



# HR in the East Midlands

February 2016

Another month, another government consultation... The focus is once again on exit pay & redundancies but also apprenticeships – see the National Developments section for more information. With restructuring and downsizing an ongoing activity for local government, our legal eagle Darren Newman looks at the dangers of age discrimination when making decisions based on costs of redundancy/early retirement.

## Flex your finances with an EMC Voucher

To help our councils and other client organisations maximize their budgets, EMC is offering a voucher scheme, as a way of making the most of your remaining budget and redeeming it in the future for any training or consultancy. This approach will enable you to boost your budget for forthcoming projects, without having to specify what you want to spend it on now. You can redeem a voucher for any training or consultancy support within 12 months. It's a great way to make the most of this year's remaining budget. If you want to find out more or purchase a voucher, then please contact Lisa Bushell at [lisa.bushell@emcouncils.gov.uk](mailto:lisa.bushell@emcouncils.gov.uk)

## What's the latest with....?

We receive a number of queries from our HR colleagues across the region asking us for any updates on national developments. We provide a summary of latest information at the end of each month's bulletin.

**Don't forget about our Employment Law Update event on 8th March 2016.** This session will take in the most important recent developments in employment law from the impact of the Trade Union Bill to recent case law on disability discrimination and the duty to make reasonable adjustments. Along the way we will also look at indirect discrimination, consistency in misconduct dismissals, calculating working time and holidays, the new 'National Living Wage' and the forthcoming rules on gender-pay reporting which are expected to be extended to the Public sector. We will also look at age discrimination and the forthcoming cap on public sector termination payments. **There's a lot to fit in but there will still be time for questions and discussion on the topics that concern you most.** For details and to book, click on:- [Employment Law Update Event Info](#)

## Projects with Local Authorities

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

- Staff survey
- Mediation



- Grievance Investigation
- HR Policy development

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).

## Mediation & Conflict Management

EMC has recently been supporting an authority with mediation. Mediation is recommended by ACAS to resolve workplace conflict and grievances and is one of the services offered by East Midlands Councils to local councils and the wider public and third sector.

Mediation is a confidential and voluntary process aimed at helping people to resolve disputes and improve working relationships. It is an informal and alternative approach to more formal procedures.

According to the Chartered Institute of Personnel & Development's *Conflict management* survey, the main benefit of using mediation is to improve relationships between employees, cited by over 80% of employers. The other main perceived benefits include reducing the stress compared with more formal processes and avoiding the costs involved in defending employment tribunal claims.

East Midlands Councils can offer qualified and independent mediators who will facilitate the process with the aim of helping the individuals to reach a mutually acceptable agreement to resolve their problems. If you would like further information please contact Lisa via email on [Lisa.Butterfill@emcouncils.gov.uk](mailto:Lisa.Butterfill@emcouncils.gov.uk)

## Events in the East Midlands

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

#### EMCs Fourth Annual Coaching Conference

The date for the fourth Annual Coaching Conference has been set for 22 June 2016 and will be held at

Nottinghamshire Fire and Rescue Authority, Arnold.  
The conference will include:-

- Mindfulness for Coaches
- **Tool and techniques Workshops** - Offering coaches the opportunity to focus on practical tool to support their day to day coaching skills
- **'Something new Sessions'** - Offering delegates the opportunity to attend a range of workshops that will explore new areas and practice in coaching
- **Keynote presentation** on the latest thinking and trends in Coaching.

Last year's conference received with over 60 coaches taking part in the day. Further details of this year's Conference will be available shortly.

## 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>



# 'In Deep with Darren'

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

## Age Discrimination & Redundancy/Early Retirement

A council spending public money in making people redundant will naturally want to make sure that the exercise, while fair, is carried out as cost effectively as possible. Meanwhile employees coming to the end of a long career will want to time their eventual exit to the maximum possible advantage. The tension between these two sets of priorities will be resolved to some extent later this year when the Government clamps down on what it views as excessive severance payments. The gross exit package for public sector employees will be capped at £95,000. Crucially and unless representations from interested parties and amendments being proposed by Members of the House of Commons Committee, are accepted at the Committee Stage, this overall cap will include any costs incurred by the employer in providing early, unreduced access to the employee's pension.

The prospect of losing out on early retirement benefits may prompt many employees who qualify to volunteer for redundancy before the cap comes into force. This is potentially a significant expense for employers and the temptation might be to refuse to make employees redundant if they are simply too expensive to let go. The trouble is that such a refusal is almost certain to amount to age discrimination.

Take a recent case from the private sector. In *Donkor v Royal Bank of Scotland* a senior employee was denied the option of applying for voluntary redundancy that was given to two of his colleagues. The reason for this was that since he was over 50, a redundancy would enable him to take early retirement at an undiscounted rate – with a direct cost to his employer of some

£460,000. Given that price tag it is not surprising that the employer was keen to find him some alternative work to do. Soon after he accepted the alternative role the pension rules changed so that the early retirement option was only available to employees aged 55 or over. There was a new restructuring exercise and this time his application for voluntary redundancy – without the early retirement option – was accepted.

His claim for direct age discrimination was initially rejected by the Tribunal, which held that the reason he was at first denied voluntary redundancy was not his age, but the astronomical cost of letting him take early retirement. The EAT overturned this finding. The huge expense in allowing him to take voluntary redundancy was simply a consequence of the fact that he was over 50. The reason for the employer's refusal was age – even if the motivation lying behind that reason was an understandable urge to save money.

