



DOYLE CLAYTON
Workplace Lawyers

Education Bulletin

Summer 2020

Welcome to the Summer term edition of our Education Bulletin.

As education practitioners we could write a textbook about the guidance and advice issued since March 2020. Covid-19 is at the forefront of everyone's minds. As we begin to move forward with our lives, this term's newsletter focusses on the future and three key developments relevant to the education sector.

1. Preparing for the New Reality

2. Covid-19 and Tier 4 visa Sponsorship

3. Case Law Update

1. Preparing for the New Reality

By 1 June 2020, it is expected that England will be ready for primary schools to welcome back children in key transition years, nursery, reception and in year 1 and year 6. It is also anticipated that secondary schools, sixth forms and colleges will be able to provide some face-to-face contact with young people in year 10 and year 12 to help them prepare for exams next year.

The Government is asking schools and childcare providers in England to plan for the return of children, ahead of confirmation of the scientific advice. It is anticipated that preparation for the reopening of schools will be part of the second phase of modifications to social distancing measures which the Prime Minister set out on 10 May 2020. The Department for Education has said the Government endeavours to continue to work closely with schools, both in the build up to and following pupils' return.

So what do schools need to do?

The Department for Education published guidance entitled '[Actions for Education and Childcare Settings to Prepare for Wider Opening from 1 June 2020](#)' on 11 May 2020. This guidance starts by reiterating that education and childcare settings are already open to priority groups and therefore the notion that schools are 're-opening' on 1 June is not accurate. What is changing, however, is that it is no longer necessary for parents of 'eligible' children to keep them at home. There is an emphasis on schools continuing to encourage and expect vulnerable children from all year groups to attend school where appropriate. ***We set out below a summary of the key points.***

'Eligible' pupils – who will return to school?

- Nursery, reception, year 1 and year 6 pupils
- Secondary schools, sixth form and further education colleges are being asked to offer face-to-face support to supplement the remote education of year 10 and year 12 students who are due to take key exams next year, alongside the full-time provision they are already offering to priority groups
- Nurseries and other early year providers, including childminders, are being asked to begin to welcome back all children



- Alternative provision settings are asked to mirror the approach being taken for mainstream schools and offer some face-to-face support for year 10 and 11 students
- Special schools, special post 16 institutions and hospital schools are being asked to work towards a phased return of more children and young people without a focus on specific year groups

What happens if some 'eligible' children do not return?

There will not be a penalty for families who do not send their children to school. However, families will be strongly encouraged to take up school places unless the child or a family member is shielding, or the child is particularly vulnerable due to an underlying condition. There is an expectation that most children will return to school for the last six weeks of term.

New Protective Measures

Detailed [guidance](#) published on 11 May 2020 sets out a range of protective measures to ensure education settings remain safe places, focussing on:

- Reducing the size of classes and keeping children in small groups without mixing with others
- Staggered breaks and lunch times as well as drop-offs and pick-ups
- Increased frequency of cleaning, reduced use of shared items and utilising outdoor space

Testing

From 1 June 2020, all children and young people who are eligible to return to the school setting will have access to Covid-19 testing if they display Covid-19 symptoms, as will any symptomatic members of their household.

Risk Assessment

Every school setting should carry out a risk assessment before opening. The assessment should directly address risks associated with COVID-19 so that sensible measures can be put in place to control those risks. Employers have a duty to consult employees on health and safety and the guidance highlights that employers are best placed to understand the risks in individual settings.

Class Sizes and Staff Availability

One of the protective measures is to have smaller groups and class sizes. Early years and primary age children cannot be expected to remain two metres apart from each other and staff. Schools are expected to work through a hierarchy of measures set out below:

- Avoiding contact with anyone with symptoms
- Frequent hand cleaning and good respiratory hygiene practices
- Regular cleaning
- Minimising contact and mixing



In the Classroom

The guidance recognises that it is important to reduce contact between people as much as possible. Children, young people and staff are being asked to mix only in a small consistent group and that small group is to be asked to stay away from other people and other groups. For primary schools, classes are advised split in half, with no more than 15 pupils per small group and one teacher (and if needed a teaching assistant). Teaching assistants can be allocated to lead a group working under the direction of a teacher. Vulnerable children and children of critical workers in other year groups are also to be split into small groups of no more than 15. Desks should be spaced as far apart as possible. For secondary schools and colleges, the same principle of halving classes will apply, and classrooms and workshops are to be rearranged with seating positions two metres apart. The guidance states that support staff may be drawn upon if there are teacher shortages, working under the direction of other teachers in the setting.

Personal Protective Equipment

There has been some controversy surrounding PPE and schools.

