

# HR in the East Midlands

December 2017



This month's issue gives us the opportunity to pass on our Season's Greetings and good wishes for 2018. As many of us will be taking annual leave at this time of year, Darren Newman's article is particularly topical and looks at the potential implications of a recent ruling on the entitlements to paid annual leave. All of the pay negotiation developments this month have been captured in our national update section.



As well as the contribution from EMC, a number of local authorities from different regions have participated and provided case studies or a contribution to the overall study about the significant benefits to be gained from proactively engaging in early dispute resolution.

A link to the study is provided below in order to help share the learning more widely:-

[mediation research](#)

If you would like any advice, support or information on how EMC can help you with mediation or conflict resolution, then please contact Lisa Butterfill or Sam Maher (our contact details are below.)

## Study into Mediation and Conflict Resolution

EMC has contributed to a study into mediation and dispute resolution. The study was led by our counterparts in the South East region, with the aim of raising the profile of mediation as beneficial practice and the role of early conflict resolution in developing leaders and changing cultures. Their objective is to celebrate progress made to help establish a foundation of best practice and innovation for others to draw upon.

The paper has now been launched and includes a wealth of information of interest to chief executives and senior managers who seek to build organisational and strategic resilience in a climate of intensifying risk, change and uncertainty.

## Projects with Local Authorities

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

- Restructuring support
- Coaching
- Pay and grading review

To find out 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).



## Learning & Development

2017 has been another exciting and busy year for EMC; we have launched new events, programmes and developed new areas of work to support our member authorities. Our highlights during the year include:-

- Holding the first East Midlands PA Conference
- Delivering accredited Action Learning Facilitator Programmes
- Running the East Midlands LA Challenge 2018
- Providing our first accredited Mediation and Conflict Resolution Programme
- Delivering two ILM 5 Coaching and Mentoring Programmes

## Personal Resilience

Since late 2016, building personal resilience featured as a theme in a number of the events, development activities and coaching sessions we have offered, and it remains an area of interest in many of our councils.

In response to this demand, EMC has developed a Building Resilience Workshop that uses the context of Myers Briggs Type Inventory (MBTI) to explore Personal Resilience. The workshop has already been provided in-house for a number of authorities, with positive feedback.

It is delivered as a two part programme, the first part helps delegates to understand themselves better, using MBTI as a framework. The second session uses these insights to explore and understand the impact of preferences in relation to managing pressure, linked to the challenges of their role, not least in relation to workloads and resources. The objectives of the workshop are to:-

- understand resilience and the impact of taking control
- explore you at your best and what happens under pressure
- understand the impact of “type” in managing pressure
- identify energisers and stressors
- create strategies for building personal resilience

Please get in touch with Lisa Butterfill or Sam Maher if you would like to find out more about the Building Resilience workshop or if you would like us to provide support with resilience on an individual

basis, rather than through a workshop, as this could be provided through a 1:1 format or through coaching.

## GDPR Event

We will be hosting an event in the New Year to cover GDPR, with a focus on the implications for HR and taking a practical approach to meeting the new requirements that will come into effect in May. We are planning to hold the event at the end of February and will provide more details soon. If you would like to register your interest in attending, please contact us.

## Employment Law Update

EMC’s popular Annual Employment Law event will take place on 8 March 2018, covering all the topical issues and developments, tailored to local government. Once again Darren Newman, Employment Law Expert and guest contributor to the EMC HR Bulletin will lead the update which is aimed at senior HR and Legal professionals in the public sector. The event will be held at Pera Business Park, Nottingham Road, Melton Mowbray, LE13 0PB.

**Early Bird Offer:** EMC are delighted to be able to offer authorities the opportunity to take advantage of an early bird offer, if you book a place before the end of January the cost per delegate is just £99 + VAT for EMC members, this is a saving of £76 on each place.

To book your place visit [EmploymentLaw2018](#)

## 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

### Paid Annual Leave Entitlement

A new ruling from the European Court of Justice has once again cast doubt on the paid annual leave provisions of the Working Time Regulations.

In **King v Sash Windows**, Mr King was engaged (to use a neutral term) to sell double glazing on what Sash Windows insisted was a self-employed basis. He was paid commission only and not offered any paid leave. When he retired after 12 years, however, he sought to recover unpaid holiday entitlement over the whole course of his employment.

The Working Time Regulations do allow for a worker to be paid for holiday ‘accrued but not taken’ when the employment comes to an end - but that only applies to the holiday accrued in the current holiday year. There is nothing in the Regulations suggesting that workers can ‘save up’ untaken holiday over a period of years and then claim it all when they eventually leave.

Sickness absence has been treated as a special case with a series of ECJ decisions holding that an employee on long-term sickness absence could not be made to take annual leave during that absence and could transfer any unused leave into the next holiday year. This was confirmed to be the position in the UK by the Court of Appeal in the case of *NHS Leeds v Larmer*. However it was subsequently held by the EAT in *Plumb v Duncan Print Group* held that this carry-over could not continue indefinitely. Relying on the ECJ decision in *KHS AG v Schulte* the EAT held that no more than 18 months’ worth of annual leave could be carried over in this way.

