SmartHR e-Newsletter

February 2014 Issue 29

SmartHR
delivering effective solutions

SmartHR is a leading provider of multi-sector outsourced HR consultancy and training solutions

HR Consultancy:

- **HR Consultancy & Advice**
- **Business Support Packages tailored to your needs**
- **HR Strategy, Audits & Planning**
- **Employment Contracts & Staff Handbooks (IOM and UK)**
- **HR Policies & Procedures**
- **Induction Programmes**
- **Performance Management / Appraisal Frameworks**
- **HR Projects & Interim Solutions**
- **Change Management Projects**
- **Business Restructuring & Redundancy Support**
- **Outplacement Services**
- **Online 'E-HR Shop' to purchase a wide range of IOM or UK template employment documents**

Training:

- **A wide range of people management 'skills workshops'**
- **1-to-1 coaching e.g. managing absence, discipline & grievances**
- **Bespoke courses created to your needs and delivered internally or externally**
- **Employment legislation overview & update sessions**

Welcome to SmartHR's February 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**
Managing Director, Smart HR Solutions Limited

Read our Client Testimonials here: Testimonials

January 2014 – TUPE Changes

For UK employers, various changes to the Transfer of Undertakings Regulations (TUPE) have been introduced from 31 January 2014, including:

- Allowing renegotiation of terms agreed from collective agreements one year after transfer, provided any changes are no less favourable to employees.
- The location of a workforce can be within the scope of an economic, technical or organisational (ETO) reason entailing changes in the workforce, thus preventing genuine place of work redundancies from being automatically unfair.
- Changing the law so that only dismissals which are "by reason of a transfer" will be automatically unfair. Those who are merely "connected to a transfer" will be potentially fair.
- Removing the legal duty on transferors to inform transferees about the number of employees transferring and any outstanding legal claims that may come across with them. The aim is to return to the long-established due diligence arrangements which leave the parties to decide what information is communicated about employees and when.
- Removing the requirement for businesses employing less than 10 people to consult with 'representatives' ahead of a transfer – they will be able to consult with individuals directly.

To clarify, for there to be a TUPE service provision change, the service provision must be "fundamentally or essentially the same" as before the transfer.

ACAS will be producing a full guide on dealing with TUPE over the coming months. They have produced a summary of the recent changes which can be found at: http://www.acas.org.uk/media/pdf/l/1/9908-2901767-TSO-ACAS-TUPE_is_changing-ACCESSIBLE.pdf

Smart HR Solutions Limited
"Small Enterprise of the Year 2013"
"Offshore HR Consultancy of the Year 2013"
T: 01624 619619 / M: 07624 478764 / E: gail@SmartHR.co.im
www.SmartHR.co.im

SmartHR E-Newsletter

February 2014 Issue 29

UK: DISMISSAL RECOMMENDATION BY EXTERNAL CONSULTANT IS POTENTIALLY FAIR

GM Packaging v Haslem

In this case the EAT ruled that it is fair for an employer to dismiss an employee on the recommendation of an external HR consultant.

GM Packaging had nine employees. One of them (the Claimant) had become involved in sexual activity with a member of staff on company premises after hours and the Managing Director became aware of this.

The company consulted an external HR consultant to advise on whether dismissal should take place. Following investigation, the HR consultant recommended dismissal and the MD accepted the recommendation.

Haslem was dismissed and appealed. The appeal was also delegated to the HR consultant and the appeal was rejected.

The ET ruled that it was fair and reasonable to delegate matters to an HR consultant, but found that the principal reason for dismissal (in the MD's view) was purely the sexual activity on the company's premises. The ET considered this was not gross misconduct and the dismissal was outside the band of reasonable responses. This was appealed.

The EAT overturned the ET's decision as all parts of the reason of 'conduct' were relevant to the reasonableness question and not just the principal act of misconduct. Dismissal for sexual activity with a member of staff on the company's premises after hours, as well as Haslem making derogatory remarks about his employer was considered within the band of reasonable responses. It found the ET had erred by substituting its own view.

What other changes are on the horizon?

