



HR in the East Midlands

January 2017

Despite “alternative facts” indicating the contrary, the pay cap regulations will not come into force tomorrow! For an update on this and other current issues, please see our National News section. Darren Newman’s article provides advice on the difficulty of dealing with investigations/proceedings when complainants want to remain anonymous. You can pose your legal queries to Darren at our [Employment Law Update in March](#).

Apprenticeship Targets

This month the Government published its response to having a target for new apprenticeship starts within the public sector in England. The document can be accessed here: [consultation response](#) DfE prepared a slide pack to launch its response, available [here](#).

EMC is linking up with providers in order to enable Councils to access apprenticeships that meet skills shortage areas or would support development of existing employees, eg planning, leadership and management, housing. We will be providing further information on this as programmes become established. If you have service areas or skills shortages that you would like to be included as part of this initiative, then please contact Sam or Lisa.

The RTP1 received confirmation last week that the government has listed the **Chartered Town Planner degree apprenticeship** proposal for public

consultation. We are helping to promote this consultation to all councils and **need your help** - a positive response across England to the consultation will help gain support from government for the next stage. The consultation closes on 5th February so there is not much time! The proposal is at: <https://consult.education.gov.uk/apprenticeships/newproposalsjanuary2017/>

Withholding Increments

Results of our recent survey into provisions for withholding increments, eg due to poor performance, showed that the majority of councils don’t have such provisions, or if they do these are rarely used in practice. Some councils do have such provisions within their performance or disciplinary or pay policies. A copy of the compiled responses will be circulated this week.

Projects with Local Authorities

This month, we have been providing individual authorities with support on a range of projects and issues, including-

- Disciplinary investigation
- Restructure of a service
- In-house team 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 or Lisa Butterfill at lisa.butterfill@emcouncils.gov.uk.



Events in the East Midlands

EMC has started the year with an early bird offer for our annual Employment Law event on 15 March, if you book a place before the end of January the cost per delegate is just £99 + VAT, a saving of £76 on each place. To book an early bird place visit [here](#).

“Making it Our Business”

A Commercial Awareness Programme for Operational Managers

EMC is offering its members the opportunity to take part in a five day modular programme on Commercial Awareness. The programme aimed at operational managers in public services, has been designed to support them in becoming more commercially aware when looking for opportunities to trade their service both internally and outside the organisation.

- Trading and Marketing in Public Services
- Negotiation Skills
- Practical Project Management
- How to Write a Commercial Business Case
- Customer Relations
- Presenting Your Business Case

The programme will include two half day Action Learning set meetings, which will provide delegates with an opportunity to focus on their specific commercial opportunity and its implementation. For further information on this programme visit [here](#).

Support for Coaching

Coaching continues to be a key area of work and support provided by East Midlands Councils, through the East Midlands Coaching Network and the suite of development offered to coaches and those embarking on their coaching journey.

Coaching on the Telephone - 23 March 2017

With resources of time and money scarce in the public sector, this CPD session will focus on the skills and techniques used in Coaching on the Telephone. Explore how this differs from face to face coaching.

This session is designed to help participants understand how much more is actually available in a client's voice than we first realise. Participants will

be invited to do some practical exercises that will help focus attention to the client's voice, to their choice of language and to their silences in a way which we normally don't have the capacity to notice when they are physically present. For more information visit [here](#).

Coaching through Overwhelm, 25 April 2017

EMC is offering Coaches in the East Midlands the opportunity to attend this one day coaching workshop on 'Coaching through Overwhelm'. We are noticing increasing numbers of clients who come to coaching with a sense of 'overwhelm' in their roles and lives and believe coaching can provide a safe space for them to reflect on the impact of this on themselves and those around them, whilst develop new and more positive ways of being. This workshop is designed to explore how we as coaches can help clients through this phenomenon whilst avoiding being drawn into a parallel process (getting overwhelmed ourselves). For more information visit [here](#).

ILM Level 5 in Coaching and Mentoring

EMC is offering an exciting opportunity to be part of an ILM Level 5 programme in Coaching and Mentoring, starting in March 2017. For more visit [here](#).

Developing a Coaching Culture, East Midlands Coaching Network, 20 April 2017

On 20 April EMC will provide authorities the opportunity and space to talk about coaching and how the East Midlands Coaching Network can support their authorities coaching journey.

