



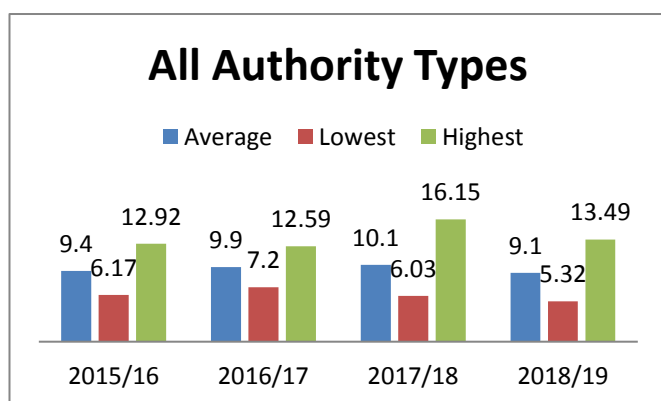
# HR in the East Midlands

August 2019

It's timely that in the peak holiday period there has been the latest ruling on calculating holiday pay in the Brazel case, this is the subject of Darren's article. Thanks for replying to our absence survey, see the summary survey results below. Our national news round-up includes the results of the survey on chief executives and chief officers pay & diversity.

## Sickness Absence Benchmarking Results

This year had the highest response rate to our sickness absence survey (31 councils). Where comparative information for the last two years is available, 52% saw an increase in sickness absence in 2018/19. The trend for the last 4 years is shown below:-



We will circulate more detailed analysis soon. As part of our work to help improve sickness absence and employee wellbeing, we have an event on 20<sup>th</sup> November – see the L&D Section for more details.

## Reminder Alert!

Our Regional Pay Roadshow is on 12<sup>th</sup> September at 1.00pm. If you would like to input your council's views but can't make the event, then please email Sam Maher to collate into regional feedback for the national negotiators. We are keen to know:-



- How much have you assumed in your 2020 budget for a pay award and is it across the board?
- Is it the same for other staff groups? (ie. Chief Officers/Executives, Craft etc)
- What do you consider an appropriate level of pay award?
- Your minimum leave entitlement for new starters
- If your working week is less than 37 hours, and, if so what have been implications (eg cost, rotas etc)
- Do you have stress/mental health policies over and above standard good practice and would you be willing to share these?

## Projects with Local Authorities

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

- 360° Performance Feedback
- Grievance Investigations
- Coaching

To find out how EMC could support an area of work for you, then please contact Sam or Lisa:

[sam.maher@emcouncils.gov.uk](mailto:sam.maher@emcouncils.gov.uk)

[lisa.butterfill@emcouncils.gov.uk](mailto:lisa.butterfill@emcouncils.gov.uk)



## Learning & Development

We have a range of exciting events taking place over the autumn. This month, we are featuring the following development opportunities on offer:-

### Attracting and Developing Talent, 9 October 2019

Before the summer we shared with you early details of our Attracting and Developing Talent event on 9 October. We're delighted to be able to share with you details of the expert speakers we have lined up, including Suzanne Ross from Nottingham Trent University on Talent Derailment.



- **Career Pathway Frameworks** - Chartered Institute of Personnel and Development (CIPD), Matt Gofton, Senior HR Solutions Manager
- **Unconscious Bias** - SHL the global leader in talent management, Penny Baker, Managing Consultant
- **Talent Derailment** - Nottingham Business School, Nottingham Trent University – (Guardian's University of the Year), Suzanne Ross, Senior Lecturer, Consultant, and Facilitator
- **Workforce Planning** - Local Government Association (LGA), Nigel Carruthers and Welna Bowden, Workforce Team
- **Modernising Recruitment** - JGP, creative public sector recruitment solutions, Steven Doyle, Head of Client Success

Our speakers will provide research, information and practical case studies on themes relating to modernising recruitment including creative solutions, career pathway frameworks, the impact of unconscious bias, workforce planning, talent derailment and the impact on talent management strategies.

EMC is delighted to offer an early bird option: with a free delegate place available for every delegate place booked. This offer is available for bookings made by end of **Friday 13 September 2019**, Local Authority Members £175 plus vat. For details and booking click [here](#)

## Employee Wellbeing Conference – Wednesday 20 November 2019

East Midlands Councils is providing an opportunity to hear from key speakers from organisations such as CIPD, ACAS, Public Health England (PHE), in the areas of:

- Demonstrating the benefits of a Wellbeing Strategy to include an evidence based approach to aid HR's influence across the organisation
- Resilience, Culture and Wellbeing
- Managing Sickness Absence
- Mental health in the workplace including EAP and OH provision

We'll share more information on this event in the September edition of the EMC HR Bulletin, you can book online via [here](#).

## A reminder of other events coming up .....



- **19 September 2019**  
Developing a Mentoring and Coaching Strategy Workshop – details [here](#)
- **14 November 2019**  
GDPR for HR - Refresher and update – details [here](#)
- **4 December 2019**  
Negotiation Skills - details [here](#)
- **5 December 2019**  
The Power of Constellations Coaching - details [here](#)
- **23 January 2020**  
Commercial Awareness for Managers - details [here](#)

We're committed to supporting you with the learning and development needs in your organisation, so if there are any other areas you are interested in, please let us know.

### Contact Details

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

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[Lisa.Butterfill@emcouncils.gov.uk](mailto:Lisa.Butterfill@emcouncils.gov.uk)  
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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.

