



HR Outsourcing

2013 - 2014

Welcome!

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myHRdept 2002 - 2013



Welcome to our guide to HR outsourcing and our A-Z of HR and employment law. If you're considering outsourcing HR we hope you'll consider CIPHR/myHRdept to meet your needs.

Outsourcing HR staff (normally for employers of 50 - 500) can substantially increase HR efficiency and value while reducing costs and headcount. With our experience (our team of 70 and over 30 years of supporting employers) we will support the transition process from internal HR to outsourced more quickly and painlessly than you might think.

We expect to save clients 20-30% on costs against an in-house HR department while increasing efficiency and reducing headcount. How? Efficient HR outsourcing combines our fully functional and supported SaaS HR system (CIPHR has a 30 year pedigree) with an experienced and highly qualified HR Advisor who will work on-site with you (supported by a wider team) to establish and deliver an HR agenda that fits your business priorities while saving against internal staff costs, external legal support costs and project consultants.

Our HR Advisors are employed to work on your site and to your agenda against pre-agreed SLAs. While they are a part of your team we provide them with support, professional development, project back-up and cover in the case of longer term absence. By outsourcing HR you can remove your internal HR headcount (we can outsource payroll too). No more worries about recruiting new HR staff either – we assume succession responsibilities. You will also gain a far more experienced and qualified HR advisor and supporting team than you might expect or be able to secure for your existing HR budget. Our team includes former HR Directors from blue chip companies, employee relations experts, experts in TUPE, redundancy, learning and development, case law etc.

A combination of our SaaS HR system and highly qualified on-site HR staff will provide proactive HR capability and we'll get to grips with key business issues quickly, from structure to hiring methods and competence frameworks, performance & absence management and

management capability development, and those complicated individual employee cases that can be so difficult (and expensive) to resolve.

Who should be considering outsourcing HR?

Employers who employ HR staff, buy in ad-hoc HR services (perhaps from lawyers), are approaching a period of change or planning a period of growth or retrenchment should all consider the efficiency and financial benefits of outsourcing. Other typical indicators for the suitability of HR Outsourcing include:

- The existing HR person has inherited or evolved into the role
- In-house HR is limited to administration, perhaps paper-based
- HR issues (discipline/dismissal) are often referred to lawyers for advice
- People performance data is unknown – absence & cost/ cost & length or time of hire/ turnover/ succession/ performance/ potential
- People management skills are questionable (recruitment, performance management)
- Due diligence audits and training rarely take place
- Payroll is still completed in-house
- Minor problems quickly escalate or become entrenched
- A small number of employees cause a disproportionate amount of employee relations pain and the managers feel powerless to deal with them
- Difficulty hiring key roles/high recruitment spend

CIPHR & myHRdept – the perfect outsourcing combination

There are HR systems and there are HR consultancy companies. Uniquely, our HR Outsourcing services are a combination of both - Two well-respected Companies with respectable long term pedigrees that provide the ideal solution for clients looking to outsource their HR.

CIPHR, with a 30 year history, delivers HR software and services in a SaaS environment. We have the vision to help you excel in HR at the highest strategic levels, enabling you to handle the twists and turns of an ever-changing business environment with the utmost skill and ease. Underpinning these qualities is an unwavering dedication to client support and a commitment to long-term client satisfaction.

myHRdept was founded in 2002 by an ex Coca-Cola HR Director and is rapidly becoming the quality HR partner of choice for ambitious businesses, supplying the tools, coaching and know-how to enable them to achieve greater security and success from a high performing, high quality people platform.

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Case Study



The ROYAL SOCIETY of MEDICINE

The prestigious Royal Society of Medicine, based in Wimpole Street in the centre of London, employs 250 people across a mix of academic and conference/hotel activities.

They originally employed 2 X full time staff looking after HR and payroll. Following a strategic review and in view of the busy people agenda ahead they wanted to ensure their support services ran as efficiently as possible. It seemed logical to look to outsource HR and payroll.

