



DOYLE CLAYTON
Workplace Lawyers

Education Bulletin

Spring 2020

Welcome to the Spring term edition of our Education Bulletin!

This edition focuses on three key developments:

1. **Brexit update – what do we know now?**
2. **Changes to the law on mental capacity - how does it apply to schools?**
3. **Case law update - how much untaken holiday can a sick employee carry over?**

We also highlight some Tier 4 changes and our latest news.

1. **Brexit update – what do we know now?**

A lot has changed since our last newsletter, including yet another general election. As the Conservative majority means that MPs have backed Boris Johnson's Brexit Withdrawal Agreement Bill, the UK will almost certainly leave the EU with a deal on 31 January 2020.

This means we now have a little more clarity on the rights of EU nationals and their families who are already in the UK, plus those who wish to arrive in the UK after this date. For any schools that employ EU staff or have EU pupils, we have set out a summary of what you need to know.

EU nationals who are already living in the UK on 31 January 2020

There is no immediate change to the rights of EU nationals and their family members who are already living in the UK. They can continue to live, work and study in the UK. However, EU nationals and their families who wish to continue living here beyond 31 December 2020 will need to apply for either settled status or pre-settled status under the EU Settlement Scheme (**EUSS**). They must apply for this before 30 June 2021.

EU nationals apply for this online and the EUSS is free and, in most cases, quick and straightforward. Details are on the Gov.uk website here: <https://www.gov.uk/settled-status-eu-citizens-families>

Under the EUSS:

- EU nationals who have been living in the UK for five years can apply for settled status, if they do not have serious criminal convictions and/or excessive absences from the UK. A holder of settled status has no restrictions on their stay in the UK and won't need to apply for a visa to live, work or study here.
- EU nationals who have not lived in the UK for 5 years can apply for pre-settled status to allow them to live, work or study in the UK without restriction. They can then apply for settled status after living in the UK for 5 years.

EU nationals who arrive in the UK between 1 February 2020 and 31 December 2020

During the Brexit transition period, expected to last until at least 31 December 2020, EU nationals and their family members may still travel to the UK without restriction, as they do now. EU nationals and their families who arrive before the end of the transition period who wish to continue living here after it has ended will also need to apply for settled or pre-settled status under the EUSS. They must also apply for this before 30 June 2021.



Checking the right to work of EU employees

Until 30 June 2021, EU nationals can prove their right to live, work and study in the UK in the same way as they do now - by producing their passport or identity card.

From 1 July 2021, an EU passport or ID card will not be valid proof of a right to work or study in the UK. Instead, employers and education institutions will need to check that an EU national has pre-settled to settled status, or another kind of visa.

Employing teachers from the EU

If we leave the EU with a deal, as expected, then schools should continue to use the existing system to check for sanctions on teachers imposed by the EU until 31 December 2020.

Schools must continue to carry out the same safer recruitment checks on all job applicants, including those who have lived or worked outside the UK. For applicants who have lived or worked outside the UK, schools must also make any further checks they think are appropriate to identify any relevant events that occurred outside the UK. For those applying for teaching roles, these extra checks may include information about their past conduct, such as documents issued by the relevant teaching regulator abroad.

Teachers currently in England from the EU who already have qualified teacher status (QTS) will still hold QTS after Brexit. If we leave the EU with a deal, then there will be no change to QTS arrangements for teachers from the EU until at least 31 December 2020.

EU nationals arriving in the UK from 1 January 2021

The Government has proposed that from 1 January 2021, EU nationals who wish to work or study in the UK will need a visa to do so, in the same way as non-EU nationals.

We do not yet know exactly what the new immigration system will look like. In December 2018, Theresa May's government proposed a new skills-based immigration system based on our current visa regime, where people wishing to work in the UK need a job with a licensed UK sponsor before they can apply for their work visa. Boris Johnson's government has promised a firmer and fairer "Australian-style points based immigration system". The UK already has a points-based system for work and study visas, but this does not assess applicants' education or professional qualifications or where in the UK they will work. We will hopefully hear details on the proposed new visa system in the coming months, so that employers can start to prepare for this.

