



# Employment Review

## In This Review...

Implications of the Repeal of the Statutory Discipline & Grievance Procedures	1
Changes in Legislation April 2009	2
Redundancy Payments Set to Rise	3
Immigration – Points System Explained	3
Q&A – Cutting Pay	5
Managing Long Term Absence	6
Case Law Update	8
Health & Safety	9
Interim HR Managers	10

## Implications of the Repeal of the Statutory Discipline & Grievance Procedures

Ever since the statutory disciplinary and grievance procedures were introduced in 2004 they have proved to be unpopular, and have had the opposite affect in terms of the early resolution of employment disputes - with the result that the number of tribunal claims actually increased.

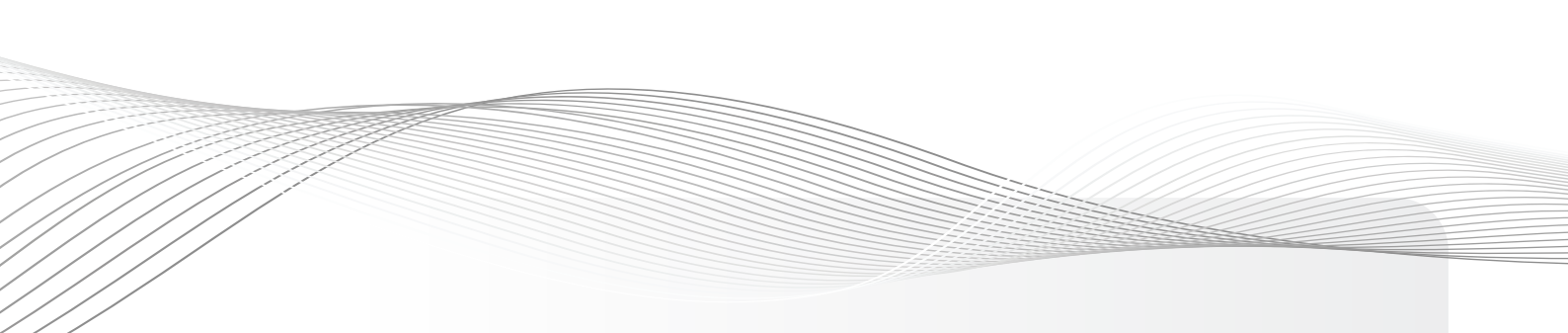
Following criticism from both employers and unions, the Government commissioned a review, the findings of which have now been incorporated into the Employment Act 2008 which comes into force on the 6th April 2009. From that date the statutory procedures will be repealed and replaced by a revised ACAS Code of Practice that sets down a number of principles for employers and employees to

follow in disciplinary, dismissal and grievance situations.

The Code is not legally binding. This means that failure by the employer to follow the Code will not constitute automatically unfair dismissal, and failure to follow the Code on the part of employee will not render any subsequent tribunal claim inadmissible

The repeal of the Statutory Dispute Resolution procedures will result in a return to the position held prior to their introduction i.e. employers must establish a potentially fair reason for a dismissal and act reasonably when carrying out that dismissal. In order to show that it has acted reasonably, an employer must follow a fair procedure.

There will be a return to the position established by Polkey v AE Dayton Services Ltd (1987) when, other than in exceptional circumstances, a dismissal will be unfair if the



employer fails to follow a generally fair procedure, even if its failure makes no difference to the outcome and it would have dismissed had it followed a fair procedure. This means that following the repeal of the statutory procedures, it will be more important for employers to ensure that they act reasonably and that dismissals are carried out according to generally fair procedures.

However, although a dismissal will be unfair if a fair procedure is not followed, the amount of compensation may be reduced, by a percentage, to reflect the chance that the employer would have dismissed the employee, even if it had followed a fair procedure.