When the time came they turned to myHRdept and CIPHR to provide a fully outsourced HR solution, replacing the previously in-house function with a myHRdept HR adviser and a CIPHR systems solution. The CIPHR/myHRdept model introduced CIPHR Net, to allow employee and manager access to HR information and processes (with myHRdept providing administrator support.) myHRdept provided a highly qualified HR practitioner working for 4 days per week, reducing from 10 on-site days previously.

Outsourcing HR & payroll represented a cultural shift for the RSM but the capability of HR increased dramatically as a direct result of the project. The reduction of internal bureaucracy through the introduction of CIPHR has been welcomed by staff and managers alike. It's a shifting picture of course and what RSM needs today has changed from where it was a year and a half ago. We regularly review and rebalance services to ensure focus on a relevant and strategic HR agenda to really add value to RSM's operations.

Today the RSM HR Outsource model includes 1 on-site HRM (a former HR director from the catering & hotel industry whose background matches the RSM structure) with administrative and strategic support being provided by myHRdept Maidenhead, and systems support by CIPHR's Marlow offices.

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A-Z of common HR/employment law issues

The following is a summary of some of the more common HR/employment law areas. See myHRdept.co.uk for more details or contact us on 01628 820515 to discuss a support package for your business.

Absence/attendance

Poor attenders cause disruption and bad feeling amongst the rest of the team and the impact is acutely felt in a small business. Many businesses believe that a doctor's note is sacrosanct. Some lack the data to illustrate the problem or the costs. An attendance system is normally quickly adopted by employees, even in small business. It should involve an Attendance Policy, key requirements which are written into employment contracts, a method of recording absence and return to work 'chats' ensuring that employees know their absence has been noted and giving the framework for a discussion on the topic. Poor attendance is a fair reason for dismissal, even if sicknesses are covered by doctors notes. A fair procedure must however be followed and care must be taken if the employee might be classed as 'disabled', i.e. if they have a physical or mental impairment that is likely to be long term (1 year+) and prevents them being able to do day to day activities. In the case of disabled employees a further duty falls upon employers to consider, in consultation with the employee, adjustments and alternative roles, leaving dismissal as the final resort once all other options have been discounted.

Agency workers, use of

After 12 weeks of employment, Agency Workers become entitled to parity (with their permanent counterparts) of 'Pay and terms and conditions', which extends to basic pay, bonuses, commissions and incentives relating to work done, overtime pay, shift premia and most working allowances and vouchers/stamps, rest periods and breaks, night working arrangements, annual leave and entitlement to paid time off to attend ante natal appointments. An 'agency worker' is defined as someone who has a contract with a temporary work agency, but works temporarily for and under the direction & supervision of an end hirer.

Bullying and harassment

Bullying can cause physical & mental harm and could result in criminal charges under health and safety legislation as well as expensive employment law prosecutions. Employers have a duty to do everything they reasonably can to prevent bullying and harassment in the workplace. Acts of bullying and harassment may be committed by managers, employees or third parties e.g. customers or suppliers. The fact that the employer didn't know that the act

or acts took place is no defence – the employer must show that it did everything it reasonably could have been expected to do to prevent the act occurring in the first place. For smaller employers establishing a Policy and ensuring employees are familiar with it will help to show ‘due diligence’ in this regard, as will documented induction procedures referencing the topic. Larger employers should expect to have more comprehensive education, information and training programmes.

Whatever the size of the employer, allegations or suspicions must be acted on fast, a proper investigation carried out & the Policy rigorously enforced. To know about an issue and then to fail to deal with it properly could land the employer in a lot of trouble.

Capability

Employees generally perform poorly for one of 2 reasons: they **won’t** or **can’t** achieve the standards. Providing of course the standards are reasonably achievable then ‘won’t’ constitutes misconduct and should be dealt with under disciplinary procedures, whereas ‘can’t’ could signify a range of issues, including a training need, ineptitude, a health issue or a lack of confidence. Where possible cases should be addressed informally through training and coaching, but sometimes (and always in the case of medical issues) the case may need to be dealt with under the Capability Procedure which may ultimately result in a fair dismissal.