What should schools be doing now?

If you have any staff who are from the EU or who are family members of EU nationals, you do not need to check their right to work again. You don't need to ask staff to apply under the EUSS but if they have any questions about their status then you can encourage them to apply to the EUSS by 30 June 2021 to ensure they have proof of their right to be here.

In the meantime, as securing a UK work visa is likely to require sponsorship from a licensed UK sponsor, schools that do not already have a sponsor licence might wish to consider applying for one in readiness, particularly if you currently rely on EU staff or enrol EU students.



2. Changes to the law on mental capacity - how does it apply to schools?

In a landmark case, the Supreme Court has ruled that parents of 16-17 year olds who lack mental capacity cannot consent, on their child's behalf, to living or teaching arrangements that mean they are subject to continuous supervision and control and not free to leave – even if these are in place to support the child. Schools and colleges with students aged 16 and 17 who have a learning disability need to be aware of this change to the law on mental capacity, and to implement new guidance that will be issued later this year.

What do we mean by “mental capacity”?

The phrase mental capacity is used in law to refer to the ability to make a decision. A person is said to lack capacity to make a particular decision if they are unable to make that decision for themselves.

The principles that govern the assessment of mental capacity, and the processes by which decisions should be made for people who lack capacity, are set out in the *Mental Capacity Act 2005 (MCA)*.

A number of principles underpin the MCA:

- You must assume a person has capacity unless it is established that they lack capacity
- You should not treat a person as unable to make a decision unless all practicable steps to help them to do so have been taken, without success
- You should not treat a person as unable to make a decision merely because they make an unwise decision
- An act done or decision made under the Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests
- Before the act is done or decision made, you must have regard to whether the purpose for which it is needed can be achieved as effectively in a way that is less restrictive of their rights and freedom of action.

Determining whether someone has capacity

Before doing an act or making a decision relating to an individual's care and treatment, the person doing so on that individual's behalf must first take reasonable steps to establish whether the individual has capacity in relation to the matter in question.

An individual is said to lack capacity in relation to a particular matter if, at that particular time, they are unable to make a decision for themselves in relation to that matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

There are two elements to the test:

- the 'diagnostic' element - does the person have an impairment of, or a disturbance in the functioning of, the mind or brain?
- the 'functional' element - does that impairment or disturbance render the person unable to make the decision for themselves?

This test must be applied to every decision an individual has to make. An individual can be determined to have or lack capacity in relation to one decision but not another. The diagnostic element of the test is often relatively straightforward and, in many cases, not in dispute.

The more complicated element of the test is usually the functional element. An individual is said to be unable to make a decision for themselves if they are unable to:

- **Understand** the information relevant to the decision
- **Retain** that information



- **Use or weigh** that information as part of the process of making a decision or
- **Communicate** their decision.

The assessment of a person's capacity to make a decision should be made by the person who is directly concerned with the individual at the time the decision needs to be made. This means that assessments can be made by different people for different decisions, including teachers and school staff.

Some young people may lack capacity owing to their special educational needs. Whilst there is always a presumption in favour of capacity, some students may at times lack the capacity to make decisions about their day to day school life, as well as more important decisions regarding their residence and care arrangements.

What has changed?

In the recent case of *D (a child)*, the Supreme Court decided that the parents of a 16 or 17 year old could not consent to their child being deprived of his liberty.

This follows on from a case in 2014, where the Supreme Court decided that a person was deprived of their liberty if they were subject to "*continuous supervision and control*" and "*not free to leave the place where they were living*". It does not matter whether restrictive arrangements have been put in place to meet the child's health, social or educational care needs or to safeguard them - this still amounts to a deprivation of their liberty and the procedural safeguards should apply.

