



HR in the East Midlands

July 2023

We had a great response to the annual sickness absence survey – so a huge thank you! The results are outlined on the following page. Darren Newman's article looks at the technicalities of calculating a week's pay and the definition of remuneration. The saga of national pay negotiations continues and we provide an update in our national news section – regional info is below.

Outcome of Unison's Ballot for Industrial Action

Thank you for letting us know the outcome of Unison's ballot for industrial action in your authority. The information painted a picture that was replicated more widely across the country.

Within the region, the outcome was that, of the returns provided, just one ballot met the threshold of at least 50% of those entitled to vote doing so. In that council, the majority of votes was in favour of taking industrial action. All other councils reported that the threshold had not been achieved.

In terms of whether or not those who voted were mainly in favour of taking industrial action, the ballot results were fairly even. 14 ballots had a majority in favour of industrial action, in 11 ballots the majority were against industrial action and there was one ballot with an even split.

The national news section gives an update on Unison's position as well as other developments with the national pay negotiations.

Back by Popular Demand - Employment Law Update Seminar

We are pleased to offer an Employment Law Update Seminar with Darren Newman on Wednesday 4th October 2023. The seminar will offer Darren's pragmatic advice and interpretation of the main developments in employment law and implications for councils.

The session will take place via MS Teams and will run from 10.00 to 12.15, including a 15-minute break.

Places will be available at a cost of £65 per delegate for member organisations. We are also offering a discount for multiple bookings – so you will be able to BUY ONE PLACE AND GET ANOTHER HALF PRICE.

You can book via our website at the following link [here](#). A purchase order number is required when booking.

Projects with Local Authorities

During July, EMC has supported councils with:-

- Supporting a complex ill-health case
- Disciplinary investigations
- Coaching and mentoring support

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

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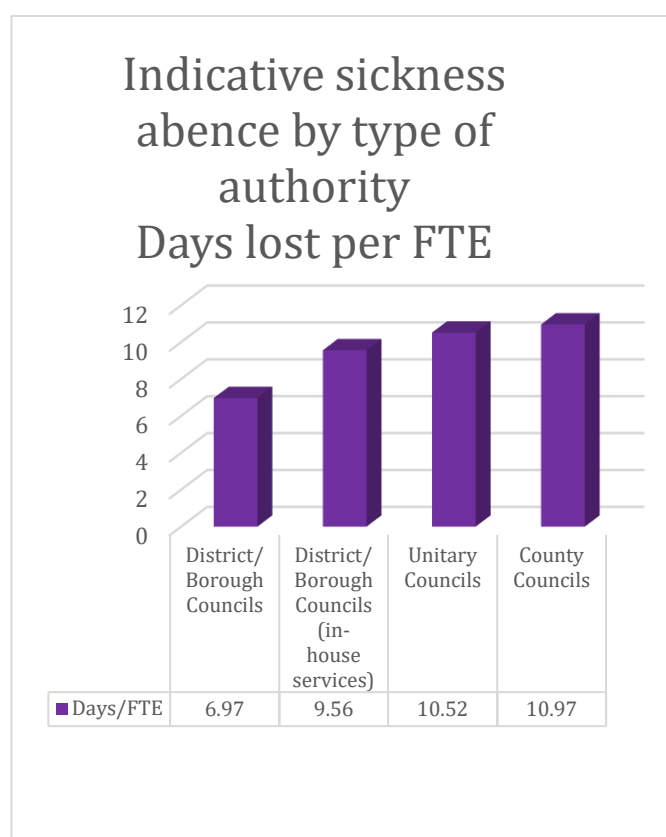
Mark.pinchen@emcouncils.gov.uk

Sickness Absence Survey Results 2022 – 2023

Thank you to the 75% of councils in the region who responded to the survey. A full report will be circulated soon and in the meantime we provide a summary of the highlights below.

Summary Absence Benchmarking Information

The data collected implies that the bigger and more complex the authority is, the higher its sickness levels are – the following chart illustrates the results:



Unlike last year, there was an even split between councils reporting increases and decreases in their level of sickness absence.