Case management

Many an otherwise fair process has fallen foul of a failure to hold a proper investigation. Investigations are essential in cases of disciplinary/dismissal issues and for formally registered grievances. An investigator should interview relevant parties, source additional evidence and write up their report to include a chronologically ordered description of events. This time consuming exercise is not core business for most small employers and consideration may be given to contracting the investigation and subsequent case management responsibilities to a third party e.g. a myHRdept case manager.

Contracts of employment

Whether or not formal terms are written down (the employment contract) the law implies certain terms of employment and tribunals may guess what other terms apply. These may not be the terms the employer wanted and so a formal written contract is strongly advised, and in any case written terms must be supplied by law after 2 months of employment. Failing to do so could result in a 2-4 weeks award at employment tribunal, and an award would be a racing certainty if the employee ever had cause to take their employer to a tribunal in the future.

Covenants – restricting employee activity after employment

Covenants are essentially additional clauses contained within the employment contract, but relate specifically to what happens after employment has ended. They tend to be used to restrict competitive activities of senior employees or prevent them poaching staff or using confidential information gained within the course of their employment for the benefit of their new employer or for their own purposes and, in doing so, damaging the business of their old employer. To be enforceable restrictive covenants should extend only to what is necessary to protect the business, should be specific as to what actions are being prohibited and should be only for a reasonable period of time. A blanket restriction on all employees may not be enforceable.

Data protection

In the course of employing people most businesses will accumulate a fair amount of personal data relating to employees. Personal data must be processed in accordance with data protection regulations. From an HR point of view the regulations refer to (amongst other things) health issues and personal details. Employees may request to view any information held on them either electronically or in hard copy and employers must allow access in a 'reasonable' period, not exceeding 40 days from the date of a written request and may charge a small fee. The intervening period presents an opportunity to check through and remove or amend any documents that the employee should not see.

Discipline, dismissals & appeals

All employers should have (and follow) published disciplinary and grievance procedures, cross referenced by employment contracts. These should comply with ACAS codes. If an employee is to be disciplined for misconduct they should be given a copy of the disciplinary procedure when being instructed to attend the hearing. The disciplinary procedure could be used for a range of issues including breaches of rules, minor and more serious misconduct, gross misconduct (normally results in summary dismissal but will still require a fair procedure to be followed, including an investigation) and wilful substandard performance. There is no point using the disciplinary procedure for employees who can't reach the requirement, for example because of a medical issue – here the Capability procedure would be more appropriate.

Discrimination

There are 9 'protected characteristics' defined by the Equality Act 2010 and it is unlawful to discriminate (or allow others to) in recruitment or employment practices directly or indirectly on any of these grounds. This includes perceived discrimination (where a person is believed to have a particular characteristic, for example believed to be gay but isn't), and associative discrimination (where a person is discriminated against on grounds they are associated with

another person who has a 'protected characteristic' such as having a partner of a different race).

Protected characteristics include sex, race, sexual orientation, religion or belief, disability, pregnancy and maternity, gender reassignment, marital status or civil partnership.

Employers are culpable for the discriminatory acts of their employees even if they didn't know, but can establish a 'due diligence defence' to show they have taken reasonable measures to prevent the act or acts occurring in the first place. For smaller employers establishing a Policy and ensuring employees are familiar with it will help to show 'due diligence' in this regard, as will documented induction procedures referencing the topic. Larger employers should expect to have more comprehensive education, information and training programmes.

Discrimination can be direct (there is almost always no defence for this and an example would be refusing to recruit women), or indirect which may be justified on the grounds of the discrimination being a reasonable and proportionate act to achieve a legitimate aim. An example of this might be requiring a contractual commitment for extensive and short notice travel for an on-site surveyor. Statistically more women have child care responsibilities and so more women than men are going to be less able to comply with this requirement, hence indirect discrimination. But the needs of the job are such that the employer would normally be able to defend it, in particular in the case of a small employer who may only have a need for one or two roles of this type.

