SmartHR e-Newsletter

June 2014 Issue 31

Welcome to SmartHR's June 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

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Right to request flexible working extended

From 30 June 2014 in the UK, the right to request flexible working will be extended to most employees with 26 weeks' continuous service. Currently the right to request flexible working only covers eligible carers of children and dependant adults. As with the current legislation, only one statutory flexible working request can be made in any 12-month period.

Under the new Children and Families Act 2014, workers, agency workers, members of the armed forces, office holders and those employed under employee-shareholder contracts will be exempt.

The statutory procedure that employers are required to follow when considering requests will be replaced by a duty to deal with such requests in a reasonable manner. The process and decision, including any appeals process, should be completed within 3 months of the application date (although the timescale can be extended by mutual agreement). Employers can still refuse a request on one or more of the 'permitted' reasons.

The new legislation will remove the statutory right that employees currently have to be accompanied at meetings to discuss their request and any subsequent appeal meeting, although employers can choose to offer for employees to be accompanied if they wish to do so.

When making an application, employees are still required to state that it is a statutory flexible working request, the change applied for, the proposed date of the change, the effect the change would have on the organisation, and how they think the change might be dealt with.

Employees can still claim to tribunal if they consider the employer has not dealt with request in a reasonable manner, wrongly treated the request as withdrawn, or made a decision in time.

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SmartHR E-Newsletter

June 2014 Issue 31

UK: SPECIAL ABSENCE TRIGGERS NOT REQUIRED FOR DISABLED EMPLOYEES

In Griffiths v Department for Work and Pensions, the Employment Appeal Tribunal (EAT) agreed with the Employment Tribunal's (ET) ruling that organisations were free to maintain workforce-wide trigger points when considering absence interventions.

The EAT noted that applying absence policies to an entire workforce meant that disabled employees were not placed at a substantial disadvantage in comparison with employees who were not disabled.

The EAT further noted that the purpose behind an employer's duty to make reasonable adjustments was to support disabled employees to be at work and remain in the workplace, rather than to support continued or extended absence. Therefore, the trigger point can remain the same within sickness absence policies irrespective of whether the absence is disability-related or not.

UK: BELIEF IN 'PUBLIC SERVICE' PROTECTED BY EQUALITY ACT 2010

In Anderson v Chesterfield High School the ET ruled that a commitment to public service was a 'protected belief' and contributed to the employee's dismissal.

Anderson was on an extended leave arrangement as he was the leader of Liverpool City Council. He was elected Mayor of Liverpool for a 4 year term, and his employer terminated his employment. The ET rejected the discrimination claim, found that the leave arrangement was a fair reason for dismissal, but that the dismissal was unfair as Anderson had not been consulted before his employment was terminated and he was not offered the right of appeal.

IMMIGRATION ACT 2014

Since our last newsletter, the UK's Immigration Bill 2013/14 has received Royal Assent and is now the Immigration Act 2014.

From 1 May 2014, the maximum penalty for employing someone illegally increased from £10k to £20. This comprises of a civil penalty of £15k for employers who have employed a worker who does not have the right to work, which is increased to £20k if the employer received a civil penalty notice in the last 3 years.

An employer who knowingly employs an individual who does not have the right to work will still have committed a criminal offence, which can result in an unlimited fine or up to 2 years' imprisonment.

From 16 May 2014, changes have been made to the procedures for checking an individual's right to work, including:

- A range of **approved documents** that are acceptable as evidence of the right to work in the UK have been reduced.
- There is **no longer a requirement to undertake annual follow-up checks** on those whose right to work in the UK is time-limited. Employers should now undertake additional checks when the employee's permission to be in the UK and undertake the work in question expires.
- Employers **no longer have to keep a copy of the front page of a passport** – they do still have to keep a record of when right to work checks are made.
- For **students** who right to work in the UK is restricted to a limited number of hours per week and during holidays, employers are required to obtain and retain a copy of evidence setting out their term and holiday times during the period of study within the UK – e.g. a student timetable from the educational establishment sponsoring the student.
- Where checks are made as a result of acquiring employees under a **TUPE transfer**, the time limit for making the checks has increased from 28 to 60 days.
- It is compulsory for an employer to make a **record of the date** on which a check was conducted.

UK: HOLIDAY PAY MUST CORRESPOND TO NORMAL PAY

In Lock v British Gas Trading, the European Court of Justice (ECJ) ruled that holiday pay must correspond to normal pay, including any commission or other variable pay that it might ordinarily comprise.

Mr Lock received a basic salary and was entitled to earn commission which could be up to 60% of his total remuneration. When Mr Lock took annual leave, his holiday pay was based on his basic salary only. As Mr Lock was paid in arrears, when he was on leave he received a total amount comparable to that earned when he was at work. However, his pay was reduced in subsequent months as he had not earned commission during the time he was on leave. Mr Lock lodged an ET claim for outstanding holiday pay, which was ultimately referred to the ECJ. The ECJ found that Mr Lock should receive an amount to reflect the commission he was unable to earn whilst on annual leave, and that this could deter employees from exercising their right to take statutory annual leave.