Both employers and employees will be expected to comply with the Code. If they do not, Tribunals will have the authority to uplift / reduce any award by up to 25%

The revised Code is not applicable to redundancy dismissals or non-renewal of fixed-term contracts, nor is it applicable to resignations or post-employment grievances. Such processes will be dealt with at the discretion of employers, having regard to statutory / contractual guidelines (redundancies & fixed term contracts) and reasonableness in the circumstances (resignations & post-employment grievances).

Transitional Arrangements are set out in terms of when the old statutory procedures cease to apply.

In terms of disciplinary issues, the statutory procedure should be followed in respect of any disciplinary process instigated prior to 6th April 2009. Any process instigated after this date should be dealt with in accordance with the revised ACAS Code of Practice.

In terms of employee grievances, the statutory procedure should be followed where the date of the act complained of wholly predates 6th April 2009. The statutory procedures will also continue to apply where the action to which the grievance relates started on or before 5 April

2009 and continues beyond that date, but only if the employee presents a claim to the tribunal or submits a valid grievance:

**on or before 4 July 2009 for most claims;**

**on or before 4 October 2009 for equal pay or redundancy pay claims.**

Any such act occurring after the specified dates should be addressed in accordance with the revised ACAS Code of Practice.

The revised ASAS Code is far less prescriptive than the old statutory procedures and it sets out a number of broad principles which are considered to be simpler for employers to follow. Both the disciplinary and grievance procedures set out in the Code essentially retain the three-step procedure, so there may be little change in how employers deal with disciplinary and grievance issues.

It is hoped that the changes to legislation will encourage dispute resolution in the workplace without recourse to employment tribunals, as was the original aim when the statutory procedures were introduced.

For further information on handling discipline and grievance issues or assistance with reviewing Disciplinary and Grievance Policies and Procedures contact us on 01942 727200.

## **Changes in Legislation From April 2009**

### **Repeal of the Statutory Dispute Resolution Procedures**

The Employment Act 2008 will repeal the Statutory Dismissal and Disciplinary Procedures and remove the provisions relating to procedural unfair dismissal.

### Right to Flexible Working extended

The right to request flexible working will be extended to parents of children aged 16 and under from 6th April 2009.

### Increase in Statutory Holiday Entitlement

The final staged increase in Statutory Holiday entitlement comes into effect from 1st April 2009 when it will increase to 5.6 weeks (28 days for a 5 day worker).

## Redundancy Payments Set To Rise

The Government is set to increase the minimum amount of money that employers must pay staff they make redundant, amid concern that rising unemployment could leave millions of families unable to pay their mortgages and household bills.

At present, statutory redundancy pay is based on a week's pay for each full year's service for employees aged between the ages of 22 and 41, and one and a half week's pay for those aged 42 and over. Total payouts are capped at £7,000 and £10,500 respectively because wages above £350 a week and service of more than 20 years are not taken into account.

Currently some 46% of the workforce earns more than £350 a week. Since the statutory redundancy pay scheme was launched in 1965, the maximum weekly pay figure has decreased from 203% of average weekly earnings to just 56%.

More than 50 Labour MPs have signed a motion calling on the Government to increase the maximum payout for redundancy payments. They want the limit to be linked to earnings rather than inflation.

Other options under consideration include

lowering the qualifying period for redundancy payments from two years to one, or raising the tax-free limit from £30,000.

The tax free limit has been £30,000 since 1988 and the TUC would like to see it raised to £50,000.

## Immigration Rules - Points System Explained

The Government's merit-based points system for non-European Economic Area (EEA) nationals wishing to work in the UK came into effect in November 2008. Previously employers had to apply on behalf of individuals for work permits under the Work Permit Scheme (which has now been abolished), but now foreign nationals who wish to obtain permission to work in the UK must apply at the British Embassy in their home country of origin.

The points-based system consists of five tiers:

**Tier 1:** highly skilled workers

**Tier 2:** skilled individuals with proven English language ability who can fill gaps in the UK labour market

**Tier 3:** low-skilled workers needed to fill specific temporary labour shortages in the UK job market

**Tier 4:** students.

**Tier 5:** youth mobility and temporary workers

Each of the tiers has a standard number of points which applicants must achieve to be eligible to work in the UK. Points are awarded according to a number of different criteria. These include qualifications, earnings, UK work experience, age, language ability, available funds etc. Documentary evidence is required to

support the points score.

