



HR in the East Midlands

June 2016

This month we look at the benefits of mediation. We provide results of a recent survey on occupational health providers, and an up-to-date picture of the take-up of the Living Wage Foundation's Living Wage. Our employment law expert Darren Newman focuses on trust and confidence, analyzing a case where an employee refused to co-operate with a disciplinary investigation.

The Living Wage Foundation's Living Wage

For a number of years, we have conducted a regular survey on local government's adoption of the Living Wage Foundation's Living Wage (LWF). We have now received the results of the survey we conducted in May and firstly, want to thank everyone for their responses. These are extremely valuable as they also help to inform discussions on pay and rewards regionally and nationally, including our review of the national pay spine.

The Regional Picture

From your responses, there are **17** councils that pay the LWF, which is a decrease from **22** when the survey was conducted last October 2015. **4** councils have received accreditation from the Living Wage Foundation (an increase from **3**). Our region's results reflect a trend nationally in seeing a reduction in LWF employers. The main reason for this is that some

councils chose not to pay the LWF rate when it increased last November 2015 to £8.25 per hour as the national rate, but have maintained the previous LWF rate of £7.85 as their minimum pay level. Anecdotally we had picked up that some councils were also now re-considering their position in the light of the NLW and in particular its likely level by 2020. The responses we have received to this survey support this.

National Results

Nationally, since October 2015, the number of councils that are using the LWF rates has fallen from **175 to 153**. In addition a further **22** councils, while not having specifically adopted the Living Wage, pay all employees above that rate as a result of the minimum pay rate within their grading structure. This number has reduced from **27**, largely as a result of the most recent pay settlement (either NJC or local) being lower than the last LWF increase. **37** councils are now accredited by the Living Wage Foundation. A further **5** councils have made a firm political commitment to adopt the appropriate LWF rate by a specific date.

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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The Growth of Mediation



Mediation is a growing trend across local government, with an increasing awareness of how this alternative approach to more formal procedures can benefit working relationships and resolve conflict.

Conflict impacts negatively on the wellbeing and effectiveness of individuals and on the organisation, in terms of:-

- management time being diverted to deal with the conflict instead of focusing on the business/service
- the risk of time-consuming formal proceedings such as grievances and employment tribunals
- unworkable relationships and a decline in productivity
- lower staff morale and employee engagement
- sickness absence costs
- staff turnover and associated recruitment costs.

According to CIPD's *Conflict management* survey, the main benefits of using mediation is to improve relationships between employees (cited by over 80% of employers), reducing the stress compared with more formal processes and avoiding the costs involved in defending employment tribunal claims.

EMC 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.

For more information visit [EMCMediation](#)

Projects with Local Authorities

As well as supporting mediation, we have been working with local authorities on a range of activities and issues recently. These have included:-

- Chief Executive appraisal facilitation
- Development centre for senior management team
- In-house facilitation skills training
- Psychometric testing

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.

Survey Results

Occupational Health Providers

At the request of an authority, we asked you which occupational health providers you used. The summary results from your responses were:-

- 3 authorities use Medigold and 3 authorities use Medicare
- 3 authorities use Hobson Health
- In Leicestershire and Rutland the counties and 3 districts entered a joint procurement agreement with Health Management Ltd
- In Lincolnshire the County, CPBS and 3 districts also use Health Management
- 4 County/Unitary authorities which replied advised they have an in house provision or combination of in house and external contract. (The external contract was with Hobson Health)

Events in the East Midlands

As we approach the summer EMC has been active supporting a number of development events, including our 4th annual Coaching Conference yesterday, which involved a mix of workshops and a very practical and physical keynote session.

Over the next few HR Bulletins we will focus in on the sessions upcoming in the autumn and take stock of how else we can support you, but here's a snapshot of what's coming up!

Events coming up 2016

- [Coaching and Team Resilience](#), 15 September
- [PA Development Support Events](#), November
- [Local Authority Challenge](#), 24 November - we have 5 authorities already registered, for is set to be a fantastic day
- [Annual Employment Law Update](#), 15 March 2017



‘In Deep with Darren’

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

Trust & Confidence

The duty not to undermine mutual trust and confidence is now a well-established part of all employment relationships. But although the duty applies to both sides, we tend to see it crop up most when it is the employer that has acted in breach of it and the employee has responded by resigning and claiming constructive dismissal.

When I talk about the duty it is usually in this context and I am often asked how the duty applies to employees. I usually reply that in practice anything an employee does to undermine mutual trust and confidence is likely to be treated as gross misconduct under the disciplinary procedure. Thanks to the EAT, however, I now have a rather more concrete example to work with.

In **House of Fraser v Christofidou** the employer was investigating the loss of stock from its flagship Oxford Street store. They interviewed the employee after it emerged that her home address was associated with an ebay account that had been selling items very similar to stock that had gone missing from the store. Her defence was that the account was nothing to do with her but was in fact operated by her ex-husband who, for some reason, continued to use her address to operate his ebay business. However she refused to give her employer his contact details - or even confirm when she had last seen him - and he was not interviewed as part of the investigation.