SmartHR E-Newsletter

June 2014 Issue 31

UK: CONSTRUCTIVE DISMISSAL RULING – WORKING LONGER THAN CONTRACTUAL NOTICE PERIOD

In Cockram v Air Products, the EAT ruled that an employee who gave longer than his contractual notice period waived his right to claim constructive dismissal

Cockram had raised a grievance about comments his line manager had made to him. His grievance was rejected. He regarded the Company's and his line manager's conduct as wholly unacceptable and so serious that he had to leave. He had a 3 month contractual notice period, but he provided 7 months' notice stating "I have no other work secured to enable me to leave immediately and I need to work for a reasonable period of time and it is for this reason only that I am giving notice."

Upon leaving he lodged a constructive dismissal claim.

The ET ruled that Cockram had waived his right to claim constructive dismissal because he had given, and worked, 7 months notice instead of his contractual 3 months. Air Products appealed the decision.

The EAT reiterated that although the law gives employees the right to resign 'with' and 'without' notice, the issue was whether Cockram's contractual notice period could be varied from 3 to 7 months.

The EAT ruled Cockram had affirmed the contract by giving and working notice that greatly exceeded his contractual notice period solely for his personal financial reasons. Cockram's claim was struck out.

Other court/tribunal rulings...

UK: Secretary of State for BIS v Knight. In this case, the ET ruled that the owner of a company can be regarded as an employee for the purpose of making a redundancy payment claim.

Knight had been the sole shareholder and MD of a company from its incorporation in 1991 until it ceased trading in 2011. In the last 2 years of the company's trading, Knight forfeited her salary so as to enable other employees and creditors to be paid. Following the company's insolvency, Knight applied for a redundancy payment from the Insolvency Service.

The Secretary of State appealed against the ET's ruling in Knight's favour. The EAT reiterated that whether or not an individual is an employee of a company is a question of fact and that as such it was not perverse for the ET to find that Knight was an employee of the company, there was no lack of mutuality or consideration, and that Knight had not discharged or varied her contract of employment by not taking salary for the previous 2 years.

Knight received a redundancy payment of £7,296 from the Insolvency Service.

UK: Ells v Nizels Golf Club. In this unfair dismissal and age discrimination case, Mr Ells was awarded £52,200.

Mr Ells, age 55, was dismissed by Nizels Golf Club after various disciplinary hearings occurred from September 2012 to April 2013 concerning a mystery shop call, a 2 week period of absence, and alleged written complaints about him (which later turned out to be made up).

Mr Ells successfully proved that Nizels were actively trying to get rid of him, he was denied the opportunity to apply for a role that he was experienced to do (it was given to a younger person), that there were no other managers over the age of 50 at the Club and he was sacked for being 'too old'.

UK: Clements v Lloyds Bank. In this age discrimination case, Clements, in his 50s, was Head of Business Continuity for Lloyds Bank. During a discussion over his performance in January 2012 he was told "You're not 25 anymore" (although the manager denied making the remark). The ET ruled that the remark was made and that it was an act of age discrimination, but that it did not form part of the conduct that led Clements to successfully claiming constructive dismissal in July 2012.

Clements unsuccessfully appealed the ET's finding that his dismissal was not caused by age discrimination. Although the 'age' remark was discriminatory, it wasn't found to be a material cause of the repudiatory breach of his contract (which was how Lloyds Bank went about trying to remove Clements from his job due to performance reasons).

SmartHR E-Newsletter

June 2014

Issue 31

UK: 12-month non-compete clause enforceable. In **Merlin Financial Consultants Ltd v Cooper**, Mr Cooper joined Merlin in April 2012 and was paid a capital payment for the goodwill arising from the transfer of his client funds. He entered into a 'goodwill agreement' which contained a 12-month non-compete restrictive covenant which prevented him from being engaged in any other business which supplied goods/services which competed with Merlin.

Mr Cooper also entered into an employment contract which contained restrictive covenants preventing him from competing with Merlin for 6 months post employment. Mr Cooper left Merlin in November 2012 and set up his own business, advising that he intended to continue working with some of Merlin's clients.

Merlin claimed for breach of contract against Mr Cooper, seeking damages for loss of business. The Court held that the restrictive covenant in the goodwill agreement was enforceable against Mr Cooper. It was treated as a business sale agreement with both parties having equal bargaining power (in an employment agreement the employer usually has greater bargaining power). The Court held that Merlin had a legitimate business interest and the 12-month restriction imposed was reasonable to protect its interests and was enforceable.

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