



DOYLE CLAYTON
Workplace Lawyers

Education Bulletin
May 2018

EDUCATION BULLETIN

Welcome to our first Education Bulletin! We will be publishing termly and covering news and topics that we hope will be of interest to schools and colleges. We will cover recent and upcoming changes in the law, a summary of cases that are relevant to schools plus a safeguarding update to make sure that you are kept up to date on the key legal issues that may affect your school or college.

OUR NEWS

Launch of our Tier 4 service

We have recently launched our Tier 4 support service for schools. If your school or college holds a Tier 4 sponsor licence, you have a duty to meet certain core requirements each year to ensure that you retain this. Our specialist education team can provide expert guidance on compliance assessments, including when to apply each year and what to do if you don't meet these core requirements. We can also provide the following support:

- We can visit your school to carry out a mock audit – this will be led by a solicitor who is a former International and Compliance Officer for a large Tier 4 sponsor.
- We can provide tailored guidance and visa support to your current and prospective Tier 4 sponsored pupils. We can also assist with applying for Parent of Tier 4 Child visas.
- If things go wrong and your licence is potentially at risk of being revoked for some reason, then we can defend allegations of compliance breaches and recommend corrective action to persuade UKVI to reinstate your sponsor licence and/or be subject to an action plan.

Conferences

We have been busy attending and exhibiting at a number of education conferences this year including the Association of Colleges Governance Summit and the Sixth Form College Association annual conference.

Our next events are the UKCISA Annual Conference on 27-29 June 2018 in Edinburgh and the Independent Association of Prep Schools conference in September 2018. If you're coming along to either do say hello!



The Legal Directories

Thank you to all of you who kindly gave references last year. We have been ranked in Band 2 by The Legal 500 (2018) and also shortlisted for a national award. If you have agreed to be a referee for this year, The Legal 500 and Chambers are likely to be in touch soon for feedback. Thank you for your time and support with this process.

IN THE NEWS

Taxing termination payments from 6 April

Schools paying termination payments to employees leaving on or after 6 April 2018 must change the way they tax notice pay. They now have to deduct income tax and national insurance contributions (NICs) from all notice payments irrespective of whether there is a payment in lieu of notice clause in the contract (a PILON).

Post-employment notice pay

Where the employee does not work out their notice period, the school will have to calculate the employee's "post-employment notice pay" (PENP). This is the employee's basic pay for their notice period, or any part of the notice period not worked. Basic pay excludes overtime, bonuses, commission, gratuities, allowances, termination awards, benefits in kinds and amounts treated as earnings (such as share-based earnings).

There is a formula in the legislation for performing the calculation. The school will have to deduct income tax and NICs from the PENP (and pay employer NICs). As is currently the case, statutory redundancy payments are always tax free. The balance of the termination payment should then be taxed in the same way as previously i.e. up to £30,000 can be paid without deductions for income tax and income tax will have to be deducted on the excess over £30,000. No employer or employee NICs will be payable in respect of the balance.

The PENP calculation will have to be performed, irrespective of whether there is a PILON in the contract and, we believe, even in cases where a termination payment is made following an employee's dismissal for gross misconduct (despite the fact that dismissal is without notice).

What else should schools be doing?

Schools will need to make changes to their settlement agreements to reflect these changes.

As there are now no tax advantages in not having a PILON in the employment contract, schools which do not already have them may wish to consider including one. This will give them the right to terminate employment with immediate effect by making a payment of salary in lieu of notice without being in breach of contract.

Preparing for GDPR

The EU General Data Protection Regulation (GDPR) comes into force on 25 May 2018, replacing the Data Protection Act 1998.

The GDPR will require schools to focus more on the legal basis for processing personal data, extend the rights of data subjects (pupils, staff and others), impose greater penalties for non-compliance and will require schools to provide greater information and have more robust policies. Schools need to review what data they process, the legal basis for doing so and update privacy notices, contracts and handbooks and introduce a policy for managing data breaches. They should also be training staff. Breaches of the GDPR can result in huge fines of up to EUR20 million and individuals will have the right to claim compensation for distress.



The government has recently published a data protection toolkit for schools which can be found [here](#).

