



HR in the East Midlands

October 2023

This month we feature the next East Midlands Challenge, following the success of the last event. Darren Newman's article looks at holiday pay - the employment law gift that keeps on giving – following a Supreme Court ruling on how far back claims for underpayment of wages can go. We also offer a roundup of key developments in HR, L&D/OD nationally and regionally.

Managing Absence & Getting the Best from Occupational Health – EMC Support

In this year's sickness absence survey, we asked you what support you would like from EMC to help with attendance management. The responses were:-

- You value the benchmarking information we provide on absence levels and policies
- You value our advice on complex cases and interpreting national terms and conditions
- You would like to improve occupational health advice

To assist with the last two requests, we are running a free event on 7th November from 10.00 to 12 noon. Delegates will hear from leading employment law experts on navigating complex sickness absence issues and how to get the best from your occupational health provider. We've had a great response, but you can still book places by emailing Suzanne at suzanne.boultyby@emcouncils.gov.uk.

Equality Diversity & Inclusion (EDI) Network Event

We are holding an in-person EDI Network Event on **Tuesday 28 November, 10.00am-3.00pm**. The event will be opportunity to hear from guest speakers on topical issues, influence the network going forward and network informally with colleagues from across the region.

The event is being held at Devonshire Place, a venue in Leicester, which is only a few minutes' walk from the train station but also has parking facilities. **One free place** per authority is provided for EDI network members and additional places are available at £45.00 each. To book a place at the event, please contact Suzanne at suzanne.boultyby@emcouncils.gov.uk The closing date for bookings is **10 November**.

Projects with Local Authorities

During October, EMC has supported councils with:-

- Disciplinary Investigation
- Support with restructuring
- Psychometric testing

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

Sam.Maher@emcouncils.gov.uk

Lisa.Butterfill@emcouncils.gov.uk

Mark.pinchen@emcouncils.gov.uk

Learning & Development

East Midlands Challenge is back on 23 April 2024!

After the most successful East Midlands Challenge event earlier this year where over 100 people from East Midlands Local Authorities participated, we are excited to open the bookings for our 2024 event at Leicester Racecourse.

Last year the Challenge Director, Richard Wills commended everyone involved saying:

“The East Midlands Challenge has had the highest calibre of teams and delegates taking part that we’ve ever seen in all of the Challenge series”.

The purpose of the East Midlands Challenge is to give aspiring senior leaders of the future an opportunity to test their ever-developing skills in a real life but safe environment. Taking on the role of senior management, teams of 6 people are required to prioritise a series of challenges, gaining exposure to issues outside of their normal work and expanding their skill set in the process.

Previous participants enthused about the value this event brought to their personal development, highlights of which are below. For all the feedback from the previous event please click [here](#)



Sally Moseley from Oadby and Wigston BC wrote a fabulous article for their staff newsletter saying:

“We all thoroughly enjoyed the day and felt it really helped with our own personal development, networking, and decision-making skills along with lots of laughs throughout the day... “The Challenge is a great opportunity to gain exposure on what it’s like to be a member of SLT by taking over a ‘Council’ that has had its previous SLT “removed”.

Who can enter?

The Challenge has been developed so that teams of 6 people from the public, private and voluntary sectors can compete against each other on a level playing field so please feel free to share with other partner organisations, e.g., Health, Emergency Services and Housing in particular, who you think may enjoy and benefit from the challenge.

Key Information and How to Book

- **Date** – 23 April 2024
- **Time** – 9:00 – 20:00
- **Cost** – early bird rate of £1750 before 9th February 2024, then £1995 (subject to VAT) until the closing date on 22nd March 2024.

For more information about the 2024 East Midlands Challenge and how to book visit [here](#).



In Deep with Darren

This month, Darren Newman's article looks at a recent Supreme Court ruling relating to a case in Northern Ireland that concerned the period of back pay liable when holiday pay is underpaid.

Last month the Supreme Court gave its long awaited judgement in **Chief Constable of the Police Service of Northern Ireland v Agnew and others**. The workers in this case were claiming that they had been underpaid their holiday pay over a period of years because the employer did not include overtime in the calculation despite the fact that this was a normal feature of their pay-packet when they were at work. There was no dispute that overtime should have been included, but it was, I think, understandable that the employer had initially thought otherwise.

