



HR in the East Midlands

June 2018

With the memories of calculating and reporting the gender pay gap still fresh in our minds, we now have facility time reporting to enjoy. The deadline of 31st July is fast approaching and so we've provided a link to the guidance in this month's HR Bulletin. The national news section gives you links to the latest pay negotiation developments, including the agreement reached for Chief Executives. Darren Newman's article looks at the issue of Employment Status.

Facility Time Reporting Guidance

Earlier this month we circulated guidance that was issued by the Government on 2nd June which relates to the requirement to report facility time. The guidance can be accessed [here](#). It contains specific guidance for local authorities at Annex C, amongst other matters that covers cost-sharing pooling arrangements for trade union representatives.

The publication service to allow organisations to publish their data on a website maintained by the Government will go live on 2 July, ready for the 31 July deadline. We understand that this will be available from a link on the same webpage that the guidance is on.

The Cabinet Office has said that there could be scope to review and improve the guidance in a year's time, as it is likely that further points will need to be addressed.

Regional Employers' Board & Joint Council Meetings

The Regional Employers Board and Joint Council met on 8th June. Pay and the benefits of pay benchmarking to support recruitment and retention and minimise equal pay risks was of particular interest to Board Members. Nottingham City Council provided an engaging presentation to Joint Council on their approach to apprenticeships, including how they support care leavers with apprenticeship and employment opportunities.

Projects with Local Authorities

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

- Assessment Centre for a Graduate Development Programme
- Harassment and discrimination investigation
- Chief Executive appraisal facilitation

To find out how EMC could support an area of work for you, then please contact Sam Maher at

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Learning & Development

The weather might be making everyone think about summer holidays and recharging batteries, but at EMC we're thinking about our autumn development offering. The ones to watch out for are our PA conference and our new look East Midlands LA Challenge, which will return in March 2019 at an exciting new venue!

PA Conference 2018

The PA Conference will return for 2018, following the excellent feedback from the first event held in 2017. This year PAs, EAs and anyone supports the work of others will explore;

- 6 Sigma in the PA world
- Trail blazing PAs

The conference is scheduled to take place on 29 November, further details to follow in coming weeks.

Managing Remotely with Confidence

This month we wanted to share with you details of our Managing Remotely with Confidence workshop, an interactive workshop that can be tailored to the specific needs of authorities.

The workshop would provide an opportunity for Senior Management and Line Management to understand the differences in managing remotely; listen to and support any concerns and share suggestions and actions for effective implementation. Workshops have covered;

- Understanding the difference between managing remotely and managing people on site?
- Exploring the reality of the change (how many staff, how often)
- Exploring hopes and fears about managing remotely
- How to transition to a culture of staying in touch – connectivity rather than visibility. Remaining visible to their teams if they are not on site.
- How to manage people without seeing them - performance management, fostering a culture of TRUST, delegation
- Action planning for your area

The workshop could include hearing from Managers and team members that already work in this way either internal to or external to the organisation. For

more information contact

Lisa.Butterfill@emcouncils.gov.uk

LEAN Practitioner Training, 19 & 20 September

This two-day module training has been designed to develop delegates understanding of how using a variety of LEAN thinking and improvement tools can achieve improved services and outcomes, details [here](#).

Day 1 focuses on LEAN Sigma tools and techniques and offers practical activities including: the Quad of Aims, Voice of the Customer, Value Stream Mapping, service review and redesign, 5s, DMAICT, variation, and PDCA.

Day 2 Mini Lean service review applying learning from day one.

Negotiation Skills, 11 October

This one-day workshop is aimed at operational managers in public services to support them in becoming more commercially aware when looking for opportunities to trade their service both internally and outside the organisation.

This workshop will help managers to 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 skills learnt will not only be useful when working outside the organisation but can also be applied to internal negotiation. For more information visit [here](#).

Report Writing, 21 November

EMC is holding a one day seminar on Report Writing for Officers. For more on this one day event 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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In Deep with Darren

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

Employment Status

At the heart of both employee and worker status is a requirement for personal service. The contract must require that the individual performs work personally for the employer. If all the employer cares about is that the work gets done, and it doesn't matter who actually does it, then the contract is not about the employment of an individual and employment rights don't apply.

We have to draw a distinction sometimes between high profile cases and important ones. Just because an employment law decision makes the headlines, that does not always mean that it is legally significant. In *Pimlico Plumbers v Smith* the Supreme Court has reaffirmed what we already knew about employment status, but has not moved the law on in any significant way.

The reporting of the case in the press has been somewhat confused but, to be fair, this is understandable. Mr Smith is a self-employed plumber claiming employment rights. He was held not to be an employee for the purposes of an unfair dismissal claim but to be 'in employment' within the meaning of the Equality Act. He was also held to be a 'worker' for the purposes of his claims for paid annual leave and unlawful deductions from wages. Those of us familiar with the distinction between workers, employees and the 'genuinely' self-employed can easily forget how counter-intuitive it seems to those encountering it for the first time.