The toolkit advises/encourages that schools do the following to ensure compliance with the GDPR:

- Raise awareness within the school for staff who come into contact with personal data.
- Create a “data map” – an overview of all the places personal data are stored and used in the school.
- Turn your data map into a data asset register - a framework around which you can document the detail associated with each dataset.
- Understand and document the reasons for processing data.
- Document how long you need to retain information.
- Identify risks which emerge in the light of your data asset register and assess what can be done to eliminate/reduce these using Data Protection Impact Assessments.
- Decide on your Data Protection Officer role.
- Communicate with your data subjects – pupils, staff, parents/carers and ex-pupils.
- Operationalise data protection and keep it living - ensure that data protection and risk management is a core part of decision making and risk management practices.

Compensation increases from 6 April 2018

Unfair dismissal compensation and redundancy pay have increased where the effective date of termination of an employee's employment is on or after 6 April 2018.

The maximum compensatory award for unfair dismissal has increased to £83,682 (up from £80,541) and the maximum amount of a week's pay (used for calculating the unfair dismissal basic award and statutory redundancy payments) has increased to £508 (up from £489).

Injury to feelings awards in discrimination claims also go up for claims presented on or after 6 April. The new bands are as follows:

- A lower band of £900 to £8,600 (for less serious cases).
- A middle band of £8,600 to £25,700 (for cases that do not merit an award in the upper band).
- An upper band of £25,700 to £42,900 (for the most severe cases). In exceptional circumstances, awards can exceed £42,900.

The bands are now reviewed annually in March.



CASE LAW UPDATE

Headteacher's dismissal for failing to disclose relationship with sex offender was justified

In *Reilly v Sandwell Metropolitan Borough Council*, the Supreme Court considered whether the failure by Ms Reilly, a headteacher at a maintained primary school, to disclose to the school governors her relationship with someone who had been convicted of making indecent images of children was a sufficient reason for her dismissal.

Facts

Ms Reilly was appointed as headteacher in 2009. In early 2010, the friend, she had bought an investment property with was convicted of making indecent images of children and forbidden from having unsupervised access to under 18s. This was not a romantic relationship and Riley and her friend did not live together. Ms Reilly took advice from various people before deciding not to disclose the connection with her friend and his offence to her school, understanding that it was not necessary.

When the school became aware of her friendship and her friend's conviction, it dismissed her for gross misconduct on the basis that, given her key role in child safeguarding and protection, she should have known that any concern in this regard should be disclosed. In addition, her 'failure to recant' led the school and governing body to decide that dismissal was the only appropriate sanction.

Ms Reilly claimed unfair dismissal but the employment tribunal found that her dismissal was within the range of reasonable responses open to the school. Whilst there were deficiencies in the appeal process that made her dismissal technically unfair, she was not entitled to any compensation as there was a 90% chance of dismissal if a fair procedure were followed and, in any event, she had contributed 100% to her dismissal.

Decision

Ms Reilly appealed unsuccessfully to the EAT, Court of Appeal and then to the Supreme Court which dismissed her appeal. The court thought that parliament has recognised in the Childcare Act 2006 and the Childcare (Disqualification) Regulations 2009 (see below) that offenders can represent a danger to children both directly and indirectly by operating through those with whom they associate. Her friend was the subject of a recent conviction and his sentence indicated that he was a danger to children. As headteacher, Ms Reilly was likely to know important information about her pupils, including their whereabouts, routines and circumstances at home, and was also likely to be able to authorise visitors to enter the school. Their friendship therefore created a potential risk to the children at the school, which required the assessment of the governors. Ms Reilly's failure to disclose prevented them from having a full and frank discussion about how risks to the pupils might be avoided.

Therefore, the Supreme Court ruled that the employment tribunal was right in concluding that it was reasonable for the school to dismiss her.

Our recommendations

This case highlights the importance of the duty to safeguard pupils in relation to the risks posed not just by offenders themselves but also through others in contact with them. This is particularly the case in schools providing early and/or later years childcare outside of normal school hours, that are covered by the Childcare Act 2006 and Childcare (Disqualification) Regulations 2009 (e.g. schools that have pre-school or after-school clubs for children up to the age of 8).



