



**DOYLE CLAYTON**

Workplace Lawyers

**Education Bulletin**  
**January 2019**

Welcome to the spring term edition of our Education Bulletin! We publish a bulletin each term covering news and topics that we hope will be of interest to schools and colleges. The bulletin includes recent and upcoming changes in the law, a summary of some cases that are relevant to schools and colleges plus any safeguarding developments to make sure that you are kept up to date.

## OUR NEWS

### Legal 500

We are delighted that our education team has been ranked in the Legal 500's top tier for its legal advice in the education sector. Simon Henthorn has also been ranked as a "Leading Individual" and both Liz Timmins and Anna Blackden have been named as recommended lawyers.

In addition, both Simon Henthorn and our education team have been shortlisted in the 2019 Legal 500 awards. Simon has been nominated personally for the Public Sector Individual (London) award and the education team has been nominated for the second year in a row for the Public Sector Firm (Specialism) award.

### Conferences

Simon Henthorn and Liz Timmins exhibited at the IAPS annual conference at the Celtic Manor on 26-28 September 2018 where they gave a legal update on equality issues and Brexit.

Simon Henthorn and Anna Blackden exhibited at the ISBA HR conference on 13 November 2018 where Anna gave a talk on recruiting international teachers.

If you would like copies of our slides please let us know.

### Immigration Masterclass

The education immigration team gave a talk on "Lessons to be learnt in Tier 4" at our Immigration Masterclass on 4 October 2018. It was great to see some of you there!

### "Forcible retirement" at Oxford University

We have had a further letter published in the Times concerning the lawfulness of Oxford University's mandatory retirement age. Please click on the link below to read Simon's letter under the title "Age Discrimination".

<https://www.linkedin.com/feed/update/activity:6486999671905546241/>

## IN THE NEWS

### Challenging an Ofsted report

The Court of Appeal has ruled (*Ofsted v R (Durand Academy Trust)*) that the fact that Ofsted's procedures do not permit a school to challenge the findings of an Ofsted report does not render the report invalid. An earlier decision of the High Court ruled that it did. The Court of Appeal considered that sufficient safeguards protecting schools are built in to the process before an Ofsted report is finalised. These entitle a school to raise issues with the conduct of the inspection, and then to escalate those to a step 1 complaint procedure. Schools are also able to raise concerns at the draft report stage. There are also additional quality assurance measures that have to be implemented before a



school can be judged inadequate, including the requirement that such as judgment must be authorised by or on behalf of the Chief Inspector.

### **Payslips**

From 6 April 2019, the right to receive an itemised pay statement is being extended to all workers. From that date schools will have to provide a payslip to all workers (not just employees). In addition, payslips for hourly paid workers will have to include details of the number of hours worked. Schools should ensure that they are in a position to provide their payroll departments and providers with the necessary information to enable them to do this.

### **Auto-enrolment**

From 6th April 2019, minimum pension contributions under the pensions auto-enrolment regime will rise to 8% of qualifying earnings. Schools will have to pay at least 3% as an employer contribution.

### **Termination payments**

HMRC's plans to charge employer National Insurance Contributions on termination payments to the extent that they exceed £30,000 have been delayed once again. The charge, which was due to come into force from 6 April 2019, will not now be introduced until 6 April 2020.

### **National Minimum Wage increases**

The National Living Wage (for workers aged 25 and over) will increase from £7.83 an hour to £8.21 from 1 April 2019. There will also be increases in the National Minimum Wage, with the rate for 21 to 24 year olds increasing from £7.38 to £7.70 per hour, for 18 to 20 year olds increasing from £5.90 to £6.15 per hour and for 16 to 17 year olds increasing from £4.20 to £4.35 per hour. The apprenticeship rate will increase from £3.70 to £3.90 per hour.

### **Parental Bereavement Leave**

The Parental Bereavement (Leave and Pay) Act 2018 received Royal Assent on 13 September 2018. The Act introduces a right for bereaved parents of children under 18 to take two weeks' paid bereavement leave from work at the prescribed rate. The right will come into force in 2020 and will apply to a wide category of parent, extending beyond biological and adoptive parents to anyone who was acting as the child's parent before the child died, including step parents, foster parents, grandparents, other relatives or family friends.

