

HR in the East Midlands

October 2017



Last month's bulletin had news on our no. 1 frequently asked question (exit pay recovery/cap) and this month our national news round-up covers the runner-up FAQ – "what's the latest on the pay negotiations?" In this month's article, Darren Newman provides advice on referring to previous incidents and warnings when dealing with misconduct.

Regional Employers' Update

The Regional Employers' Board met on 4th October and Members were given an update on key developments including national pay negotiations and the implications of Brexit. Outcomes from the meeting are:-

- A regional response to government consultation on a levy on unions and employers' associations for the functions of the certification officer.
- A recommendation to EMC Management Group to continue in membership of CEEP UK and CEEP, which is one of the social dialogue partners.
- A regional level work plan for the next 12 months, based on the current HR related priorities for councils, which were agreed as:-
 - GDPR (General Data Protection Regulations) which will come into force in 2018
 - Apprenticeships – supporting councils to maximise return on the levy and identify apprenticeships to assist with skills shortage areas and workforce development
 - Pay and rewards
 - Health and social care integration
 - Recruitment and retention within planning, building control and social care.

The **Regional Joint Council** also met in October and agreed to work jointly as unions and employers on:-

- Employee Wellbeing & Resilience
- Apprenticeships
- Communicating on DOCAS (Check Off)
- Joint Communication of National Joint Working

Information Sharing – Volunteering Policies

In the last couple of months we have received 3 separate requests for information on policies to support employees with volunteering. We have 10 different examples of policies that councils have shared with us. If you would like any further information on these, then please get in touch with us.

Projects with Local Authorities

During September EMC has provided individual assistance to councils on the following types of project:-

- Chief Executive Pay Benchmarking
- Mediation
- Assessment Centre

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

From this month we are broadening our regional learning and development events page to cover other news and information relating to learning and organisational development.

Webinar for Local Government on IR35

In response to concerns that we have raised on behalf of councils, I am pleased to let you know that HMRC have agreed to hold a webinar for local government on IR35, to take place on **10th November from 11am to 12 noon.**

The webinar will be presented by Mark Frampton, Policy Advisor at HMRC, and it will cover:-

- Background
- What were the changes to the legislation in April 2017?
- What are the key things to look out for?
- Myth-busting: things that are said but are not true
- Q & A

Any particular questions that attendees would like answered can be emailed in advance to eru@local.gov.uk to make sure they are covered in the webinar. If you would like to register and take part, go to the full details at: <http://bit.ly/2yZ8Xko>

EM LA Challenge 2017

We have 12 teams competing in this year's LA Challenge event, taking place on 16th November at Donnington Park. All the news of outcomes and successes from the event will be shared in next month's bulletin.

Coaching Support: Coaching Tools Boot Camp

As part of support to the East Midlands Coaching Network, we are providing a ½-day workshop for coaches on 7th December 2017. The workshop will focus on tools used within coaching sessions. We all have our favourite things and coaches are no different, this CPD session will enable coaches to share with one another their favourite coaching tools.

Facilitated by experienced executive coach Cathy Lasher, the workshop will help to develop coaches' knowledge and skills when using coaching tools, enabling coaches to have access to a variety of different tools and understand when they are most effective.

Employment Law Update

The annual EMC Employment Law update is already scheduled into the busy 2018 diary, with employment law expert Darren Newman. We will again offer an early bird opportunity: if you book a place before the end of January the cost per delegate is just £99 + VAT for EMC members (saving £76 on each place).

The Update will be at Pera, Melton Mowbray from 9:45 to 3.30 and includes a buffet lunch with refreshments throughout the day.

Apprenticeships

Jamie Saddler has joined the LGA in the role of **Apprenticeships Adviser** to lead its work on apprenticeships to support regional employers' organisations and councils in sharing practice as well as representing councils' interests back to government. EMC is liaising with Jamie to provide a link to councils within this region.

Workforce Strategy

A national workforce strategy for local government is being developed. EMC will be consulted on the draft version and we will ensure councils can be involved and informed as the strategy develops and becomes finalised.

Contact Details

For further information about any of our work please contact the Local Government Services Team. Either call 01664 502 620 or email:-

Sam.Maher@emcouncils.gov.uk,
Lisa.Butterfill@emcouncils.gov.uk,
Sarah.Short@emcouncils.gov.uk,
Kirsty.Lowe@emcouncils.gov.uk



‘In Deep with Darren’

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

Warnings and Investigations

Possibly the most important – and most often quoted – case in the history of employment law is **BHS v Burchell** from 1978. In that case the EAT said that in order for a misconduct dismissal to be fair the employer had to have an honest belief in the guilt of the employee; have reasonable grounds for that belief – and to have conducted a reasonable investigation. Any Tribunal dealing with a conduct dismissal will ask itself whether the ‘Burchell test’ has been satisfied and an employer that falls down on any one of the three requirements is almost certain to lose the case.

But we should always remember that the ‘real’ test of unfair dismissal is set out in the Employment Rights Act 1996 – and that is whether, in all the circumstances, the employer has acted reasonably in dismissing the employee. Ultimately it is the overall fairness of the dismissal that counts rather than what is done at each individual stage of the process.

