

HR in the East Midlands

July 2018



July saw the conclusion to some outstanding pay negotiations and our national news round-up provides links to these circulars as well as other developments. Following a recent ruling that overturned previous case law on the issue of minimum wage entitlement during sleepover shifts, Darren Newman provides a summary and advice in his article.

Sickness Absence Survey

EMC is currently conducting the annual regional sickness absence survey and thanks to those of you who have provided information on your sickness absence levels from April 2017 to March 2018. There is still time to contribute to the survey by sending information to sam.maher@emcouncils.gov.uk.

Many of you find the survey information helpful and we will be publishing the results in next month's HR Bulletin.

Research & Information – Occupational Health Providers

On the theme of sickness absence, we recently ran a survey on behalf of a council in the region who is reviewing their current occupational health provider. A handful of responses have been received so far. If you would like to see these responses or want to

contribute, then please contact Lisa Bushell at lisa.bushell@emcouncils.gov.uk

Facility Time Reporting Deadline Today!

Last month we provided guidance on calculating and reporting the amount and cost of facility which is a legal requirement. **Today - 31st July 2018 - is the deadline by which councils have to publish this information relating to 2017-18.**

The data must be published on the council's website and reported on a Government webpage which was launched by the Cabinet Office this month. The link to the webpage can be found at: [reporting site](#)

Projects with Local Authorities

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

- Assessment Centres for Senior Manager Roles
- Restructuring Advice and Support
- Disciplinary investigation

To find out how EMC could support an area of work for you, then please contact Sam Maher at sam.maher@emcouncils.gov.uk, Lisa Butterfill at lisa.butterfill@emcouncils.gov.uk or Sarah Short at sarah.short@emcouncils.gov.uk



Learning & Development

Looking ahead to Autumn 2018, EMC has a range of development opportunities on offer. We're particularly excited by the LEAN Practitioner training in September.

GDPR 6 months on

In April this year EMC held a one day workshop on GDPR for HR. We have received interest in a follow up workshop, providing a space to explore GDPR for HR six months on. We're looking at how we can bring authorities together to explore challenges and issues facing authorities, sharing how they have responded to some of the complexities of GDPR, such as Subject Access Request. If you are interested in a follow up sessions email kirsty.lowe@emcouncils.gov.uk.

Mental Health First Aid

EMC are also looking at offering the internationally recognised 2 day training course in Mental Health First Aid (MHFA). MHFA teaches people how to spot the signs and symptoms of mental ill health and provide help on a first aid basis.

What will delegates learn?

- Learning takes place through a mix of group activities, presentations and discussions:
- A practical skills and awareness course designed to give you:
- A deeper understanding of mental health and the factors that can affect people's wellbeing, including your own
- Practical skills to spot the triggers and signs of mental health issues
- Confidence to step in, reassure and support a person in distress
- Enhanced interpersonal skills
- Knowledge to help someone recover their health by guiding them to appropriate support

Email kirsty.lowe@emcouncils.gov.uk for more information.

PA Conference 2018

The PA Conference will return for 2018 on 29 November, following the excellent feedback from the first event held in 2017 (details [here](#)). This year PAs, EAs and anyone supports the work of others will explore;

- techniques that could be used within workplace setting to improve how things work, do things differently, or create efficiencies
- themselves and their wellbeing needs
- delegates own personal development and action plan

EM LA Challenge returns in 2019

The Local Authority Challenge will return in Spring 2019, with a new look, venue and exciting storyline to challenge the best local government has to offer. The Challenge will take place on 21 March 2019, with team registration open from September 2018.

We'll also start recruiting the support team that is so essential to the day, we're looking for adaptable people that like a fast paced challenging environment. To find out more email kirsty.lowe@emcouncils.gov.uk.

National Mediation Conference

Colleagues from South East Employers are organising the National Mediation Conference in London on **Tuesday 11th September 2018**. The programme is available from [here](#). To book one of the places (the cost is £55 per places) visit [here](#).

Our autumn offering:

- **LEAN Practitioner Training, 19 & 20 September** - details [here](#).
- **Negotiation Skills, 11 October** - details [here](#).
- **Taking Minutes not Hours, 8 November** - details [here](#).
- **Report Writing, 21 November** - details [here](#).
- **Telephone Coaching, could more be less?, 06 Dec 2018** - details [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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In Deep with Darren

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

Sleepover Shifts

In a dramatic reversal of previous case law, the Court of Appeal in **Royal Mencap Society v Tomlinson Blake** has ruled that workers on a sleepover shift are not working when they are asleep with the result that those hours do not have to count towards their minimum wage entitlement. But is this the final word on the subject or is there more uncertainty ahead?

Although the Court of Appeal has overturned the finding of the Tribunal that the whole of a sleepover shift had to count towards the calculation of working time, the Court does not actually disagree with the underlying legal analysis that I explained in this bulletin back in May 2017. Regulation 32 of the National Minimum Wage Regulations 2015 says that time when a worker must be available for work at or near the workplace will count as working time – except when arrangements are made for the employee to spend that time sleeping. In that case it is only the time when the worker is 'awake for the purposes of working' that counts.