The Working Time Regulations 1998 provide that an employee is entitled to be paid at the rate of a 'week's pay' when taking annual leave. Those drafting the Regulations did not come up with their own definition of a week's pay for the purposes of calculating holiday pay, but adopted the existing definition in the Employment Rights Act – the definition that we use when calculating a redundancy payment or a basic award for unfair dismissal. I remember that at the time (I've been in this game for quite a while) no-one thought this was a problem – we were much more concerned with issues like night work, rest breaks and reference periods and assumed that holiday pay was a straightforward issue. We all turned out to be very wrong about that.

Over the years we have had case after case where the rather technical and limited definition of a week's pay in the Employment Rights Act has been found to fall short of the requirements of the Working Time Directive by the European Court of Justice. The ECJ has regularly stresses that what matters is that a worker taking annual leave should receive their 'normal' pay so that their pay is not interrupted or adversely affected by taking annual leave. So it was no surprise when the EAT held in **Bear Scotland v Fulton & ors** that a worker who was normally paid overtime should have that fact reflected in their holiday pay.

The issue for the Supreme Court in Agnew was not the principle of including overtime, but the issue of backpay. If an employer has been underpaying holiday pay for years (since the Regulations came into force in fact) can a worker now bring a claim for a quarter century of underpayments?

A worker claiming that they have been underpaid in respect of their holiday pay will generally bring a claim for an unlawful deduction of wages rather than a claim for unpaid holiday under the Regulations themselves. This is because of the way in which time limits work for unlawful deductions cases. Under the Working Time Regulations any claim for a failure to pay holiday pay must be brought within three months of the failure – there is no way of claiming for a series of failures stretching back over time. With an unlawful deductions case the situation is different. The claim must be brought (ignoring the complications of Acas early conciliation) within three months of the deduction or, where there is a 'series' of deductions, within three months of the last deduction in the series. The claimants in the Agnew case were arguing that all of the occasions on which they had been underpaid their holiday pay amounted to a 'series' of deductions and since they had brought their claims within three months of the most recent one they could add in every deduction that had been made since their employment began – all the way back in some cases to the time when the Working Time Regulations were introduced.

The problem they faced was something said by the EAT in the Bear Scotland case. The Judge ruled that, in relation to back pay, any two deductions separated by more than three months could not be part of the same series. So if an employee took holiday in December and his or her December pay slip contained an underpayment, but did not take another holiday until April and was then underpaid again, those two payments would not be part of the same series and the employee would have lost the right to claim for the December underpayments and all the underpayments before that. The rationale for this approach was that the time limit for claiming the December underpayment would have already expired by the time of the April underpayment and it could not have been the intention of Parliament to resurrect a time-barred claim purely



because a further unlawful deduction from wages had occurred.

Employment lawyers were surprised by this ruling from the EAT. No-one had previously suggested that such a rule existed and it is not set out in the legislation itself. Frankly, the EAT had just made up a rule because they thought it seemed like a sensible rule to have. That's really not how legislation works and it is unsurprising that the Supreme Court has now ruled definitively that the EAT was wrong.

The question of whether two unlawful deductions are part of the same series is a question of fact for the Tribunal. The passage of time between the two deductions is a relevant consideration, but it is not definitive. What mattered in this case was that each deduction in the series was linked to its predecessor by what the Supreme Court referred to as the 'common fault' or 'unifying vice' of failing to include overtime in the calculation of holiday pay. That made each deduction part of the same series even where they were separated by more than three months – or indeed separated by payments where there was no unlawful deduction because no overtime had been due.

Implications for Employers

This case is more significant in Northern Ireland than in the rest of the UK. In England Scotland and Wales the amount of backpay that can be awarded in an unlawful deduction claim is limited to two years. That is as a result of the Deduction From Wages (Limitation) Regulations 2014 which were introduced specifically in response to the Bear Scotland case. The Regulations do not however apply to Northern Ireland and the employer in this case estimated that the total cost of meeting the claims that they faced totalled some £30 million.

One final point to note is that time is running out for the Government to clarify the position relating to holiday pay when the relevant provisions of the Retained EU Law (Revocation and Reform) Act come into force at the end of the year. Those provisions abolish the supremacy of EU law and it could be argued that as a result we no longer need to interpret the Working Time Regulations a way that complies with rulings of the European Court of Justice. That would throw into doubt the whole question of whether overtime needs to be included in the calculation of holiday pay at all.

