of employment which included his notice period increasing from 3 to 12 months, a garden leave clause being added and a non-solicitation covenant - in return for an increase in his salary. In July 2013, he resigned following an offer of employment from another stockbroker organisation. Following his resignation he was placed on garden leave and reminded that he had a 12 month notice period. Holliday asked to continue to receive market briefings during his garden leave. His employer refused. Holliday claimed that his was a repudiatory breach, terminating his contract of employment. Holliday then made arrangement to commence in his new role in August 2013.

JM Finn applied to the High Court for an injunction to enforce the garden leave clause and for Holliday to uphold his 12 month notice period. The High Court held that Holliday had not been constructively dismissed and granted an injunction for Holliday's 12 months' notice. It considered that Holliday had taken legal advice when signing his new contract in 2008 and it did not consider that Holliday would lose his skills whilst on garden leave or that it would damage his reputation.

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