



DOYLE CLAYTON
Workplace Lawyers

Education Bulletin

Autumn 2020

Welcome to the Autumn term edition of our Education Bulletin.

Although our daily lives continue to be affected by Covid-19 restrictions, schools and colleges have welcomed back their students this Autumn term. There are now less than 100 days until the end of the Brexit transition period. The UK's formal departure from the European Union from 1 January 2021 will have significant implications for schools and colleges, including navigating a new points-based immigration system that treats EU nationals and non EU nationals equally.

This term's Education Bulletin focuses on the overhauled Student Visa Route of the new immigration system, gives details of our upcoming SEN webinar and a new specialist Health and Safety software package for education providers. We also outline key case law developments relevant to the education sector.

1. New Student Visa Route

2. Special Education Needs Webinar

3. Health and Safety Software Package for Education Providers Case Law Update

4. Case law Update

1. New Student Visa Route – Post Brexit overhaul of Tier 4

A revamped Student Route of the new points based immigration system will come into force today, 5 October 2020. The new Student Visa rules, first published on 10 September 2020, heralds the dawn of the Government's intention to create a single immigration system that applies equally to all individuals coming to study in the UK, including European nationals.

Replacing the current Tier 4 visa route, the biggest change is that EU nationals will now be required to meet the same requirements to study within the UK as non EU nationals. EU students already resident in the UK on or before 31 December 2020 should not use the new Student Route and are eligible to apply to the EU Settlement Scheme and have until 30 June 2021 to do so.

The terminology of the Student Visa Rules is also changing - with *'Tier 4 (Child)'* becoming *'Child Student'* and a *'Tier 4 sponsor licence'* will become a *'Student Sponsor Licence'*. An independent school that does not yet hold a sponsor licence to enrol non UK pupils will now need to apply to the Home Office for a *'Student Sponsor Licence'* to sponsor *'Child Students.'*

Individuals coming to the UK with the sole purpose of study (rather than coming, for instance, as dependant family members) will now need to meet a new 70 points requirement. This can be demonstrated by:

- Having an offer from an approved education institution;
- Being able to speak English to the required level (although exceptions remain for Child Students); and
- Able to financially support themselves during their studies in the UK.

Other changes to make a more streamlined and simple student visa application process include allowing student visa applications to be made 6 months in advance of a course start date and more applicants allowed to apply from within the UK for a Student visa. Moreover, EU nationals will join the list of countries whose nationals will benefit from easier 'light touch' documentary evidence

requirements, with no requirement to submit with their visa applications financial evidence or educational qualifications. A significant change for EU students, however, will be the additional visa costs involved in applying to study in the UK – the student visa application fee is currently £348 for an overseas application plus a mandatory Immigration Health Surcharge of £300 per year of study, due to increase to £470 in October 2020.

Independent Schools and Colleges who do not currently hold a sponsor licence should therefore seriously consider applying now to become a Home Office approved sponsor. Being an approved Home Office sponsor - which can include both a 'Student Sponsor' category and a new 'Skilled Worker' category - will give your education institution the ability to enrol pupils and hire staff from all over the world - including Europe - whose primary reason for coming to the UK is to study or work.

For more details about the new Student Route, please see the article by Anna Blackden, our Education Team's Student Immigration expert: <https://www.doyleclayton.co.uk/resources/news/new-student-visa-route-announced-post-brexit-overhaul-tier-4/>

2. Live SEN Webinar on 15th October 2020

In the first of our education webinar series on the 15th October 2020, we focus on SEN for schools. Using a case study as a real-life example, the webinar will cover the key areas of:

- The basics of special educational needs and disability (SEND)
- SEND law, processes and procedures - what they mean for your school
- SEND and exclusion

Aimed at schools and further education colleges in the independent and state sector, the webinar will enable you to:

- Find and use the law and statutory guidance about SEN, disabilities and exclusions.
- Understand the education, health and care (EHC) assessment and planning procedure.
- Recognise where exclusion is an option and the risks of excluding.
- Understand the duties of the school and the local authority towards pupils with SEN.

We will share top tips and strategies to help you navigate common pitfalls and provide practical support to your school staff. The webinar will empower you to work collaboratively with your local authority, the clinical commissioning group, parents and pupils.

To book a place on our SEN webinar on 15th October (1pm – 1:45pm), phone our Events team on **0118 959 6839** or via the link. <https://register.gotowebinar.com/register/8040262751014032399>

3. Health and Safety Software Package for Education Providers

We have teamed up with iProtectu – a company which provides health and safety software for schools, colleges and universities. iProtectu EHS (www.iprotectu.co.uk) is used by schools and universities such as Harrow, Wellington College and Trinity University of Dublin.