Safeguarding policies in such schools should already ideally ask staff providing or managing early and/or later years childcare to notify the school if they become disqualified under the 2009 regulations (typically where they, or a person they live with, have committed certain sexual or violent offences). In the light of the Supreme Court's decision, schools may wish to go further and consider updating their safeguarding policies as well to ask staff to disclose any relationships with people who may be disqualified under the 2009 Regulations.

University student fails in negligent teaching claim

University legal teams can breathe a small sigh of relief following the recent High Court judgment in the widely-publicised case of *Siddiqui v University of Oxford*.

Facts

Mr Siddiqui sued the university for negligent teaching on his modern history undergraduate course. He claimed that if he had been better taught, he would have achieved higher than his low 2:1 and would have been admitted to law school in the US and ultimately gone on to a more successful and lucrative legal career.

Decision

The High Court found against Mr Siddiqui on every aspect of his claim.

Firstly, it decided that Oxford had not delivered the course negligently. Mr Siddiqui had failed to show that his course had been under-resourced, as the same amount of teaching had been delivered to his year group compared to others, albeit his teacher was under more pressure owing to staff shortages. Secondly, even if Mr Siddiqui had shown negligent teaching, it was generally difficult (and impossible in his case) to show that this caused him to perform measurably worse in his exam. There were other factors that could have affected his performance and, on a practical level, his exam scripts had long been destroyed. In addition, the court found that he had not shown that his exam results had contributed to his failure to get into US law school or to his career success.

Implications

The case shows that it will be difficult for students to successfully claim compensation for underperformance allegedly caused by negligent teaching except where there has been a clear case of operational negligence, such as being taught the wrong course content or set the wrong exam. The quality of teaching will always be just one of many factors that can contribute to underperformance in exams.

That said, whilst it may be legally difficult for students to successfully bring these sorts of claims, it remains to be seen whether students will actually be dissuaded by this judgment, particularly when they are investing heavily in their University education.

Mr Siddiqui is currently seeking permission to appeal the decision.



Enhancing maternity pay but not shared parental pay is not direct sex discrimination

Schools which enhance pay during maternity leave but not during shared parental leave are not directly discriminating against men.

Facts

In *Capita Customer Management Ltd v Ali*, Capita enhanced maternity pay but not shared parental pay. Women on maternity leave received 14 weeks' full pay, followed by 25 weeks' basic rate Statutory Maternity Pay. When Mr Ali's daughter was born, he took two weeks' ordinary paternity leave and received full pay. His wife was diagnosed with post-natal depression and returned to work (with another employer). Mr Ali wished to take further leave to look after his daughter. Capita told him he could take shared parental leave but they would only pay him at the statutory rate of Shared Parental Pay.

Mr Ali claimed direct sex discrimination, arguing that he should receive the same pay as a woman on maternity leave.

Decision

The employment tribunal upheld his claim but the Employment Appeal Tribunal (EAT) subsequently overturned the tribunal's decision.

When comparing the treatment of a man and a woman in a case of direct sex discrimination, there must be no material difference between their circumstances. However, the EAT ruled that the circumstances of a woman on maternity leave are different to those of a man on shared parental leave. The purpose of maternity leave is to enable the mother to recover from giving birth and to bond with her child, whereas the purpose of shared parental leave is childcare. The correct comparator for Mr Ali was a woman on shared parental leave. As a woman on shared parental leave would have been paid the same as him, there was no direct discrimination.

Even if the correct comparator was a woman on maternity leave, Capita's more favourable treatment of women on maternity leave was special treatment afforded in connection with pregnancy/childbirth which has to be disregarded when looking at whether a man has been discriminated against.

Implications

Schools may enhance pay for women on maternity leave without having to enhance pay for employees on shared parental leave. However, they must pay men and women on shared parental leave the same – so they cannot enhance pay for women on shared parental leave but not men.

The EAT suggested that after 26 weeks the purpose of statutory maternity leave might change from allowing the mother to recover from the birth and bond with her child to caring for her child. At that point it considered that it may be possible to compare a man's treatment while on shared parental leave with a woman's treatment while on additional maternity leave. If that's right, it is possible that schools who enhance maternity pay during additional maternity (i.e. after 26 weeks' leave) could still face claims of direct sex discrimination if they do not enhance pay during shared parental leave. However, European case law suggests that that may not be right and that the whole of the 52 weeks' maternity leave provided in the UK is for health and safety purposes.