### **Ethnicity pay gap reporting**

The Government is undertaking a consultation on proposals requiring employers to report on their ethnicity pay gap.

The Government sought views on:

- The main benefits for employers in reporting their ethnicity pay information
- What pay information employers should report
- What supporting or contextual data (if any) employers should disclose to help ensure ethnicity reporting provides a true and fair picture
- Whether an employer that identifies a pay disparity should be required to publish an action plan for addressing the disparities.

The Government recognises the difficulty employers face in collecting ethnicity data including:

- Individuals are not legally obliged to disclose their ethnicity information

- Employers who do collect this information may use different classifications from one another
- Ethnicity data will be “special category personal data” for GDPR purposes and so employers will need to comply with data protection legislation when handling it and ensure that individuals cannot be identified from the pay data published.

The Government considers that employers with fewer than 250 employees should not be in scope but has sought views on whether the threshold should be higher or lower.

The deadline for responding to the consultation was 11 January 2019 so we await the Government’s response to this.

## **CASE LAW UPDATE**

### **Discrimination arising from disability: causation test satisfied by chain of events**

In *Sheikholeslami v The University of Edinburgh*, the Employment Appeal Tribunal considered the causation test in a claim for discrimination arising from disability.

#### **Facts**

Professor Sheikholeslami was employed as Professor and Chair of Chemical Process Engineering. She raised several complaints about her treatment by the University which ultimately led to her being signed off work sick with anxiety and depression. She asked to be transferred to another department because of what she perceived to be hostility from colleagues, but the University refused. It then dismissed her as her work permit was expiring and it could not extend it if she refused to return to the role for which it had been granted.

She claimed discrimination arising from disability, arguing that her dismissal was because of something arising in consequence of her disability. The employment tribunal concluded that her refusal to return to her previous role (which meant that her work permit could not be extended) was not because of her disability but because she had been treated badly by her department. It therefore rejected her claim and she appealed to the Employment Appeal Tribunal (EAT).

#### **Decision**

The EAT ruled that the employment tribunal had asked itself the wrong question when considering whether her dismissal was caused by her disability. It had asked itself whether her refusal to return to her role was because of her disability or because of some other reason, such as her having been treated badly. However, the test is not a binary question and both reasons might be in play if her disability caused her to experience anxiety and an inability to return to the place where she perceived the mistreatment and hostility to be located. The employment tribunal had applied too strict a test. It should have asked whether her refusal to return was “in consequence of” (rather than caused by) her disability, which is a much wider test potentially involving more than one link in the chain of consequences.

#### **Implications for schools**

Schools should exercise caution when dealing with disabled employees. Even where on the face of it there appears to be no link between the school’s actions and the employee’s disability, the loose causation test may result in a link being established. As a result, schools should always consider how their actions can be justified as they will then have a defence to claim of discrimination arising from disability.

## Successful appeal meant no dismissal

In *Patel v Folkestone Nursing Home Ltd*, the Court of Appeal considered whether an employee who had successfully exercised a contractual right of appeal could still claim unfair dismissal.

### Facts

Mr Patel worked as a care assistant. He faced disciplinary charges of being asleep on duty and falsifying residents' records. Following a disciplinary hearing, both charges were upheld and he was dismissed for gross misconduct. His employer informed him that it would provide details of the second offence to the Disclosure and Barring Service (DBS).

Mr Patel exercised his contractual right of appeal. His employer informed him by letter that his appeal had been successful. The letter dealt only with the first offence, finding that he was actually on a break when he was asleep. It made no mention of the other offence. Mr Patel refused to return to work as he had not been cleared of the second offence and he claimed unfair dismissal.

The tribunal considered whether there was a live dismissal when he brought his claim so that he could claim unfair dismissal. The Employment Appeal Tribunal (EAT) overturned the employment tribunal's decision. Mr Patel appealed to the Court of Appeal.

