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# HR in the East Midlands

April 2016

This month provides a snapshot of recent HR developments including local government pay, a guide to the apprenticeship levy and the survival of the check off facility for trade union subscriptions. In his article, our employment law specialist, Darren Newman, looks deeply into the question of whether or not an employee is disabled. The issue of defining disability follows from a recent case involving a local authority employer.

## U-turn on Proposal to Stop “Check Off” Facilities in Trade Union Bill

The East Midlands Regional Joint Council, provided through EMC’s employers’ organisation, has lobbied the Government on its proposals to remove the stop workers paying for their trade union subscriptions via wage deductions (known as “check off”). This facility is clearly convenient to employees but is also useful to employers, as it gives an indication of union membership levels and is often a service that is paid for by the trade unions.

In November the Chairs of the Employers’ and Unions’ Sides of the Regional Joint Council, Cllr Tom Beattie, Leader of Corby Borough Council, and Chris

Tansley, Unison, wrote to Minister Sajid Javid expressing concerns about the proposals in the Trade Union Bill. A copy of the letter can be accessed [here](#).

It is therefore pleasing to see the announcement this week that this proposal within the Trade Union Bill will be dropped when the Bill goes through its next reading in the House of Lords. Lord Bridges of Headley made the announcement and added that the payment of subscriptions via salary deduction will continue, as long as the unions bear the administrative cost.

## Projects with Local Authorities

We have been working with local authorities on a range of activities and issues recently. These have included:-

- Leadership Team Development Centre
- Performance Management & Appraisal Training provided in-house
- Advising a Disciplinary Hearing
- Drafting HR policies/procedures

If you would like to know how EMC could support an area of work for you, then please contact Sam Maher at [sam.maher@emcouncils.gov.uk](mailto:sam.maher@emcouncils.gov.uk) or Lisa Butterfill at [lisa.butterfill@emcouncils.gov.uk](mailto:lisa.butterfill@emcouncils.gov.uk).



## Events in the East Midlands

In 2016 EMC are offering a range of learning and development opportunities; here are just a few. We're always keen to get feedback and understand what you would be interested in seeing provided regionally, on a shared basis with other authorities, or in-house - so feel free to get in touch.

### Taking the Minutes, 24 May 2016

EMC is holding a one day course on minute-taking. The subject may not sound the most exciting - but we guarantee that anyone who takes minutes will find it worthwhile, fun and interesting.

Meetings, short or long, formal or informal or informal, need minutes and/or action notes. This one-day course shows how easy it is to take effective, readable minutes.

In the process delegates learn how to set and use an agenda - including what 'any other business' is really for - and find out who should be doing what if the meeting is to work well.

<http://www.emcouncils.gov.uk/Officer-Events/Taking-the-Minutes/34354>

### East Midlands Coaching Conference 2016, 22 June 2016

**On 22 June 2016 EMC are holding their fourth annual Coaching Conference. The day will be a mix of workshops and plenary. This week we are pleased to announce our latest workshop for delegates to attend, 'How can you keep your coaching "muscle" toned?'**

As an internal coach you have to juggle both your day job responsibilities and your commitments to the coaching pool. When the day job gets busy the inevitable consequence is that you take on less coaching clients or spread out the frequency of your coaching sessions. With less coaching activity however you can start to feel rusty or more hesitant with your interventions than you once were. If not tackled your confidence starts to slide and pretty

soon you avoid taking on additional clients. In this interactive session we offer up a number of reflective activities that you can engage in that will keep your interest in coaching high and your coaching muscles toned. In particular we will look at the role of group supervision in this mix and how you can use it to be more of a personal workout than you may have previously considered.

In this interactive session we offer up a number of reflective activities that you can engage in that will keep your interest in coaching high and your coaching muscles toned.

For further information about the conference visit <http://bit.ly/EMCoaching>

### Local Authority Challenge 2016, 24 November 2016

At EMC we are already getting excited about the autumn and bringing the Local Authority Challenge to the East Midlands. This highly participative and exciting event will be held at the prestigious Donington Park in the Paddock Suite.

The challenge is open to teams of six people from any area of local authority work. Delegates will spend the day as the management team of a fictional local authority, encountering many of the tasks that a real corporate team would deal with. They will have to work as a team, with neighbouring councils and with partner organisations to deliver a new strategy for the council.

For more information about the event visit [EM LA Challenge 2016](#)

#### Contact Details

For further information about any of our work please contact the Local Government Services Team. Either call 01664 502 620 or email:-

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# ‘In Deep with Darren’

## Darren Newman’s in-depth analysis of a topical HR issue and its implications for local authorities

How do you know whether an employee is disabled? I get asked this question a lot and I tend not to give a very straight answer. Many employers ask occupational health or a doctor to advise them, but that won’t always help. Ultimately, the definition of a disability is a legal question rather than a medical one. Medical advice can be useful in telling you what the employee’s condition is – and what he or she can and can’t do – whether that condition is a disability is a matter for the Employment Tribunal to decide.

The Court of Appeal made that point back in 2013 in the case of *Gallop v Newport City Council*<sup>1</sup>. Mr Gallop had a history of absence caused by stress and anxiety. He was eventually dismissed when a deputation of his colleagues alleged that he was a bully. The Tribunal upheld an unfair dismissal claim but rejected claims for disability discrimination and a failure to make reasonable adjustments. The Tribunal held that the employer did not know – and could not reasonably be expected to know – that Mr Gallop was disabled because it had been given clear advice from occupational health that he was not. The Court of Appeal held that this was not good enough. What mattered was the employer’s knowledge about Mr Gallop’s condition – not occupational health’s opinion about whether that condition met the test of disability set out in the Equality Act. The case was sent back to the Employment Tribunal to re-hear the discrimination complaint.