2013 was another year of change in employment legislation, with employers constantly needing to assess the potential impact of changes, make any required adjustments to their employment documentation and internal HR policies & procedures, communicate relevant changes to their staff, and ensure that their management teams are trained and competent in dealing with the changes. The next year or so looks to be busy too, with various changes and potential changes on the horizon, including:

IOM:

- **Control of Employment Bill and Regulations** – new legislation is expected to replace the existing legislation. Implementation date unknown.
- **Equality Bill** – further progress is expected with the Equality Bill which will deal with discrimination on the grounds of race, religion, sexual orientation, age, disability and gender reassignment.

UK:

- **ACAS Pre-claim Conciliation** – major changes to the processing of lodging tribunal claims will be introduced on 6 April 2014.
- **Additional Employment Tribunal Reforms** – after 6 April 2014 employment judges will be able to levy fines equivalent to 50% of any award made (up to a maximum of £5k) on employers who lose cases and have been found to have acted unreasonably in defending a claim. This will include negligence on the part of the employer as well as deliberate unreasonableness. From 6 April 2014 the 'questionnaire system' will also be abolished re equal pay and some areas of discrimination. This will allow workers who suspect that they may be being treated unlawfully to ask questions of their employer in writing about their perceived unfair treatment and to have them answered swiftly, prior to the person making an Employment Tribunal claim.
- **Extending the Right to Request Flexible Working to all Employees with 26 weeks' service** - this was due to be implemented on 6 April 2014 but has been delayed. Implementation date unknown.
- **Increases to SSP, SMP, SPP and SAP** – statutory benefit rates are expected to increase from April 2014.
- **Executive Pay / Remuneration Policy** - for financial years ending after October 2013, shareholders of UK quoted companies are given a binding vote on the Company's proposed remuneration policy. Also, when reporting on Directors' pay, companies will have to state (in a single sum) what each Director's individual package is worth (i.e. what they actually earn in total).
- **Recruitment Agency Reform** – a reform of the regulations covering recruitment agencies is likely to progress during 2014.
- **Equal Pay Audits** – legislation is likely to be come into effect from October 2014 that will allow Employment Tribunals to require employers who lose equal pay claims (contractual or non-contractual) to carry out a compulsory equal pay audit.
- **Caste Discrimination** – UK Govt has indicated its intention to outlaw discrimination on grounds of caste within 2 years (i.e. by April 2015).
- **Shared Parental Leave** – details of the changes to existing maternity / paternity / parental leave legislation are being determined. They are likely to affect parents of babies born after April 2015. The intention is that once a new mother has taken her 2 weeks' SML, she will be able to share her subsequent 50 weeks SML leave with the father, along with the remaining 37 weeks of statutory maternity pay. Mothers and fathers will be able to take the leave concurrently if they choose to.

SmartHR E-Newsletter

February 2014 Issue 29

UK: WHISTLEBLOWER CAN CLAIM UNFAIR DISMISSAL WITHOUT 2 YEARS' SERVICE

Norbrook Laboratories v Shaw

In this case the EAT decided that three different emails warning of a health & safety risk to his staff after snowfall made driving potentially dangerous qualified for protection under whistleblowing legislation

Under the Employment Rights Act 1996, workers must establish that they have made a 'qualifying disclosure' to gain protection. There is no qualifying period of employment required for making a claim of automatic unfair dismissal, but the disclosure must contain information, not just an allegation.

During winter 2010, Shaw emailed his employer 3 different times regarding H&S concerns for his regional sales team. He emailed the H&S Manager twice, asking for advice regarding his team driving in the snow, asked if a H&S risk assessment had been done, and asked for formal guidance as the team was under pressure to keep out on the roads and it was dangerous. Subsequently, he emailed the HR Dept saying he was only after a policy statement to help build morale an goodwill with the team and that as their Manager he had a duty of care for their H&S. He said his own experience showed driving through the snow was dangerous and unproductive. He wrote that "if the team are not going to be paid then I have to put in contingencies for diverting calls to those team members still on the road. In the absence of any formal guidance I take full responsibility for the directions given to my team."

Shaw was dismissed. He didn't have 2 years' service to claim unfair dismissal and instead claimed automatically unfair dismissal for making a protected disclosure under whistleblowing rules. The ET concluded a protected disclosure had been made. The employer appealed. The EAT said the ET was correct and Shaw's claims were sent back to be considered in full by the ET.