Tier 1, which replaced the Highly Skilled Migrant Programme, was put in place in June 2008. Tier 1 applicants do not require a job offer and do not have to be sponsored by an employer. Entry under Tier 1 is open to highly educated individuals who have exceptional skills, to encourage them to live and work in the UK.

To be successful in applying for entry under **tier 1**, an individual must score a minimum of 75 points and pay a fee of £600. Permission to stay in the UK is given for up to three years initially, although the individual can apply to renew his or her tier 1 visa. After five years, he or she can apply for indefinite leave to remain. An individual with a tier 1 visa is not bound by any employment restrictions ie the visa is not tied to a specific employer.

**Tiers 2 and 5** were rolled out on 27 November 2008.

**Tier 2** applicants must have a job offer from a licensed employer and must score a total of 70 points.

For **tiers 2 and 5**, points are awarded for a valid certificate of sponsorship from a UK employer, the number of points allocated being dependent on the type of sponsorship licence that the employer holds.

**Tier 3** has been suspended in the meantime because most low-skilled jobs are currently capable of being filled by EEA nationals.

**Tier 4** is expected to be put in place in the spring of 2009.

No switching between tiers is permissible. An individual who wishes to switch to a different tier would have to return overseas and make a fresh application.

Employers who wish to employ non-European Economic Area (EEA) nationals under tiers 2 or 5 of the points-based system, must obtain a

sponsorship licence to be able to sponsor migrants, and must agree to fulfil certain duties and responsibilities to earn and hold that licence. Employers who do not hold a licence cannot recruit non-EEA workers. The licences are obtained via the UK Border Agency.

There are 2 types of licence – either A rated or B rated – depending on the outcome of the employer's assessment. B-rated sponsors will have to comply with an action plan to achieve an A-rating, or risk losing their licence.

Employers are required to comply with a number of duties to gain and retain licences, such as appointing individuals to certain defined positions of responsibility, having effective HR systems in place, keeping proper records and informing the UK Border Agency if a foreign national fails to turn up for work.

Employers have to pay £1,000 (this fee is reduced for charities and small employers) for a 4 year licence to sponsor tier 2 migrants.

Once an employer has obtained its sponsorship licence, it can access an online system operated by the UK Border Agency through which it can issue its own certificates of sponsorship to potential migrant workers. The UK Border Agency sponsorship takes the form of a unique reference number to be provided by the employer to its potential recruit, who will then be able to apply for entry clearance into the UK at the British Embassy in his or her home country.

For employers using illegal migrant workers a civil penalty system was introduced in February 2008 which operates on a sliding scale of amounts, based on the type of eligibility checks employers have made on their workers, the number of occasions on which warnings have been issued or civil penalties imposed, and the extent to which the employer has co-operated with the Agency.

Employers found to be using illegal migrant workers will be served with a notification of potential liability (NOPL) by immigration staff

carrying out enforcement and compliance visits. After considering the evidence employers can then be issued with a notification of liability (NOL) and a civil penalty of up to £10,000 for each illegal worker.

The new penalty scheme sits alongside a tough new criminal offence of knowingly employing an illegal migrant worker. This will be used in the more serious cases where unscrupulous employers knowingly and deliberately use illegal migrant workers, often for personal financial gain. This will carry a maximum two year custodial sentence and/or an unlimited fine.

## Introducing Pay Cuts

In the current economic climate, many employers are having to consider a variety of cost-cutting measures, one of which could be reducing pay. Introducing pay cuts is not necessarily a straightforward option as it may expose the organisation to legal action. We have answered some common questions that arise.