D was 16 and was diagnosed with attention deficit hyperactivity disorder, Asperger's syndrome and Tourette's syndrome, plus a mild learning disability. He was being cared for in a residential placement with locked doors, which was arranged by the local authority. He was therefore subject to continuous supervision and control and not free to leave.

The Supreme Court had to decide whether D's parents could consent to this deprivation of liberty on his behalf. The Court decided by a majority of 3 to 2 that D's parents could not consent on his behalf and therefore the deprivation of his liberty needed to be authorised.

How does this impact schools?

If a school or college has any 16-17 year old students who lack capacity and who are subject to a high degree of supervision and control, including under an education, health and care plan (EHCP), this can amount to a deprivation of the student's liberty. In such a case, the student's parents cannot consent to this deprivation on their behalf and so the school will need to put safeguards in place to ensure the arrangement is lawful.

To reflect this significant change, new Liberty Protection Safeguards (LPS) are due to come into effect in October 2020. Once introduced, any deprivations of liberty for anyone aged 16 or over will be authorised administratively by local authorities, whereas now the only means of authorisation is by an order from the Court of Protection. This should make authorising the deprivation quicker and simpler.

LPS could apply to 16-17 year olds with special educational needs and disabilities in a range of settings, including education institutions and also domestic settings such as supported living arrangements.

Groups who may go on to require LPS authorisation include those with global developmental delay, autism and learning disabilities.

What will the Liberty Protection Safeguards scheme look like in England?

Ofsted and CQC will be responsible for monitoring and reporting on the LPS scheme and will have the power to visit hospitals, care homes, children's homes and family centres, residential schools and



colleges. They can also interview relevant people and inspect records and will be required to report on the scheme.

Under the LPS, the agency responsible for authorising arrangements that give rise to a deprivation of liberty will be called the “responsible body” and will replace the “supervisory body” under current arrangements. This will vary but in many cases will be the local authority that is meeting the person’s special educational needs.

New regulations expected

The Government will draft a series of regulations and a code of practice which it will consult on setting out the detail of how the LPS will work. We will report on these in future editions of this bulletin, so watch this space!

If you would like help with understanding your obligations under mental capacity law, please contact Amara Ahmad in the Doyle Clayton education team.

3. How much untaken holiday can a sick employee carry over?

Employees who are on long term sick leave can pose a number of issues for schools, including what holiday pay they are due whilst on sick leave. A recent European Court of Justice case has looked at how much holiday employees on long term sick leave can carry over from one holiday year to the next.

The court confirmed that the obligation to allow sick workers to carry over untaken holiday in a holiday year only applies to the four-week entitlement guaranteed by European law (called the Working Time Directive), as opposed to the 5.6 weeks guaranteed by UK law.

In two Finnish cases, the employees were unable to take their holiday as they were on sick leave. Their employers allowed them to carry over untaken holiday out of their four-week entitlement guaranteed by the Working Time Directive. However, the employers refused to allow the sick employees to carry over additional holiday provided under a national collective agreement.

The employees brought claims arguing that this breached EU law and the case was referred to the European Court of Justice, which ruled this did not breach the Working Time Directive. Where national laws provide holiday entitlement over and above the minimum required by the Working Time Directive, they can also determine the conditions on which it is granted and lost. The employers were therefore entitled to refuse to allow the employees to carry over more than four weeks’ holiday.

In the UK, the Working Time Regulations 1998 give workers an extra 1.6 weeks’ holiday on top of the four-week minimum. The Regulations also allow workers to carry this extra 1.6 weeks over to the next holiday year, but only if this is agreed in a relevant agreement such as the employment contract or a collective agreement.

What does this mean for schools?

If your employment contracts say that your staff can carry over holiday then you will have to allow your employees to carry over their full holiday entitlement if they are prevented from taking it because of sick leave. However, if your contracts or collective agreements do not allow carry over and an employee is unable to take their holiday owing to sickness absence, this case makes it clear that schools do not have to allow them to carry over more than four weeks’ holiday.



