



HR in the East Midlands

December 2015

Season's Greetings from EMC and good wishes for the New Year. A date to note in your 2016 calendar is the Employment Law Update event on 8th March 2016. See our events page for more information and our Early Bird discount offer. This month we cover key national developments on exit pay recovery proposals and pay negotiations. Employment law specialist, Darren Newman, delves deep into making reasonable adjustments to absence management policies for disabled employees.

Draft Regulations on Exit Payment Recovery - Consultation

This week the government released a consultation on the draft regulations giving effect to powers in the Small Business, Enterprise and Employment Act 2015, which allow for the recovery of exit payments when a public sector employee earning over a certain amount returns to the public sector after exit. It is intended to make these provisions effective from **April 2016**. We are circulating a briefing note, but a summary is provided for you here. The consultation closes on 25th January 2016.

Since the last public consultation, the government has modified the policy. These changes include:-

- lowering the minimum earnings threshold for individuals subject to the recovery provisions from £100,000 to £80,000
- the recovery amount will be reduced over time for a return at any point up to 12 months from exit
- recovery will now include payments under the LGPS providing unreduced pensions for early retirement
- applying the policy to returns to any part of the public sector, instead of to the same part of the public sector..

The draft raises many questions and we are working with the LGA to put these to Government. If you have any questions or concerns then please let me know so we can make sure they are included. If your authority wishes to express a strong view about any of the above changes, please let us know and, subject to numbers, we will submit a response reflecting the overall view of our constituent members.

Consultation documents can be found at <https://www.gov.uk/government/consultations/public-sector-exit-payment-recovery-regulations>



Events in the East Midlands

Employment Law Update, 8 March 2016

Back by popular demand! We are pleased to confirm that Darren Newman will be returning to deliver an Employment Law Update in Melton Mowbray.

We get excellent feedback from delegates about our previous events with Darren. The focus is on key developments in employment law and their implications for local authorities. The approach is interactive, providing opportunities for questions on any employment law issues you may have.



Make the most of our **Christmas Early Bird Offer**..... if you book a place before the end of January the cost per delegate is just £99 + VAT for EMC members.

<http://bit.ly/1Y4FJ7F>

Coaching CPD Session, 11 March 2016

Embodied Coaching, Somatic Clues that we can use in coaching

This is a practical, half-day workshop which will include an introduction to relevant concepts, and then an exercise that will heighten people's awareness of their somatic responses to another person, followed by an exploration of how that could be used in coaching. It provides:-

- An understanding of embodiment, and how it can enhance coaching effectiveness
- Tools to help clients deepen the coaching experience
- Techniques you and your clients can use to help you gain access to additional ways of 'knowing'

The workshop will be facilitated by Cathy Lasher, an executive coach and coaching supervisor with extensive coaching experience. <http://bit.ly/1P7TFxb>

ASPIRE - Strategic HR & OD Business Partner Programme

We're delighted to launch **new dates** for the ASPIRE – Strategic HR and OD Business Partner Programme. We are working in collaboration with West Midlands Employers, the LGA and CIPD to bring this programme to the East Midlands.

This exciting programme was developed in conjunction with the HR and OD community to enhance the business skills to challenge and influence organisational direction and drive culture change. On completion of all the elements attendees receive a CIPD Certificate of Achievement which can be used to evidence your continuous professional development.

For full details of this exciting opportunity and the new dates, please click on the link below.

<http://bit.ly/1Mihywk>

Projects with Local Authorities

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

- Facilitating a Chief Executive appraisal
- Advice to a Member Appeal Panel on a capability dismissal
- Psychometric testing
- Assessment Centre & Recruitment Support

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 or Lisa Butterfill at lisa.butterfill@emcouncils.gov.uk.

Contact Details

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

Sam.Maher@emcouncils.gov.uk,
Lisa.Butterfill@emcouncils.gov.uk,
Sarah.Short@emcouncils.gov.uk,
Kirsty.Lowe@emcouncils.gov.uk



‘In Deep with Darren’

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

Sickness Absence – Reasonable Adjustments and Proportionality?

One of the hardest issues to judge in employment law is the extent of an employer’s duty to make reasonable adjustments for employees with a disability. This is particularly the case where the adjustment in issue is not the purchase of specialist equipment, or alterations to the working environment but the application of the employer’s absence management policies.

The case law on reasonable adjustments has not always been helpful – particularly when it comes to the issue of absence. In two cases, *Royal Bank of Scotland v Ashton* and *Griffiths v Secretary of State for Work and Pensions* the EAT held that there was actually no duty to make reasonable adjustments to an absence management policy. The EAT took the view that provided the policy applied equally to disabled and non-disabled employees it could not cause a substantial disadvantage to a disabled employee when compared with an employee who was not disabled. This was so even if it could be shown that the disability increased the likelihood that the employee would be absent, because a non-disabled employee with the same level of absence would be treated just the same.