Age discrimination is, however, unique in the Equality Act in that it is possible for an employer to argue that direct discrimination is justified – a proportionate means of achieving a legitimate aim. The *Donkor* case has now been sent back to the Tribunal to decide whether the test of justification was met. At first sight this would seem to be an open and shut case. Any employer would want to avoid spending a significant amount of money on making one employee redundant and, in any event, the discrimination consisted of finding the employee alternative work rather than making him redundant – which is hardly the most oppressive form of discrimination one can imagine.

In previous cases involving employers seeking to avoid making huge pension payments, the issue has turned on whether the employee had any reasonable expectation of being allowed to reach early retirement age. In *Woodcock v Cumbria Primary Care Trust*<sup>1</sup> the employer brought forward the employee's notice of dismissal so that it expired before he qualified for an enhanced pension that would have cost the employer at least half a million pounds. The direct age discrimination involved was held to be justified by the Court of Appeal, but in that case the employee had

<sup>1</sup> [2012] EWCA Civ 330



managed to delay his redundancy significantly by spending a year on secondment and then repeatedly postponing a consultation meeting. In bringing forward his dismissal the employer was simply preventing him from enjoying a windfall.

That case was, however, decided before the decision of the Supreme Court in *Seldon v Clarkson Wright and Jakes*<sup>2</sup>. The facts of that case were very different, involving the forced retirement of a partner in a law firm, but Baroness Hale reviewed the European case law and concluded that to justify direct age discrimination, the employers aim had to be a social policy objective 'such as those related to employment policy, the labour market or vocational training'. The aim had to be of a 'public interest' rather than a purely individual reason 'such as cost reduction or improving competitiveness'.

### Darren's Analysis and Advice for Employers....

So we cannot take it for granted that a local authority seeking to avoid making people redundant who qualify for enhanced pension rights would be able to show that such discrimination was justified. Certainly it will not simply be enough to point to the exorbitant cost of the exercise – something more than that is needed. One option, for example, could be looking at what else could be done with the money. Perhaps fewer people could be made redundant or a more generous redundancy package could be provided for all. Viewed in that context the aim of the discrimination is not to save money per se but to achieve fairness in protecting jobs and public services or compensating those who lose their jobs more generously. Although there are many policy and practical hurdles to such an option within the local government context, it may be enough to persuade a tribunal that there is a 'legitimate aim' and that the employer's approach was proportionate in all the circumstances.

The problem will, of course, go away to some extent by the end of the year when the Public Sector Exit Payments Regulations 2016 come into effect. On the other hand, I wouldn't rule out a legal challenge to the

Regulations, which are obviously more likely to affect the severance payments of older employees. Attempts to strike down Regulations through Judicial Review are not usually successful, but they can lead to a year or two of uncertainty. It may be that this issue will not go away as quickly as we might hope.

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

## National Developments

### Exit Payment Cap Effective Date

On 23<sup>rd</sup> February at the House of Commons committee stage for the Enterprise Bill, the Government confirmed that the £95k exit payment cap will not come into effect until **1st October 2016** at the earliest. In the committee debate, the Minister of State (Department for Business Innovation & Skills) Rt Hon Anna Soubry MP gave the following answer in response to a question on the date the exit payment cap will come into effect: "To answer the hon. Gentleman's question directly, the regulations giving effect to the cap will not be in force until 1 October 2016 at the earliest, giving employers and employees time to prepare. The power to relax the cap can address any unforeseen unfairness or hardships that arise, which will include cases where the exit is agreed and scheduled to take place before the regulations come into force, but, for a reason beyond the control of the employee, the exit occurs after they have come into force."

Last week Sam [e-mailed](#) our HR contacts with an update on [developments with exit pay](#), as the proposals go through the parliamentary process. We will continue to make sure you are informed of any updates as they arise.

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<sup>2</sup> [2012] UKSC 16





## Local Government Pay Negotiations

UNISON has issued a [newsletter](#) to its branches to inform them that the Employers' pay offer for "Green Book" employees has been rejected by 64% to 36%. There is no mention of a turnout figure.

In response, the Employers have issued the following statement:-*"The National Employers are disappointed that UNISON has today announced that its members have rejected the final pay offer. However, we shall await the results of GMB's and Unite's pay consultations, which are due in the next few weeks, before commenting further"*.

Today, UNITE have also announced the outcome of their ballot was to reject the pay offer. GMB's ballot closes on 14<sup>th</sup> March 2016.

There are no further developments to report regarding the negotiations for Chief Executives, Chief Officers and Craftworkers.

## Apprenticeship Levy

This week, Sam Maher attended a meeting with BIS, CLG, SFA and the LGA to discuss the plans for an apprenticeship levy. The Government is consulting on its proposal to introduce a levy and targets for apprenticeships through the Enterprise Bill. The Bill gives government powers to set public sector organisations with 250+staff an apprenticeship recruitment target of 2.3% of the workforce headcount per year. A key issue for local government is whether this is based on headcount of FTE, as there would be a significant difference, given the high number of part-time workers in our sector. All employers with a payroll of £3m+ will be subject to a levy to fund apprenticeship training costs, set at 0.5% of payroll. The details of the proposals are still subject to consultation.

To ensure local authorities in our region are fully informed and able to contribute to the consultation process, EMC will be arranging a meeting in the region with CLG, BIS and other key players. Please contact Sam if you or a colleague in your authority would like to be involved – [sam.maher@emcouncils.gov.uk](mailto:sam.maher@emcouncils.gov.uk)

## Replacement DIP processes

National negotiations have been taking place this month to seek agreement to new provisions in national conditions of service regarding procedures to replace the Designated Independent Person process that was removed in legislation last year. As soon as we have any outcomes to report we will share them with you.

## 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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