The workshop will provide participants the opportunity to hear directly from network members on their coaching journey and their development of coaching activity within their organisational setting. For further information visit [here](#).

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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Lisa.Butterfill@emcouncils.gov.uk,
Sarah.Short@emcouncils.gov.uk,
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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

Keeping Whistleblowers

Anonymous

The latest fallout from Peter Clarke’s investigation and report into the so called ‘Trojan Horse letter’¹ concerns the disciplinary proceedings being conducted by the National College for Teaching and Leadership (NCTL) in relation to five of the teachers accused of professional misconduct.

The BBC has reported² that witnesses who gave evidence to the initial investigation were told that the transcripts of their interviews will be disclosed to the representatives of the teachers concerned despite assurances given in the course of the investigation that their evidence would remain confidential. The disclosure of the transcripts has now been temporarily blocked pending a final decision on whether the evidence should be disclosed or not.

There is a difficult conflict of rights here. On the one hand individuals who cooperated with the investigation thought that their identity would be protected and now fear that they may be targeted by extremists. On the other hand, the accused teachers stand to lose their careers if the case against them is upheld and they are entitled to a fair hearing. If they do not know who has accused them of wrongdoing they may be seriously hampered in their attempts to challenge that evidence. They are entitled to a fair hearing – and knowing the details of the case against you is a fundamental aspect of natural justice.

In the employment context, employers are frequently faced with a similar dilemma when employees are only prepared to make a complaint on the condition that their anonymity is assured. The employer can, of course, maintain that anonymity in the course of internal disciplinary procedures – but this does make it harder to follow a fair procedure.

The leading authority on the use of anonymous evidence is **Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235**. In that case the EAT held that the employer should take particular care when the identity of a witness is not disclosed to the employee and take into account the difficulty that employees have in putting their side of the case without knowing who their accusers are. In particular the EAT emphasised the importance of trying to obtain corroboration of an informant’s account, and investigating whether there were any grounds to believe that the informant may have some ulterior motive for making the accusation and is hiding behind the veil of anonymity in order to avoid scrutiny.

The EAT also suggested that the manager conducting the disciplinary meeting should test the anonymous evidence by interviewing the witness personally – in the absence of the accused employee. There are no fixed rules, however, and in **Ramsey v Walkers Snack Foods Ltd [2004] IRLR 754** the EAT held that dismissal could be fair even if the identity of the informant was also kept from the manager conducting the hearing. In that case there was simply no other way of persuading employees to give evidence of a serious case of wrongdoing and the HR manager had interviewed the informants and produced a detailed witness statement of her own, giving details of the evidence they had provided.

If a case based on anonymous evidence subsequently reaches an employment tribunal, however, the

¹ http://dera.ioe.ac.uk/20549/1/Report_into_all_egations_concerning_Birmingham_schools_arising_from_the_Trojan_Horse_letter-web.pdf

² <http://www.bbc.co.uk/news/uk-england-birmingham-38507968>



employer is no longer in a position to guarantee that the anonymity of witnesses will be respected. The Tribunal's overriding objective is to deal with cases fairly and justly. That means that both sides are entitled to a fair hearing and if the only way to give the employee a fair hearing is to order the disclosure of evidence that reveals the identity of someone who believed that they were making their allegations in confidence, then that is what the Tribunal will do. Complying with an order issued by a court or tribunal overrides any other duty the employer may have to the employee, either as a result of assurances that were given when the evidence was obtained, or under the provisions of the Data Protection Act.

Nevertheless a Tribunal will not want to reveal the identity of anonymous informants unless that is necessary for a fair resolution of the claim – and in many cases it won't be.

In the 'Trojan Horse' case the key issue for the NCTL is whether the teachers are actually guilty of the misconduct alleged. One can see why the panel would want to assess the evidence against them and also why the teachers themselves need to know exactly what that evidence consists of. In an unfair dismissal case, however, the issue is different. The Tribunal does not usually need to decide whether the evidence shows that the employee is guilty of the misconduct. The question is whether the employer has behaved reasonably in deciding that the evidence is sufficient to warrant dismissal. In making that assessment, it will often not be necessary to disclose the identity of the witnesses concerned, because the emphasis will be on how the employer used that evidence and whether it was reasonable to rely on it rather than whether it was actually accurate.