But just because the law can seem confusing from the outside, that does not mean that it is actually confused. The outcome in *Pimlico Plumbers* is just what most employment lawyers would have expected it to be. The Employment Tribunal, the EAT, the Court of Appeal and the Supreme Court have all agreed that Mr Smith was working for Pimlico Plumbers and was not running an independent business of which Pimlico was merely a client or customer. The only reason there was any question mark over his status was that, over time, Pimlico Plumbers had inserted provisions into his

contract which sought to claim that he was more independent than he appeared to be. The EAT held that the contractual documentation had been 'carefully choreographed' by Pimlico so that their plumbers could be presented to the world as being part of their workforce, remain under their control and yet be treated in law as independent contractors with no employment rights. An employer who attempts to have its cake and eat it in this way is unlikely to win the sympathy of the courts and *Pimlico Plumbers* can hardly feel surprised or aggrieved at the result.

Indeed, when we look at the cases that have been coming before the courts in the past year there is a remarkable consistency in their approach. Time after time those working in the so-called 'gig economy' have established that they are workers rather than wholly independent contractors. This does not suggest any great ambiguity in the test to be applied. To that extent, I think last year's Taylor Review was wrong in its diagnosis. If we are to keep the distinction between employees and workers, there really is no need to simplify or clarify the definitions of either. The distinction is already about as clear as we can reasonably expect it to be.

Perhaps, however, one issue does emerge from the *Pimlico Plumbers* case with a little less clarity than we might hope for – and that is the effect of a substitution clause. At the heart of both employee and worker status is a requirement for personal service. The contract must require that the individual performs work personally for the employer. If all the employer cares about is that the work gets done, and it doesn't matter who actually does it, then the contract is not about the employment of an individual and employment rights don't apply.

Over the years, the courts have held that a right to send a substitute to do the work is therefore inconsistent with either employment or worker status. *Pimlico Plumbers* argued that there was just such a right in Mr Smith's contract because he was free to arrange for another Pimlico Plumber to take a job that he had quoted for if, for example, he had a more lucrative job to work on. The Supreme Court agreed with the Tribunal that this did not prevent Mr Smith from being a worker. The right to send a substitute was a limited one. It was not set out in the contract itself and



in any event the substitute had to be another Pimlico plumber – this was not a case in which the business did not mind who did the work as long as somebody did.

But the Supreme Court also seemed to attach importance to the fact that personal service was a ‘dominant feature’ of the contract as a whole. Substitutes were rarely sent and much of the contract related to the personal obligations of Mr Smith in terms of how he presented himself and performed his work.

This lessened the significance of the contractual right (such as it was) to send a substitute. Does this represent a loosening of the rule that a clear substitution clause is an absolute bar to employment or worker status? Or is the ‘dominant feature’ test something that only applies where the substitution clause is vague or limited?

We have had an initial answer to that question already. Last year Deliveroo defeated an application for union recognition on the basis that they had successfully inserted a substitution clause into their contracts allowing their riders complete discretion to have someone else work in their place.

The Central Arbitration Committee found that the term was genuine in the sense that Deliveroo were prepared to accept substitutes if they were sent and there was evidence that at least one Deliveroo rider was subcontracting all of his work to a friend and making a (presumably modest) profit in the process. The union (Independent Workers of Great Britain) is seeking a judicial review of that decision and the High Court has just ruled that it cannot be argued that the CAC was wrong to find that the substitution clause meant that Deliveroo riders were not workers. Despite what the Supreme Court said in *Pimlico Plumbers*, the test is still whether there is a contractual obligation for personal service rather than just an expectation of it. Asking whether personal service is a ‘dominant feature’ of the relationship may be useful where the contractual position is unclear, but not when the substitution clause is express and unqualified. I would expect an appeal on that point – and for the issue to be raised in other cases currently making their way through the system. I suspect, however, that the High Court’s view will prevail. In that case, the Supreme Court’s decision will really have added little or nothing to our understanding of employment status.

More information can be found on Twitter:
@daznewman

National Developments

Chief Executive’s Pay Agreement

On 8th June, the Employers’ Side of the JNC for Chief Executives made an increased offer which was accepted. You can access a copy of the circular setting out the details of the agreement here: [circular](#)

Chief Officers’ Pay Negotiations

The National Employers also revised its offer to Chief Officers, increasing the offer to a 2% annual increase for 2018 and 2019. GMB and UNISON (who represent Chief Officers) will be consulting their members over the next few weeks on the revised offer and the outcome will be shared with you as soon as it is announced.

National Pay Spine Update

EMC recently held a workshop for HR Officers from councils across the region to discuss the implications of implementing the new national pay spine for local government from April 2019. The workshop was well-attended and well-received by those who participated. The questions and issues raised at the event was used to inform the development of national technical advice which is now attached.

At the workshop, a number of issues were identified on which EMC will be supporting councils:-

- through a pay and rewards network, mainly operating virtually and meeting as appropriate
- specific workshops on aspects such as pay modelling protection, consultation, equality impact assessments, options for councils not currently using the national pay spine
- a discounted pay modelling service



Sam Maher will be contacting council's HR leads and those who have asked to join the pay and rewards networks in July to take the work forward.

The NJC Circular 2019 Pay Spine FAQs document is available from [here](#).

Social Work Regulatory Body

This month the Government published information on the new professional regulatory body being established for social workers. **Social Work England** will have public protection as its primary purpose. It will set professional, education and training standards for social workers, hold the register and provide assurance that those registered meet the standards, are qualified and remain fit to practise. It is expected that Social Work England will start its regulation role from Spring 2019.

The current regulator is the Health & Care Professions Council and will cover registration renewals running from 1st September to 30th November 2018.

Further information is available below

- Social Work Fact Sheet [here](#)
- Social Work England Q&A [here](#)

