



DOYLE CLAYTON

Workplace Lawyers

Education Newsletter

September 2018

Welcome to the autumn term edition of our Education Bulletin! We publish a newsletter each term covering news and topics that we hope will be of interest to schools and colleges. We cover 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

Tier 4 podcast

Earlier in the year we launched our Tier 4 support service for education institutions. This service provides schools and colleges who hold a Tier 4 sponsor licence with expert guidance on sponsoring students and ensuring compliance, as well as other bespoke services in relation to Tier 4 sponsorship.

[Liz Timmins](#) and [Anna Blackden](#) have recorded a podcast on 5 Top Tips for Tier 4 Sponsors and passing a Home Office compliance visit. This will be published on our website soon.

Conferences

Doyle Clayton exhibited at the UKCISA Annual Conference on 27-29 June 2018 in Edinburgh. We enjoyed meeting a number of you there.



[Simon Henthorn](#) and [Liz Timmins](#) will be exhibiting at the IAPS annual conference from 26-28 September 2018, where they will also be giving a seminar on discrimination, harassment and Brexit. Do come along to meet them!

Immigration Masterclass

Our [Business Immigration Team](#) is holding its next Immigration Law Masterclass on 4 October 2018 and has kindly allowed us an education slot. We will be giving an update on key Tier 4 issues including Tier 4 sponsorship duties and sponsoring students, plus how to prepare for Home Office Compliance Visits and a Brexit update. Please contact Gemma Ford if you are interested in attending: GFord@doyleclayton.co.uk

IN THE NEWS

“Forcible retirement” at Oxford University

Our Head of Education, [Simon Henthorn](#), had a letter published in the Times concerning the lawfulness of Oxford University’s mandatory retirement age. The debate continues! Please click [here](#) to read Simon’s letter.

General Data Protection Regulations (GDPR)

Following on from the EU General Data Protection Regulation coming into force on 25 May 2018, there have been a few horror stories in the news about sensitive personal data being shared by schools when emails have been sent to the wrong “distribution list”, or when an unencrypted USB stick containing data about every pupil at Rochester Grammar School was lost.

By now, most schools and colleges will have updated their policies and procedures to implement the principles of the GDPR and made sure that staff are appropriately trained. However, for any school struggling, the Government has published a Data Protection Toolkit for schools which can be found [here](#).

We also have a dedicated Data Protection Team who work closely with our Education Team to assist with your Data Protection concerns.

Women and Equalities Committee inquiry into the enforcement of the Equality Act 2010.

The Women and Equalities Committee has launched an inquiry into the enforcement of the Equality Act 2010 (EqA). The Committee has previously identified that individuals face difficulties enforcing their rights and has questioned the effectiveness of the Equality and Human Rights Commission (EHRC) in challenging discrimination. Previous recommendations included longer time limits for bringing pregnancy discrimination and sexual harassment claims, increased financial penalties, greater use by the EHRC of its enforcement powers and greater action by other regulators, such as Ofsted, to tackle discrimination.

Improving compliance

The Committee is now seeking views on what more can be done to achieve widespread compliance with the EqA and is asking for views on:

- How easy it is for people to understand and enforce their rights
- How well enforcement action under the EqA works as a mechanism for achieving wide scale change
- How effective and accessible tribunals and other legal means of redress are, and what changes would improve those processes



- The effectiveness of current remedies where discrimination is proven in achieving change, and what alternative or additional penalties should be available
- The effectiveness of the EHRC as an enforcement body, including:
 - Whether its powers are sufficient and effective
 - Whether it is using its powers well
 - Whether it uses enforcement action appropriately and effectively as part of its wider strategies for advancing equality
 - Whether its role as an enforcer is widely known and understood and acts as a deterrent to discrimination
- Whether there are other models of enforcement that could be a more effective means of achieving widespread compliance with the EqA, either overall or in specific sectors.