Therefore, if you have any employees on long term sick leave you should check their employment contract and any collective agreement that applies to them, to see what they provide about holiday carry-over.

As a reminder, previous case law also provides a further limit on carry-over of the basic four-week holiday entitlement. Holiday not used up within 18 months of the end of the leave year in which it accrued is lost.

Case names: *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry* and *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry*

Student visas – latest Tier 4 updates affecting schools

Attendance Monitoring

Throughout 2019, the Tier 4 Policy Team engaged extensively with key stakeholders in the international student sector on changes to a Tier 4 sponsor's attendance monitoring obligations. Currently a Tier 4 sponsor must report a student who misses 10 consecutive expected contact points.

The proposed changes mean that rather than a 'one size fits all' approach, different attendance monitoring applies to different levels of study. Independent schools who sponsor Tier 4 (Child) students will need only to follow the attendance requirements in Department of Education publication, *School Attendance: Guidance for Maintained Schools, Academies, Independent Schools and Local Authorities*. Colleges and Universities who sponsor Tier 4 (General) students below degree level will in future need to take appropriate action/report the student if attendance drops to a certain percentage of the minimum of 15 hours classroom based study.

New Attendance Monitoring guidance is expected to be published ready for the start of the next academic year 2020/2021. However, the Tier 4 Policy Team promised a 12-month transition period.

Changes to the nationalities who are required to provide evidence of funds and qualifications

A Tier 4 visa is the main visa used by non-EU nationals for studying in the UK. An applicant applying for either a Tier 4 (Child) or Tier 4 (General) visa will need to provide various documents and information to support their application. Following the latest annual review of low-risk nationalities, the list of countries whose nationals enjoy easier documentary requirements has been updated.

For Tier 4 Sponsors concerned about visa refusal rates for annual Basic Compliance Assessment purposes, a country's inclusion in Appendix H (the list of low-risk countries) can provide a helpful steer on where to target your international student recruitment efforts. From 6 April 2019, nationals of the following countries can benefit from the easier documentary requirements when applying for a Tier 4 student visa to study in the UK:

- Brazil
- Kazakhstan
- Mauritius
- Oman
- Peru
- Tunisia.



Argentina, the Maldives and Trinidad and Tobago have been removed from the list, which means that nationals of these countries will have to provide evidence of their money and qualifications when applying for a Tier 4 visa to study in the UK.

Tier 4 (Child) Visas and evidence of funds

There have also been changes to the Tier 4 (Child) visa route – used by students from outside the EU who are aged 4-17 and wish to study at a UK independent school. Under new rules, visa applicants who need to evidence funds can confirm funds are held or being provided to them by a foster carer or close relative.

Schools that have a Tier 4 sponsor licence should still exercise caution when recruiting students from certain high-risk countries. A recent investigation by the Times newspaper found that independent schools were being targeted to traffic Vietnamese children as young as 15 to the UK through the Tier 4 student visa route, only to disappear upon arrival in the UK. Sponsors of children under the age of 18 therefore have additional duties to ensure that there are suitable care arrangements in place for them in the UK. Tier 4 Sponsors could face a compliance visit if there are any reasons for the Home Office to have child safeguarding or immigration abuse concerns.

Doyle Clayton news

A warm welcome to Amara Ahmad, our new SEN specialist

Amara Ahmad has joined Doyle Clayton's education team as a Senior Associate. Amara is an expert in education law and the laws relating to keeping children and young people safe. She has 13 years' experience in advising parents, students and schools on all aspects of education law, with a keen interest in special educational needs and discrimination cases.

Amara also advises on mental capacity law for young people and the impact of mental capacity law on special educational needs in schools. Amara also has a wealth of experience in social care and family law, which often overlaps with education issues.

Amara has advised schools on their behaviour, discipline and anti-bullying policies and school exclusion matters, particularly where there are disability rights issues.

IR35 training

We are also busy delivering bespoke IR35 training to bursars at seminars in February and March. If you would like to receive any information about our IR35 support, including training, please let us know.

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