The software comes complete with education relevant risk templates, enables the management of both employee and student incidents with email distribution of reports. A full video and presentation based training distribution solution is included which provides ability to schedule certificated IIRSM (International Institute of Risk and Safety Management) approved courses to employees without the need for to login, all of the essential training such as Fire, COVID Awareness, Homeworking and DSE are included.

To meet Department for Education requirements for safeguarding, iProtectu can schedule required policies and training to all employees, which eliminates the need for costly classroom training.

iProtectu also includes COVID Gateway as standard which supports the return to work of employees and is aligned to UK Government and WHO guidelines.

Why not take 2 minutes to view the product overview video on their website or YouTube channel <https://www.youtube.com/watch?v=605clSHomeY>

Please let Simon Henthorn know if you would like any further information on 0203 696 7172 or shenthorn@doyleclayton.co.uk.

4. Case Law Update

Teacher suspected of possessing indecent images of children unfairly dismissed

In *K v L*, the Employment Appeal Tribunal ruled a school was not entitled to dismiss a teacher on grounds of reputational risk after he was charged, but not prosecuted, for possessing indecent images of children.

K, a teacher, was charged by the Police with possessing indecent images of children after they seized a computer from his home. He informed the school he was under investigation and denied he was responsible for the images on the computer. He lived with his son who also had access to the computer. The school suspended him so it could investigate. The Police could not establish who had downloaded the images and decided not to prosecute him or his son but reserved the right to do so in the future.

As part of its investigation, the school asked the Police to share the evidence they had. They responded with a summary of the evidence entirely blanked out, said they could give no view on whether he was a risk to children but confirmed he had not been reported on any similar matter.

The school's investigation report recommended a disciplinary hearing and referred to the Police investigation on charges of possessing indecent child images and to the risk of reputational damage. However, the letter inviting K to a disciplinary hearing failed to mention risk of reputational damage as a possible ground for disciplinary action.

At the disciplinary hearing, the school concluded there was insufficient evidence to find K had downloaded the images. However, it dismissed him because of an irretrievable breakdown of trust and confidence and unacceptable level of risk of reputational damage. While it could not be shown

that he had not downloaded the images, continued employment posed an unacceptable risk to children. The school also considered there was a risk of reputational damage if he was prosecuted in future and it became known the school was aware of the allegations but had continued to employ him.

The employment tribunal ruled K's dismissal was fair. He appealed to the Employment Appeal Tribunal which overturned the tribunal's decision and ruled his dismissal unfair. It ruled:

- It was not open to the school to dismiss on grounds of reputational risk as the letter inviting him to the disciplinary hearing did not mention this as a potential ground for dismissal. K had not had a proper opportunity to address this issue at the disciplinary hearing
- This left the school with the misconduct and the school could not dismiss on this basis. It had to decide on the balance of probabilities whether he had downloaded the images on the computer. Instead it had decided that unless it could exclude the possibility that K was guilty, it could dismiss him on this basis

The Employment Appeal Tribunal went on to consider whether the school could have dismissed K fairly based on risk of reputational damage if it had included this in the disciplinary charges. It decided that dismissal on this basis would still have been unfair.

The case of *Leach v Office of Communications* demonstrates that dismissals based on reputational damage may be fair, even where the conduct giving rise to the reputational damage is disputed. However, K's case was different from *Leach* as in *Leach*:

- The employer had received substantial evidence from the Police about the employee's activities with children. In K's case, the school received no information and he denied responsibility for downloading the images. There was also no information about the nature of the images
- The employer critically analysed the information with the Police and the court accepted that the employer was entitled to rely on this information
- There was already press interest in the case and the employer's press advisor had evaluated the risk of adverse coverage and considered it to be real. In K's case, there was no existing press interest. There was no prosecution and no indication that this would change
- The employee had broken the trust and confidence of his employer by hiding the court case from them

By contrast, K was dismissed in the absence of any information about the nature or seriousness of the images, or about why it had been decided not to prosecute. The Employment Appeal Tribunal concluded the evidence was insufficient to support a dismissal based on reputational damage.

What does this mean for schools?

When inviting an employee to a disciplinary hearing, schools should ensure they include all the possible grounds for dismissal or other disciplinary action in the disciplinary charges. This enables the employee to know the case against them and to come to the hearing prepared to deal with all the charges.

The Employment Appeal Tribunal's view that it would not have been possible to dismiss fairly based on risk of reputational damage will be of concern for schools. While it is possible to dismiss fairly on this basis, it can be difficult, particularly where a decision has been taken not to prosecute. Schools

should try to get as much information as possible about the charges from the Police, assess that information critically (so not take it at face value) and give the employee a proper opportunity to put their case. They will also need to assess the likelihood of the information becoming public knowledge as this will have a bearing on whether there is a real risk of reputational damage.

