



HR in the East Midlands

November 2015

In this edition of our monthly bulletin we provide an overview of the take-up of the Living Wage nationally and in our region. Our Events page features development opportunities and resources available for HR business partners. Employment law specialist, Darren Newman, delves deep into the issue of zero hours and casual contracts in this month's article.

Research & Information Results - The Living Wage

We now have the results of a national survey into the adoption of the Living Wage within local government. For clarification, this is the Living Wage as set by the Living Wage Foundation and not the government's proposed National Living Wage which will come into force in April 2016.

Nationally there has been an increase in the number of councils that have implemented the Living Wage. Since April, the number increased by 18 to **175** local authorities having adopted the Living Wage. In addition a further **27** 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 could of course change if increases in the LWF rates are higher than pay settlements within the sector in future years.

It should be noted that a couple of councils have dropped off the list because, while they had implemented the LWF rate in previous years, they have taken a specific decision not to increase pay in line with the rates published in November 2014. Those rates recently increased to **£9.40** (London) and **£8.25** (rest of UK). It should be noted that in some cases councils have adopted the Living Wage on an 'open ended' basis, while in others the issue is considered each time the Living Wage figure increases.

Of the 175 councils that have adopted the Living Wage, 18 are not covered by national pay bargaining. 33 councils are now accredited by the Living Wage Foundation. A further 8 councils have made a firm political commitment to adopt the appropriate LWF rate by a specific date.

A number of councils have adopted a locally determined Living Wage that is lower than the nationally set rate. These are not counted in the figures, as we think that we need to keep to the national/London benchmarks to produce summaries on a consistent basis.

In terms of our region, there are currently **22** local authorities who are paying the Living Wage and 3 are accredited with the Living Wage Foundation.



Events in the East Midlands

HR Business Partnering

The events section of this bulletin has details of [Aspire](#), a development programme created in partnership with the CIPD specifically for our sector. The first cohort in our region will start in 2016.

The Aspire programme is for strategic HR & OD professionals within the public sector. It aims to enhance self-awareness, build confidence and help individuals develop a strong personal profile within their own organisation and with their stakeholders. It is delivered in conjunction with CIPD and comprises 5 different modules:-

- Strategic context and challenges
- Getting under the skin of the business
- Win friends and influence people - the organisational dimension
- Win friends and influence people -the personal dimension
- Using technology and business tools

The programme includes 360° feedback and practical projects.

Reports from Aspire

The first Cohort on the Aspire Programme presented their project reports to an expert panel and an invited audience at an event held at Villa Park in June 2015.

The quality of these reports reflect the significant commitment, time and effort of each of the groups, but also represent a significant research resource which has both a current and practical focus and covers a number of common threads with regard to developing effective organisational culture. The reports cover issues such as:-

- organisational culture to support community engagement in the context of austerity
- the characteristics of customer-focused leadership and how can this be achieved
- Engagement to maximise individual potential and to manage and measure by deliverable outcomes

- HR tools and interventions to understand the skills and capability requirements of a commissioning organisation

The reports can be accessed by clicking on this link: [Aspire Reports Cohort 1](#) We hope you will find them of interest and value.

For further information about the Aspire programme go to the dedicated Aspire website:

www.aspirehrbp.org.uk or contact Lisa Butterfill, Kirsty Lowe or Sam Maher at EMC – see our contact information at the bottom of this page.

[The 360° feedback tool](#) for HR business partnering, [HRBP360](#), can also be provided by EMC as a stand-alone development opportunity for teams and individuals.

Projects with Local Authorities

We have been working with local authorities on a range of activities and issues recently. These have included:-

- In-house training on action-learning facilitation
- Grievance investigation
- Coaching
- Restructuring support

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.

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

Zero Hours Contracts

Whenever I think of zero-hours contracts I think of Sir Humphrey Appleby in Yes Prime Minister describing ‘politician’s logic’: ‘Something must be done. This is something. Therefore we must do it’. I think a very similar line of reasoning lay behind the new rules on zero-hours contracts introduced by the Small Business Enterprise and Employment Act 2015. The Act outlawed the use of ‘exclusivity’ clauses in zero hours contracts. As a result, any term in an employee’s or worker’s zero-hours contract that prohibits him or her from working for another employer is void.

This is an almost entirely cosmetic change that makes practically no difference in the real world. There is very little evidence that such clauses are widely used in practice – and even if they were, most zero-hours workers would be in no real position to challenge them. The new rules did, however, allow the Government to claim that they had ‘tackled the abuse’ of zero-hours contracts.

One consequence of the new law however is that we now have a definition of a zero-hours contracts contained in s.27A of the Employment Rights Act 1996 – inserted by the 2015 Act. This says that a zero-hours contract is one in which ‘there is no certainty’ that the employer will provide ‘any’ work to the worker. I don’t want to get too technical about this, but that drafting is rubbish. All an employer needs to do to get around this definition is guarantee some minimal amount of work – one hour a month perhaps – and the contract will not count as a zero-hours contract. The Coalition Government said that they would introduce regulations setting minimum thresholds of pay and work to stop

employers from doing this but so far there has been no sign of the new Government following through on that. Perhaps they have decided that no employer would bother trying to get around the new law simply because it is so weak.