### Decision

The Court of Appeal agreed with the EAT that there was no live dismissal. If an employee has a contractual right of appeal, it is implicit in the contract that if an appeal is pursued successfully, then the employment relationship is treated as having remained in existence throughout. By including a contractual right of appeal, the employer provides the employee with an opportunity to overturn the decision to dismiss. A successful appeal does not result in the employee having a choice whether to return or not. Instead, both the employer and the employee are contractually bound to treat the dismissal as having no effect.

### Implications for schools

In the absence of any provision to the contrary, the effect of an employee successfully exercising a contractual right of appeal is that they are regarded as never having been dismissed. They will not therefore be able to claim unfair dismissal. Instead, they will be entitled to back pay and to the benefit of all other contractual terms and continuity of employment. Whilst it is generally accepted that it makes no difference whether the right of appeal is contractual or non-contractual, there is no binding case law to that effect.

Schools should ensure that they conduct the appeal process fairly and that they consider all of the offences for which an employee was dismissed when deciding whether to uphold an appeal.

## When is a resignation letter not a resignation?

In *East Kent Hospitals University NHS Foundation Trust v Levy*, the Employment Appeal Tribunal considered whether an employee who gave written notice to her employer had resigned from her employment.

### Facts

Ms Levy was employed as an administrator in the hospital's records department. She had been offered another role with the Trust, subject to pre-engagement checks. Following an altercation with a colleague, she handed a letter to the operations manager which stated "Please accept one month's

notice from the above date.” The Trust withdrew the job offer as a result of her failing to satisfy the pre-engagement checks and she sought to withdraw her resignation. The Trust refused and she claimed unfair dismissal.

### **Decision**

The employment tribunal rejected the Trust’s argument that it had not dismissed her as she had resigned. It considered that her letter of resignation was unclear and ambiguous as it did not identify what she was resigning from (her current role in the records department or her employment with the Trust). Given the ambiguity, her words had to be construed in context. Against a background of her unhappiness in her role, a conditional job offer in another department, her being unaware that her absence record to date might affect her job offer and her need to support her family, a reasonable observer would conclude that she had informed the operations manager of her intention to accept a conditional offer of a new role. It was not a notice of termination.

The Employment Appeal tribunal upheld the employment tribunal’s decision.

### **Implications for schools**

Schools should ensure that if there is any ambiguity in an employee’s resignation letter they seek to clarify with the employee exactly what they are intending. Case law already indicates that an employer should not take at face value a resignation given orally in the heat of the moment and should instead give the employee a reasonable opportunity to change their mind. The employment tribunal in this case suggested that employers may similarly need to exercise caution where notice is given hastily in writing.

If an employee asks to withdraw their resignation, the school will first of all need to consider whether it is a valid resignation. If it is, then the school is not obliged to agree to the withdrawal. However, where no valid notice is given, there is in effect no notice to withdraw and so a refusal will mean that the employee has been dismissed and will be able to claim unfair dismissal.

### **Whistleblowing: individual employees liable for dismissal**

In *Timis and Sage v Osipov*, the Court of Appeal considered whether individual employees were personally liable for their part in dismissing an employee on whistleblowing grounds.

#### **Facts**

Mr Osipov made a number of protected disclosures which led to Mr Timis instructing Mr Sage to dismiss him. Mr Timis and Mr Sage were both directors of International Petroleum Limited (IPL), Mr Osipov’s employer. Mr Osipov brought a claim for unfair dismissal against IPL and for detrimental treatment against Mr Timis and Mr Sage on grounds of whistleblowing.

The employment tribunal upheld his claims and awarded him over £1.7m in compensation to be paid by IPL, Mr Timis and Mr Sage on a joint and several basis. IPL became insolvent, leaving Mr Timis and Mr Sage to foot the bill. Mr Timis and Mr Sage appealed unsuccessfully to the Employment Appeal Tribunal and they then appealed to the Court of Appeal. They argued that the whistleblowing legislation does not permit an employee to bring a detrimental treatment claim where the detriment relied on is dismissal. Instead the employee can only bring an unfair dismissal claim against the employer.



