HR in the East Midlands

November 2017

November has been seen important announcements on pay and we set out below a summary of these in this month's bulletin. Our Learning & Development page celebrates the success of councils who took on this year's LA Challenge. Feedback from participants was extremely positive, so let us know if your organisation would like to be involved in the future. Darren Newman's article this month provides advice on illegal working and 'right to work' checks on employees.

Developments on Pay

Last week the Chancellor announced that the **National Living Wage (NLW)** will rise from next April from £7.50 per hour for those aged 25 and over to £7.83, an increase of 4.4%. This is the minimum wage rate for employees aged 25 and over.

Earlier this month, the **UK Living Wage rate**, which is set by the Living Wage Foundation and is voluntary, unlike NLW, was increased by 3.6% from £8.45 to £8.75. Living Wage Foundation rates are independently calculated, based on the real cost of living in the UK and London. The 2017 increases have been largely driven by higher inflation feeding through to the basket of goods and services that underpin the rates, with rising private rents and transport costs also having an impact. This rate is £1.25 per hour more than the current NLW, which will be increasing from April 2018 as highlighted above.

The Employers' Side of the NJC for Local Government Services are meeting this week, with the potential for a **pay offer** being communicated in the first half of December. We will keep you posted of any news on this.

IR35 Webinar for Local Government

In last month's bulletin, we informed you of the webinar that had been arranged to take place earlier this month on IR35. For those of you who are interested in this issue and were unable to participate, you can access the slides from the event here: HMRC IR35 workshop

Projects with Local Authorities

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

- Action learning
- Coaching
- Psychometric testing

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.

Learning & Development

This month we share information on key events held in November, and remind you of our coaching tools "boot camp" taking place on 7th December.

EM LA Challenge 2017

This year 13 teams from councils across the region competed with each other and had a fantastic time being part of the East Midlands LA Challenge 2017.

South Kesteven District Council scooped the top prize for the second year running, winning the Challenge and the Best Chief Executive Award. For South Kesteven the challenge started a day early, with the last minute loss of their appointed Chief Executive, who had to pull out due to illness. In the 24 hours before the Challenge event, the team rallied round, recruited a new team member and appointed a new chief executive.

"From our perspective: South Kesteven officers thoroughly enjoyed the challenge and thrived off the buzz during the competition. The challenge was made that bit sweeter when the winner was announced. The event helped to bond the team members in a professional standing as well as getting officers to develop knowledge around the wider functions which take place within a council. It's a management training event like no other and we are glad to have taken part".

Congratulations go to all teams and all those who made the day possible. The results were:-

- **Local Authority Challenge East Midlands Winner -** South Kesteven District Council
- **Runners up -** Gedling Borough Council
- **Best Chief Executive -** William Tse, South Kesteven District Council
- **Best Partnership Working award -** North Kesteven District Council
- **Best Presentation** - Gedling Borough Council
- **Best Residents' Magazine -** North Kesteven District Council

Thank you for the positive feedback...

"It was a fabulous day, challenging and fun".

"Thanks again for all you help and support with the event, we loved it and would highly recommend it to any LA thinking of taking part".

"Many thanks for your vital role in organising the event – my team all really enjoyed it! A fantastic personal development exercise for us all, and for positive team-building too".

"Big thanks for all of your hard work on the challenge. The team thoroughly enjoyed it and were truly pleased to take part. We have nothing but positive things to say about the day!

"What a great day yesterday. Thank you! We are still buzzing".

Mediation Programme Launched

Colleagues at EMC were delighted to launch this month our first accredited Meditation Programme, which saw 12 delegates from 10 different authorities in the region participating in this 3-day ILM endorsed programme. We're keen to hear from if you are interested in being part of a future programme, or a mediators' network - feel free to get in touch.

PA Conference 2017

Building on our previous support for PAs, team secretaries and administrators, EMC launched its first PA Conference in November. As well as providing an opportunity to network, the event covered the changing role of PAs, influencing skills and personal resilience. Feedback from delegates was extremely positive.

What's left to come in 2017…

Coaching Tools Boot Camp, 7 December - a Coaching Tools Boot camp that will provide a safe environment for coaches to share and experience new coaching tools. http://bit.ly/EMCCoachingTools

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

Illegal Working

A recent case has highlighted a common misconception among employers about the obligation to carry out ‘right to work’ checks on employees. Under the Immigration Asylum and Nationality Act 2006, it is a criminal offence to employ an illegal worker knowing or having ‘reasonable cause to believe’ that they are not entitled to work in the UK. A civil penalty of up to £20,000 per worker can be imposed on an employer who employs such people inadvertently. This is a daunting prospect, but the employer will be ‘excused’ from paying that penalty if it has taken copies of specified documents that demonstrate that the worker is entitled to work in the UK.

So with such draconian penalties at stake it is obviously a good idea to carry out thorough right to work checks and keep copies of the appropriate documents. Looking at the online guidance issued by the Home Office however, you could easily form the impression that it is actually a legal requirement to do so. And it isn’t.