If you would like to contribute your views, then the deadline for replying is Friday 5 October 2018. You can access the form for replying [here](#).

CASE LAW UPDATE

Whistleblowing – how specific does a protected disclosure have to be?

In *Kilraine v London Borough of Wandsworth*, where a school employee alleged that she suffered a detriment in not being supported when raising safeguarding concerns, the Court of Appeal gave some useful guidance on how factually specific a “protected disclosure” has to be to give the complainant protection as a whistle-blower.

Facts

Ms Kilraine, who worked at a school (in a non-teaching role), claimed detrimental treatment on whistleblowing grounds. She said she had made two “protected disclosures”, that:

- the Council had failed in its legal obligations towards her in respect of bullying and harassment and there had been “numerous incidents of inappropriate behaviour” towards her, including repeated side-lining; and
- her line manager had not supported her at a meeting when she had raised a safeguarding issue.

The Employment Tribunal rejected her claim, ruling that as the disclosures only contained allegations, neither of them disclosed information and one did not “tend to show a breach of a legal obligation” (or other relevant failure) and so neither met the legal test for a protected disclosure.

Ms Kilraine appealed to the Employment Appeal Tribunal (EAT) which dismissed her appeal, but warned employment tribunals not to fall into the trap of thinking that an alleged disclosure had to be either an allegation or information, when it may be both.

Decision – Court of Appeal (CA)

The CA dismissed her appeal and agreed with the EAT that statements which might also be characterised as allegations can still be protected disclosures. Sometimes a statement that can be characterised as an allegation will also contain information and potentially amount to a protected disclosure. However, not every statement involving an allegation will do so. The key is whether the



statement contains information tending to show a breach of a legal obligation (or other relevant failure).

Although the Tribunal had been wrong on this point, the CA found that it had come to the correct conclusion on the facts as there was no evidence to show that Ms Kilraine had any of the Council's legal obligations relating to safeguarding in mind when she complained of a lack of support from her line manager. Even if she did, she had not disclosed information "tending to show a breach". To say that an individual officer of the Council might have been unsupportive on one particular occasion in responding in relation to a safeguarding issue is not indicative of a failure by the Council to make appropriate general arrangements in accordance with safeguarding legislation. Her claim for detriment on the grounds of whistleblowing therefore failed.

Implications for schools

Where an employee lacks unfair dismissal protection or wants to avoid the Tribunal's compensation cap (of a year's pay or approximately £80,000), they can sometimes try to claim that their employer subjected them to some kind of detriment or dismissed them because they blew the whistle. If so, the question is whether a particular statement or disclosure is a disclosure of information which, in the reasonable belief of the person making it, tends to show a failure to comply with a legal obligation (or another relevant failure). This case is a helpful reminder that to be protected, a disclosure has to have sufficient factual content and be sufficiently specific in order to meet the legal test.

Discrimination arising from disability - school liable even though unaware that the employee's actions were due to his illness

In *City of York Council v Grosset*, an employer was liable for discrimination arising from disability when it dismissed an employee for gross misconduct, even though it was not aware that the employee's actions were due to his disability.

Facts

Mr Grosset was Head of English and was disabled as he suffered from cystic fibrosis, which his school knew about. He had to spend up to three hours a day doing physical exercise in order to clear his lungs. When his workload increased following a change of head teacher, he struggled to cope with the additional demands placed on him. He suffered stress, which in turn exacerbated his cystic fibrosis.

During this period, Mr Grosset took two lessons of 15 and 16-year olds in which he showed the 18-rated film Halloween. Following a disciplinary investigation he was dismissed for gross misconduct. The dismissing panel did not accept that showing the film had been a momentary error of judgment, caused by the level of stress he was under.

The Employment Tribunal ruled that the dismissal was fair as the school's decision was within the band of reasonable responses. However, it ruled that he had suffered discrimination arising from disability - although the medical evidence available to the school at the time did not suggest a link between Mr Grosset's misconduct and his disability, medical evidence available by the time of the Tribunal hearing demonstrated otherwise.

