

HR in the East Midlands

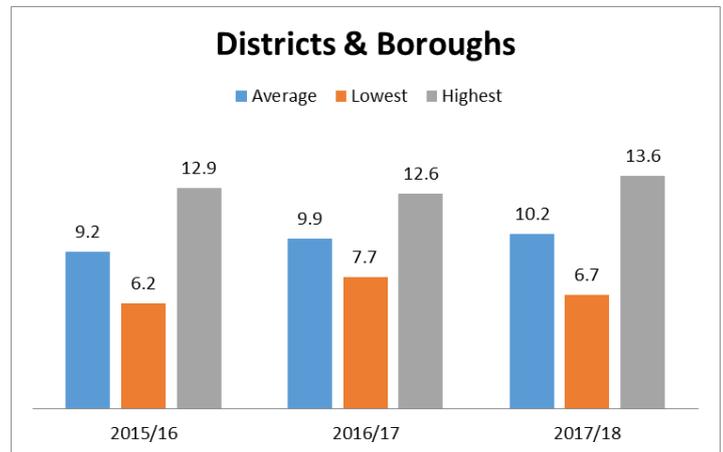
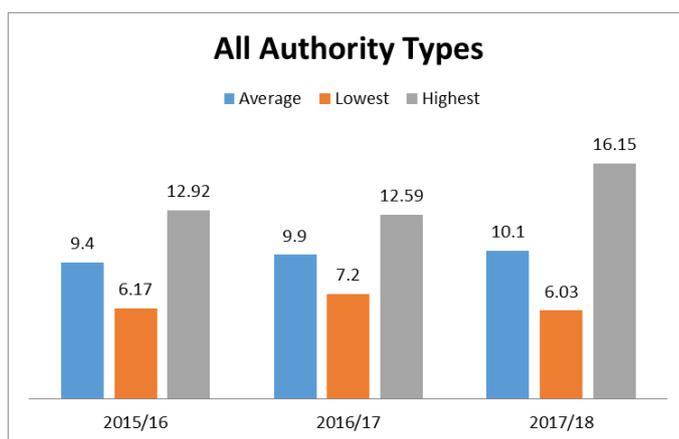
August 2018



We hope you find the sickness absence information provided in this month's bulletin useful. Darren Newman's article looks at refusing to postpone a disciplinary hearing and our national round-up includes an update on remaining pay negotiations.

Sickness Absence Benchmarking Results

Thank you for providing your sickness absence information – 27 councils responded to the survey and the results are set out below, including trends over the last 3 years. Where comparative information was available, 57% of councils saw an increase in sickness absence levels last year.



Over the next year, EMC will be supporting councils to help improve sickness absence and employee wellbeing and resilience and is also working jointly with trade unions on this through the Regional Joint Council.

Projects with Local Authorities

During August we have provided support to councils on the following projects:-

- Psychometric testing
- Chief Executive appraisal facilitation
- Interim HR Management

To find out how EMC could support an area of work for you, then please contact Sam Maher at sam.maher@emcouncils.gov.uk, Lisa Butterfill at lisa.butterfill@emcouncils.gov.uk or Sarah Short at sarah.short@emcouncils.gov.uk



Learning & Development

EMC colleagues have been busy over August, planning a range of exciting events to take place over the rest of 2018/19, including our new People Conference.

New for 2018

Mediation Conference, London 11th September 2018

Mediation is an activity that EMC supports and a service that we provide as a positive means of conflict resolution. Our counterparts in the South East, in partnership with the LGA, have organised a national conference in London (Oxford Street) which is open to councils from all regions to attend. There is a nominal charge of £55 per person.

The conference is aimed at senior and middle managers and will showcase local authorities who have a story to tell, outlining their achievements and pitfalls to avoid; there will also be bite sized workshops to talk through the practicalities of making a compelling case for change, establishing the skills for effective mediation and looking at changing culture whilst bringing people with you. Follow the link below for the programme and booking information: [SEE website](#)

GDPR and HR 6 months on, 13 November 2018 - In April this year EMC held a one day workshop on GDPR for HR. EMC are holding a follow up workshop, providing a space to explore GDPR for HR six months on.