**Q** What steps should an employer take when considering pay cuts?

**A** Basically, pay cuts cannot be imposed without the consent of the employee – as it would constitute a fundamental breach of contract. Agreement should be sought through consultation, bearing in mind the current climate, the employer's financial position and, potentially, as a way of avoiding redundancies.

**Q** If the employee agrees to the proposed change, what should the employer do to confirm this?

**A** The employee should be issued with an amendment to terms which confirms the

change in writing, and asked to sign signifying acceptance of the change.

**Q** What rights do staff have in terms of objecting to such cuts?

**A** Employees are not obliged to accept the proposed reduction in pay, unless bound by their contract or by a collective agreement. If an employer makes a pay cut without the employee's agreement, or terminates their current contract and offers them a new one, the employee could resign on the grounds that the employer has fundamentally breached their contract of employment. Alternatively, the employee could make it clear that he/she is working under protest and raise a grievance detailing the complaint. The employee could then be in a position to bring a claim for unlawful deduction from wages or, if they have already resigned, claim constructive dismissal.

**Q** What if some employees accept the pay cut while others don't?

**A** It will depend on whether the majority of employees readily accept the pay cut after consultation. If there are only a few who object and the employer still wishes to proceed, it may consider going ahead with the pay cut and wait to see what happens. Alternatively they could consider terminating the contracts of those staff who continue to object and offer them new ones.

The employer will have to have sound business reasons for the proposed change, and may have to provide employee representatives with financial documentation to support their case.

If an employer is proposing to change the terms of 20 or more staff, there will have to be collective consultation with appropriate employee representatives. The length of the consultation will depend on the number of staff

affected. A 30-day period should be allowed unless 100 or more are affected, when 90 days is required. The timing of any change will depend upon the agreement reached. Where terms and conditions have been collectively agreed with one or more trade union, negotiations should be conducted with involved unions.

If, after consultation, agreement cannot be reached, the employees should be informed in writing that their employment may be terminated if they continue to refuse. Any such dismissal must be undertaken in accordance with statutory notice provisions. The employees should then be offered a new contract with the new pay terms. Any claims for unfair dismissal resulting from the termination could be resisted on the basis of "some other substantial reason" as a result of the business case.

**Q** If the employer terminates employees' contracts following their refusal to accept the pay cut, will they be entitled to redundancy pay?

**A** No – as they are not being dismissed on the grounds of redundancy – but on the basis that they have refused to accept a pay cut.

**Q** If the workforce agrees to a pay cut but the measures do not result in the required cost savings and there is subsequently a requirement to make staff redundant, would the redundancy pay be based on the employees' reduced rate of pay or their original salary?

**A** Statutory redundancy pay is calculated on the basis of a week's pay, subject to a current maximum of £350. The calculation of a week's pay is made at the date of dismissal. If the weekly pay rate has been reduced, even for only a short period of time before the calculation date, the redundancy payment will be calculated on the new rate of pay.

## Managing Long Term Absence

As we outlined in the last bulletin, employee absence due to illness represents a significant drain on a business, with the potential cost of occupational sick pay, lost production, reduced service levels, sometimes the need to hire replacement staff and problems with the morale and commitment of other members of staff who are affected by the absence of a colleague for a prolonged period of time.

Long term absences through sickness, or the inability to attend work regularly and consistently because of ill health, are often amongst the most difficult problems for employers to deal with. It is therefore vital that organisations have a strategy in place to help employees get back to work after a prolonged spell of sickness or injury-related absence.