## Decision

The Court of Appeal dismissed the appeal. An individual worker can be liable for an employee's dismissal via a detrimental treatment claim. When Parliament decided that workers should be personally liable for treating a co-worker detrimentally because of whistleblowing, it could not have intended that they should not be liable if the detriment amounts to dismissal. Although the legislation states that an employee cannot bring a detrimental treatment claim where the detrimental treatment relied on is dismissal, that only prevents them bringing a claim against their employer, where the claim should instead be brought as one of unfair dismissal.

The Court of Appeal went on to express its view that an employee can in principle claim dismissal losses where prior detrimental treatment on whistleblowing grounds causes a later lawful dismissal, although the usual rules about remoteness and quantification of such losses will apply.

## Implications for schools

The decision has serious ramifications for schools and staff involved in dismissing employees in whistleblowing cases. Schools should make sure that they train staff so that they recognise whistleblowing and do not victimise a colleague who has blown the whistle. They should also revisit their whistleblowing policies to see if any guidance needs updating.

There are a number of reasons why an employee dismissed on whistleblowing grounds may choose to bring a claim for detrimental treatment against a co-worker, in addition to a claim for unfair dismissal against their employer:

- It is possible to obtain compensation for injury to feelings (which is not available in a claim for unfair dismissal)
- The burden of proof is easier to satisfy in a detriment claim. The claimant only needs to show that their whistleblowing disclosure materially influenced their colleague's treatment of them. By contrast, in an unfair dismissal claim they need to show that whistleblowing was the reason or principal reason for their dismissal
- It does not matter that the employer will normally be the one with deeper pockets, as employers will be vicariously liable for detrimental treatment meted out by their employees and workers (unless they can show that they took reasonable steps to prevent their unlawful conduct). This means that employers can be held liable, via the back door, for an employee's dismissal (and the losses flowing from it) even where the employee is unable to satisfy the higher burden of proof for unfair dismissal. They could also be on the hook for an injury to feelings award.

## Implied term prevented employer dismissing employee whilst receiving long-term disability benefits

In *Awan v ICTS UK Ltd*, the EAT considered whether to imply a term into an employee's employment contract which prevented the employer dismissing him on grounds of incapacity whilst he was entitled to long-term disability benefits.

### Facts

Mr Awan's contract provided that after six months' absence on sick leave he was entitled to disability benefits. He would be paid two thirds of his salary until he returned to work, retired or died. It also provided that his employer could terminate his employment by giving notice.



His employer terminated his employment on grounds of incapacity. Mr Awan's claims for unfair dismissal and disability discrimination were rejected by the employment tribunal. It ruled that his contract entitled him to long-term disability benefits but it refused to imply a term that ICTS could not dismiss him on grounds of incapacity whilst he was entitled to those benefits. As there was an express contractual term which allowed ICTS to terminate by giving notice, it considered that it could not imply a term which contradicted that express term.

Mr Awan appealed to the Employment Appeal Tribunal.

### **Decision**

The EAT considered that the terms of the contract were inherently contradictory. The whole purpose of providing long-term disability benefits would be defeated if ICTS could simply terminate Mr Awan's employment for incapacity. It was therefore possible for it to imply a term that ICTS would not dismiss Mr Awan whilst he was entitled to long-term disability benefits.

As a result, his dismissal was in breach of contract and whilst this did not automatically mean that his dismissal was unfair, a breach of an implied term of this sort was a highly relevant factor when assessing fairness. The tribunal's finding that the dismissal was fair and not discriminatory (as it was justified) could not stand and the EAT sent the case back to a different tribunal to consider these issues.

### **Implications for schools**

Schools need to be careful when dismissing an employee who is entitled to long-term disability benefits. A dismissal in breach of an implied term that they will not dismiss for incapacity whilst the employee is entitled to disability benefits is likely to be unfair and discriminatory, as well as being in breach of contract. Compensation for such claims would include the lost disability benefits and so could be very costly.