Discrimination is a huge area of employment law, and cases eat time, money and erode enthusiasm for life. Time is well spent investing in due diligence to educate and train employees (new and existing) in the requirements of suitable policies and procedures, and the topic should be regularly re-visited. This of course isn't core business for any employer, but a single messy discrimination case can easily become all consuming, and so the 'stitch in time saves nine' adage most definitely applies.

Equal Pay

Men and women are entitled to equal pay & benefits for 'like work', work rated as 'equivalent' or of 'equal value'. There are some exceptional circumstances where a difference in pay between the sexes can be justified, but these are normally limited to new employees who have less experience, and are hence less productive than existing employees. However, experience related pay differentials should last no more than the time it takes for an employee to become 'fully competent' in their role, and in any case no longer than 5 years.

Flexible working

The right to request flexible working extends to certain qualifying employees (in the main those with 26 weeks service and with children under 17, or to those who have caring responsibilities) and enables them to ask for a permanent amendment to their contract of

employment. Amendments requested are usually to do with hours of work, days of work or place of work. Employers are only under a duty to *consider* any request, but must do so properly and in good faith and must only refuse the request on one of 8 specified grounds. Whilst there is no automatic right to flexible working, employers must consider any request by following a prescribed procedure, which includes (unless the request is automatically granted) a meeting and an appeal and specific deadlines by which responses must be made.

Grievances

Employees have a right to raise grievances and employers should have as a minimum a 2-stage procedure (hearing and appeal) to deal with them. Persistent trivial grievances eat time however and so may be regarded as a disciplinary offence. Grievances should first be raised informally. Whilst the grievance hearing and outcome are important the investigation phase is crucial. See the 'Case Management' section for more about investigations.

Holidays

All 'workers' (not just employees) have the statutory right to 5.6 weeks paid holiday which can include bank holidays. This is easy to work out for workers with regular contractual hours and pay, but less so for a worker who has variable hours or days of employment, in which case the employer is normally required to calculate his or her holiday entitlement on an on-going basis, usually taking an average over the 12 weeks preceding a holiday request.

Employers may stipulate when holidays are taken and can require and refuse holidays within certain time limits. This should be written into contracts of employment. Small employers sometimes fail to monitor holidays properly and arrive into the last quarter with employees carrying excessive holiday balances. Clear rules backed up by contractual terms are very useful.

Holiday continues to accrue during maternity leave and problems can sometimes occur if the woman is unable to take all of her accrued holiday before the end of the leave year (assuming holiday cannot be carried over). In some circumstances the woman may choose to end maternity leave early and switch to holiday to ensure holiday leave is not lost.

Similarly holiday pay continues to accrue during sick leave and workers returning from long term sick should be given the opportunity to take their accrued holiday even if the leave year has expired. Where sickness occurs during a holiday period the period of holiday should be reclassified as sickness (and the holiday re-credited) and ideally the business should have clear rules (described in employment contracts) for how such sickness should be reported and certificated.

Hours of work

See 'Working Time'.

Immigrant workers

Generally any nationals of EEA countries may be employed without restriction and other workers must have a work permit to be legally employed – to employ an illegal immigrant carries a potential £10K fine (per worker), which an employer may escape if they can show that they undertook reasonable checks. Fake documents are common and employers should reasonably verify that documents are genuine. Some employers check only the documents for applicants who appear to be ‘foreign’. This can give rise to discrimination claims, which could have been avoided had the employer checked everyone’s details as a matter of routine. Copies of evidence should be kept and signed ‘original seen’.

The government has set and will vary the number of non EEA nationals who may work in the UK each year and has developed 4 tiers of immigrant worker, from highly skilled to unskilled and students, with the latter normally restricted during term time to working no more than 10 or 20 hours per week depending on their studies.