The top three reasons for absence were reported as:

1. Mental Health
2. Musculo-skeletal
3. Flu/cold (inc. Covid-19)

The level of long-term sickness reported was significant, with 24 out of 27 who responded to the question stating that long term sickness contributed to 40% or more of its total sickness absence.

The data returned to EMC, along with what is happening in the wider economy shows that while there are pockets of improvements, sickness absence is still a challenge and one where there are opportunities for improvement.

Actions and Outcomes

Supporting attendance and wellbeing is a priority identified by the East Midlands Regional Joint Council and this issue links in with the wider regional workforce priority of workforce capacity.

A more detailed report on the findings of the sickness absence survey will be presented to the next meeting of the Regional Joint Council in September and we will also publish a report on our website – see future HR bulletins for more information.

Part of the survey included an opportunity for you to let us know your views and ideas on how EMC can support the sector on wellbeing and improve sickness absence levels. Thank you for the many suggestions that came through that included continuing with some of our current activities, eg benchmarking and providing advice on complex cases.

You also suggested other things that EMC could do to support employee wellbeing and attendance, and we will keep you posted on how we put into action your suggestions. These will inform the development of a comprehensive regional programme of activities, information and support to assist councils in supporting employee wellbeing and improving sickness absence.



Learning & Development

Coaching for Wellbeing Masterclass

Earlier this month, EMC ran a masterclass on Coaching for Wellbeing. This event was part of a series of virtual sessions that are free to organisations that are part of the regional coaching network, and places are also available on a low-cost paid basis for other delegates.

The Coaching for Wellbeing Masterclass provided invaluable insight, tools and models on coaching for self-care, wellbeing, resilience and healthy sustainability. Packed with invaluable practical advice this session was doubly beneficial to coaches for their own wellbeing and also for coaching for wellbeing with their coachees.

The remaining events in the programme of coaching masterclasses are on the following themes:-

- **How to be both supportive and challenging in a Coaching Relationship**
- **Coaching for Neurodiversity**

For full information on each masterclass including dates and costs please use the following link
[Coaching CPD - 1 \(pagetiger.com\)](https://www.pagetiger.com/coaching-cpd-1)

In addition to the masterclasses, EMC is also offering:-

- a programme that provides practical coaching skills for managers
- a coaching and mentoring programme at ILM 5, with delegates having the choice of undertaking the programme without the qualification.

To book or for further information about the coaching network, masterclasses or either of the programmes, please contact
lisa.butterfill@emcouncils.gov.uk

Support for Scrutiny and Councillor Development

The local elections in May resulted in significant change, with 600 newly elected councillors and changes in administration within many councils.

Supporting new councillors and those with new roles has been a priority for EMC, where we look to complement in-house councillor development with regional programmes and events.

A survey has been issued to the regional scrutiny network, so that officers and Members can inform priorities for the network going forward and identify development needs.

EMC's councillor development events have been popular, with a number being repeated due to demand and can be run regionally or in-house. A highlight of the programme is the event for new councillors – "Hitting the Ground Running". This took place on 14th July and feedback was excellent. As well as hearing from fellow members, the event provides an opportunity for networking.



For further information on our support for scrutiny and councillor development more widely, please contact
lisa.butterfill@emcouncils.gov.uk



In Deep with Darren

This month, Darren Newman's article looks at the calculation of a week's pay and differences in the definition of wages and remuneration, for example for the purposes of calculating exit payments. Darren raises the question about whether or not the employer's pension contribution should be included?

One of the oldest concepts in employment law is that of a week's pay. Its basic definition – now found in the Employment Rights Act 1996 - dates back at least as far as the Contracts of Employment Act 1963. It is such a venerable concept that it is easy to just assume that we know how it is defined without bothering to check – although most HR people are now aware of the dangers of doing that when it comes to calculating holiday pay under the Working Time Regulations. Don't worry – this article is not about that.