The same EAT heard an appeal in another case, *Hextall v Chief Constable of Leicestershire*, where it was argued that cases like this could give rise to indirect sex discrimination. The employment tribunal rejected the indirect discrimination claim but the EAT ruled that the employment tribunal's judgment contained a number of errors. It sent the case back to the employment tribunal to consider the indirect discrimination claim again. The question of whether enhancing maternity pay but not share parental pay gives rise to indirect sex discrimination therefore remain unresolved for now.

Employee with “pre-cancerous lesion” deemed disabled

An employee with a “pre-cancerous lesion” had skin cancer and was therefore deemed to be disabled.

Facts

In *Lofty v Hamis (t/a First Café)*, Mrs Lofty was dismissed following absences from work, at least some of which related to treatment for her condition. She claimed disability discrimination, arguing that that she was suffering from cancer and was therefore deemed to be disabled under the Equality Act 2010.

There was a variety of medical evidence about her condition, lentigo maligna. It was described both as a “pre-cancerous” lesion which could result in skin cancer and a “cancer in situ” (a type of the earliest stage of a skin cancer).

The employment tribunal concluded she did not have cancer within the meaning of the EqA 2010 and was not therefore disabled. It paid particular attention to the parts of the medical evidence using the term “pre-cancerous” and to the evidence that the condition was not (yet) invasive.

Mrs Lofty appealed and the Employment Appeal Tribunal (EAT).

Decision

The EAT overturned the tribunal's decision and ruled that Mrs Lofty was disabled and so could bring a disability discrimination claim.

The tribunal had not paid sufficient attention to the parts of the evidence indicating that Mrs Lofty had an "in situ" melanoma, the early stages of skin cancer where cancer cells were present in the top layer of skin. The EAT noted that parliament had chosen not to differentiate between invasive and other forms of cancer.

Implications

Employees suffering from cancer are deemed disabled from the point of diagnosis, without having to satisfy the usual test of disability under the Equality Act 2010. Schools should look critically at medical evidence about disability and should not assume that a condition described as “pre-cancerous” is not in fact cancer. As the claimant in this case argued, the term "pre-cancerous" can simply be medical shorthand for a particular stage in the development of cancer and does not necessarily mean that the person is not already suffering from cancer.



SAFEGUARDING UPDATE

Response to the consultation on the “*Working Together to Safeguard Children*” guidance published

The outcome of the consultation on the “*Working Together to Safeguard Children*” guidance was published in February 2018. The consultation sought views on proposed revisions to the statutory guidance, which deals with what is expected of organisations to safeguard and promote the welfare of children, following the legislative changes introduced through the *Children and Social Work Act (2017)*.

Key aspects of the *Children and Social Work Act (2017)* for schools are:

- The introduction of statutory relationships education in primary schools and relationship and sex education to secondary-aged pupils.
- The ending of Local Safeguarding Children Boards (in their current form).
- The exclusion of education (schools) from being a 'safeguarding partner' (in the *Children and Social Work Act (2017)* the safeguarding partners are the local authority, the local clinical commissioning group and the local police chief officer.)

The government will now review the guidance and statutory instruments in the light of the consultation findings and publish an updated version of ‘*Working Together to Safeguard Children*’ although we don’t yet know when this will be.

The response notes that local areas will have twelve months from the date of commencement to develop and publish their arrangements, and a further three months to implement them in full. We’ll keep you posted on this and report on the new guidance once it is published.

Consultation on “*Keeping children safe in education*” has closed

To reflect the changes being made to *Working Together to Safeguard Children*, the government has suggested changes to *Keeping children safe in education* (KCSIE), the statutory guidance to which all schools and colleges must have regard when carrying out their duties to safeguard and promote the welfare of children. Any resulting revisions to *Working Together to Safeguard Children* will be reflected in KCSIE.

The Government consultation on and the proposed changed to KCSIE (plus a new departmental non-statutory advice document covering sexual violence and sexual harassment between children in schools and colleges) closed in February 2018. The results of the consultation and the department's response, alongside updated KCSIE guidance, should be published soon (summer 2018).

Any Suggestions?

If you have any suggestions about what you would like us to include in future editions, please get in touch with Simon Henthorn on +44 (0)207 329 9090 or shenthorn@doyleclayton.co.uk.