Employers may pay to become a registered sponsor of (currently tier 2) immigrant workers, and this can be a good way of sourcing scarce skills affordably. Being a sponsor does carry some responsibilities however and that includes the employer keeping evidence to show that they have first tried but failed to recruit for the role in the UK.

Investigations.

See ‘Case Management’.

Maternity, paternity, parental leave and adoption

Maternity Leave

All pregnant women are entitled to 26 weeks Ordinary Maternity Leave (OML) and 26 weeks Additional Maternity Leave (AML), and the rights to paid leave to attend ante-natal classes, not to suffer a detriment on grounds of their pregnancy or childbirth, not to be dismissed and to return to work normally to the same job when the maternity leave has ended. In most cases women will qualify for Statutory Maternity Pay (SMP), although in some cases Maternity Allowance (MA) may apply instead.

Employers must, upon being notified that an employee is pregnant, conduct a risk assessment (if one is not in place already and covering pregnant employees) and then take all reasonable action to remove any and all potential risks that may harm the pregnant woman or her unborn child. Specific health and safety regulations extend to the period after the mother has returned to work and while she is breast feeding and during the first 6 months after the birth of the child.

A woman has to tell her employer when she will start her maternity leave but does not need to give notice of her return date which will be assumed to be after her full ordinary and additional maternity leave period of 52 weeks. She may however return earlier than this by

giving 8 weeks' notice. During maternity leave she may attend the employer's premises for up to 10 'keeping in touch' (kit) days without this affecting her maternity leave or pay entitlements, but these kit days are optional, i.e. an employer cannot require her to attend.

During leave, terms and conditions (except pay) continue as normal. As far as pay is concerned a woman is currently entitled to 39 weeks Statutory Maternity Pay (SMP), of which the first 6 weeks are 90% of normal pay or SMP, the next 33 weeks being paid at SMP and the remainder (up to 13 weeks) of the leave being unpaid.

After maternity leave the mother is entitled to return to the same job as before and on the same or better terms. If a redundancy situation arises special consideration must be given to retaining the mother over and above other employees who do not themselves have one of the 'protected characteristics' listed under the Equality Act (see the 'Discrimination' section).

Most serious problems stem from the employer failing to handle return to work arrangements properly, for example by not keeping the woman's job open for her. Attitudes to women can sometimes change from the point an employer realises a woman is pregnant, and female business owners are seemingly as prone to this behaviour as males. Some employers are so cautious with pregnant women that they allow their businesses to suffer, perhaps through tolerating high levels of non-pregnancy related absence or poor performance.

Paternity Leave

Qualifying employees are entitled to 'Ordinary Paternity Leave' and pay of 2 weeks to be taken within 56 days of the birth of the child either as a 2 week block or 2 blocks of a week each.

There is also an entitlement to share maternity leave and pay with the mother if the mother decides to return to work early. This is known as 'Additional Paternity Leave' and the right applies from the 20th week after childbirth, subject to some qualifications.

Parental Leave

Parents (including adoptive) with one year's service are entitled to 18 weeks parental leave per child, to be taken at any point up to the child's 5th birthday (18th if disabled). The employer can postpone a request and require minimum and maximum leave rules of a week and 4 weeks respectively.

Adoption leave

There are similar rules to maternity and paternity leave and pay for adoptive parents in respect to children adopted before their 18th birthday.

Pensions and auto enrolment

From 1st October 2012 large employers were required to auto enrol workers into a pension scheme if they do not already belong to one. For smaller employers (no employer is exempt) 'staging dates' range from 2015 – 2017. Auto enrolment applies to all workers over 22 but below state pension age and who hit, in any particular month, an earnings 'trigger' above a certain amount (for the 2013 - 2014 year the trigger is £786.67 per month and this will be

reviewed each year). Earnings between the trigger point and an upper amount (currently £3454.17) will be counted for pension purposes and employers and employees will have to pay a percentage into the pension scheme. The employer contribution (which can't be deducted from salary) will start at 1% and increase by 2017 to 3%, with employees paying in initially 0.8% of their earnings rising to 4% by October 2017. Additional tax relief will increase total contributions to the pension pot from an initial 2% to 8% by October 2017. Employees are allowed to opt out (by following a certain procedure), but cannot be encouraged or required to do so.