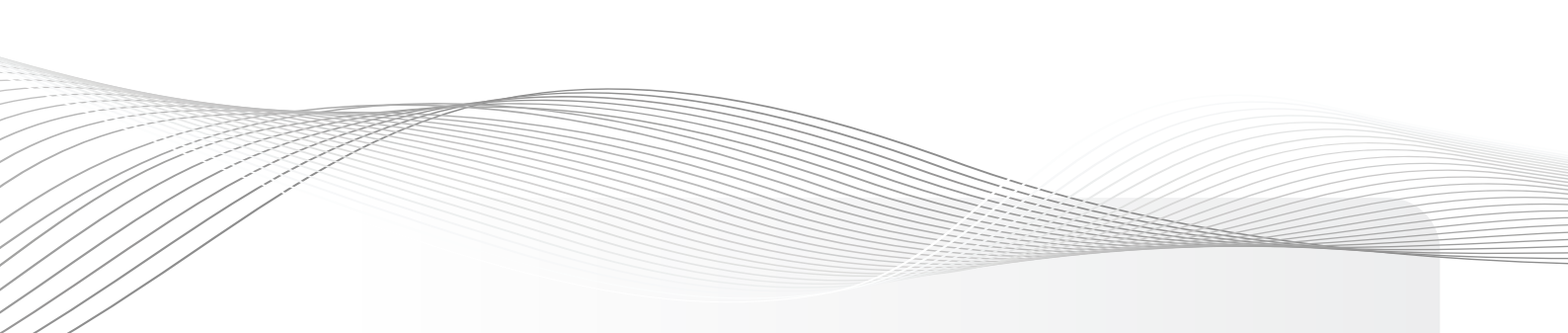
There are numerous hurdles to overcome and a minefield of employment legislation to face when managing long term absence, in order to avoid costly unfair dismissal and disability discrimination claims.

The role of the line manager is crucial in managing long term absence but there are also other interventions which are important and these include:-

- Occupational health involvement
- Changes to work patterns or environment
- Return to work interviews
- Rehabilitation/counselling programmes

There are four typical elements in the recovery and back to work process:

**Keeping in contact with sick employees** – ensure contact is maintained on a regular basis using a sensitive and non intrusive approach. This form of contact should be agreed between the member of staff and the manager and, where appropriate the union or the employee



representative. Such contact could include agreed home visits, phone calls or meeting an employee at a location other than their work environment.

**Planning and undertaking workplace controls or adjustments** – some obstacles may hinder an employee's return to work. A risk assessment can identify measures or adjustments to help workers return and stay in work. Such examples may include allowing for a gradual return to work e.g. building up from part time to full time over a period of weeks, changing work patterns to allow more flexible working, or adjusting the work environment to accommodate the employee's mobility.

**Using professional advice and treatment** – It is often wise in the first instance to obtain the employee's consent to access a medical report from their GP. In addition occupational health professionals should be able to play a major role in evaluating the reason for absence, carrying out health assessments and assisting HR professionals and managers in planning a return to work. The management of employees who are or who become disabled may mean that employers have to make reasonable adjustments before they can return to their jobs. Sometimes it can prove helpful to enlist the support of a Disability Employment Adviser who may be available at a local level. An employer has responsibilities under the Health and Safety at Work Act 1974 to protect employees before any absence and after they return to work, especially if they become more vulnerable to risk because of illness, injury or disability.

**Planning and co-ordinating a return to work plan** – a return to work plan must be agreed by the employee and the line manager, and any other staff likely to be affected. The plan needs to include the goals, such as modified working hours or a modified job role, the time period involved, a statement about the new working arrangements and the dates when the plan will be subject to review by the employee and the line manager.

The primary aim in dealing with cases of long

term absence, is to facilitate the individual's return to work at the earliest reasonable point. Of course it's important to bear in mind that, in extreme cases, the person may ultimately be unable to return to work. In such cases, the burden of proof lies with the employer to demonstrate that a dismissal arising out of long term sickness is for a potentially fair reason. The employer must be able to show that they have followed a fair and proper procedure and acted reasonably in the circumstances. An Employment Tribunal will consider a number of factors including the nature of the employee's illness, the nature of the job, the needs of the employer, the employee's length of service, the type and amount of sick pay paid to the employee and the consideration of alternative employment.

A Tribunal will judge the reasonableness of an employer's actions against the background of their size and administrative resources. The key to a fair dismissal for long term ill health is obtaining the information to enable you to make a fair and reasonable decision, discussing it with the employee, and following a fair procedure. The key information required should be up to date, comprehensive and include helpful medical evidence.

