

HR in the East Midlands

July 2017



Pay in the public sector has been a topic of discussion politically and in the media this month, and it was in this context that we hosted the regional pay consultation meeting. Our July bulletin gives an update from the meeting, which many of you attended. The bulletin also provides a BOGOF, with Darren Newman providing advice from two recent cases – on dismissing for poor performance and discrimination relating to maternity leave/parental leave provisions.

Pay Consultation Meeting

We have received positive feedback from attendees at the pay consultation meeting hosted by EMC on 19th July 2017. The meeting provided an opportunity to find out latest developments regarding national pay negotiations and progress with reviewing the national pay spine to keep it in line with National Living Wage projections for 2020, help to address the erosion of pay differentials and avoid the need for pay and grading/JE reviews.

A copy of the slides from the meeting is circulated to accompany this bulletin. Councils can feed their views into the national negotiations by contacting Sam Maher at sam.maher@emcouncils.gov.uk

Results of Research into Apprenticeship Pay

A number of Councils in the region are reviewing their arrangements for apprenticeships in the context of the new national regime. This has prompted a great response to our recent survey on apprenticeship pay. Responses indicate common approaches are:-

- to pay the statutory minimum wage rate based on age
- to pay the National Living Wage
- to pay a percentage of the evaluated grade for the role
- to pay at a spinal column point, either as a fixed point or with progression

The full compiled results will be circulated to HR contacts this week.

Projects with Local Authorities

During July EMC has provided individual assistance to councils on the following types of project:-

- Psychometric testing
- Senior management restructuring support
- Advising a Member Appeal panel on a grievance issue

To find out 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

Many of you will be heading off for a summer break, so this month's round-up of learning and development opportunities features what we have on offer from September onwards to give you the chance to plan ahead.

EMC is keen to support emerging development needs, so if there is an area of development that you would like us to explore or provide regionally just drop us a line.

Accredited Mediation and Conflict Resolution Programme

EMC is running a 3-day ILM endorsed programme in Mediation and Conflict Resolution which will give you the skills and confidence to undertake mediation from initial meeting with the parties to closure, following a mediation model. The course is designed to be intensive and participatory to enable the development of skills, competence and confidence to either simply improve your skills in dealing with difficult situations through to supporting a mediation service within your workplace. The skills covered are those required by an effective mediator <http://bit.ly/2sWe4i1>

Developing Coaches

Coaching Creatively, 27 September 2017 - a practical workshop on 'Coaching Creatively', provided by one of the independent Coaches on the network Sandra Whiles. <http://bit.ly/CoachingCreatively>

Exploring Learning through Supervision, 13 October 2017 - Coaching Supervision is an important element of developing as a coach. For more <http://bit.ly/2qHDP3T>

EM LA Challenge 2017

The highpoint of 2017 will be our second East Midlands LA Challenge. The interactive format ensures an opportunity to learn by doing with the Challenge offering participants the opportunity to:

- test and hone many skills including interpersonal, communication and time management skills
- Discover strengths and weaknesses and how to develop them in a safe environment.
- Use the days experience as an opportunity to help progress to the next level career-wise.
- be part of an extraordinary (and highly enjoyable) event

- work with a wide range of colleagues from across our region

<http://bit.ly/EMLAChallenge2017>

PA Development and Support

29 November 2017 will be the first East Midlands PA conference, designed to support Office Managers, Secretaries, PAs, Team Administrators – in fact anyone who organises others to achieve their goals. It's a development and networking day, based on the theme of personal and organisational change. It's for everyone working in the public and voluntary sectors whose role is to support and organise the work of others—from a single person to a whole team.

<http://bit.ly/EMCPAConference>

Negotiation Skills, 7 February

A half day workshop for Officers, designed to help delegates understand what negotiation is, and is not, in the business world. It will give them practical skills to enable them to prepare for a negotiation scenario, weighing up variables and anticipating challenges along the way. The session will cover:

- Knowing the difference between Negotiation, Persuasion and Influence and when to use each
- The different types of negotiation and choosing the right one
- Getting the fundamentals right, such as processes and variables, trading concessions and money matters
- Preparation, tools and techniques for a successful negotiation
- Getting the relationship right – building rapport and managing one's own behaviour

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

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

Dismissals for Poor Performance & Maternity and Shared Parental Leave

Everyone seems to be talking about the grand sweeping reform of employment law proposed by the Taylor Review. The Review is certainly interesting and makes some radical proposals, but we shouldn’t hold our breath while we wait for them to be implemented. Brexit legislation will take up at least the next two years’ worth of parliamentary time – and who knows what the Government will be able to concentrate on after that.