Normally, when that happens, it is the last we hear of it. Once the legal point has been disposed of by the Court of Appeal, the parties can work out what the eventual outcome is likely to be and settle the case accordingly. Not in this case. The claim went back for a five-day hearing before a fresh Employment Tribunal – which also rejected Mr Gallop’s discrimination claim. His case

has now made its second visit to the Employment Appeal Tribunal<sup>2</sup>.

The main issue for the EAT concerned the allegation of direct discrimination - with Mr Gallop’s arguments about reasonable adjustments being dismissed because he failed to present any evidence in relation to them. So the only real question was why Mr Gallop was dismissed. If the dismissal was in some sense ‘because of’ his disability then his claim would succeed, and if not it would fail.

Here the issue of the employer’s knowledge came to the fore again, because the Tribunal found that the manager who dismissed Mr Gallop did not know that he was disabled. The Tribunal found that the dismissal could not be ‘because of’ a disability that manager did not even know about.

On appeal, Mr Gallop argued that anything known by occupational health should be taken to be known also by the employer as a whole. Occupational health may have been wrong about whether Mr Gallop’s condition was a disability or not, but they certainly knew of his condition. Mr Gallop argued that the manager should therefore be deemed to have also been aware of the disability when he decided to dismiss him.

The EAT rejected this. In a direct discrimination claim the Tribunal had to concentrate on the reason for the treatment complained of. That meant the reason for the behaviour of the manager whose act was alleged to be discriminatory. The Court of Appeal had confirmed that point in the age discrimination case of *CLFIS (UK) Ltd v Reynolds*<sup>3</sup>. In this case the manager dismissed Mr Gallop in response to a complaint from colleagues and without knowing that Mr Gallop had a condition which could potentially amount to a disability. Without that knowledge it could not be said that the dismissal was ‘because of’ the disability.

Mr Gallop was dismissed way back in 2008 (this case really has dragged on rather) – before the Equality Act came into force. He was not therefore able to claim discrimination because of something ‘arising in

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<sup>1</sup> [2013] EWCA Civ 1583

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<sup>2</sup> *Gallop v Newport City Council* [2016] EAT

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<sup>3</sup> [2015] EWCA Civ 439



consequence' of his disability under s.15 of the Act. If he had been dismissed today, there is no doubt that such a claim would be his best option. He would have to show – first of all - that the behaviour for which he was dismissed was in some way a consequence of his disability. We don't know the details of the bullying allegations, but I suspect the he could plausibly argue that his condition affected the way in which he interacted with colleagues and so that part of the test could well be met. The question would then be whether the employer's actions were a 'proportionate means of achieving legitimate aim'. An employer cannot simply be expected to put up with inappropriate behavior – even if it does have its origins in the employee's disability. However, Mr Gallop succeeded in his unfair dismissal claim and so it seems that the Tribunal thought that there was something unreasonable about the way in which the employer approached the case. They may have struggled to show that their actions were proportionate.

That would leave the question about the state of the employer's knowledge. A claim under s.15 will not succeed if the employer did not know 'and could not reasonably be expected to know' that the employee had a disability<sup>4</sup>. In Mr Gallop's case it seems that the manager who dismissed him was completely unaware of his condition, but that the details were known to occupational health. The Equality Commission's Code of Practice<sup>5</sup> suggests that in such cases the employer as a whole should be taken to know of the condition so the ignorance defence under s.15 would not apply. While there has been no definitive ruling on the issue, I think that is probably right. It is the employer's knowledge that matters for these purposes rather than the whether disability was in the mind of the person who took the decision to dismiss.

## Implications for employers

It would be a mistake to take the lesson from this case as being: 'ignorance is bliss'. If an employee's behavior is causing concern, a fair employer will investigate

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<sup>4</sup> Equality Act 2010, s.15(2)

<sup>5</sup> Employment Statutory Code of Practice (paras 5.17 to 5.19)

whether there are any underlying factors that may be contributing to the problem. If that leads to the discovery that the employee might have a disability, then so be it; the employer can then make a properly informed decision about what it needs to do to address the problem. If the decision is to dismiss the employee then it will be easier to show that the decision was proportionate and reasonable if the employer can show that it was in full possession of the facts and took them properly into account.

More information can be found on Twitter:  
[@daznewman](#)

## National Developments

### Local Government Services Pay Negotiations

This week EMC circulated news that following a meeting of its Local Government Committee on 27<sup>th</sup> April 2016, Unison announced that it will accept the Employers' pay offer for "Green Book" employees.

GMB had already accepted the offer and we now await news from Unite who had, like Unison, originally rejected the offer. Unite have said that they are reviewing their position in light of UNISON's decision. It is likely that there will be no further news on this until next week at the earliest.

EMC will, of course, continue to inform local authorities of developments as soon as they arise.

### Apprenticeships Levy Employer Guide

Further information on the operating model of the apprenticeship levy was promised by the Department of Business, Innovation & Skills (BIS) to help UK employers understand how the levy will operate from April 2017 and how funding for apprenticeship training in England will be accessed by all employers, whether they pay the levy or not.

The 'employer guide' published by BIS on 22<sup>nd</sup> April 2016 is intended to be operational: something that employers can refer to so that they can use to prepare



ahead of the levy implementation in April 2017 and give them information on how they will access funding for apprenticeships, what they will be able to spend the funding on and how. The guide will be updated regularly and will focus on the following key areas:-

- Paying the apprenticeship levy
- What happens to the money once it is paid to HMRC
- Buying apprenticeship training
- What apprenticeship funding is available
- Eligibility for training
- Preparing for the introduction of the apprenticeship levy

To access the guide, follow this link: [apprenticeship levy guide](#)