In the case of **NHS 24 v Pillar** the employee was a nurse working on an NHS helpline. She was dismissed after an incident in which she seriously mishandled a call involving a man with chest pains. Instead of spotting the ‘red flags’ that would have warned her of the risk of heart attack and the need for a 999 call requesting an ambulance, she advised the patient to seek further advice from an out-of-hours doctor’s service. This was obviously a serious matter and an investigation was conducted prior to a disciplinary hearing. The management report that emerged, however, also included details of two previous incidents where the employee’s advice had put patient safety at risk – one of them in almost identical circumstances. Following those incidents the employee had undergone further training and assessment but there had been no suggestion of formal disciplinary action.

The employee was dismissed for gross misconduct and the Tribunal found that the dismissal was unfair. The investigation had not been a reasonable one said the Tribunal, because it should not have included reference to the earlier incidents. Having said that the Tribunal went on to find that - based on the information that was actually put before the disciplinary panel - dismissal was ‘within the range of reasonable responses’ open to the employer. Once the disciplinary panel had been told of the earlier incidents, it was reasonable to take them into account. The dismissal was unfair, said the Tribunal, because the investigation should not have resulted in those earlier incidents being put in front of the panel.

After observing that it was unusual for a Tribunal to criticise an investigation for being ‘too thorough’, the EAT held that the Tribunal’s approach was inconsistent. How could it be unfair for the investigation to deal with the earlier incidents and yet still be reasonable for the employer to take account of those incidents when it came to the disciplinary hearing? The investigation was not a stand-alone feature that could be judged in isolation from the disciplinary hearing that followed it – it was the overall reasonableness of the decision to dismiss that was the key issue. On the findings made by the Tribunal about the serious nature of the misconduct and the fact that it had happened before, the dismissal was a fair one.

The question of when it is appropriate for an employer dealing with an allegation of misconduct to look at previous incidents is not a straightforward one. We know, of course, that if the employee was previously given a warning which has now expired, then that warning must be disregarded when it comes to any future disciplinaries (see the Court of Session in **Diosynth Ltd v Thomson**). On the other hand, where the conduct under consideration would in itself be sufficient to justify dismissal, the employer can take expired warnings into account in rejecting a plea for a lesser sanction because of mitigating circumstances (see **Airbus UK Ltd v Webb**). More recently the EAT seemed to take the view that expired warnings were always part of the background circumstances that could legitimately be taken into account in deciding on the penalty to be imposed (**Stratford v Autorail VR Ltd**). This last case involved an employee who was given a



warning for misconduct and then dismissed because the employer believed that further misconduct was inevitable and warnings were doing no good. Since the employee was on his 18th warning, the employer perhaps had a point, although you have to wonder how things had been allowed to get that far.

Advice on Implications for Local Authorities

To my mind what should really matter is how well the employer has communicated the consequences of misconduct to the employee. Tribunals give employers a great deal of latitude in setting the standards that employees must reach. If it has been made sufficiently clear that there will be zero tolerance of certain forms of misconduct then it is difficult for the Tribunal to overrule the employer and find that dismissal is outside the range of reasonable responses. The question to ask is whether any employee would have understood that the misconduct in question would lead to dismissal.

In the NHS 24 case what strikes me is not that the investigation encompassed previous incidents, but that the way in which those incidents were handled gave the impression that they were not the sorts of thing that could lead to dismissal. When similar incidents had occurred in the past they had been treated as matters of performance and no disciplinary action was taken at all. The employer was frankly lucky that the Tribunal got itself into such a muddle over the difference between the investigation stage and the disciplinary hearing that it rather lost sight of that point. The fact that the misconduct in question had such potentially serious consequences was also, no doubt, a factor in the overall decision that it warranted dismissal. In a less 'life and death' case an employer that had previously sent such unclear signals may well have struggled in an unfair dismissal claim.

As is often the case in employment law, the lesson is to be clear. Clear about the standards that are expected and clear about the consequences of not meeting those standards. While individual circumstances should always be taken into account, taking a consistent approach to instances of misconduct is the best way to ensure that all employees understand what those standards are.

More information can be found on Twitter:
@daznewman

National Developments

Pay Negotiations

The Employers' side of the NJC for Local Government Services (Green Book) have decided to meet again in November so that any pay offer that is constructed is informed by the Chancellor's Budget announcement.

A meeting will take place on 30th November, following which arrangements are likely to be made with the Joint Unions in early December to discuss a pay offer. As soon as there is any more information to share, we will keep you updated.

Pay Spine Review

Work is continuing to review the national pay spine with a view to addressing the erosion of differentials and the impact of the Government's targets for the National Living Wage. A meeting of the employers' technical sounding board will be held on 13th November 2017.

JNC for Coroners Circular

This month we issued the latest Circular from the JNC for Coroner which sets out the current situation regarding work on the joint job evaluation exercise. The circular can be accessed at [circular no.60](#)

Pensions - New Automatic Enrolment brief guide

A new version of the automatic enrolment brief guide (version 7.0) is available on www.lgpsregs.org. This is a complete rewrite of the guide which aims to supplement the information provided by the Pensions Regulator (TPR). It covers automatic enrolment from the perspective of the Local Government Pension Scheme and Teachers' Pension Scheme and contains signposts to the detailed guidance available on TPR's website. The sample letters have also been updated and are now contained in a standalone document – clean and tracked version of these are also available on the website.

