



HR in the East Midlands

September 2022

It is great to announce that the LA Challenge will be back as a live event in March 2023. This is the biggest development event for the sector, offering the chance to work as a team to gain unique experience in a pacy but fun environment, culminating in a celebratory awards dinner – see the L&D section for details. The national news section includes the outcome of Unison’s ballot on national pay, the Living Wage Foundation rate rise, and government proposals. Darren Newman’s article covers legal protection given to whistle blowers. The many fans of Darren will be pleased to see that we are offering an Employment Law Update with him in November.

Guidance on Implications of the Brazel-v-Harpur Trust Ruling

In a previous bulletin we have covered the long-awaited Supreme Court ruling on Brazel -v- Harpur Trust regarding calculating annual leave entitlement for term-time employees.

Some councils have approached EMC for further guidance and information. The latest Advisory Bulletin from the LGA covers the topic and can be accessed [here](#).

EMC can facilitate an Exchange with expert input for councils who need to review their practice or have received/expect to receive claims for back pay and what to share approaches. To register your interest, please email Mila at mila.pereira@emcouncils.gov.uk

Employment Law Seminar with Darren Newman

We are pleased to offer an Employment Law Update Seminar with Darren Newman on Wednesday 9th November 2022.

Back by popular demand, 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 for EMC members of **£65 per delegate**. We are also offering a discount for multiple bookings – so you will be able to **BUY ONE PLACE AND GET ANOTHER HALF PRICE**. To book, please go to our website at the following link [here](#) A purchase order number is required.

Projects with Local Authorities

During September EMC has supported councils with:-

- Senior Leadership Team development
- Interim HR Management
- Facilitating a Chief Executive appraisal

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

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Learning & Development

East Midlands Challenge 2023

We are delighted to announce that East Midlands Councils will once again host the regional Challenge event. The East Midlands Challenge will take place on 16 March 2023, with 20 team places available. We have a great new venue for the event - Leicester Racecourse in Oadby Leicestershire.

The challenge offers a fantastic opportunity for aspiring leaders to gain exposure to issues outside of their normal work giving them a taste of what senior management is really like.

To successfully complete the challenge, teams will have to work with neighbouring stakeholders and partners to deliver a new strategy for their organisation. They'll identify which areas to prioritise, deal with politically sensitive issues and maintain customer focus when determining how to provide the public with the best services possible despite limited resource.

In a post-pandemic world - we can all relate to how important simulation experiences can be to help prepare today's aspiring leaders for tomorrow's unpredictable future.

Who can enter?

Organisations can enter as many teams as they wish. Each team will comprise of 6 people who aspire to reach a senior post within their organisation and are currently working in Local Government and organisations within Emergency Services, Housing or Health.

How else you can get involved? - Volunteer!

Competing teams are expected to meet with potential stakeholders and partners such as the regional local government association, fire, police, health, central government, and charities. As part of the simulation, we will be arranging real-life meetings for the teams, and we need additional people with local government experience and know how to fill these roles and make the challenge as realistic as possible.

The roles are:

- Leaders to guide and advise competing teams
- Media representatives to put teams through their paces at a press conference
- Partners to meet with teams as requested

Delivery team members will need to be:

- Able to think on your feet
- Able to work in a fast-paced environment
- Up for anything

In return you will get:

- The opportunity to be part of an extraordinary (and highly enjoyable) event
- The chance to test and hone your interpersonal, communication and time management skills (to name but a few!)
- To work with a wide range of colleagues from across our region
- Lunch and an invite to the Evening Awards Ceremony and Dinner!

If you are interested in being part of the delivery team contact Kirsty – details below.

Key Information about the Challenge

- **Date** – 16 March 2023
- **Time** – 9:00 – 20:30
- **Cost** – early bird rate of £1750 before 30 November 2022, then £1995 (subject to VAT)
- **To book** - To secure your places, please complete the online booking form below.

For more information about the 2023 East Midlands Challenge visit [here](#).

High Impact Leadership, ILM Level 5 Award in Leadership and Management (November 2022)

Due to popular demand, EMC is hosting another ILM Level 5 Award in Leadership and Management, this programme will start in November 2022. For more information on this programme visit [here](#).

A small number of places are available for this course, which will take place through a mix of face to face and virtual workshops.

Contact Details

For further information about any of our work please contact the team:-

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In Deep with Darren

This month, Darren Newman looks at issues relating to legal protections for whistleblowers following a recent Court of Appeal decision.

Whistleblowing: It ain't what you do, it's the way that you do it!