One reason why we don't think much about calculating a week's pay is that for some purposes it is capped. When we are working out a week's pay for the purposes of calculating a statutory redundancy payment, or the basic award in an unfair dismissal cases – as well as some other claims such as a failure to handle a flexible working request appropriately - the amount of a week's pay is capped at £643. I was surprised to discover that this is about in line with the mean average salary in the UK – and some way above the median. My memory is that for most of my career the limit on a week's pay has been well below average earnings, but as it is increased annually in line with inflation, it has clearly outpaced wages growth in recent years.

A more recent use of the concept of a week's pay is in calculating the maximum compensatory award payable in an unfair dismissal case. Since 2013 the award has been limited to a week's pay multiplied by 52 rather than simply a flat upper limit. For this calculation there is no limit on the level of a week's pay per se – although the award is limited by an overall cap currently set at £105,707. If a week's pay is actually higher than the employer thinks then that can have a significant

impact on the compensation that an employee is due.

In cases where an employee is on a salary and there is no need to worry about average earnings, the amount of a week's pay is defined in S.221 of the 1996 Act as the amount of remuneration that is 'payable by the employer under the contract of employment'. Back in 1994 the EAT in *Port of London Authority v Payne* assumed that to mean that a week's pay is the amount that an employee is entitled to receive under the contract of employment. But on a closer look, S.221 does not quite say that. It talks about the amount that is payable but does not specify that the amount must be payable to the employee.

That point was picked up by the EAT in the 2017 case of *University of Sunderland v Drossou*.

The EAT held that when the Employment Rights Act was referring to payments made directly to the employee it used the word 'wages'. The definition of a week's pay used the word 'remuneration' and that had a wider meaning that encompassed pension contributions paid by the employer to a pension fund. Those contributions were payable under the contract of employment and the fact that they were not paid directly to employees did not stop them from forming part of their remuneration.

It appears that since 1963 this point had simply not occurred to anybody – although the employees that Parliament had in mind when passing the Contracts of Employment Act would be unlikely to have benefitted from a company pension. The *Drossou* case is only an EAT decision so could be overruled at some stage by the Court of Appeal. But most employment lawyers think that its reasoning is pretty sound.

Applying this to local government is not straightforward

Employers do of course contribute to the cost of an employee's pension under the Local Government Pension Scheme. But the amount that an employer must pay is determined in accordance with the actuarial valuations of the scheme that are made from time to time to ensure that there is sufficient money to pay the benefits of all the relevant members.



In essence the amount that is payable by the employer is derived not from the contract of employment but from a combination of the Local Government Pension Scheme Regulations and the valuation certificate.

If that analysis is correct, then an employer's pensions contributions to the Local Government Pension Scheme will not form part of an employee's remuneration and will not count towards a week's pay.

I wouldn't want to bet a significant amount on this being right. Until we actually get a case giving an authoritative view on this, we just won't know for sure whether LGPS contributions count as part of an employee's weekly remuneration.

In most cases this will only be an issue in complex litigation so doubt over the issue might assist the parties in reaching a settlement. On a more day to day level, however, employers need to decide whether pension contributions should be taken into account when calculating exit payments for employees being made redundant. This is especially important when the employer has an enhanced scheme in place. It might then be worth clarifying how a week's pay will be calculated and making it clear that pension contributions will not count. As long as the total payment is then at least in line with the capped amount due as a statutory redundancy payment then there should be no problem.

Darren's Advice to Councils

On balance I would suggest that if employers have not been counting pension contributions in calculating redundancy payments, then there is no need to start doing so. However, this may be an area where it is wise to keep one eye on the case law to see if a clearer ruling comes along requiring a change in approach.

Darren will be providing an employment law update that is targeted to our sector on 4th October 2023, when you will be able to hear his pragmatic take aways and ask him questions. See the front page for details and how to book!

National Developments

National Pay & Conditions

Outcome of Unison's ballot for industrial action on the Offer to Green Book employees

Unison announced on 14th July that it will wait until the outcome of Unite's ballot for industrial action before confirming its next steps. This followed the results of the disaggregated ballot, where most ballots failed to reach the threshold required for a turnout of over 50% of those entitled to vote.