Having found that he had been discriminated against, the school's justification defence did not succeed either. Although the school had legitimate aims of protecting children and ensuring disciplinary standards were maintained, dismissal was not proportionate and a formal written warning



would have been sufficient to achieve these aims. The Tribunal found that the decision to show the film had been the result of stress arising in consequence of Mr Grosset's disability and his remorse was sincere, so there was no real risk of any repetition if his stress levels were reduced.

Decision

Both the EAT and Court of Appeal agreed with the Tribunal and confirmed that in discrimination arising from disability cases, the employer does not need to know that there was a link between the misconduct and the employee's disability, they only need to have known that the employee was disabled.

Implications for schools

The Tribunals are looking at the area of discrimination arising from disability with increasing scrutiny. In order to avoid a similar situation, in disciplinary cases you should be careful to explore any potential reasons for misconduct and consider whether any reasonable adjustments should have been or could be made before taking disciplinary action. Dismissal will not be justified if a lesser penalty would achieve the desired result.

Zero hours workers and part-time working discrimination

It is discriminatory for an employer to treat a part-time worker less favourably than a full-time worker because of their status, unless the treatment can be objectively justified. In *Roddis v Sheffield Hallam University*, the EAT gave guidance on a what kind of full-time employee a lecturer employed on a zero hours contract could compare himself to, in order to show less favourable treatment.

Facts

Mr Roddis was employed as a part-time lecturer on a zero hours contract. He brought an Employment Tribunal claim seeking to compare himself to a permanent full-time lecturer. At a preliminary hearing, the Tribunal found that Mr Roddis was an employee of the University (as opposed to a worker) on a zero hours contract. However, the Tribunal decided that he could not compare himself to a full time employee as they were not employed under the same *type* of contract - Mr Roddis was engaged on a "work on demand" basis so could not compare himself with a full-time colleague who did not have the option of refusing work.

Decision

Mr Roddis appealed to the EAT which overturned the Tribunal decision, finding that an employment contract cannot be treated as being of a different type just because the terms and conditions that it lays down are different, nor because an employer chooses to treat employees of a different type differently. It could not be the case that a zero-hours employment contract of itself was a different type of contract to a full-time employment contract, as this would prevent all zero-hours employees who experienced unjustified less favourable treatment from bringing a part-time worker claim. The EAT therefore decided that Mr Roddis could compare himself to the full-time employee and so his claim for part-time worker discrimination can proceed.



Implications for schools

The case is a useful reminder of the need to ensure that your part-time staff, including those working on a zero-hours contract, are not treated less favourably than your full-time employees unless you have a good business reason for this. Examples of less favourable treatment that a part-time worker might complain about could be not receiving certain benefits or bonus payments or being selected for redundancy over full-time colleagues.

SAFEGUARDING UPDATE

Sexual Violence and Sexual Harassment between children guidance (May 2018, DfE)

This new DfE guidance on sexual violence which was first published in December 2017 was updated in May 2018. This gives guidance to all schools and colleges on protecting children from child sexual violence and how to support children when it does occur or is alleged to have occurred.

All schools and colleges should ensure that all their systems, policies, procedures and training deal with sexual violence and sexual harassment. The guidance is summarised and referred to in Part 5 of the September 2018 version of *Keeping Children Safe in Education* and can be found [here](#).

Working Together to Safeguard Children (2018)

This guidance has been updated to take into account changes in the law. There are now local safeguarding partnerships which replace the Local Safeguarding Children Boards. The partnership is formed of the local authority, healthcare officials and the police.

Although schools and colleges are not included as part of this partnership, the guidance does state that arrangements should be made to allow educational providers to be “fully engaged, involved and included in the new safeguarding arrangements”. You can download the guidance [here](#).