### Calculating Holiday Pay Entitlement for Casual Workers

Entitlement to paid annual leave has to be one of the most fiercely litigated subjects in employment law. One of the reasons for this is that the Working Time Regulations took a rigid and limited approach to what sums counted towards the calculation of a week's pay. That approach has not withstood 20 years of case law from the European Court of Justice and there is now a significant mismatch between the words of the Working Time Regulations and a worker's rights under the Working Time Directive. Since the Regulations must be interpreted to comply with EU law (a position that is not immediately affected by Brexit) it is the worker's rights under the directive that prevail.

Slightly unusually, however, the latest decision from the Court of Appeal – *The Harpur Trust v Brazel* – centres of the operation of the Working Time Regulations themselves. It was actually the employer who argued (unsuccessfully) that EU law should take precedence. In a decision that will concern many in local government the Court upheld a ruling from the EAT that a casual term-time only music teacher had to have her holiday pay calculated on the basis of a twelve week average of her earnings – even though this gave her a proportionately higher entitlement than year-round staff.

The Working Time Regulations themselves seem pretty clear on this point. All workers are entitled to 5.6 weeks' leave - that is the four weeks' annual leave required by the Working Time Directive plus 1.6 weeks of additional leave set out in the Regulations to represent public holidays. Each week of leave must be paid at the rate of a normal week's pay. Where there are no normal working hours (as in this case) then a week's pay is determined by taking a twelve week average. An important point that is sometimes missed is that weeks where the employee earns nothing do not count towards this. So if in the previous twelve weeks there were some weeks with no pay due, then you must

pass over that week and count further back until you have twelve paid weeks on which to base the average.

In *Brazel* the employer had followed Acas guidance on holiday pay for casual workers and calculated holiday pay on the basis of 12.07 per cent of earnings. That calculation is based on the idea of holiday entitlement accruing with each hour worked. A worker employed throughout the year will work for 46.6 weeks with 5.6 weeks' holiday entitlement. The pay for 5.6 weeks works out as 12.07 per cent of the total paid in those 46.6 weeks.

The problem with this formula is that it was specifically designed for casual workers who do not have an ongoing contract with the employer. For them it is necessary to calculate their holiday entitlement at the end of each period of work and the 12.07 per cent figure seems to be a reasonable way of doing that. The figure may also work for those who have a consistent working pattern throughout the year. But you cannot get away from the fact that the Working Time Regulations do not say that entitlement to holiday pay accrues with each hour worked. The formula to apply is the twelve-week average. If this results in a higher figure for term-time only workers (in *Brazel's* case it apparently came out at about 18 per cent) then why should the worker concerned not be entitled to the benefit of that?

The employer argued that to follow the Regulations gave part-timers an advantage over full timers. But there is no law against that. Part-time workers are protected from less favourable treatment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 but there is nothing preventing them from receiving more favourable treatment. In the Court of Appeal the employer argued that the European Court of Justice had accepted that the entitlement to paid annual leave was subject to the 'pro-rata' principle. We are used to having to interpret our domestic legislation so as to comply with EU law, but that only applies when that approach is needed to meet the minimum requirements of a directive. EU rights are a floor not a ceiling and the UK is free to improve on them.



The Court of Appeal held that even if it could be said that the Working Time Regulations provided a better entitlement to annual than was strictly required under the directive, then that was not something with which they could interfere.

In a sense of course we already do have a pro-rata system. All workers are entitled to 5.6 weeks' leave but what constitutes a week will vary depending on the employee's working pattern. For someone working a standard five-day week that will amount to 28 days' leave in a year. For someone who works three days a week that will equate to 17 days (with a bit of rounding up). It is always worth remembering however that the Regulations deal in weeks and proportions of a week, not in days or hours.

### Darren's Advice for Employers

The frustration for employers is that the approach dictated by the Regulations is not easy to reproduce in a payroll system. It is much easier to allocate a fixed percentage of a worker's pay as the basis for calculating holiday pay without having to worry about individual working patterns over variable periods of time. Add to this the difficulty of knowing whether or not overtime and other allowances are sufficiently regular and predictable to be included and it is easy to see why so many disputes arise. All the same, it is no defence to a claim to argue that your payroll software cannot easily perform the calculation that the Regulations require.

The most practical solution may be to agree regular top-up payments when the operation of the payroll system may result in an underpayment of holiday pay. This may not strictly count as compliance, but if workers are ultimately being paid what they are entitled to over the course of a year then it is unlikely that they will want to bring a claim.

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

## National Developments

### Pay Roadshow Event – Thursday 12<sup>th</sup> September 2019

Bookings are still being taken for the pay roadshow event that the EMC will be hosting. The event will be chaired by Cllr Tom Beattie, Leader of Corby BC and Chair of the Regional Employers Board on 12<sup>th</sup> September 2019. The meeting will start at 1.00pm.

The event will provide an opportunity for you to hear from members of the Employers' Side of the negotiating body and to provide your views on the pay claim and any offer in response. If you can't attend you can still provide your views by emailing Sam Maher – see our Reminder on the front page. Places at the event are limited, so for more information or to book a place click [here](#)

### Pay & Diversity Survey Results – Chief Executives & Chief Officers

This month the LGA published a report with the results of the national survey it conducted on pay and diversity of chief executives and chief officers. You can access it [here](#)

## Apprenticeships

The LGA Newsletter for **August** can be accessed through this link: [apprenticeships](#). This month's edition covers:-

- Development of SENCO Apprenticeship for Schools, FE and Early Years settings
- Workshop – 'Preparing for Industry Placements & T levels'
- LGA Support Programme: Action Learning Sets (October 2019 – March 2020) – Have Your Say
- Reminder: LGA Launches 'Apprenticeships MOT' Offer to Councils
- Reminder: Public Sector Target Reporting Deadline
- Level 6 Environmental Health Practitioner Apprenticeship Events
- Professional Body for Policy Officers
- Approved Occupational Standards

