



DOYLE CLAYTON

Workplace Lawyers

Education Bulletin

Autumn Term 2019

Welcome to the Autumn term edition of our Education Bulletin!

This edition focuses on three key developments:

1. Support staff and peripatetics – are you getting it right?
2. No deal Brexit – what does it mean for your staff?
3. TPS – what are the options? And government consultation launched.

We also highlight the latest version of KCSIE and the events we are attending.

1. Support staff and peripatetics - time to review contracts

It is always important to keep contracts with staff up to date to address changes in the law. There are two key developments: (1) Schools and colleges may need to change the way they calculate paid holiday entitlement for some of their staff following a recent Court of Appeal decision. (2) Now is also a good time to review your contractor arrangements in view of forthcoming changes to the IR35 legislation aimed at tackling tax avoidance. These will affect larger schools and colleges that engage contractors who provide their services through a personal service company. To help clients investigate their contractor arrangements and answer CEST's questions accurately, we have developed a fixed-cost due diligence assessment tool and accompanying guidance.

Paid holiday entitlement

In *The Harpur Trust v Brazel*, the Court of Appeal ruled that a school should not have pro-rated holiday entitlement for a peripatetic music teacher to reflect the number of weeks she worked. The teacher was employed on a permanent zero hours contract (meaning she had no guaranteed working hours) but she only worked during term time. The number of hours she worked varied each term depending on the number of pupils requiring tuition. She took her holiday in the school holidays. Although her contract stated that she was entitled to 5.6 weeks' holiday, the school capped her holiday pay at 12.07% of her earnings the previous term. The 12.07% figure comes from the fact that 5.6 weeks' statutory holiday represents 12.07% of a working year. The school did this to reflect the fact she only worked for part of the year.

The teacher argued she was being underpaid for her holiday and this method of calculation did not comply with the Working Time Regulations 1998. The employment tribunal dismissed her claim. However, the Employment Appeal Tribunal and Court of Appeal both agreed with her.

The Court of Appeal categorised the teacher as a "part-year worker" i.e. someone employed for the whole year who only works for part of it. It rejected the Trust's argument that it was necessary to reduce the teacher's holiday entitlement as she had worked for only part of the year. It accepted this could mean some part-year workers receive a higher proportion of their annual earnings as holiday pay but it did not consider this was unfair. The teacher was employed on a permanent contract and this was sufficient to entitle her to 5.6 weeks holiday, irrespective of the number of weeks she worked.

As a result, the Trust should have calculated her holiday pay by working out her average weekly pay in the previous 12 weeks (ignoring any weeks where she did not receive any pay), as required by the Working Time Regulations for workers who do not have normal working hours .

Schools and colleges who employ teachers or other workers on permanent contracts to work part of the year should review the way they calculate holiday pay. Continuing to calculate holiday using the 12.07% approach could lead to holiday pay claims, plus claims for underpaid holiday pay going back



up to two years. Schools and colleges may also need to adjust their employment contracts and practices to ensure part-year workers are entitled to and receive 5.6 weeks' paid holiday per year, with no pro-rating to reflect the number of weeks worked.

Employers commonly use 12.07% as a basis to calculate holiday pay for casual workers and ACAS guidance supports this approach. The decision in this case does not consider whether this practice is lawful for casual workers. It is certainly a good starting point when calculating holiday entitlement and pay for casual workers but it is worth checking at the end of each year (or at the end of a contract) that this approach is not resulting in an underpayment of holiday pay.

IR35 changes

IR35 is the name given to tax legislation which seeks to tackle tax avoidance. It applies where a contractor receives their fees in a more tax efficient manner than if they were a direct employee of the person hiring them, by providing their services through an intermediary (often the contractor's own personal service company).

Currently for contractors working for hirers in the private sector, the contractor's personal service company is responsible for assessing whether the contractor would be an employee of the hirer for tax purposes. Their personal service company also has to deduct any income tax and National Insurance Contributions (NICs) due and pay employer NICs to HMRC.

From 6 April 2020, the Government is changing how the IR35 rules apply in the private sector. The majority of the changes have been in force since April 2017 for hirers in the public sector, including state schools and academies. The changes will now affect larger companies, organisations and businesses in the private and third sectors, including larger schools and colleges.

Where the new rules apply:

- Schools and colleges will be responsible for determining whether the contractor would be regarded as their employee for tax purposes if they engaged them direct, rather than through a personal service company. They will have to provide an employment status determination direct to the contractor and to the party in the recruitment chain they have a contract with. This could be the contractor's personal service company or, for example, a recruitment business
- The person who pays the contractor's company (the "fee payer") will be responsible for operating PAYE and will have to deduct income tax and NICs and pay employer NICs and the apprenticeship levy charge (if applicable). This could mean that schools and colleges will have to operate PAYE in respect of their contractors
- Schools and colleges will also have to consider and reply to any representations the contractor makes if it disputes the employment status determination
- If a school or college fails to comply with the rules they could be liable for income tax and NICs and HMRC will have powers to pursue other parties in the recruitment chain if any party defaults on their obligations.