Additional guidance entitled '[Implementing Protective Measures in Education and Childcare Settings](#)' was also published on 11 May 2020. It includes a section on personal protective equipment, including face coverings and masks. Wearing a face covering or face mask in schools or other education settings is not recommended. The Government anticipates that most staff in educational settings will not require PPE beyond what they would normally need for their work, even if they are not always able to maintain a distance of two metres from others. PPE will only be needed in a very small number of cases, including if a child or young person becomes unwell with symptoms of COVID-19 while in school and needs direct personal care until they can return home. In such a situation a face mask should be worn by the supervising adult if a distance of two metres cannot be maintained. If a risk assessment determines that there is a risk of splashing to the eyes from coughing, spitting or vomiting then eye protection should also be worn.

The guidance advises that local supply chains should be used to obtain PPE.

Planning for 1 June 2020

Schools are expected to implement protective measures in education settings before wider opening on 1 June and are asked to consider the following steps when planning and organising:

- Refresh risk assessments and other health and safety advice for children, young people and staff
- Organise small class groups as described above
- Organise classrooms, workshops and science labs in a manner that maintains space between seats and desks, where possible
- Refresh the timetable for each year group and decide which lesson or activities will be delivered, consider which lessons or classroom activities can take place outdoors and consider reducing movement around the school building when timetabling
- Stagger assembly groups, break times including lunchtime, drop-off and collection times



- Plan parent drop-off and pick-up protocols to minimise adult to adult contact
- Use halls, dining areas and sports venues at half capacity. The guidance says these areas can be shared as long as different groups do not mix and adequate cleaning between groups is in place
- Stagger the use of staff rooms and offices to limit occupancy
- Limit the use of shared resources such as stationery and other equipment. Shared materials and surfaces should be cleaned and disinfected more regularly

Communication is key

Schools should communicate their plans to children and young people, parents, carers and visitors, such as suppliers and cleaning contractors.

Health and Wellbeing

The guidance states that governing bodies and senior leaders should be conscious of the wellbeing of staff and senior leaders themselves. This includes the need to implement flexible working practices in a way that promotes good work life balance and supports teachers and leaders. Schools and colleges should assess whether staff who are having to stay home due to health conditions are able to support remote education, while others focus on face-to-face provision.

Transport

The Government's message is to walk or cycle and avoid public transport at peak times. The Government will shortly publish guidance on how to travel safely which schools can refer to in planning for opening.

Food

Schools are to ensure food is available for people who attend school. Educational settings are expected to reopen their kitchens and ensure that meals are prepared and served safely.

Existing Guidance

There are no changes to the previously announced measures on assessment and accountability, no exams or assessments will take place in the summer term and Ofsted will continue to pause routine inspection. The [existing guidance](#) for schools and educational settings published on 20 March continues to be relevant, but it is likely to be updated in due course. The Department for Education is also expected to publish further guidance for senior leaders to work through; this will be co-produced with experienced school leaders and sector representatives.

Quick, get out the tape measure, what should schools and colleges be doing immediately?

The rapid publication of new guidance can be overwhelming, so, take a deep breath and absorb the summary set out above. Many schools are already open, so some of the practical steps set out in the guidance may already be in place. Only eligible children are scheduled to return on 1 June 2020, so there is time to prepare for an anticipated full return in September 2020. Remember, the focus is on safety, so refreshing existing risk assessments is the best place to start.



2. Covid-19 and Tier 4 Student Visa Sponsorship

With visa centres throughout the world temporarily closed, countries in lockdown and tight travel restrictions in place, the implications of the Covid-19 pandemic for UK immigration is affecting all nationalities and UK visa routes, including student visas.

The Home Office recently published Covid-19 guidance specifically aimed at Tier 4 sponsors and Tier 4 student visa holders.

Temporary concessions cover the entire international student journey, from visa application stage (both in the UK and overseas) and sponsor record keeping to permissible methods of learning, attendance monitoring and reporting.

The Home Office is taking a pragmatic approach, for example:

- To unavoidable Covid-19 related delays to inspections that independent schools and colleges ordinarily must have to maintain their sponsor licence
- Sponsors can continue to sponsor students who are continuing their studies through distance learning
- Relaxing the usual attendance monitoring duties of Tier 4 sponsors. Tier 4 students do not need to be reported for missing expected contact points due to moving to distance learning, or for being absent from classrooms as a result of Covid-19 related illness or travel

Notwithstanding the relaxation or removal of many of the usual sponsorship duties and Tier 4 visa requirements, a Tier 4 sponsor's safeguarding duties towards their sponsored students under the age of 18 remain unchanged. Independent schools and colleges currently sponsoring a child have a continuing duty to ensure suitable care arrangements are in place for them while the child remains under their sponsorship and is in the UK, even if they are not attending classes.

The Covid-19 Guidance makes clear that the concessions will be kept under regular review and will be withdrawn once the situation returns to normal. The Home Office has taken a pragmatic and necessary approach to support Tier 4 sponsors and international students during an unprecedented time. It is clearly in the UK's interests to help the country maintain its position as a first-choice study destination for international students.

If your school or college holds a Tier 4 sponsor licence, you may wish to read our more detailed [overview](#) of the Home Office's response to the Covid-19 pandemic. In the overview, **Anna Blackden**, an immigration specialist in Doyle Clayton's Education Team, also gives best practice advice for Tier 4 sponsors to help ensure their education institution – and sponsored Tier 4 students - benefit from the temporary Covid-19 related concessions.