The Tribunal held that her dismissal was unfair because the employer had not done enough to check the employee’s story and track down her ex-husband. The EAT overturned this finding. Since the employee was relying on her ex-husband as her defence it was up to her to make sure that the employer had access to his evidence. It was not the employer’s job to go chasing after him since the employee refused even to furnish them with his phone number.

The case becomes more interesting, however, when we look at the reason for the dismissal. The employer had not simply concluded that the employee was in some way involved with the theft of stock. Rather, she was dismissed ‘for gross misconduct due to a lack of trust’. The Tribunal found that the reason for dismissal was not theft, but that her evasive, inconsistent and suspicious answers during the course of the investigation had ‘led to a breakdown in trust and confidence’. The Tribunal found that this conduct was not sufficiently serious to warrant a summary dismissal but this conclusion was overturned by the EAT. The EAT observed that the obligation to maintain trust and confidence went to the heart of the employment relationship. By being evasive and uncooperative when questioned, the employee had acted in breach of this fundamental term and this entitled the employer to dismiss without notice.

Now it is important to be careful here. There is a danger of using ‘trust and confidence’ as a fall-back whenever the employer feels that there is not enough evidence to establish misconduct but feels that there must have been ‘something going on’. If an employee is accused of misconduct then, in general, the employer should either conclude that the employee is guilty – and have the gumption to say so clearly – or conclude that there is insufficient evidence to establish the point and take no disciplinary action. In most cases it would not be right to act simply on the basis of some lingering suspicion.

This case is different, however, because the breakdown in trust and confidence was caused by the employee’s own actions in adopting an uncooperative approach to the investigation. The dismissal was not, therefore, based on some general feeling that the employer could no longer have trust and confidence in the employee but rather on the basis that the employee had acted in such a way as to undermine that trust and confidence.

Darren’s advice

This is a very positive decision from the EAT which should strengthen the position of employers investigating misconduct who come up against an employee who thinks it is appropriate just to sit back



and say 'no comment'. The employee is under a duty to cooperate with the employer and act in a way that furthers the employer's interests. That means answering truthfully and helpfully when the employer is conducting an investigation into alleged misconduct.

What this case does not help with, however, is the more ambiguous case where the employee's lack of co-operation is based on sickness absence – often through stress or anxiety. Punishing an employee in these circumstances would be quite inappropriate in the absence of very clear evidence that ill-health is being deliberately faked in order to delay or avoid the eventual outcome. This does not mean that all procedures should grind to a halt of course. An employer only has to do what is reasonable in the circumstances and it may be that the procedures can go ahead even if the employee is unable to cooperate with them. That, though, is a separate issue entirely.

My one reservation in this case was that the employer dismissed without ever putting the employee's lack of co-operation to her as an allegation in its own right. The basic requirement of a fair procedure is that the employee knows what he or she is accused of and then has an opportunity to put his or her side of the case. It is not clear in this case that the employee had the chance to do that with the allegation that the employee had breached trust and confidence. The EAT don't address the issue but I think that if an employee blankly refuses to cooperate with an employer's investigation, then that should be the subject of a disciplinary hearing in its own right. The employee should be told of the charge and that there is a risk of dismissal if it is upheld. That would give the employee an opportunity to explain his or her attitude, knowing how seriously the employer is taking the matter. It may also lead to an employee rethinking his or her approach to the main investigation.

What is clear, however, is that an employee cannot simply thwart an employer's investigation by refusing to cooperate with it. Disciplinary investigations are simply meetings between the employer and employee and the normal rules of that relationship apply. An employee who thinks that he or she in an episode of 'The Bill' (remember that?) and has 'the right to remain silent' is making a serious mistake.

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

National Developments

Youth & Community – Pay Offer

The JNC for Youth and Community Workers met on 15 June at which the Employers' Side responded to the Staff Side's pay and conditions claim. The claim can be accessed at: [Y&C Claim](#)

Following this meeting, a pay offer has been made by the Employers as follows:-

- From 1 September 2016:-
 - The deletion of pay point 1
 - £300 (2%) on pay point 2
 - £300 (1.9%) on pay point 3
 - £250 (1.5%) on pay point 4
 - £200 (1.2%) on pay point 5
 - 1% on all other pay points
 - 1% on London and Area allowances
- From September 2017:-
 - £300 (1.93%) on pay point 2
 - £300 (1.86%) on pay point 3
 - £250 (1.50%) on pay point 4
 - £250 (1.45%) on pay point 5
 - 1% on all other pay points
 - 1% on London and Area allowances

A copy of the offer, with all details, including a response to other non-pay elements of the Staff Side's claim is at: [offer](#)

A response to the offer is expected next month.