Information Sharing (2018)

This guidance has been updated following the implementation of the GDPR and Data Protection Act 2018 and now specifically states: “*The GDPR and Data Protection Act 2018 do not prevent, or limit, the sharing of information for the purposes of keeping children and young people safe.*” It reminds readers that the GDPR is not a barrier to information sharing where it is justified. However, it does establish a framework to ensure that personal data is processed and shared appropriately.

The guidance contains a helpful flowchart of when and how to share information and a “myth-busting guide” to assist with effective information sharing.

You can download the guidance [here](#).

Keeping Children Safe in Education 2018

The latest edition came into force on 3 September 2018 and replaced the 2016 version. All schools and colleges should ensure that all of their staff have read at least Part 1 of the guidance and should update their Safeguarding policies as needed. You can download the guidance [here](#).



We summarise below some of the key actions that schools and colleges need to take in light of the changes and the recent updates to other key guidance:

- When reviewing your Safeguarding policy make sure to update all references to the most up-to-date guidance and legislation (*Keeping Children Safe in Education 2018, Working Together to Safeguard Children 2018, Sexual Violence and Sexual Harassment between children May 2018, Information Sharing 2018, Disqualification under the Childcare Act 2018*)
- Schools must now complete a risk assessment for all volunteers to decide whether they should apply for an Enhanced DBS. Parents hosting overseas students are also in regulated activity so you will need to complete an Enhanced DBS check. Paragraph 138 has a helpful flowchart on this
- Make sure your policy is clear that pupils are taught about safeguarding (pupils should be able to “recognise when they are at risk and how to get help when they need it”)
- Your policy should refer to the importance of considering wider environmental factors in a child’s life that may be a threat to their safety and/or welfare (known as Contextual Safeguarding)
- Your policy should include information about the criminal exploitation of children, including ‘county lines’
- In relation to tackling Children Missing Education, your policy should explain what the school does when children have poor attendance or are regularly missing school and say that parents should ensure that the school has at least two emergency contacts for their child
- Your policy should reflect that children with special educational needs and disabilities can face additional safeguarding challenges
- In relation to peer-on-peer abuse and ‘sexting’, your policy should cover how peer-on-peer abuse will be dealt with, minimised, recorded and investigated and how the victims and perpetrators will be supported
- It should be clear in your policy what to do if the DSL is not available
- In proprietor-led independent schools, the policy should set out that concerns about the proprietor(s) should be taken directly to the local authority Designated Officer (LADO)
- In relation to confidentiality and the school’s information sharing policy, it may be useful to quote paragraphs 75 and 77 of KCSIE 2018 (*‘The Data Protection Act 2018 and GDPR do not prevent, or limit, the sharing of information for the purposes of keeping children safe’ and ‘This includes allowing practitioners to share information without consent’*)
- If your school has children under 8 years old, your policy should refer to the Disqualification by Association under the Childcare Act 2006 (as amended)
- If your school has children between 8 and 18, the policy should say that the ‘relationships and associations’ that staff have in school and outside (including online), may have an implication for the safeguarding of children in the school. Where this is the case, the member of staff must speak to the school



- The policy should refer to online safety and the policy must be clear how the school will manage pupils' use of their own devices whilst in school
- Annex A includes an updated list of additional information, including children with family members in prison and children and the court system. The sections contain links to further information on how to support children in these situations.

Disqualification under the Childcare Act 2006

Disqualification by Association – where staff could be suspended or have their employment terminated if they shared a household with someone with a conviction that would prevent him/her from working with children – no longer applies to individuals who work in childcare in non-domestic settings. Since 1 September 2018, schools have no longer needed to enquire about the cautions or convictions of someone living or working in a member of staff's household.

Disqualification by Association still applies to all those who work in childcare in a domestic setting and the provisions of the Disqualification under the Childcare Act 2006 still apply to staff themselves.

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](mailto:shenthorn@doyleclayton.co.uk) at shenthorn@doyleclayton.co.uk.