A recent decision from the Court of Appeal has raised a tricky issue around the legal protection given to whistleblowers. Employers must be careful not to dismiss employees or subject them to any detriment for making a public interest disclosure. But what if the employer claims that it is not the substance of the disclosure they object to, but the way in which the employee went about making it?

In *Kong v Gulf International Bank (UK) Ltd* Ms Kong was an internal business auditor who had raised an issue with the Bank's Head of Legal about the use of a financial compliance template. That was accepted as being a protected disclosure, but when, as a result, Ms Kong was dismissed, the Tribunal held that this was not a whistleblowing dismissal.

The dismissal was held to be unfair, but that was not really the issue. I suspect that the nature of the business meant that a normal unfair dismissal settlement was never going to be a problem for the bank. The real question was whether the reason for the dismissal was the whistleblowing allegation. If it was, then the usual cap on unfair dismissal compensation would not apply.

The Tribunal held that the reason for the dismissal was not the disclosure itself but the separate issue of the way in which the disclosure was made. In raising her concern, Ms Kong had cast aspersions on the Head of Legal's 'legal awareness' and she in turn had interpreted that as an attack on her integrity - which made her very upset. The dismissal was found by the Tribunal not to be based on the substance of the criticism, but on Ms Kong's lack of emotional intelligence and the way in which she had expressed her views.

The Court of Appeal upheld that finding. The Tribunal had to be allowed to draw a distinction between the fact of the disclosure and the manner in which it was made. Otherwise "whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad".

Well, up to a point. It has long been recognised that behaviour which is so bad that it is 'properly separable' from the disclosure itself can be a ground for dismissal. If I wrap my perfectly valid public interest disclosure around a brick and throw it through my boss's window in the early hours of the morning, then no-one is suggesting that I should be protected against disciplinary action. But what if the employer's only objection is to the employee's tone of voice or the language in which the complaint is expressed?

A good explanation of the distinction comes in the related area of victimisation under the Equality Act. In *Martin v Devonshires Solicitors* (2010) an employee who suffered from delusions made wholly false allegations of sexual harassment against fellow employees. She had no insight into her condition and refused to accept that the allegations were false. The medical evidence was that further false allegations would continue to be made and the employer decided to dismiss.

That was held not to be discrimination because the particular issues with the employee were 'properly separable' from the allegation of discrimination. But the President of the Employment Appeal Tribunal, Mr Justice Underhill went on to say:

"Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had said, used intemperate language or made inaccurate statements."

That seems like a sound approach. Almost all whistleblowing is an irritant. There is almost always something about the tone of the complaint or the manner in which it is made that the employer might take some exception to.



In the Kong case the employee's disclosure was phrased rather tactlessly given that it was addressed to the Head of the Legal Department, but it was, as the Tribunal found, not associated with any actual misconduct. The Tribunal did not find that there was any contributory conduct on the part of the employee justifying a reduction in her normal unfair dismissal compensation.

And yet the Tribunal has drawn precisely the distinction that the EAT warned against in Martin and the Court of Appeal has upheld that finding. Essentially, the Court held that the issue of whether or not conduct is 'properly separable' is not a legal principle, but simply a question of fact about why the employer has decided to dismiss. It is not a question of how unreasonable the employee's behaviour is, but what lay behind the employer's decision.

In this case there was evidence that the employer was genuinely concerned with how the disclosure was made rather than the fact of it. The Tribunal was entitled to accept that the dismissal was on that ground rather than the ground of the disclosure itself. Giving the leading judgment Lady Justice Simler said: "In a proper case, even where the conduct of the whistleblower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment."

What would Mr Justice Underhill think about this reading of his decision in Martin v Devonshires? Well, he is now Lord Justice Underhill and he was one of the two other judges who agreed with Lady Justice Simler. He added: "I do not see our decision as turning on any question of principle or as opening any general breach in whistleblower protection ... The fact that the tribunal found that the claimant had not in fact behaved in a way which justified her dismissal does not mean that it was required to find that the dismissal decision was taken on the proscribed ground."

This reduces Martin v Devonshires to a case turning on its facts rather than setting out any general principle. I don't think this is a good move. While I can see a distinction in principle between objecting to a complaint on the one hand and the manner in which

a complaint is made on the other, I do not share the Court of Appeal's confidence that Tribunals will be able to draw that distinction in practice. The danger of its decision in Kong is that it will act as a template for employers who want to rid themselves of troublesome whistleblowers (and whistleblowers are often troublesome).