In **Baker v Abellio London Ltd** the employee was a Jamaican national who had lived in the UK since childhood and had the right to both live and work in the UK. However, when the employer carried out a right to work audit of its workforce he was unable to provide the required documentation. He did obtain a new Jamaican passport, but this did not contain a visa and the employer was advised by the Home Office that the passport alone was not sufficient evidence of his entitlement to work. He had no other documentation so was left in the unfortunate position that while he was entitled to work in the UK (there was no doubt about this), he did not have the documentation to prove it. The employer dismissed him on the grounds that his current documents did not provide the employer with a ‘statutory excuse’ for continuing to employ him.

In the resulting unfair dismissal claim, the Tribunal held that it was not enough for an employee to have the right to work, it was also necessary to provide documentation establishing that right – otherwise the employer could not legally continue to employ him. The Tribunal held that the dismissal was fair on the basis of what is commonly referred to as the ‘statutory ban’ reason for dismissal set out in s.98(2)(d) of the Employment Rights Act.

The trouble with this conclusion, however, was that it was completely wrong. It totally misunderstood what the 2006 Act actually says about documentary evidence of a right to work.

The Act does not make it illegal to employ people without documentary proof of the right to work in the UK. It makes it illegal to employ a person ‘who is subject to immigration control’ and who does not *in fact* have the right to work in the UK. The Act then provides employers with a ‘statutory excuse’ if they have obtained specified documents from the employee showing that he or she was entitled to work.

But this does not mean that an employer is legally obliged to obtain one of those documents. An employer is perfectly free to take no steps whatsoever to obtain proof of a right to work – but will then be taking the risk of a financial penalty if it turns out that someone is employed illegally. So while proper ‘right to work’ checks are to be highly recommended, they are not a legal requirement in their own right.

The EAT allowed Mr Baker’s appeal. His dismissal did not come under the ‘statutory ban’ reason for dismissal. Since he was entitled to enter and leave the UK without permission, he was not subject to immigration control and not covered by the employment provisions of the 2006 Act. It was not illegal to employ him even in the absence of the documentation the employer was seeking.

That did not mean that his dismissal was unfair however. It is well established that an employer who dismisses an employee on the basis of a genuine but mistaken belief that their employment is illegal can argue that the dismissal is for ‘some other substantial reason’ and potentially fair.

The EAT accepted in Mr Baker's case that the employer genuinely believed that the documents were required in order for his continued employment to be lawful, so an 'SOSR' reason was established.

That still left open the question of reasonableness. Mr Baker argued that even if the employer's belief was genuine, it should have realised that he was not subject to any restriction on his employment. The employer countered that they had enquired of the Home Office who had advised them that Mr Baker needed to provide documentation for his employment to be lawful. Surely, they said, it was reasonable for them to act on the basis of Home Office advice?

The EAT sent this issue back to a fresh Tribunal to decide.

It wasn't apparent from the evidence whether the employer had given enough information to the Home Office to make it clear what the position was. If they had provided full information about Mr Baker – which would have made it clear that he was not subject to immigration control – then it could have been reasonable to rely on incorrect advice from the Home Office. If they had not done so, however, then the Tribunal would be likely to find that the dismissal was unfair.

Advice on Implications for Local Authorities

The lesson to be taken from this case is that an employer should only dismiss someone for not producing 'right to work' documentation if there is some reason to believe that they are not entitled to work in the UK. Of course an employer can insist on that documentation being produced before employment is confirmed – but Mr Baker had been employed for three years when he was dismissed. Surely there is a responsibility on an employer in that situation to take proper advice on the employee's status? A call to a Home Office helpline seems an inadequate basis on which to dismiss someone.

More information can be found on Twitter: @daznewman

National Developments

Public Health Workforce

A report has been published this month by the Royal Society of Public Health and the Professional Standards Authority. The report reveals the extent to which practitioners on accredited registers – an 80,000 strong workforce including counsellors, acupuncturists, and sports therapists – are able to contribute to addressing public health challenges in the UK. The report can be accessed via this link: Report

Apprenticeships

The number of people starting apprenticeships in England has fallen by 59% after the introduction of the apprenticeship levy in May, according to figures from the Department for Education (DfE).

The DfE said it had expected an initial fall in numbers following the apprenticeship levy's introduction, suggesting that, because employers have two years to spend training funds, many are still formulating new schemes. In his Budget, the Chancellor announced that the levy scheme could be reviewed in the future with the prospect of introducing more flexibility.

Employment Status

The Work and Pensions Committee and Business, Energy and Industrial Strategy (BEIS) Committee have produced a draft Bill designed to tackle the perceived exploitation of "gig economy" workers. If passed into legislation, the Bill would assume a "worker by default" status, meaning employers would have to offer basic rights such as sick pay and holiday pay.

The draft Bill follows from Matthew Taylor's review of modern employment practices, and from a number of tribunal cases debating worker status, including the decision this month by the Central Arbitration Committee that Deliveroo riders are self-employed contractors rather than workers, and the other decision that Uber drivers were workers.