**Long term absence issues can be complex to manage and no two cases are the same. For that reason you are encouraged to take early advice from our experienced consultants here at Employee Management Ltd when faced with such a problem by calling 01942 727200.**



## Case Law

We are continually looking to ever-changing case law in order to interpret key points of legislation, particularly in relation to new legislation, so that we can identify the impact on employers.

### Paid Annual Leave and Long Term Sickness Absence

#### Stringer & Ors v HM Revenue

The European Court of Justice has handed down its judgment in the above case on whether workers on long-term sick leave are entitled to accrue paid annual leave during that period.

#### Background

The claimants, who had been absent from work on long-term sick leave and had exhausted their entitlement to contractual and statutory sick pay, successfully argued before both an employment tribunal and the EAT that they were entitled to paid annual leave under the Working Time Regulations 1998.

However, the Court of Appeal allowed an appeal by the Inland Revenue, and the employees appealed to the House of Lords, which referred the case to the ECJ.

#### Decision

The ECJ concluded that, since the Directive does not distinguish between workers who are absent from work on sick leave and those who have in fact worked during the course of the year, it must be implemented without any preconditions. Consequently, a worker cannot be deprived of that right when he or she has not had the opportunity to exercise it. Since a worker who has been absent for the whole of the holiday year has been denied the opportunity to exercise his or her right to paid holiday, the right to holiday pay does not disappear at the end of the holiday year.

The ECJ went on to say that the purpose of the entitlement to paid annual leave is to enable the worker to rest and enjoy a period of relaxation and leisure, whereas the purpose of the entitlement to sick leave is to allow the worker to recover from being ill. Since one type of leave cannot displace the entitlement to another type, there is nothing to prevent national legislation that stops workers from taking holiday during a period of sick leave. However, it must be allowed at a later date.

Workers' entitlement to annual leave therefore continues to accrue during their sickness absence and those whose employment ends before they have been able to take their full entitlement are entitled to payment in lieu. Although not explicitly stated, the judgement would seem to suggest that workers returning from a period of sickness absence in a new holiday year would still be entitled to take holiday that accrued during that sick leave.

#### Comment

The case will return to the House of Lords, which will give a ruling in the light of the ECJ's judgment, but until the House of Lords gives judgment, the position remains uncertain.

Allowing long term sick employees to carry over untaken holidays into the next holiday year would impose yet more burdens on hard pressed businesses already struggling in the current recession, notwithstanding the fact that the WT Regs themselves prohibit holiday leave being carried forward and that payment in lieu can only be made for untaken leave on termination of employment. The safest course for employers is probably to allow employees on long-term sick leave to take a period of paid annual leave before the expiry of the current leave year.

**We would also advise employers to put in place robust policies relating to sickness absence and holidays. For assistance with this, contact any of our consultants on 01942 727200.**

## Slips, Trips and Falls Can Be Costly!

**A Company - found to be responsible for a driver breaking his ankle - was recently fined a total of £5,600 and ordered to pay costs of £8,951.**

The court heard how a driver, an agency worker who had been working at the Company for just two weeks when the incident took place, was stranded after slipping as he prepared to fill his truck with diesel. After falling, he was alone for 20 minutes until managing to contact his wife by mobile phone who called an ambulance. The injury he sustained to his ankle required a plate and two pins to be inserted to repair it.

The man had slipped on the wooden decking in front of the diesel pump. He took just two steps before slipping and injuring his ankle. When the paramedics arrived, they too found the surface to be slippery and had to remove some of the decking before they could move the injured man to the ambulance.

The court also found that it was not the first time drivers had slipped in this area, and the pump had a minor drip leak when not in use. No injuries had occurred before.

The Company was prosecuted for failing to ensure there was a suitable and sufficient risk assessment of the wooden decking near the diesel pump in its depot and failing to protect drivers using the pump.