National Developments

National Pay & Conditions

Update on Union Consultation on Green Book Pay Offer for 2022

On Monday UNISON's NJC committee met to discuss the results of its membership consultation on the Green Book pay offer. Following the meeting, Unison announced the outcome of the vote. On a turnout reported to be 34%, UNISON's members voted by 63.5% to 36.5% to **accept** the National Employers' final pay offer.

Of course, in order for the pay deal to be finalised so that it can be implemented and paid to employees, GMB and/or Unite must also vote to accept the employers' offer. Unite's consultation closes on 14th October and GMB's closes on 21st October.

Working Arrangements for Christmas 2022 and New Year 2023

With the summer holidays just behind us, we issued the national circular providing information on working arrangements for Christmas 2022 and New Year 2023. A copy is available [here](#).

These circulars are only produced in years when Christmas/New Year falls over a weekend, so the next won't be until 2026. Which will be here before we know it!



Chief Executive's Handbook

Earlier this month we circulated an updated copy of the Handbook with the National Conditions of Service Handbook for Chief Executives of local authorities. A copy of the updated Handbook is available here: [Chief Executives Handbook](#)

Guidance on the Additional Bank Holiday for the State Funeral of Her Late Majesty Queen Elizabeth II

Following the announcement of the sad news of the death of the late Queen Elizabeth II, we circulated Joint Guidance on the additional bank holiday that was given to mark the occasion of the state funeral. It includes advice relating to calculating the additional leave for term-time workers. A copy of the guidance can be access here: [NJC Guidance](#)

Living Wage Foundation Rate Increase

The Living Wage Foundation is a voluntary scheme that some councils in the region have signed up to. On 22nd September the Living Wage Foundation increased its "Real Living Wage" rate to £10.90 per hour outside of London. The increase announcement is 2 months earlier than usual and represents an increase of £1 per hour or 10.1%, which is the highest increase since its introduction – reflecting the rising cost of living.

HMRC Mileage Rates

In last month's bulletin we updated you on the progress made in lobbying HMRC to review their mileage rates. The LGA has now received a response to the letter from Cllr Andrew Western, Chair of the LGA's Resources Board. A copy of the response is available [here](#).

Government Proposals within the "Mini Budget"

Last week, the Government's mini budget or "fiscal event" included announcements affecting employers including:-

- removing the IR35 regulations from 6 April 2023. This will shift back to individuals the

responsibility for determining their employment status and paying tax and NI appropriately when they work providing services via an intermediary/personal service company.

- Amendments to industrial action: requiring minimum service levels within public transport which then limits the impact of industrial action and making it easier settle disputes by ensuring meaningful employer pay offers are put to employees.

Retained EU Law

You will be know that the EU Withdrawal Agreement saw existing EU law continuing within UK law until such time that the UK makes changes. Recently, the Government announced a Bill relating to such a review and covers UK legislation that originated from EU law. Examples include:-

- working time rights to rest and paid holiday • maternity provisions • parental leave provisions • fixed-term workers' rights • part-time workers' rights • agency workers' rights • TUPE • equal pay • discrimination law

The Bill provides that all EU derived law will expire on 31 December 2023 unless by then the Government has decided to retain it. It contains the possibility of extending that deadline to 31 December 2026. The Bill also contains provisions on how previous EU case law is to be treated.

The Bill will need to go through the usual parliamentary approval processes and so it is likely that there will be amendments prior to being enacted and we will keep you updated. You can access the Bill here: [Retained EU Law \(Revocation and Reform\) Bill](#)

ACAS Guidance on Suspension

ACAS has updated its guidance on suspension, including suspension for reasons relating to medical, pregnancy and when conducting disciplinary investigations. A link to the guidance is here: [ACAS Guide: Suspension](#)



T Levels news and updates – September 2022

This edition contains news and updates including the results of the first intake of students, new T Levels starting this September, the Youth Voice Census, and upcoming events. Click [here](#) to view the bulletin.

Apprenticeship Newsletter

The September edition of the LGA's Apprenticeship Newsletter has been published today and can be accessed [here](#).

It includes the following:-

- Reminder of public sector target reporting deadline (today!)
- Reminder that the target is going but the data still needs to be reported annually
- Survey for feedback on the LG Apprentice of the Year event
- Update to the Levy Transfer Pledge Function and links to videos on how to use the function:
 - An update/ steps on Pledging and Transferring Apprenticeship Funds- [click here to view](#)
 - Creating a Transfer Pledge and View, Accept or Reject Applications- [click here to view](#)
- 1-day course on 4th October on effective apprenticeship levy spending for local authorities
- University of Birmingham's Systems Thinking and Leadership Practitioner Apprenticeship/MSc Programme
- IFATE Updates