Policies and procedures (HR)

As part of their due diligence employers should have and follow a full set of policies and procedures as an essential part of their HR system. The myHRdept policy suite extends to 19 separate policies, many of which cross reference each other. These have been subjected to (and have passed) numerous third party audits and are updated at least annually.

But a shiny file in the corner of an office does not a successful employment law defence make! Employees should be able to easily access the file (which could also be held on the internet) and should be given a copy of the appropriate policy and procedure when they are to be subject to it. Employers for their part have a duty to understand the application of policies and, where appropriate, to draw the attention of employees and in some cases third parties and customers to it, and keep documentary evidence that reasonable efforts have been made to do so. Larger employers will be expected to supplement policies with further communications and training. This is particularly important if, for example, an employer or an employee of the employer is accused of discriminatory behaviour. The employer could be legally liable (even if he didn't know of the event being complained about), but the liability will often be reduced if the employer can show a) a suitable policy is in place to prohibit such acts and b) that reasonable communication of the expectations of the policy to the people being accused of the act had taken place and c) the employer themselves behaved in accordance with the policy.

Recruitment

Good recruitment practices generally result in good appointments and the opposite is also true. Effective recruitment starts by having a good number of candidates (the internet can be effective for this) and then requires the application of sensible selection criteria, both to pick the shortlist and then to interview. Too many small employers don't cast their net wide enough and settle for the candidate they most like, usually on a personal level, out of a restricted choice. While 'fit' is important, a skills based approach to selection (followed by telephone references from previous employers) nearly always yields a better result.

The biggest employment law headache in recruitment comes from discrimination – where someone has not been selected for interview or for a role they're suitable for because of their pregnancy, sex, age, ethnic background etc. Sometimes such discrimination can be committed

unwittingly by an inexperienced recruiter if they suffer from inherent discriminatory tendencies of which they are unaware. Care should be taken to run an objective process (from advert to offer), and preferably those involved in recruitment should be trained in recruitment techniques.

Redundancy

One of the fair reasons for dismissal (subject of course to following a fair procedure) is redundancy. An employee is potentially redundant if:

1. The employer stops or intends to stop carrying out the business for which that employee is employed by them; or
2. The employer stops or intends to stop carrying out that business at or near the location where the employee is employed; or
3. In either '1' or '2' above the requirement for the work diminishes rather than ceases altogether.

A restructuring of a business can bring about a potentially fair redundancy situation if the net result of the restructuring is that less staff are needed. Collective redundancies occur where 20 or more staff are to be dismissed at one location over a 90 day period. In this situation a minimum statutory process (including time limits) applies. In any redundancy situation the employer must be able to show that it consulted fairly with the employees dismissed and sought ways to avoid the redundancies and if that was not possible it looked at how to reduce the impact of the redundancies. If employees are to be selected from a 'pool' then selection criteria must be fair and objective. To qualify for a statutory redundancy payment an employee must have at least 2 years continuous service, the payments are then dependent upon age and service. Notice should only be served after consultation has been completed, which should involve at least 2 meetings with the employee.

Women who are pregnant, on maternity or have recently returned from maternity must be afforded special protection from redundancy.

Employers sometimes use 'redundancy' as a convenient reason for dismissing an employee without otherwise having a solid reason for doing so. This creates an unfair dismissal risk. Other risks come about through inadequate consultation, poor or subjective selection criteria and not observing contractual notice requirements.