Unite's ballot ended on 28th July and covers Green Book as well as Craftworkers pay negotiations. In the next month, we expect that both Unison and Unite will notify the Employers of their next steps. **Please email Sam with the outcome of Unite's ballot in your organisation so that we can target support, understand the impact for the region overall and feedback to our national colleagues.**

GMB will Ballot on Industrial Action

Last Thursday, we updated Councils with the announcement that day from GMB that it will conduct disaggregated industrial action ballots of its NJC 'Green Book' and JNC Craft 'Red Book' members in some councils and schools in England, Wales and Northern Ireland. The organisations to be targeted for strike ballots will be notified in the next few weeks. The strike ballots will open on 12th September and close on 24th October. GMB's ballot timetable means even further delay to this year's already protracted pay round.

Despite this, the National Employers continue to advise very strongly against imposing any pay offer before the collective bargaining process has concluded. To do so would not only fragment the unity of the employers' position but would also leave councils vulnerable to questions being asked by auditors about why, in the absence of a national collective agreement, expenditure has been unnecessarily incurred.

Perhaps more importantly, councils would need to consider very carefully the wider legal issues, including



those arising out of the cases of **Kostal UK Limited v Dunkley** and **INEOS Infrastructure Grangemouth Limited v Jones & others**.

You can access the LGA's comprehensive guidance on managing industrial action, along with associated FAQs here:

- [managing industrial action guide](#)
- [industrial action FAQs](#)

We will continue to keep you updated with any developments with the national pay negotiations as they arise.

Youth and Community Workers Pay Claim 2023

Last week, the National Employers received a pay and conditions claim from the Staff Side Trade Unions for 2023. The headline element of the claim is for a pay increase of RPI + 2%. The National Employers will be undertaking a consultation of local authorities next month which will inform the response to the claim. A copy of the claim can be accessed here: [Youth & Community Workers Claim 2023](#)

Soulbury Officers – Further Details of AEP Ballot

Last month we gave an update on the dispute between the National Employers and the Soulbury Officers' Side on pay for 2022. We now have further details of the timing of the Association of Educational Psychologists' (AEP) ballot for industrial action. The ballot will run from July to September and depending on the outcome, strikes could start in councils in September.

Employment Law Developments

Use of Agency Workers to Cover Striking Employees

On 13th July, the High Court ruled against the Government and found that the legislation introduced in 2022 which allowed employers to hire agency workers to cover striking staff was unlawful. The judicial review was brought by a number of unions, and it was found that proper consultation had not taken place.

As a result, the previous restrictions on the use of agency staff to cover industrial action is back in place with effect from 10th August 2023.

Consultation on Code of Practice on Handling Flexible Working Requests

ACAS is consulting on an updated statutory Code of Practice on handling requests for flexible working. This is in anticipation of changes to the statutory flexible working request regime being introduced under the Employment Relations (Flexible Working) Bill, which received Royal Assent on 20 July 2023 and so is now an Act. The changes to the Code are also being made to reflect the changing practices and views on flexible working since the last Code was published in 2014.

The revised Code also takes into account that separate legislation will be introduced to make the right to request flexible working a 'day one' right.

The Government has announced that the changes are expected to come into force in approximately a year's time.

Links to the Bill/Act and the consultation are provided below:-

- [Employment Relations \(Flexible Working\) Bill](#)
- [Consultation](#)

EMC and the LGA will be responding to the consultation and you can assist with their response, you can send answers to consultation questions through to Sam at sam.maher@emcouncils.gov.uk by end of 24th August 2023. She will collate these and forward them to the LGA. Councils can of course respond directly to the consultation by using [Acas's online form](#), or email consultations@acas.org.uk. The deadline for responses to Acas is 6 September 2023. We would be grateful for a copy of any such response.

T Levels Newsletter – July 2023

In the latest Newsletter you will find details of DfE webinars to support your organisation to plan and prepare to offer industry placements. There is also the chance to share your feedback with the DfE through the T Levels and industry placements employer survey. Click [here](#) to view the newsletter.