In *King*, the Court of Appeal asked the European Court of Justice (among other things) whether this limitation on carrying over untaken leave could be subjected to a similar limit when the reason paid leave was not taken was the employer’s refusal to grant it. The Court held that it could not. The reason a limit had been placed on carry-over in cases of sickness was fairness to an

employer who was already having to cope with long periods of absence from the employee. That didn’t apply when the situation arose from the employer’s failure to guarantee that annual leave would be properly paid. An employer who does not allow workers to exercise their right to paid annual leave must, said the Court ‘bear the consequences’. It followed that Mr King was entitled to keep his unpaid annual leave carrying over year on year until his retirement.

Now you could take a narrow view of this case and say that it only applies where the employment has ended and the employer has refused to allow the worker to take any paid holiday. I don’t think that it is safe to do that. I think there are strong grounds to believe that the same principle – let the employer ‘bear the consequences’ – would also apply to cases where the employer accepts that there is a right to paid holiday but disputes how holiday pay should be calculated.

Take a situation in which a worker’s holiday pay has been calculated to exclude overtime. The need to include both compulsory and voluntary overtime in the calculation of holiday pay is now clearly established by two EAT decisions. The 2014 decision in *Bear Scotland Ltd v Fulton* concerned compulsory overtime and in July this year the EAT confirmed in *Dudley Metropolitan Borough Council v Willetts* that the same principle applied to voluntary overtime.

When the prospect of having to include overtime in the calculation of holiday pay was raised in the *Bear Scotland* case, the Government was concerned to avoid landing employers with claims for unpaid holiday potentially stretching back over many years. It therefore amended the legislation on unlawful deductions from wages to limit claims to a maximum of two years of back pay.

As it happens, that rule was hardly necessary because the EAT in *Bear Scotland* held that a series of deductions from holiday pay could only be included in a single claim if there was no more than three months between any two deductions in the series. This made it very difficult for employees who had been underpaid holiday pay over extended periods to construct a case. To do so they would have to look at each individual



instance of underpayment and check it was not more than three months after the last one. And in any event, they could not claim for a series of deductions going back more than two years.

### Advice on Implications for Local Authorities

The question raised by King, however, is whether this limitation on claims for back pay can still be valid. It is true that King was concerned with a complete failure to allow paid annual leave, rather than an underpayment of the amount due, but I don't think that can really make a difference. Every time it gets an opportunity, the ECJ makes it clear that the right to paid annual leave is a fundamental right and that in order to ensure that workers are not deterred from exercising it is important that 'normal pay' is maintained. In King, The Court insisted that an employer who failed completely to provide paid annual leave should 'bear the consequences' of that and even went so far as to say that any limitation on the amount that could be claimed by the worker would amount to the 'unjust enrichment' of the employer.

Is it really likely that the Court would take a different view where the employer had been paying some - but not all - of the holiday pay that was due? I would be prepared to bet that, if asked, the Court would say that the two-year limit on back pay – and the 'three month' rule set out in Bear Scotland - are in breach of the Directive and must be disregarded. Of course, it may be some time before we get final clarity on this. In the meantime, however, employers who have yet to sort out the inclusion on overtime in holiday pay are potentially vulnerable to claims stretching back to the introduction of the right to paid annual leave in 1998.

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

## National Developments

### Pay Offer for Local Government Services

The National Employers have made a pay offer to the joint trade unions for Local Government Services

employees (Green Book). The offer is over 2 years and incorporates a revised national pay spine.

A copy of the pay offer can be accessed at the following link: [national pay offer](#) The offer takes into account pressure at the lower end of the pay spine coming from increases to the National Living Wage. Assimilation to the new pay spine would take place on 1<sup>st</sup> April 2019.

The unions will begin their consultations in early January and we will know the outcome by early/mid-March. The unions are clear that the Employers' offer is final and it is expected that they will consult on the basis of recommending acceptance. We will keep you informed of any further developments as they arise.

### Pay Claim from Craft Unions

The National Employers have received a pay claim from the Trade Union Side of the Craft JNC. To see a copy of the claim, click here: [craft pay claim](#)

The Employers' have sent a response to acknowledge receipt and will be discussing this claim in the New Year once the dust has settled on the main NJC pay offer.

### Gender Pay Gap Reporting Guidance: Teacher & Term-Time Only Calculations

At the request of the LGA, Acas and the Government Equalities Office have revised their guidance on gender pay gap reporting so that it now includes examples on how to calculate weekly hours for teacher and term time only workers (see pages 30-31). The Guidance is at [ACAS Guide on Managing Gender Pay Reporting](#)

Although schools based employees do not fall within local authorities' reporting duties, many authorities will be working with schools to help them report their figures.