In the meantime it is more productive to keep an eye on the cases being decided every week if we want to keep up with the latest developments in employment law. This month I want to look at two cases. One is a useful illustration of a well-established principle. The other is a potentially radical new take on how employers need to approach maternity and shared parental leave.

Dismissals for poor performance

In **Awojobi v London Borough of Lewisham** the issue revolves around a dismissal for poor performance. We actually see very few appeal-level decisions on this topic. The leading case on the requirements for a fair dismissal based on poor performance is **James v Waltham Holy Cross** from 1973 – which tells us that this is not a fast-moving area of the law. In **James** it was held that central to a fair dismissal for poor performance was an opportunity for the employee to improve – and a warning of the consequences if no improvement was forthcoming. It is worth bearing mind that the very complex performance management procedures that we often find in local authority employers should have these essentially simple principles at their heart. In **Awojobi** the issue was whether, when it was clear that the required improvements could not be made, the employer needed to consider whether the employee could be

redeployed to some other role. The manager conducting the final hearing ruled out any transfer without considering any individual vacancies. He reasoned that the employee’s failures were not specific to the role she was performing but more about her general approach to the organisation of her work - transferring her to a new role would simply shift the problem elsewhere. The Tribunal held that this was a fair approach and the EAT agreed. There is no specific requirement to consider alternative work when an employee faces dismissal for poor performance.

Implications for Local Authorities

Of course the situation might be different if the employee was recently promoted or transferred to a role and proved to be unsuitable. In a case of that sort the employer must bear some responsibility for the situation and you would expect a reasonable employer to consider returning the employee to his or her original job if that was possible.

Maternity and shared parental leave

Generally speaking it is best not to get too excited about cases that have only reached the level of the Employment Tribunal. Every so often however, a case touches a nerve and addresses a question that has been bubbling away under the surface for some time. When that happens, it is worth taking notice. One such case is **Ali v Capita Customer Management Ltd** which held that a male employee was directly discriminated against when he took shared parental leave but was only paid the statutory minimum rate, when a woman taking maternity leave would have been paid at an enhanced rate.

Implications for Local Authorities

Many local authority employers pay more than the statutory minimum when it comes to maternity pay – but I know of very few who match that benefit when it comes to shared parental leave. Is that direct discrimination? This case suggests that it could be, but I’m going to stick my neck out and say that it is wrong. Direct discrimination depends on the ‘reason why’ one person is treated less favourably than another. I don’t see how it can be direct sex discrimination to pay both



men and women who take shared parental leave the statutory minimum. In the Ali case the employer argued that women who give birth and who therefore qualify for maternity leave are in a different position from parents (of either sex) who take shared parental leave after their partner has had the baby but the Tribunal held that that was not a 'relevant factor'. I suspect that the higher courts (and many mothers) will disagree. Besides which, more favourable treatment of employees in connection with pregnancy or childbirth is specifically allowed under s.13(6)(b) of the Equality Act 2010. Case law suggests that there is a limit to how much more favourable such treatment can be but the Tribunal, in my view, has taken an absurdly limited position in suggesting that three months of enhanced pay for employees who have given birth is disproportionate.

More interesting is the question of indirect discrimination – not at issue in the Ali case - where the suggestion is that a provision criterion or practice (PCP) of only paying the statutory minimum rate for shared parental leave puts men at a particular disadvantage. I'm not sure that quite works because it involves comparing them with women who have given birth and I don't think that is a like-for-like comparison. But we should also remember that there is no indirect discrimination if the employer shows that the PCP is a 'proportionate means of achieving a legitimate aim'. Paying an enhanced rate of maternity pay strikes me as an important tool in ensuring the retention of female employees who need to take time off after giving birth. A requirement to match that enhanced pay for all parents regardless of whether they had given birth or not will just make any enhanced benefits prohibitively expensive.