The Company was also found guilty of failing to ensure every floor in the workplace was suitable for the purpose for which it was used and was not slippery.

While incidents like this can often be seen as trivial, the cost to businesses and victims in the event of an accident mean they need to be taken seriously. In this case a basic risk assessment would have identified the dangers and they could have been avoided by installing a

different type of flooring.

In this case the HSE officer observed that although the Company Health and Safety Officer had observed a trip hazard from pallets the slippery nature of the decking had not been identified as a hazard. The risk assessments that had been undertaken bore little reality to the actual hazards highlighted and demonstrated the inadequate training given to those employees undertaking them. Consequently the Company took no action to reduce the likelihood of a future incident occurring until intervention by the HSE during its own investigation.

The Company was fined £2,400, after pleading guilty to breaching Regulation 12 (1) of the Workplace (Health, Safety & Welfare) Regulations 1992. It also pleaded guilty to the charge of breaching Regulation 3(1) of the Management of Health & Safety at Work Regulations 1999 for which the court imposed a fine of £3,200.

**Regulation 3(1) of the Management of Health and Safety at Work Regulations 1999 states:**

**Every employer shall make a suitable and sufficient assessment of:**

**The risks to Health and Safety of his employees to which they are exposed whilst they are at work; and**

**The risks to the Health and Safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking.**

In this case, the agency driver was a non-employee who was put at risk by the Company's failure to have a safe system of work.

**EML can provide support with risk assessments and can advise on the introduction /maintenance of safe systems of work. Contact Grahame Barker on 01942 727200 for further information.**



## Could an Experienced Interim HR Manager Make a Difference to Your Business?

You may well be aware that the demand for Interim Managers has increased as organisations face structural changes and steer away from adding permanent headcount. No longer are Interim Managers seen purely as "gap fillers", as it is now more likely that an organisation would consider bringing an Interim Manager in to spearhead a major HR project, help guide them through structural change or assist with change management.

Interim Managers are also changing; they are more ambitious and generally dynamic. Organisations can make good use of their skills when it comes to those specific projects where they may not have the necessary in-house expertise or the need for a permanent employee to deliver a programme.

The attractions for the Interim Manager are many. Financially, it can be extremely rewarding, they can choose when and where they work, they have flexibility, work/life balance and a varied and interesting workload.

From the client perspective, employers can "cherry pick" the best person for the job at peak periods creating total flexibility. The Interim can bring a fresh perspective, new ideas and experience of dealing with similar situations within various sectors.

The rapid turnaround to recruit an Interim can also be very attractive. It can take up to 6 months to make a senior appointment whereas an Interim can usually be in place within 48 hours and can start making an impact immediately. An Interim can also be used to stop gap a vacancy where there is no current incumbent.

The downturn in the economy will more than likely show a shift from more generalist HR

roles to more specialist, internally focussed roles such as learning & development, succession planning and talent management as businesses face different challenges within the workplace. This opens up the opportunity to place Interim specialists to plug these skill gaps or even help to "up skill" the HR team.

The future for Interims in general looks rosy as organisations change the way they work. They need a core nucleus of staff to deal with the day to day processes, whilst having the ability to bring in experts as and when the need arises.

If you have an opportunity which could be filled by an Interim, or you wish to be included on our register, contact us on 01942 727200.

## Right to Reply

If you have any comments or feedback regarding this newsletter or would like to highlight a specific topic you would like covering in our next issue, please e-mail the details to us. If there are other individuals in your organisation who you feel would benefit from receiving future newsletters, please forward the details to the e-mail address below.

EML's consultants are on hand to assist you and provide a tailor made service to support your organisation in effectively managing human resource or health & safety issues. Please contact any of our consultants on the contact number below if you would like to discuss any specific problem.

The information and any commentary on the law contained in this newsletter are provided for information purposes only. No responsibility is assumed for its accuracy or for any consequences of relying upon it. The information and commentary does not, and is not, intended to amount to legal advice and the writers do not intend that it should be so relied upon.