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## HR Consultancy:

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- 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
- Visit our online 'E-HR Shop' to purchase a wide range of template employment documents

## Training:

- 'Skills Workshops' delivered on a wide range of topics to improve people management skills
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## Welcome to SmartHR's October 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

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## OCTOBER EMPLOYMENT LAW CHANGES

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

- **Shareholder votes on Executive Pay:** from 1 Oct 2013 shareholders of UK-incorporated quoted companies have a legally binding vote on the remuneration levels of Senior Executives every three years. A single total reward figure will be subject to an advisory vote by shareholders. If the shareholders do not vote in favour, the Board will not get paid and new remuneration details will need to be provided for approval. The new rules will mean that Directors who approve high remuneration payments, which have not been approved by shareholders, will be personally liable for the payout unless they can demonstrate that they acted in an honest and reasonable way. Once a remuneration policy has been approved, a company will only be able to make remuneration and loss of office payments permitted within the limits of the remuneration policy, unless the payment has been approved by a separate shareholder resolution.
- **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harassment, whereby an employer could be found liable if an employee is harassed by a third party e.g. a customer, is repealed from 1 Oct 2013. This does not mean that employers never have liability for the harassment of staff by a third party. There is a risk that where a direct discrimination or harassment claim is brought as a result of the conduct of an employee, any evidence of failure to deal with third party harassment may undermine the employer's 'reasonable steps' defence. An employee may also resign and claim constructive dismissal for breach of trust and confidence where they are subjected to third party harassment which an employer ignores, make a negligence claim and/or a claim under the Protection from Harassment Act 1997.
- **Gender Balance Reporting:** for financial years ending on or after 30 Sept 2013, quoted companies are required to include details of gender balance within their annual report. The report must include a breakdown showing at the end of the financial year the number of persons of each sex who were directors, senior managers and employees of the company.

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## UK: EAT RULES REFUSAL OF PART-TIME WORKING WAS NOT DISCRIMINATION

(Little v Richmond Pharmacology)

Little was a full-time Sales Executive who requested to work part-time when she returned from maternity leave. Little's request was refused, subject to appeal, as the company stated the job had to be done on a full-time basis as the high level of service to clients required that one person should be the central contact between the company and the customer at all times during the sales and drugs trial process.

Little appealed the decision, but then resigned. She was asked to reconsider her resignation pending the outcome of her appeal. During the appeal hearing Little was offered a 3 month trial on reduced hours. She refused the offer, left the company and claimed indirect sex discrimination.

The ET rejected the claiming, finding:

- 1) The provision, criterion or practice (PCP) of full-time working applied to all Sales Executives
- 2) The PCP disadvantaged women as a group compared to men, because of their primary child care role
- 3) While the PCP did apply to Little when she requesting part-time working, it was not applied on appeal, so she did not suffer a disadvantage as an individual
- 4) The PCP was justified in any event

Little appealed on points 3 & 4. The EAT rejected the appeal. It found that the internal appeal formed part of the employer's decision-making process. The original rejection of Little's request for part-time working was subject to appeal, and that appeal was successful. The requirement to work full-time would not apply to her when she eventually returned to work so she had not suffered any person disadvantage.

## CONSTRUCTIVE DISMISSAL AND THE '3 ELEMENTS'

In this UK case, **Hutchinson v Scottish Ministers**, the EAT had to consider whether voluntary severance was compatible with constructive dismissal.

Hutchinson was absent from work for stress-related reasons whilst working for the Scottish Prosecution Service. Her employer made an offer to the workforce to apply for voluntary severance. Hutchinson made an application for this. She returned to work briefly in an alternative role. She then received a severance offer (of a lump sum payment) which she accepted.

Hutchinson negotiated a leaving date and then immediately made an employment tribunal claim for constructive dismissal. Hutchinson alleged the stress caused by her employer amounted to a fundamental breach of the employment relationship for which she had no other option but to leave her employment. She argued this was supported by medical evidence that returning to her former role would be detrimental to her health. Hutchinson believed her position was no different from someone who was dismissed and subsequently entered into negotiations over leaving terms. She did not think it was unreasonable to pursue an opportunity to leave with a financial package.

**The ET and EAT (after appeal) dismissed Hutchinson's claim and found that her employment had ended by mutual agreement. To establish constructive dismissal she would need to show the employer had acted in fundamental breach of her contract and that this was the reason for her resignation.**

The ET found at no stage Hutchinson had communicated to her employer that she considered the employment relationship had ended due to the employer's conduct. The EAT found Hutchinson might well have established a potential claim for constructive dismissal if she had tendered her resignation and communicated her reasons for doing so clearly. As a result, the basis of her employment ending was by way of voluntary severance.

**Employees must establish 3 key elements in respect of claiming constructive dismissal:**

- a fundamental breach of contract on the part of the employer
- the employee must have resigned because of this
- the employee must not delay unduly in doing so

## IOM: WORK PERMIT CHANGES FOR SKILLED ENGINEERING AND ICT WORKERS

The Department of Economic Development has announced details of a streamlined work permit process for applications for skilled ICT (Information and Communication Technology) and engineering workers.

In response to a shortage of ICT and engineering workers on the Island, the DED has decided that relevant work permit applications which are correctly submitted will be considered administratively within *two working days*.

The DED has also decided that work permits for skilled ICT and engineering jobs may be issued for extended periods in excess of the normal 12 months, with special consideration being available for certain senior and strategically important positions.