On balance, we are not yet in a position where local authorities should be looking to equalise the pay for maternity and shared parental leave. But it is clear that we should get something like a definitive answer from the courts in the next year or two.

I'd be astonished if anything comes of the Taylor Review in that timescale. Over the next year, I'll be picking over the Taylor Review as much as anybody, but it is still the case law where the real action lies.

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

National Developments

Tribunal Fee Regime Ruled as Unlawful

There was significant press coverage last week of Unison's successful claim at the Supreme Court which held that the employment tribunal fee regime denied access to justice and so was unlawful. This means that fees for bringing claims will no longer be payable, and fees already paid will be reimbursed.

We will keep councils informed of further information on how the reimbursement will impact on organisations that have paid a successful claimant's fees.

Taylor Review Outcomes

Matthew Taylor's review of Modern Working Practices has made recommendations to support "fair and decent" work. The report identified three key challenges UK employers and policy makers need to address: tackling exploitation and the potential for exploitation at work; increasing clarity in the law and helping people know their rights; and aligning the labour market in the longer term with broader industrial strategy.

Recommendations include:-

- a proposal that the current status of "worker" is renamed "dependent contractor" and individuals who fall into this category should receive employment protections, and that those who "control and supervise" their workers should pay a range of benefits, including national insurance.
- increases to national minimum wage rates for those who have non-guaranteed hours
- those returning from time off for sickness should receive the same protections as those returning from maternity, providing they have engaged with the Fit for Work service.
- as part of its review of the right to request flexible working in 2019, the Government should consider whether or not individuals should be able to request



temporary changes to contracts, for example for a particular caring requirement

- agency workers should have a right to request a direct employment contract with the hirer once they have worked there for 12 months
- Continuity of service would be preserved for gaps of less than a month (currently a week Sunday to Saturday)

NMW Enforcement Suspended for Social Care Sleep-ins

The Government has announced that it has temporarily suspended National Minimum Wage enforcement activity and is waiving historic financial penalties, against employers in relation to sleep-in shift pay in the social care sector. The Government is waiving the financial penalties faced by social care sector employers who are found to have underpaid their workers for sleep-in shifts. The waiver applies to any arrears relating to shifts before 26th July 2017. In future, employers underpaying staff for such shifts will be liable to the usual 200% of arrears as a penalty. The suspension of enforcement has been introduced to allow time for the Government to work with sector representatives to look at the issue and its impact further. It will end on 2nd October 2017.

Health & Social Care Workforce Integration

Working jointly with the Department of Health, NHS Employers and others, the LGA has developed a presentation which identifies the key workforce challenges and opportunities in health and care integration through a brief study of some major examples.

The LGA has developed case studies and gathered views from Skills for Care and Public Health England which can be accessed at the following link:-

[integration case studies](#)

National Negotiations – Offer Made to Firefighters

This month a pay offer was made by the National Fire Employers to the FBU. The offer can be accessed here: <http://bit.ly/2uRp4gH>

The initial response from the FBU was fairly negative – click here for full details:

<https://www.fbu.org.uk/news/2017/07/04/firefighters-union-declares-new-pay-offer-inadequate>

Training for Independent Panel Members

From information we have previously circulated, HR colleagues will be aware that following the regulations have been repealed which required the involvement of a Designated Independent Person's in conduct issues relating to the Head of Paid Service, s151 and Monitoring Officer. Instead, there is now a requirement that any recommendation to dismiss such an officer is reviewed by an Independent Panel before the decision is taken by the Full Council.

These changes have been reflected in the updated version of the Chief Executive's handbook (13 October 2016).

The JNC for Chief Executives has agreed that the Independent Panel should comprise of independent persons (at least two in number) who have been appointed by the council, or by another council, for the purposes of the council members' conduct regime under section 28(7) of the Localism Act 2011.

Training is available for the Independent Panel Members from the LGA. Further information is provided here: <http://bit.ly/2viktHO>