Retirement

The default retirement age was abolished on 5th October 2011. After that date it became illegal to retire employees at a fixed age (whether 65, or above/below 65). So can an employee be legally retired? The short answer is 'not easily'. Retirement was effectively a form of legal dismissal, although most of us would prefer not to think of it in those terms. To legally retire an employee at a standard age employers must be able to objectively justify a retirement age, which is a tricky thing to do as people age and re-act to changes in technology etc. in very

different ways. It is difficult therefore to know where to draw the line, and it's safest not to have a standard retirement age.

Settlement Agreements

New for 2013, Settlement Agreements take the place of Compromise Agreements. - A mechanism for agreeing to part company with an employee under circumstances where that employee waives their right to pursue an employment tribunal claim against the Company usually in exchange for a financial settlement and a reference. Commonly used to provide some reassurance for employers after standard dismissals or redundancies etc. the new regulations extend the doctrine of 'without prejudice' so that, properly applied, the employee cannot use the settlement conversation itself as evidence of the employer's wrong doing or intention to dismiss. Settlement Agreements form a valuable part of an employer's toolkit and can be used in circumstances where there's an existing dispute (when the old 'without prejudice' rule will apply) or when there is no existing dispute, in which case S111a of the Employment Rights Act renders the discussion inadmissible in future proceedings providing the employer does not behave improperly or the Agreement is not being used to compromise certain statutory rights.

Employees receiving a settlement proposal should be given at least 10 days consideration time and must be advised by an approved adviser (usually a solicitor) at the employer's expense. Employers are advised to use the ACAS templates provided for this purpose and to embellish these with any required post restrictive covenants (See 'covenants' section in this A-Z) to combat the possibility of the employee then soliciting business from their former employer's customers.

Sickness & Sick Pay

Many employees are entitled to Statutory Sick Pay (SSP) which is paid for up to 28 weeks in any 3 year period. There is no right to SSP in the first 3 days of absence and employees generally must provide evidence that they cannot work because of their sickness. Normally that evidence is a "self-certificate" of absence for absence of up to 7 days or a doctor's certificate after the first 7 days.

Sickness and how to deal with it is one of the most commonly raised topic areas for myHRdept customers. See the section on Absence/Attendance for more.

Tribunals, unfair and wrongful dismissal

Unfair dismissal relates to an employee who wouldn't have been dismissed but for the unlawful action of their employer and wrongful dismissal usually concerns the manner of the dismissal, for example if the employer failed to give contractual notice. 'Automatically Unfair Dismissal' applies in cases where an employer dismisses for any of the protected

characteristics listed in the Discrimination section, or for a collection of other reasons where statute has been breached, for example dismissing employees for reasons connected with health and safety, trade unions (duties or membership of), making disclosures about their employers which are protected in law (usually when the employer is acting unlawfully), acting in the capacity of an elected representative or for carrying out certain public duties.

Employment related complaints including dismissal are normally brought before an employment tribunal, but employees who joined after April 2012 need 2 years' service to bring a claim (a year if service commenced prior to then). This doesn't apply to claims of unlawful discrimination and in certain other circumstances – in those cases a complaint can be brought at any time including if the person bringing the complaint isn't an employee, e.g. a job applicant who has been rejected for discriminatory reasons.

If a tribunal finds in the employee's favour they may make an award against the employer split into a basic award (calculated in the same way as redundancy pay) plus a compensation award (uncapped in the case of unlawful discrimination otherwise limited to £74,200 from Feb 2013). They may also make an additional award in rare cases. Whilst this makes it all sound pretty expensive, high awards are usually reserved for large or public sector employers and in reality of the 3,000 or so compensation awards made last year, the average was less than £5,000, and the same or more normally spent on legal fees.

Newly introduced in 2013 was the tribunal fee regime. The new regulations stipulate that from July 29th 2013 claimants have to pay tribunal fees under a two tier system. Listing a claim under the first tier for 'minor claims' costs £160. The second tier is designed for more serious and lengthy cases, includes unfair dismissal and costs £250. If the claim progresses to a hearing, the claimant will then need to pay court fees of approximately £230 and £950 respectively, which will not automatically be returned even if they win their case. This will mean that any ex-employee wishing to make a claim will have to be able to pay £1,200 with no guarantee of return. These changes will also potentially impact employers, as most settlement agreements will have to include a reimbursement of these tribunal fees, pushing the net cost up by £1200. There is a separate fee structure in Scotland where the respective fees are much lower than under the English and Welsh system.