## UK: REASONABLE ADJUSTMENTS REQUIRED FOR PSYCHIATRIC DISABILITY

**In the case of Croft Vets Ltd v Butcher, the Employment Appeal Tribunal ruled that the employer's failure to pay for treatment for depression for a disabled employee was discriminatory.**

After several months off work suffering from work-related stress, Butcher was assessed by a Consultant Psychiatrist who recommended that her employer paid for specialist cognitive behavioural therapy and six more psychiatric sessions. The employer didn't act on the recommendations.

Subsequently, Butcher resigned and claimed disability discrimination (namely that the Company had failed to make reasonable adjustments) and constructive dismissal.

**The EAT found that the employer's conduct amounted to a fundamental breach of trust and confidence.**

## UK: GOVT RELAXES RULES FOR SME PENSION AUTO-ENROLMENT

Employers will now have six weeks to auto-enrol new employees, and the deadline for employers providing information to staff on their joining rights has been extended to six weeks.

**The changes will be effective from 1 April 2014.**

To find out how SmartHR can add value to your business call Gail on 619619 / 478764, email: [gail@SmartHR.co.im](mailto:gail@SmartHR.co.im) or visit our website at [www.SmartHR.co.im](http://www.SmartHR.co.im)

## AGE DISCRIMINATION & PHI PAYMENTS

In the UK case of **Witham v Capita Insurance Services**, Mr Witham had received benefits from Capita via a Permanent Health Insurance scheme arranged between Capita and an insurance provider. The payment stopped when Mr Witham reached age 55.

Mr Witham was not 'actively at work' when Capita arranged a more favourable PHI scheme that commenced in 2002 – allowing employees to claim PHI payments up to age 65 (rather than age 55 under the original PHI scheme). The insurance company declined to indemnify any employee who was not 'actively at work' at that date. In 2006, Mr Witham's employment contract was changed and entitled him to receive PHI payments until age 65. However, in 2009 the provision was reinstated that benefits would cease once the employee reached age 55.

**Mr Witham claimed against Capita for both direct and indirect age discrimination, and for making unlawful deductions from his wages in relation to the PHI scheme.**

The ET held Capita had directly discriminated against Mr Witham on account of his age, and found that the decision to stop Mr Witham's PHI benefits once he reached age 55 had been a purely cost cutting measure. The ET also found that Capita had indirectly discriminated against Mr Witham on the grounds of his age.

## FAILURE TO FOLLOW A NON-CONTRACTUAL GRIEVANCE PROCEDURE CAN AMOUNT TO A BREACH OF TRUST AND CONFIDENCE

In **Blackburn v Aldi Stores Ltd** the EAT ruled that failing to provide an impartial grievance appeal amounted to a breach of the implied term of trust and confidence.

Aldi's grievance procedure required grievances to be dealt with by a Section Manager and appeals to be heard by the next level of management. Blackburn lodged a grievance about health and safety, lack of training and being mistreated by the Deputy Transport Manager. The grievance was heard by Heatherington (Regional MD), who upheld some aspects but rejected the allegation of mistreatment. Blackburn appealed. Heatherington heard the appeal (contrary to the grievance procedure) and rejected it.

**Blackburn resigned and claimed constructive dismissal, arguing that the appeal process had not been impartial as Heatherington had dealt with the grievance and appeal hearings. Blackburn claimed Aldi had breached the implied term of trust and confidence.**

The ET rejected the claim for constructive dismissal. Blackburn appealed. The EAT upheld the appeal. It considered the ACAS Code of Practice provision that an appeal should be dealt with impartially wherever possible by a Manager who has not previously been involved in the case. Even where a grievance procedure is not contractual, a failure to follow it is capable of amounting to a breach of trust and confidence. The EAT stated a failure to adhere to a short timetable for dealing with a grievance will not necessarily be a breach, but a failure to respond to a grievance or provide an appeal, or an impartial appeal, may well amount to a fundamental breach.

## UK: REFUSAL TO BE ACCOMPANIED AT A MEETING BREACHES TRUST AND CONFIDENCE DUTY

**St Francis Hospice v Burn.** Burn was signed off work sick in 2009. In 2010 a return to work meeting was to be arranged. During 2010 there was 'considerable correspondence' between Burn and her employer about her return to work and other aspects of employment. Burn raised a formal grievance under relevant procedures. After alleged bullying and harassment by her employer, Burn treated a letter from Hospice in Oct 2010 as 'the last straw'. She resigned and claimed unfair dismissal – listing 10 alleged breaches of the employer's obligation to maintain mutual trust and confidence. Hospice stated there had been no bullying or harassment and that Burn resigned in order to tour the Far East for which an absence request had been refused.

One of Burn's allegations was that Hospice failed to allow her to be accompanied by a colleague to a meeting with Hospice's management (not a grievance or disciplinary meeting for which there is a statutory right to be accompanied). *The ET found that Hospice had acted in breach of the implied term to maintain trust and confidence.* Hospice appealed stating an employee could not establish an implied entitlement to be accompanied to meetings that went wider than statutory rights apply. Hospice's appeal failed on this and other grounds. As Burn had been off work for some time and was anxious about attending a meeting alone, the fact there was no statutory right to be accompanied did not prevent there being such a breach when a request for accompaniment going beyond the statutory right was refused.



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Contact Gail on 478764 / 619619

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- Effective Team Meetings
- **Effective Time Management**
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