UK: DISMISSAL FOR SMOKING ON WORK PREMISES RULED UNFAIR

In **Vincent t/a Shield Security Service v Hinder**, a security guard was dismissed for gross misconduct after a 6 year unblemished employment record. Hinder was working a night shift at a largely unoccupied factory when there was a break-in. The next day two colleagues informed Hinder of the break-in and inspected the physical damage to the premises. Hinder's colleagues saw him smoke two cigarettes inside the premises during their inspection, which was a serious breach of health and safety regulations.

Hinder was suspended and invited to a disciplinary hearing to respond to allegations of him neglecting his duties. The disciplinary letters provided by the company suggested that the alleged misconduct could potentially fall under gross misconduct, which could ultimately result in his summary dismissal.

The Chair of the disciplinary hearing acquitted Hinder of neglecting his duties, but did find that he had been smoking whilst on the factory premises. The Investigating Officer noted during the investigation that Hinder had admitted to smoking, said his reasons for doing so was because he was confused about the break-in, and had apologised. Hinder denied he had admitted to smoking.

Hinder was dismissed for smoking illegally inside a client's premises. Hinder made an ET claim. The ET found that the dismissal was unfair on five grounds:

1. The employer's disciplinary procedure was unclear on whether a serious infringement of health and safety rules was a gross misconduct offence
2. Hinder had been confused at the time of the incident
3. Neither of his colleagues had stopped him smoking
4. The premises were more or less empty
5. A reasonable employer looking at Hinder's good employment record would have considered an alternative sanction

The company appealed, arguing the ET judge had substituted his own view on the right course of action and had not applied the 'band or reasonable responses' test correctly. The EAT rejected the appeal and said that the ET judge was best placed to consider the matter.

Employers do not have to prove that a dismissal is reasonable, that is for the Tribunal to decide. An employer should show that a dismissal is for a fair reason and that a fair procedure has been followed (which follows the ACAS Code of Practice on Discipline and Grievance Procedures).

UK: RIGHT TO REQUEST FLEXIBLE WORKING EXTENDED TO ALL EMPLOYEES

The change to flexible working legislation (Children and Families Bill) has been delayed and will not now be implemented on 6 April 2014. A new implementation date will be advised once known.

SmartHR E-Newsletter

February 2014

Issue 29

UK: 'Employee' defined under Equality Act 2010. In **Halawi v World Duty Free (WDF)**, the EAT ruled that an individual engaged through a personal services company was not an "employee" for the purpose of a discrimination claim brought under the Equality Act 2010 (the Act). Halawi sold cosmetics in a duty-free outlet at Heathrow Airport. Following complaints from her colleagues, WDF removed her airside security pass. Halawi said she had been discriminated against and made an ET claim. This progressed to an EAT. Halawi provided her services through her own personal services company, Nohad Ltd, to Caroline South Associates (CSA). She brought a claim against WDF & CSA and was required to show that she was an employee of one of the companies. Halawi did not have a contract of employment with either company as her services were provided via Nohad Ltd. The EAT reviewed whether Halawi had a 'contract to personally do work'. Halawi was unable to show that her contractual work arrangements fell within the definition of the Act, but she argued that EU Law did not require such contractual requirements. It was established that WDF & CSA had no obligation to provide her with work, she was free to refuse any shifts assigned to her, and that she was permitted to appoint a substitute to perform her services (and had exercised that right). The EAT ruled there was no mutuality of obligation, economic dependency or element of subordination that would usually be associated with an employment relationship. The EAT upheld the ET's decision that there was no employment relationship,

SmartHR
delivering effective solutions

Are you complying with employment legislation?
Have you reviewed your employment contracts and HR policies recently?
Would your business benefit from HR expertise?
Do you need HR support on a flexible basis?

SmartHR can provide onsite and offsite HR support on an interim or longer-term basis to deal with day-to-day HR management matters, restructuring, HR projects etc.

Contact Gail on 478764 / 619619

email gail@SmartHR.co.im

or visit our website and view our testimonials at: www.SmartHR.co.im

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