Whether a court will imply a term preventing dismissal on grounds of incapacity in such circumstances will depend on how the contract is drafted. A court will generally not imply a term which contradicts an express term but may be prepared to do so if the contractual terms are contradictory. Schools that want to be able to terminate employment on incapacity grounds notwithstanding the employee's entitlement to long-term disability benefits will need to make it very clear in the contract they are reserving the right to do so. Schools can also limit their liability by making it clear in the contract that disability benefits are insured, are subject to the terms of the insurance policy and that if the insurer refuses to pay out the school has no obligation to continue the payments.

## **SAFEGUARDING UPDATE**

### **Mental health and behaviour in schools guidance**

The DfE has updated its guidance for schools on supporting pupils whose mental health problems manifest themselves in challenging behaviour. The guidance:

- Sets out schools' roles and responsibilities in relation to mental health and behaviour
- Outlines how schools can identify whether a child or young person's behaviour (such as being disruptive, withdrawn, anxious, depressed or otherwise) may be related to a mental health problem, and how to support them if that's the case
- Provides advice on working with other professionals and external agencies where appropriate



- Provides links to additional support available to schools, including frameworks, audit tools, evidence and resources.

The guidance sits alongside and should be read in conjunction with the DfE's non-statutory [Behaviour and Discipline in Schools advice](#), which summarises the statutory powers and duties for school staff and the approaches they can adopt to manage behaviour in their schools. It also supports implementation of chapter 6 of the [Special Educational Needs and Disabilities \(SEND\) Code of Practice](#) (which sets out the process for identifying and responding to additional needs) and reflects recent policy developments in other related areas, such as alternative provision, exclusions and children's safeguarding.

The intervention and support guidance may also be useful for colleges and other post-16 institutions.

Click [here](#) for a link to the Mental Health and Behaviour in Schools guidance.

### **School security: draft guidance**

The DfE is consulting on its new school security guidance. The guidance will provide schools with access to a range of information sources and tools intended to help them develop sensible and proportionate policies and plans to meet their security needs. Whilst the guidance is for schools it will also be relevant to further education and sixth form colleges. Responses to the consultation are required by 18 February 2019.

Key points from the guidance include:

- The importance of having a security policy and plan in place so schools can manage and respond to security related incidents, not just on school premises but offsite and in the local area
- Security is part of a school's health and safety obligations
- Schools should establish and maintain relationships with local security networks and work with the police, local authority and others in the wider community to gather and share security related information
- Staff and pupils should take personal responsibility for their own security and the security of colleagues/fellow pupils
- All staff should have appropriate security training
- Staff and pupils should be familiar with what the security policy and plan requires
- Staff should know what to do to protect themselves and pupils from harm, safeguard the school estate and be able to determine when it is appropriate to contact the police/emergency services
- A balance should be struck between the school being an open and welcoming environment (for pupils, parents and the wider community) and protecting them from harm
- A security policy should be proportionate, and based on the realistic assessment of threat (both local and national)
- Schools should consider the need for a dynamic lockdown procedure
- Schools should consider business continuity, recovery and restoring to normality after a traumatic event.

Two annexes to the guidance includes useful links and potential threats to consider, including cybersecurity.



The guidance refers to the [Nottinghamshire County Council's 'School Emergencies'](#) collection of emergency planning templates and staff training resources on emergency procedures which are a good starting point for schools developing security policies and procedures.

The consultation and guidance document can be viewed [here](#) and you can also respond to the consultation from this link.

### **Keeping Children Safe in Education 2018**

The 2018 edition of Keeping Children Safe in Education came into force on 3 September 2018. On 19 September 2018, some minor changes were made to this version. The most important of these was clarification (in paragraphs 158 and 159) about when schools should refer a (former) staff member to the Disclosure and Barring Service for possible disqualification.

As there is no change to Part One, it is not necessary to give this version out to staff again but you should make sure you keep a copy of the latest version in your files.

You can download a copy of the updated guidance [here](#).

### **Any Suggestions?**

If you have any suggestions about what you would like us to include in future editions of our Education Bulletin, please email Simon Henthorn at [shenthorn@doyleclayton.co.uk](mailto:shenthorn@doyleclayton.co.uk).