The new rules do not apply to schools classified as small. A school is small if it meets at least two of the following conditions:

- Annual turnover not more than £10.2 million
- Balance sheet total not more than £5.1 million
- No more than 50 employees



There are special rules for companies that form part of a group.

Other organisations and businesses are small if their turnover (include that of connected persons) is not more than 10.2 million.

Schools and colleges affected by the IR35 changes should be taking steps now to assess their contractor's employment status. HMRC has an online assessment tool, CEST (Check Employment Status for Tax), which helps assess whether contractors are caught by the IR35 regime. HMRC will stand by the result CEST provides where the questions have been answered accurately and arrangements have not been contrived to obtain a particular answer. To help clients investigate their contractor arrangements and answer CEST's questions accurately, we have developed a fixed-cost due diligence assessment tool and accompanying guidance. We can also provide a comprehensive overview of your contracts, resourcing practices and processes in light of your IR35 position, to help you understand what changes (if any) you may need to make going forwards when it comes to engaging staff and contractors.

If you would like help with reviewing or changing your staff contracts or contractor arrangements or further information on our fixed price due diligence tool, please contact [Simon Henthorn](#) or any member of our education team.

2. No deal Brexit: no immediate end to free movement

Schools and colleges employing EU/EFTA nationals may have been concerned by recent press reports suggesting that freedom of movement will "end overnight" if the UK leaves the EU without a deal on 31 October. These reports led to the Home Office issuing a factsheet attempting to clarify the position and reassure those who are already here that nothing has changed. Despite Boris Johnson's assertions that we will be leaving the EU on 31 October come what may, current events in Parliament mean that we still do not know whether we will be leaving on that date and whether we will be leaving with a deal or no deal. As ever, the situation is changing by the day and needs to be kept under constant review.

The position for EU/EFTA nationals in the event of a no deal departure is as follows:

Residing in the UK before Brexit

- Eligible EU/EFTA nationals and their family members wishing to remain in the UK following a no deal Brexit must apply for either settled or pre-settled status under the EU Settlement Scheme. This scheme has been fully operational since March 2019
- EU/EFTA nationals intending to be the main applicant must enter the UK by the day we leave the EU. The overall deadline to apply under the scheme is 31 December 2020

This is the position agreed under Theresa May's Government and the Home Office factsheet confirmed nothing had changed. The factsheet also confirmed that:

- No one who is eligible to apply under the scheme, but has yet to apply, will be prevented from re-entering the UK if they are abroad at the time of a no deal Brexit.



Arriving in the UK after Brexit

The fact sheet appeared to indicate that the position for those arriving in the UK after Brexit was under review. Further guidance published on 5 September confirms the updated position for EU/EFTA nationals moving to the UK after Brexit:

- EU/EFTA nationals arriving to the UK after a no deal Brexit will still be able to live, work and study in the UK **as they do now** until 31 December 2020
- EU/EFTA nationals will be able to prove their right to study in the UK **as they do now**, by producing their EU/EFTA passport or identity card until 31 December 2020
- Any EU/EFTA national arriving after a no deal Brexit will be able to apply for **voluntary** European Temporary Leave to Remain, now re-named as 'Euro TLR' **if they wish to**
- The deadline for applying will be 31 December 2020
- The application will be free of charge and will be a digital status
- Euro TLR will be valid for three years and the Government now says it **will** count towards permanent residency in the UK
- At the end of the three year period, or earlier if they wish, they will need to apply under the new immigration system once it is finally in place (subject to meeting the relevant eligibility requirements)
- EU/EFTA nationals who do not hold Euro TLR will need to apply under the new immigration system by 31 December 2020 if they wish to remain in the UK beyond that date

Given that EU/EFTA nationals (and their eligible family members) arriving to the UK after a no deal Brexit will still be able to live, work and study in the UK as they do now until 31 December 2020 this certainly does not constitute the 'overnight end of free movement' and so should alleviate the concerns of many.

What should EU/EFTA nationals resident in the UK before Brexit be doing now?

As a precautionary measure we recommend that all eligible EU/EFTA nationals and their family members submit their applications for settled or pre-settled status prior to the current exit date of 31 October 2019 (or any subsequent exit date), even though the factsheet states that the deadline for applications will remain at 31 December 2020.