Facilitated again by Lynn Wyeth, the workshop will bring authorities together to explore challenges and issues facing authorities, sharing how they have responded to some of the complexities of GDPR, such as Subject Access Request and Right to Erasure requests as well as reporting data breaches.

<http://bit.ly/2BWtNWl>

Writing Press Releases, 14 November 2018 - The workshop is designed to help delegates to:

- Understand what makes news through an analysis of print and digital media.
- Know how human interest is the key feature of a successful story.

- Recognise the components of a good story in a variety of different outlets both external and internal, specialist and general.
- Examine their own business areas and identify the existing areas of work most likely to bear fruit journalistically.

For details of the workshop visit <http://bit.ly/2C6jK1t>.

New for 2019

People Conference, 6 Feb 2019

People are always at the forefront of what we do at East Midlands Councils. Our vision for the EMC People Conference is to provide a tailored event for colleagues from across HR, Organisational Development and Learning and Development, showcasing exciting developments and innovative ways of working in our people focused world. We'll share with you the programme and how to book in a future HR Bulletin. If there is an area you would like to be covered at the conference or in a separate event, drop Kirsty Lowe a line

kirsty.lowe@emcouncils.gov.uk

Back by Popular Demand!

EMC Employment Law - Darren Newman will deliver the 2019 EMC Employment Law update on 13 March 2019. If you book a place before the end of January 2019 the cost per delegate is just £99 + VAT for EMC members (£76 saving on each place).

<http://bit.ly/EMCEmploymentLaw2019>

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.

When a union representative is unavailable to represent an employee at a scheduled disciplinary hearing, what should the employer do?

Under the statutory right to be accompanied the employee can postpone the hearing for up to five working days – but the EAT has now held that that complying with that rule does not mean that it will be fair to go ahead with the hearing.

In **Talon Engineering Ltd v Smith**, the employee was suspended in July 2016 and initially invited to a disciplinary hearing on 5th September. She was unable to attend that due to sickness and so the hearing was postponed. Then on 19th September she was invited to a hearing on the 29th. Her chosen trade union representative was not available on that day because he was attending a conference and so the employee put forward a series of alternative dates – the earliest of which was just under two weeks later. The employer was not prepared to agree another postponement and so told Ms Smith that the hearing would go ahead. She refused to attend without her representative being present and so the hearing took place in her absence. She was then dismissed for gross misconduct.

The Tribunal seemed to accept that the fact that her representative was not available meant that Ms Talon could not attend the hearing and held that it was unfair of the employer to go ahead with it in her absence. No reasonable employer, it said, would have refused to postpone the hearing for a short period so that both the employee and her chosen representative would be available.

What the Tribunal did not consider – or even refer to – was the right to be accompanied set out in s.10 of the Employment Relations Act 1999. That provides that where the employee's chosen representative is not available on the date set by the employer, the hearing can be postponed to a new date put forward by the employee but which must be within no more than 5 working days of the original date. The postponement

requested by Ms Smith did not meet this requirement, so the employer was not in breach of the right to be accompanied. Could it really be unreasonable for an employer to refuse a postponement when it was simply applying the rule set out in the legislation?

The EAT said it could. It pointed out that the statutory right to be accompanied and the right not to be unfairly dismissed were two separate things. Compliance with the right to be accompanied did not affect whether or not the employer had behaved reasonably. Further, since it was unreasonable for the employer to refuse to postpone the hearing, it followed that the employee was 'not at fault' in failing to attend. The finding of unfair dismissal was upheld.