3. Case Law Update

Constructive dismissal claims triggered by innocuous act

In *Williams v Governing Body of Alderman Davies Church in Wales Primary School*, a teacher whose resignation was triggered by innocuous conduct on the school's part succeeded in his claim for constructive unfair dismissal.



Mr Williams was a schoolteacher. He was suspended and investigated for an alleged child protection matter. The school also instituted disciplinary proceedings against him for alleged breach of its data protection policy. It discovered he had downloaded a large number of documents from its systems, relating to what he perceived to be a background of poor treatment of him. Mr Williams had numerous complaints about the school's handling of the disciplinary process and raised a grievance, which the school rejected. After several months he resigned, stating that the last straw was learning that a colleague, under investigation for a connected data protection breach, had been instructed not to contact him.

He claimed he had been constructively dismissed and that his dismissal was unfair. The employment tribunal was critical of the school's handling of the disciplinary allegations against him but ruled he had not been constructively dismissed. An employee can resign (and claim constructive dismissal) in response to a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. However, the last straw which caused Mr Williams to resign (discovering that his colleague had been instructed not to contact him), was not unreasonable conduct by the school, in view of the connected ongoing disciplinary investigations. As the last straw was innocuous, it could not contribute to a breach of the implied duty of trust and confidence and so did not entitle him to resign and claim constructive dismissal.

Mr Williams appealed to the Employment Appeal Tribunal, arguing that even if the alleged 'last straw' was innocuous, this did not necessarily mean he had not been constructively dismissed. The Employment Appeal Tribunal agreed with him. The tribunal should have considered whether the school's earlier conduct itself amounted to a breach of the implied term of trust and confidence. If it did and (1) Mr Williams had not affirmed the contract since (which would mean he could no longer rely on that breach) and (2) the school's earlier conduct contributed to his decision to resign, then he could still claim constructive dismissal.

What does this mean for schools?

Schools need to be cautious. Where there is prior conduct which breaches the implied term of trust and confidence, a reasonable and seemingly innocuous act on their part may trigger an employee's resignation and enable them to claim constructive dismissal. However, this will only be the case where the employee has not affirmed the contract following the breach and where the employee's decision to resign is in some part due to the school's prior conduct.

Dismissals because of concerns about reputational risk

In *Lafferty v Nuffield Health*, the Employment Appeal Tribunal ruled that an employee's dismissal because of his employer's concerns about reputational risk was fair.

Mr Lafferty was employed by Nuffield, a registered not-for-profit charity, as a hospital porter. His duties included moving anaesthetised patients to and from operating theatres. He was arrested, charged with assault with intent to rape and released on bail. The alleged conduct took place outside of work. Following a disciplinary investigation and hearing, Nuffield decided to dismiss him. It was concerned about potential damage to its reputation if he was found guilty of the charge.

Mr Lafferty claimed unfair dismissal. The employment tribunal dismissed his claim, finding that Nuffield's concern about the risk of reputational damage was a fair reason for dismissal. It had also acted reasonably in coming to its decision to dismiss. Mr Lafferty appealed to the Employment Appeal Tribunal.



The Employment Appeal Tribunal agreed with the tribunal that the dismissal was fair. Risk of reputational damage can provide justification for dismissal, even though criminal charges are not proved. Whether or not it does so will depend on the facts of each case.

In this case Nuffield had not relied on immediate damage to reputation, but on what would happen if there was a conviction. That was a reasonable position to take because that is when damage to its reputation would crystallise, because it would have exposed vulnerable patients to a risk between the time it learned of the charges and the date of conviction. The risk was not trivial and had been identified by experienced managers who genuinely believed it existed.

The tribunal had found Nuffield had conducted a fair investigation. There had been no knee-jerk reaction on its part. It had not taken the allegations at face value and had instead tried to find out more about the charges, both from Mr Lafferty and from the bail and police reports. It was also important that the CPS had decided to prosecute and so this was not just a bare allegation. Nuffield had also considered and acted reasonably in rejecting alternatives to dismissal, including suspension on full pay.

What does this mean for schools?

Schools concerned about reputational risk arising from criminal charges against employees may be able to dismiss fairly. However, this will depend on the circumstances of each case. There will need to be some relationship between the matters alleged and the potential for damage to reputation. In this case, the fact that Mr Lafferty was in charge of vulnerable patients was a key factor, as it could have given him an opportunity to commit the kind of act with which he was charged. It was also relevant that the charitable sector was under scrutiny at the time as a result of conduct that had been exposed in relation to employees engaging in sexual offences. Finally, the EAT also suggested that an employer with greater funds might be expected to suspend the employee on full pay until result of the trial is known.

If you have any queries regarding anything in this newsletter, please contact [Simon Henthorn](mailto:shenthorn@doyleclayton.co.uk) on 0203 696 7172 or shenthorn@doyleclayton.co.uk.

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