3. TPS costs – being shy and retiring is not an option

Parents often tell their children money does not grow on trees. This old truism will resonate with many schools, especially those in the independent sector, who have returned from the summer holidays to face a major challenge on staff pensions before the leaves have hit the ground. New valuations carried out by the Government Actuary mean that from September 2019, the employer contribution which colleges and schools pay to the Teachers' Pension Scheme (TPS) has risen from 16.48% to 23.68% of staff salaries – an increase of almost 40%. To put this into some further context, if a teacher earns £40,000 per annum, the pension contributions payable in respect of them has increased by £2,800 a year. Applied across an entire teaching staff over the course of their career, these numbers can easily escalate into significant black holes on the school's balance sheet.

The Government has recognised that this spike in costs will majorly impact school budgets, and has confirmed that it plans to distribute a TPS contribution grant to schools and colleges for the 2019-20 academic year to fully cover the additional contributions due, at a projected cost of over £800m. However, the amount of central funding available for future years remains uncertain, and in turn, this raises questions about the sustainability of the TPS. Importantly, it will not provide this financial



mitigation to either independent schools or higher education institutions that are in the TPS. They will therefore need to think very carefully around what form of pension benefits they will provide to their staff in the future. In particular, independent schools will need to wrestle with the following challenges:

- Is the TPS in its current form affordable for their school? If not, how can any funding shortfall be addressed, including by an increase to school fees?
- Even if the funding gap can be bridged, would ongoing TPS membership be in line with the school's constitution and any relevant charitable and legal objectives?
- Set against this, can the school afford a TPS exit – both in terms of any immediate financial cost to the scheme as well as the risk of losing key staff who may migrate to other employers who continue to offer TPS membership?

The standard approach to pensions risk taken by a private sector employer when faced with unsustainable costs is to exit their scheme and provide their staff with a standard group pension arrangement in its place. However, although this option would of course be open to schools who wish to exit the TPS, exiting the scheme could crystallise some costs in respect of the school's past participation in the TPS which would need to be settled. Also, pensions are an emotive subject for the workforce, especially in the public sector where generous defined benefit pension schemes are viewed as a key benefit of the profession.

Recognising the challenging position which independent schools face as regards future costs, the Department for Education has launched a consultation to gather feedback on the ability of independent schools to opt out of the TPS more flexibly. Currently, the position under the TPS regulations is that where an independent school opts out of membership, all TPS members employed by that school automatically leave active service. The consultation is therefore seeking industry views on whether a "phased" withdrawal process would help independent schools manage the financial pressure of increased employer contributions. It sets out proposals to achieve this, including by allowing schools to maintain TPS membership for existing staff but offer new joiners an alternative arrangement, and whether any flexibility could be introduced into the TPS regulations to allow schools to provide continued TPS membership for staff in specific circumstances (e.g. staff who re-start employment after extended periods of non-statutory leave). It also considers whether there are any potential equality impacts from the phased withdrawal proposal, and, if so, the extent to which these could be mitigated. The thinking behind phased withdrawal is that existing teaching staff would retain membership of a high quality pension scheme, but the school's costs would gradually reduce over time through natural turnover. The consultation is open until 3 November with a formal decision expected on whether TPS phased withdrawal will be introduced by the end of the year.

If you would like to discuss the changes to the TPS, the issues raised in the DfE consultation and the potential next steps available to your school, please contact our Head of Pensions, [Andrew Campbell](#) in the first instance.

Revised Keeping Children Safe in Education Safeguarding in force

The 2019 version of Keeping Children Safe in Education is now in force. It does not contain any core changes or new expectations. The update is simply to ensure it is consistent with other areas of government policy. The changes from the 2018 version include:

- A reference to the new criminal offence of upskirting in the section on peer on peer abuse. Schools and colleges should ensure staff are aware of this new criminal offence



- A new section on serious violence and factors that might suggest a child is involved with or at risk from serious violent crime
- An update to the section on multi-agency working to reflect new safeguarding partner arrangements which are replacing Local Safeguarding Children Boards from September
- References to the new curriculum for Relationships Education, and Relationships and Sex Education, and Health Education
- A reference to the new Ofsted framework and
- Reference to the new guidance on “Teaching online safety in schools”

Conferences

On 26 and 27 September the Team is exhibiting at the IAPS Annual Conference being held in the QE2 Centre, London.

Our Team is then attending the ISBA Annual HR Conference on 20 November 2019. The head of our Team, [Simon Henthorn](#), is leading a session on conflict management, and speaking to a team of in-house HR officers.

We are then providing training at an IAPS event on 27 November 2019.

If you are attending any of these events please pop along and say hello. We will be ready to answer all of your questions about peripatetics, TPS and Brexit!