At one level the EAT's decision is perfectly defensible. The fairness of a dismissal always depends on all the circumstances of the case and so merely complying with the right to be accompanied cannot mean that that the employer must automatically be treated as having acted fairly. But surely it is at least a relevant consideration that the requested postponement is for a longer period than provided for in the right to be accompanied? Doesn't the fact that Parliament has set a five-day postponement period at least set some sort of reference point by which the employer's reasonableness can be judged? There may well be cases where a reasonable employer would wait for longer, but the fact that the employer is scrupulously complying with the statutory right to be accompanied must at least be a relevant consideration. The current Acas Code of Practice tells employers to allow a five-day postponement if the representative is not available, but gives no hint that an even longer delay might also need to be accommodated. In this case the Tribunal didn't even refer to the right to be accompanied – or the Acas Code - and the EAT's conclusion that there was no need for it to do so, strikes me as going too far.

The other aspect of the case that concerns me is that the Tribunal seemed to think that the unavailability of her chosen representative meant that the employee could not attend the disciplinary hearing - and criticised the employer's decision to proceed in her absence. Going ahead with a hearing that the employee cannot attend is a big step for an employer to take. The central purpose of the disciplinary hearing is to hear the



employee's side of the story and so the absence of the employee makes that very difficult. Where the employee is unwell a fair employer will bend over backwards to make suitable arrangements that will either allow the employee to attend or ensure that his or her response to the allegation is fairly heard.

But in this case the employee was not unwell, merely unwilling. Even if it was unfair of the employer to refuse a postponement of the hearing, and even if the employee was therefore disadvantaged due to the absence of her chosen representative, that does not mean that she was entitled to boycott the hearing altogether. There is no consideration in the case of whether or not other representatives were available and there was nothing to suggest that the charges were so complex or involved that only her existing representative would be able to assist her. The EAT's decision that the employee was entitled to refuse to attend the hearing without her chosen representative is likely to encourage other employees to follow suit – making it harder for employers to follow a fair process.

Darren's Advice for Employers

As it happens, my sense is that most employers in local government would have allowed the employee to postpone the hearing in this case. The employee did, after all, offer alternative dates that were just a few days outside the five-day period and it is probably better to accept a small delay rather than give the employee an excuse to claim unfair dismissal. But nevertheless, this is a worrying decision from the EAT which makes it harder to deal with an employee whose chosen representative is unavailable for a scheduled disciplinary meeting.

If the five-day postponement in the right to be accompanied is simply irrelevant, then what kind of delay are employers expected to put up with? Neither the Tribunal nor the EAT give any guidance on that issue.

More information can be found on Twitter:
@daznewman

National Developments

Pay Negotiations

Soulbury: The Employers responded to the Officers' Side on 18th July with an offer of 2% for 2018 and 2% for 2019 on all pay points on the Soulbury pay spines and allowances. It also agreed to further discussions on reform of the pay spines and terms and conditions on a without prejudice basis. The staff associations are now consulting on this.

Youth & Community: The Employers responded to the Staff Side Trade Unions on 13th July with an offer which consisted of removal of pay point 2 in 2019, additional cash payments on points 2-6 for 2018 and 2019 and 2% for 2018 and 2% for 2019 on all of the remaining pay points on the Youth and Community Support Worker and Professional spines and allowances. It also agreed to further discussions on evening working practices, ETS accreditation for playworkers and apprenticeships in the sector. The Staff Side is undertaking a consultation on this.

Teachers in Residential Establishments: The Employers' Side is currently considering a claim from the Teachers' Side for a 2% uplift in JNCTRE allowances and instructors' pay scale of 3.5% with effect from 1 September 2018 in line with the increase in STPCD allowances.

Apprenticeships

The August edition of the LGA's Apprenticeship Newsletter has been published and can be accessed at the following link: [apprenticeships](#)

New Gender Pay Gap Resources for Employers

The Government Equalities Office has launched new resources for employers including suggested actions that employers can take to close their gender pay gap: [available here](#) An analysis of the gender pay gap figures in local government, the information is available here on the LGA's website: [click here](#).