This always felt wrong and the position has now been clarified by the Court of Appeal considering Ms Griffiths’ appeal¹. The Court makes it clear that the comparison exercise should be carried out with someone who does not have the disability or the absence that it causes. An absence management policy that kicks in once absence has reached a particular ‘trigger’ level therefore causes a substantial disadvantage to a

disabled employee whose disability leads to increased absence from work. Put this way, it seems quite obvious really.

Another issue put to rest by the Court of Appeal is whether disregarding a trigger point and not giving a warning to an employee is the sort of ‘step’ that is envisaged by the duty to make reasonable adjustments. In *General Dynamics Information Technology Ltd v Carranza* the EAT held that an adjustment had to consist of a positive step aimed at getting the employee back to work, not merely the passive step of ignoring a warning. However the Court of Appeal in *Griffiths* has said that there is no need to take such a narrow view. The issue is whether the adjustment would remove – or partially remove – the disadvantage that the employee would otherwise suffer.

All of this means that the duty to make reasonable adjustments is indeed engaged when an employee with disability-related absence comes within the ambit of the employer’s absence management procedures. However, the Court of Appeal in *Griffiths* also upheld the Tribunal’s finding that there had been no actual failure to make reasonable adjustments in that case. The employer could not be expected to simply write off the extended absence – some 62 days - that the employee had taken even if it was related to her disability. And when it came to the extension of trigger points, the Tribunal had been entitled to hold that it was not clear how much extra absence should be allowed to alleviate the employee’s worries about a potential dismissal. There was no suggestion that all disability related absence had to be discounted and there was no basis on which a fair figure could be arrived at. In particular where the absences caused by a disability were likely to be frequent and extensive there was limited value in granting a relatively short extension of a trigger point.

The result of *Griffiths* therefore is that the duty to make reasonable adjustments does arise in the context of absence management but we are no nearer to knowing what adjustments it is reasonable to make when an

¹ *Griffiths v The Secretary of State for Work and Pensions*, Court of Appeal, 10/12/15 [2015] EWCA Civ 1265



employee's disability causes a serious absence problem. Certainly where the disability causes just a few extra days absence every year then the employer should probably adjust any trigger points to ensure that the employee does not go on to receive a warning – but in the local Government context most employers are doing that already. It is the more serious cases of prolonged and frequent absence that cause the difficulty.

The Court of Appeal acknowledged that that there comes a point when an employer is entitled to say that it will not continue to accommodate the employee's absences any longer. Just when that point is reached, however, remains difficult. The Court made it clear that the employer is entitled to take the whole of the employee's absence record – including disability-related absence - into account but also stressed that the employer's legal obligations were not confined to the duty to make reasonable adjustments. An employee would also be entitled not to be discriminated against under s.15 of the Equality Act.

[Darren's Analysis and Advice for Employers....](#)

There is increasing emphasis in the case law on s.15 which provides that it is discrimination to treat an employee unfavourably because of something 'arising in consequence' of a disability. Any decision to dismiss an employee for absence will very likely meet this test and so the question will be whether the dismissal is 'a proportionate means of achieving a legitimate aim'. Just how this test relates to the more familiar question of reasonableness in an unfair dismissal claim is not entirely clear - but it does seem that there is no 'band of reasonable responses' test. The Tribunal will have to reach its own view as to whether what the employer has done is proportionate.

In my experience employers in local government are only likely to dismiss an employee whose absence is clearly a serious and on-going concern and (in the case of long-term absence) where there have been several attempts to find ways of returning the employee to work. This does not guarantee that the proportionality test will be met, and Tribunals have in the past been slow to understand that public sector employers cannot simply absorb an unlimited amount of absence. Where a local authority feels it has reached the end of the line with an employee it should therefore be

prepared to argue its corner and explain to the Tribunal why a dismissal was appropriate. Proportionality is about balancing the rights of the employee against those of the employer. The key thing to focus on the employer's side is the impact of the absence on the employer's ability to deliver high quality services to the public as well as the effect that the absence has on the other employees who have to provide cover for their absent colleague. After all, the purpose of disability discrimination law is to remove the obstacles that could prevent disabled employees from participating in the workplace on an equal basis with others. It is not there to require employers to just put up with a bad situation. The Court of Appeal decision in Griffiths provides support to an employer that tries to solve an absence problem, but is not afraid to act when no other solution is available.

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

National Developments: Update on National Negotiations

EMC arranged a meeting for HR colleagues in September to put forward their views to national negotiators on national **collective bargaining arrangements for youth & community workers**. As an outcome of this meeting and others across the country, the National Employers are working towards the assimilation of these employees onto Green Book terms and conditions and move away from separate collective bargaining arrangements which exist through the JNC. [Click here for the Circular](#)

A pay offer has been made for **Green Book** employees from April 2016. The offer is being considered by the joint trade unions. We will keep you informed of any developments as they arise. [Click here for the Circular](#)

East Midlands Regional Joint Council has written to Government raising concerns about the **Trade Union Reform Bill**. [Click here to see the letter](#)