The Court of Appeal agrees with previous decisions to the effect that this sleepover exception only applies in cases where the worker is 'available for work' rather than actually working. This analysis boils the issue down into a single question. When a worker comes into work and goes to bed with the intention of sleeping through the night unless specifically woken up to deal with a particular issue, is that worker working or just making him or herself available for work if needed? The EAT said that this depended on a range of factors and it is here that the Court of Appeal disagrees. It simply rules that a worker who is asleep cannot also be working. That has some common-sense appeal, but I'm not convinced the issue is so straightforward.

Some of the criticism I have seen of this case centres on the undeniable fact that a worker on a sleepover shift is not free simply to go home – his or her presence in the workplace is contractually required.

But that factor alone cannot be determinative. If merely being required to be present at work was enough to establish that the worker was working, then there would be no need for reg 32 to provide for that explicitly. The existence of reg 32 in itself shows that the intention was that mere attendance at the workplace is not enough to establish that the worker is working. That is why the EAT emphasised the need to look at a range of other factors before reaching a view.

In the Court of Appeal's opinion, however, it was 'self-evidently' the intention of the sleep-in exception to deal comprehensively with the issue. The Court relies on the initial reports of the Low Pay Commission when the minimum wage legislation was being designed, which made it clear that time spent on a sleepover shift should not count as working time. Regulation 32, says the Court, was intended to give effect to that policy and it did so on the assumption that anyone on a sleepover shift is merely making him or herself available for work if required. We then get to the crux of the reasoning. Lord Justice Underhill says, 'it would not be a natural use of language, in a context which distinguishes between (actually) working and being available for work, to describe someone as "working" when they are positively expected to be asleep throughout all or most of the relevant period'. The judgement is 100 paragraphs long but when you pick it apart it really comes down to this point.

The Court thinks that it is obvious someone who is asleep cannot also be working. I think, however, that while this may seem obvious from the bench of the Court of Appeal, it might be rather less so to those who have to leave their family for the night to go and sleep in a care home.

A worker who is sleeping over in the workplace is not necessarily there 'just in case'. There may be legal requirements that the home be staffed 24 hours a day, the presence of the staff member might be necessary for insurance purposes and the round-the clock availability of staff may be an important feature of the care home's sales pitch to customers. By remaining present throughout the night, the employee is performing a specific task that is of benefit to the employer. If this isn't work, what is?



It is disappointing that the Court of Appeal thought the issue was so obvious that it was not worth even analysing. The result is that there is a clear opportunity for the workers in this case to appeal. The Supreme Court likes dealing with big legal questions and I suspect it will relish getting its teeth into the nature and meaning of work. But an appeal to the Supreme Court could take a year or more to reach a final outcome.

Darren's Advice for Employers

In the meantime, the position is that there is no obligation on employers to include the time that a worker spends sleeping in the calculation of minimum wage entitlement. The way our system works is that the Court of Appeal is not claiming to have changed the law – it is describing the law as it always was. This leaves the HMRC with some questions to answer over its rather gung-ho approach to enforcement of the minimum wage in relation to sleepover shifts. At the time of writing the HMRC's Social Care Compliance Scheme – which encourages employers to avoid enforcement action by paying full back-pay to workers – still seems to be open. Clearly it needs to be mothballed – and HMRC guidance urgently needs to be updated to reflect what we now understand the position to be. Now that we have this ruling, HMRC will need to put all enforcement action in cases based on sleepover shifts on hold until we know that the case has been finally resolved.

More information can be found on Twitter:
@daznewman

National Developments

National Pay Agreements

Chief Officers' Pay

Agreement has been reached on pay awards for Chief Officers and covers the period 1 April 2018 to 31 March 2020. The individual basic salaries of all officers within scope of the JNC for Chief Officers of Local Authorities should be increased by 2.0% with effect from 1 April 2018 and 2.0% with effect from 1 April 2019.

The JNC has also agreed to co-operate on a joint survey on the levels of stress, workload pressures

and unpaid overtime being experienced by Chief Officers.

The circular is available from [here](#).

Craftworkers

Agreement has been reached between the National Employers and the JNC Trade Union Side on rates of pay applicable from 1 April 2018 and 1 April 2019. The circular which provides the details of the agreement is available [here](#).

Apprenticeships

LGA Apprenticeship newsletter for July 2018

The latest edition of the LGA's Apprenticeship Newsletter is available from [here](#). It provides the latest news and developments on apprenticeships that are relevant to local authorities.

Local Government Workforce Survey

The Local Government Workforce Survey Report was published last week. The Survey covers key workforce data for 2016/17 and can be accessed through the following link: [survey report](#)

New advice to help employers support employees to deal with domestic abuse

Public Health England (PHE) and Business in the Community have published a new toolkit to help employers support workers affected by domestic abuse. The Domestic Abuse [Toolkit](#) forms part of a suite of toolkits developed by Business in the Community, in association with PHE.

For more information visit [here](#)