As a further step the Government has just published¹ a guidance document on the use of zero-hours contracts designed to discourage abuse. It has absolutely no legal force and really is nothing more than a well-meaning leaflet. It suggests that the use of zero hours contracts ‘might not be appropriate’ for employees who are going to ‘work regular hours over a continuous period of time’ and reminds employers that individuals working under zero-hours contracts ‘are entitled to employment rights’ either as an employee or a worker.

There, of course, is the rub. Just what employment rights are individuals working under a zero hours contract entitled to? This is an important question for local government because many councils will employ people on these contracts – even if the phrase ‘zero-hours’ is seldom used. The fact is that there really isn’t much of a difference between a zero hours contract and a casual contract. Both involve the claim that there is no obligation on the employer to provide work. The question is whether that claim stands up to scrutiny.

Darren’s Analysis and Advice for Employers....

Many local authorities will employ people on a casual contract where the volume of work required is difficult to predict. Usually the flexibility benefits both sides. The employer may not, on paper, be obliged to offer work, but in practice the employee has a great deal of control over his or her working pattern.

Labels can be deceptive. If a casual contract genuinely has no guarantee of any work then it will also be a zero-hours contract. If it does guarantee some work then you have to ask just how ‘casual’ it is. Labelling something as ‘casual’ doesn’t get you very far in legal terms. It certainly doesn’t resolve the central question of what legal status individuals enjoy and what

¹ <https://www.gov.uk/government/publications/zero-hours-contracts-guidance-for-employers/zero-hours-contracts-guidance-for-employers>



employment rights they have. Are they employees with a right not to be unfairly dismissed or are they just workers with rights under the Working Time Regulations (paid annual leave), the Equality Act and entitlement to the National Minimum Wage? In some cases where the relationship between 'employer' and individual is one where the individual is genuinely running an independent business, they might be neither.

It is odd that one of the most difficult problems in employment law is figuring out exactly to whom it applies. You can easily fill a textbook describing the tortuous case law that has tried to draw a distinction between workers, employees and what are sometimes known as the 'genuinely self-employed'.

The Government guidance on zero-hours contracts suggests that employers should make it clear to individuals just what their status is and what employment rights they will enjoy. If only it were that easy. The employer cannot simply decide to engage someone as an employee or as a worker. What matters is the nature of the contract, not the label that you put on it. If you make a four-legged wooden structure with a flat surface used for putting things on, then you have made a table. You can call it a sofa if you like, but a table it will remain. If the contract that you create has all the features of a contract of employment then that is what it will be. You can label a contract 'casual' but ultimately a Tribunal will have to decide whether there is some obligation to provide work and some obligation to accept it. If it appears that over the years a pattern of work has emerged and become an implied obligation then it is highly likely that the tribunal will find that there is an employment relationship. Describing someone as a casual worker will not cut much ice if that no longer reflects the reality of the situation.

One recent trend in employment has been the rise of the 'gig' economy where individuals sell their labour in small units to a variety of employers, often through an online marketplace. Here the issue is whether the individual falls outside of employment law altogether by being in business on their own account. Is the 'employer' in reality a 'customer'? Local Government services may not yet have adopted an Uber model, but there are plenty of freelance individuals providing their services to local authorities – out of school activities for example – where it is not clear whether they are entitled to any employment rights at all.

We need new case law to help us fit these recent trends into our employment law system and here again it seems that Uber will be leading the way. A legal challenge has now been mounted by a number of Uber drivers claiming that they should be treated as workers with the entitlement to paid annual leave and the minimum wage. The issue is likely to be argued out in front of a variety of increasingly senior judges over the coming months and years and it will be interesting to see the result. Will employment law be able to keep up with these changes in the nature of the labour market?

More information can be found on Twitter:
@daznewman

National Developments: Consultation Meeting with Cabinet Office on “Fluency Duty”

In last month's bulletin we highlighted the Government's proposals to introduce an [English language fluency requirement](https://www.gov.uk/government/consultations/language-requirements-for-public-sector-workers) for front-line public sector workers. A draft code of practice on how the “fluency duty” will be implemented has been published:-
<https://www.gov.uk/government/consultations/language-requirements-for-public-sector-workers>.

Implementation issues include: which roles will be covered; determining the standard of English fluency that is required; how the requirement will apply to existing employees; reviewing policies, including complaints and selection procedures to reflect the new requirement.

In response to concerns raised from some of our HR colleagues in authorities, EMC has arranged an opportunity for you to [meet with Cabinet Office representatives](#) as part of the consultation process so that the issues can be discussed. The meeting will be held on 30th November 2015 at EMC's offices in Melton Mowbray.