The Tribunal will usually try to respect any reasonable assurances that witnesses have been given about confidentiality – in so far as that is consistent with the need to dispose of the case fairly. That may mean that evidence is disclosed to the Tribunal in the first instance, and then redacted to remove any material that might identify witnesses.

If a Tribunal does order disclosure on terms that would reveal the identity of anonymous informants, then the employer can challenge that and insist on a hearing where the arguments on both sides can be heard.

But in those cases where the Tribunal does feel that the identity of an informant must be disclosed in order for the claimant to have a fair hearing, then the only way the employer can realistically protect that individual is by negotiating a settlement or even conceding liability and bringing the case to an end.

Implications for Local Authorities

Protecting the identity of informants always presents a risk. There is a risk that internal procedures will be unfair and a risk that at some stage the informant's identity will have to be disclosed anyway. It is clearly better for evidence to be open so that it can be properly assessed and with witnesses provided with appropriate support and protection. Where informants insist on anonymity, however, the employer must decide whether the case is serious enough – and the evidence sufficiently cogent - to proceed on that basis. It is important not to 'over promise' potential witnesses that their identities will be kept confidential.

In the end, the most that can be done is to guarantee confidentiality in internal procedures and that the employer will use its 'best endeavors' to resist any attempt to reveal their identity in any subsequent proceedings.

More information can be found on Twitter:
[@daznewman](https://twitter.com/daznewman)

National Developments

Exit Pay Reforms

The Government will soon be conducting a further formal consultation exercise on exit pay cap regulations. In terms of the Exit Pay Recovery regulations, these are expected soon – probably before Easter. It is expected that draft regulations on the Exit Pay Cap will be issued, along with guidance on waiving the cap. The guidance is likely to be prescriptive, rather than permissive. There are expected to be no provisions for backdating or transition in the Regulations.



Term-time Working

Earlier this month, EMC hosted a meeting to enable councils to meet up and discuss issues and concerns relating to terms and conditions for staff working term-time. The information shared at the meeting will be used to inform the national joint working group that was set up as an outcome of the last pay agreement.

Those attending found the meeting really useful and it was agreed to hold further meetings to enable face-face updates and sharing of practice and information.

For further information, please contact Sam –

sam.maher@emcouncils.gov.uk

National Pay Spine Review

Work is continuing at national level to develop a pay spine that will help meet the projected National Living Wage and address concerns regarding the erosion of differentials. The pay data to be used to cost models is currently being finalised and verified.

The project aims to have an outcome by June and a proposed pay spine would be included in this Autumn's pay consultation round, which EMC would host.

The joint working group has agreed on a without prejudice basis to proceed according to three principles:

- That a revised pay spine should look similar to the existing one: ie individual pay points matched to a specific salary figure
- That the differentials between each of the pay points should be consistent
- That a revised pay spine should be extended beyond the existing pay point 49

The next meeting of the working group will be in March.

Pensions

Although active membership of the LGPS scheme itself has increased, mainly due to auto-enrolment, there has been very limited take-up of the **50-50** option within the scheme. A survey will be carried out soon to find out why, and authorities are being asked to encourage employees – regardless of whether they are current LGPS members – to respond.

The **website** for LGPS members

www.lgpsmember.org has been improved to provide greater choice for improved accessibility and includes 3 new modellers to enable people to work out how much of their pension can be converted to a lump sum, whether they are likely to exceed the Lifetime Allowance and to check how much of their annual allowance has been used. A version of the website has also been launched which is compatible for mobile devices. Users will automatically be taken to this version of the website if logging on from a mobile device.

Implications of Brexit

On 17th January the Prime Minister set out the “Plan for Britain” including the 12 priorities that the UK Government will use to negotiate Brexit. This includes taking back control of laws and ending the jurisdiction of the European Court of Justice. It would appear, therefore, that post Brexit agreements reached by the European Social Partners through “Social Dialogue” and other laws and regulations produced by the European institutions will no longer apply to the UK.

Grant for the English Speaking Requirements of the Immigration Act

The duty under Part 7 of the Immigration Act 2016, that public sector roles in public-facing roles should speak fluent English, was introduced on 21 November 2016. During policy development a [New Burdens Assessment](#) was conducted and it was determined that each Local Authority would receive an amount for the assessed burden.

The amount to be paid is **£477.00** on **30th January** and DCLG is administering this payment on behalf of Cabinet Office. If you have any queries regarding this payment please contact alicia.devries@cabinetoffice.gov.uk in the first instance.