The last thing we need in this area is more uncertainty, so amendments to the Working Time Regulations making the position clear one way or another are urgently needed.

National Developments

National Pay Negotiations – Update

We are waiting to hear the outcome of a meeting held by GMB at national level that took place today (31st October 2023) to consider its next steps in response to the results of its ballots for industrial action in relation to the national pay negotiations. From the information received so far from councils across the region only one authority had GMB conduct a ballot and the threshold was not achieved. It appears that GMB have been very selective in their approach to balloting.

National Employers will meet on 2nd November 2023, and Sam Maher will be attending.

Uplift to the Living Wage Foundation Rate

Employers can voluntarily choose to pay the Living Wage Foundation rate. This is reviewed annually and on 24th October 2023, the Foundation announced that the rate has increased to £12.00 per hour outside of London. Employers who are signed up to the Foundation rate have a period of 6 months in which to increase their rate of pay to the new level.

LGA Workforce Capacity Surveys – Regional Focus Group on Finance

As mentioned in last month's bulletin, the LGA are launching a series of seven workforce capacity surveys to collect details about the capacity issues in a number of service areas.

To follow on from the survey, there will also be focus groups taking place in some regions. We are pleased to announce that we are working jointly with CIPFA to arrange a focus group to look more closely at the



capacity issues within the finance function. We will be circulating further information soon, but you can register an interest in being involved by contacting Sam at sam.maher@emcouncils.gov.uk

The information collated will be useful in supporting regional and national improvement work, as well as providing DLUHC with information they can use in funding discussions with HM Treasury.

Apprenticeships – Pooled PAYE

Today we have heard positive news from Jamie Saddler, Adviser on Apprenticeships at the LGA on this issue:-

“Following a series of discussions between the LGA and DfE on this issue over the spring and summer, Government has agreed to make changes to the Apprenticeship Funding Rules that will allow councils to use some of their own levy funds to pay for apprenticeships in other organisations that are part of their Pooled PAYE schemes. These changes were announced in the latest update to the funding rules at the AELP conference today, and are published on the government website [here](#) (see p7 for the changes).

This is an important breakthrough that we have been lobbying for and will hopefully give many of you that are affected by this issue the opportunity to support your affected schools with some of your unspent levy funds.

This will ultimately work in a similar way to how you currently manage apprenticeships for your maintained schools and it will be for you as councils to decide to implement it or not and how.

Any council who wants to help their schools but is concerned that they are close to spending their full levy allocation and is wanting to avoid going into co-investment should be aware that the funding rules were changed last year to allow any employer to receive a levy transfer, even if they have previously transferred money to other employers themselves. Councils in this position should consider asking for a transfer from another employer to help fund apprenticeships in schools on their Pooled PAYE. DfE officials tell me that levy payers have on average only transferred

6% of the possible 25% they are permitted to transfer, so many will have headroom to potentially help.

I know some councils will find it more challenging than others to implement this solution due to the sheer number of schools you are working with, the high interest some of them have in accessing apprenticeships and the resultant impact on your capacity. However, I think making sure there is at least one viable route to helping these schools access apprenticeships funding is important, and this was the only solution we have managed to get traction on in recent months. I'm happy to discuss any challenges further with councils and get further clarity from government if needed, while government have indicated they will be monitoring the numbers of apprentices that start through this route and will review how this is working over time.

Lastly, many of you will know that I have been working on finding a solution to this issue for a considerable amount of time. I'm pleased that we have been able to make progress over the last few months and am grateful for the work that DfE colleagues put in to getting this over the line. I also want to thank all the councils who have engaged with me over this issue, in particular those that completed our Pooled PAYE survey over the summer. That information allowed me to present a much more updated and accurate picture of the extent of the problem to DfE and I know it was vital in helping them to make an effective case internally for why they should make the change and what impact it was likely to have on starts and the wider apprenticeships budget.

I'm very happy to have further conversations with any affected councils over this issue, it's challenges and how to implement it and would also be happy to facilitate a group discussion among affected councils to discuss how you might make this work if that is desirable.”