As a result of the fees, we saw a huge increase in unfair dismissal claims in July. It would be safe to assume that the increase will be short term.

Accompanying the new fee regime were new tribunal forms, guidance on who may qualify for remission of fees (it's not straightforward) and an inevitable period of chaos in claims handling by employment tribunal offices!

It is worth noting that there are legal challenges ongoing against the fee system in both England and Scotland, the outcome of which was not known at the time of writing (September 2013), so how long the fee system is with us is, at this stage, anyone's guess!

TUPE (transfer of an undertaking, protection of employment)

TUPE rules apply where an "undertaking" moves from one business (A) to another (B). This can happen when an employer loses or wins a new contract to provide services, or buys or sells all or part of its business to another business. The TUPE regulations require both employer A and employer B to consult fairly with affected employees prior to the transfer taking place and make it unlawful for either to change the terms and conditions of employees or to dismiss employees because of the transfer, or to change terms and conditions of employees for reasons connected with the transfer except for certain categories of reasons known as 'economic, technical or organisational' (ETO) and where these ETO reasons entail a change in the workforce. So while dismissals or changes to terms are possible in a TUPE scenario, great care should be taken to ensure that they fall within the ETO umbrella.

For the purposes of our summary here, from the employee's perspective nothing should change as far as service, pay and conditions are concerned whether working for employer A or B. So having been the subject of a transfer from A to B, the employee's contract of employment is treated as if it had always been between the employee and employer B.

TUPE is a very complex piece of legislation. The first employment law consideration is to establish whether it applies at all, and mistakes here can be costly. If problems are to arise under TUPE they will normally first show during consultation, or stem from the lack of it. Other issues include failing to count service as continuous, making changes without the agreement of employees, not realising that even changes with agreement may not be binding, if considering redundancies (even for ETO reasons) failing to include all potential employees in the 'at risk' pool (from both employers) and errors in paperwork e.g. confirmation letters, new contracts etc.

Expected in January 2014 are changes to the TUPE Regulations to:

- allow renegotiation of terms agreed from collective agreements one year after transfer, provided any changes are no less favourable to employees
- class a required new location of a workforce to fall within the scope of an 'economic, technical or organisational reason entailing changes in the workforce' (there has been a lot of legal argument around this point and so this change provides welcome clarification that genuine place of work redundancies are not automatically unfair)
- clarify that for there to be a TUPE service provision change, the service provision must be "fundamentally or essentially the same" as before the transfer
- allowing microbusinesses (generally defined as 10 or less employees) to inform and consult directly with employees; and (in some circumstances)
- allow TUPE consultation to satisfy collective redundancy consultation rules

Working Time Regulations

Often known by the 48 hour week limit, working time regs actually cover myriad working conditions under the health and safety umbrella. The 48 hour week is normally an average over a 17 week referencing period and excludes travel to and from work and certain rest breaks. There are special provisions for young workers, night workers and children. Employees can choose (note 'choose', not be forced!) to waive their entitlements to some of the provisions of the Working Time regs including the 48 hour week, providing they voluntarily sign a working time waiver form which the employer must keep on file for inspection if required.

The regulations also cover daily and weekly rest breaks, health assessments for night workers and situations where rights can be postponed in the event of unexpected circumstances and where alternative cover is not possible.

Where an employee is known to be working long hours, employers should look at the reasons behind this and take appropriate measures, which may include requiring the employee to sign a waiver form. Similarly to holiday pay, working time regulations apply to 'workers', not just employees.

Working Time regulations are extensive and complex and there are certain industry exemptions covering the military, continuous production, domestic labour living as part of a family, fishing and sea going crews, agriculture etc.



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