Tribunal wrong to strike out unfair dismissal claim because compensation unlikely

In *Evans v London Borough of Brent*, the Employment Appeal Tribunal ruled an employment tribunal should not strike out an unfair dismissal claim just because compensation is unlikely to be awarded.

Dr Evans had been employed as a Deputy Head Teacher for 12 years. The school investigated allegations of misconduct and financial mismanagement by members of the senior management team, including Dr Evans. He was invited to a disciplinary hearing but was only given the investigation report and evidence a couple of weeks before the hearing. He asked for the hearing to be postponed so he could be accompanied by his sister and review the paperwork (which ran to over 800 pages). The school refused and the disciplinary hearing took place in his absence.

The schools dismissed Dr Evans for gross misconduct and he claimed unfair dismissal. The tribunal proceedings were stayed as there were criminal proceedings against him and other senior school staff. The school also instituted a High Court claim to recover payments Dr Evans had unlawfully paid himself. The High Court ruled he had received more than £250,000 in overpayments.

The stay was then lifted in the tribunal proceedings and the tribunal considered whether Dr Evans' unfair dismissal claim should be struck out for having no reasonable prospects of success. It considered that due to procedural unfairness (the school's refusal to adjourn the disciplinary hearing), he had a reasonable prospect of succeeding. However, due to the nature of the misconduct there was no reasonable prospect of him being awarded any compensation and it was not therefore in the interests of justice for the case to proceed.

Dr Evans appealed and the Employment Appeal Tribunal upheld his appeal. It noted the tribunal had failed to acknowledge the potential value to him of a finding of unfair dismissal, even without compensation. It set aside the tribunal's judgment and allowed the case to proceed on the basis of procedural unfairness only.

What does this mean for schools?

Just because a claimant is not likely to be awarded any compensation does not mean their claim has no reasonable prospects of success. An employee is entitled to pursue a claim for unfair dismissal to obtain a finding they were unfairly dismissed, even if they are unlikely to recover any compensation. Schools should therefore ensure they follow a fair procedure, even where they clearly have extremely good grounds for dismissal.

Redundancy and alternative employment

In *Gwynedd Council v Barratt*, the Employment Appeal Tribunal ruled a school acted unreasonably in using an interview process when considering redundant employees for alternative employment.

The claimants were teachers employed by the Council to teach at a secondary school. The Council undertook a reorganisation of schools which included closure of the secondary school and the opening of a new school on the same site.

Between 19 May 2015 and 1 September 2017, the Council kept affected schools informed on the progress of the reorganisation process. It told affected staff that:

- All existing contracts of employment would be terminated with effect from 31 August 2017
- The staffing of the new school would be determined by an application/interview process and
- Unsuccessful candidates would be made redundant as of 31 August 2017 unless they were successfully redeployed to a suitable alternative post.

The claimant teachers were interviewed for roles at the new school but were unsuccessful and so their employment terminated. The roles were filled by external candidates.

The employment tribunal agreed their dismissals were unfair as the Council's approach to recruiting for the new roles fell outside the band of reasonable responses.

The Council appealed, arguing that as it was recruiting teachers for new roles it was open to it to select them based on an application and interview process. It did not have to use objective selection criteria. The Employment Appeal Tribunal disagreed. This was not a case of appointments being made to new roles. The employment tribunal had found that the teachers were required to apply for either an identical job or a substantially similar job. Where recruitment was to the same or substantially the same role as the one which the employee had been doing, the employer should have used objective selection criteria, rather than an interview process, to determine who was to be made redundant.

What does this mean for schools?

When selecting employees to be made redundant it is necessary to use objective selection criteria such as performance (based on appraisals), attendance, length of service and disciplinary record. Where there is a recognised trade union schools should seek to agree the selection criteria with the union.

Schools should consult with affected staff and also consider whether there is any alternative employment they can offer to redundant employees. Where alternative employment is available, it may be possible to select for that vacancy using an interview and application process, but generally only where the new role is substantially different to the one they were performing previously. This is because where the new role is different, the school needs to assess the employee's ability to perform that role. Performance to date may be less relevant and an interview process may be more appropriate. Where, however, the role is essentially same as the previous one, the school should choose based on previous performance and use objective selection criteria to decide who is offered alternative employment. What is fair in any particular case will depend on the precise facts and schools should therefore seek legal advice.

Disclaimer: These materials are of a general nature and are not a substitute for legal advice. No responsibility can be accepted for the consequences of any action taken or not taken as a result of its contents.

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