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EDUCATION BULLETIN

2016 CASE LAW DIGEST

A summary of some of the cases involving schools and other education establishments during the 2015/16 academic year

Dismissal of teacher for refusing to separate from her sex offender husband was religious discrimination

The case of *Pendleton v Derbyshire County Council and the Governing Body of Glebe Junior School* concerned a junior school teacher whose husband, a head teacher, was imprisoned for offences including covertly taking photographs of boys in his school while they changed for PE.

The school threatened the teacher with dismissal if she continued to support her husband following his conviction. Despite this, she decided to stay with her husband as he was "penitent" and she had taken a vow in the marriage ceremony to stay with him for better or worse. Following a disciplinary procedure, Mrs Pendleton was summarily dismissed and she brought a number of claims in the Employment Tribunal, including one for indirect religious discrimination.

The EAT held that the teacher had been indirectly discriminated against because the practice of dismissing someone for standing by their spouse put her and others sharing her religious views at a particular disadvantage because of their strong commitment to the marriage vows.

Whilst a defence was raised that the dismissal was justified, or a proportionate means of achieving the legitimate aim, it was held no evidence had been presented to support this argument.

This was not a case in which the controversial "disqualification by association" rules applied. These rules apply to staff providing Early Years childcare (up to and including reception age) or activities outside school hours (not including school clubs) to children up to the age of 8. Where the rules do apply, staff have a duty to disclose if they live with someone who has been cautioned for or convicted of certain criminal offences of a violent or sexual nature.

Disclosure of spent convictions when applying for work with children may breach right to privacy

In *R (on the application of P) v Secretary of State for Justice* a prospective teaching assistant successfully challenged the rules on disclosing spent convictions on the basis that they are in breach of the right to respect for privacy under the European Convention on Human Rights (the Convention).

As a general rule, spent convictions and cautions do not have to be disclosed to a prospective employer unless the candidate is seeking work in an "excepted" occupation, such as working with children. In that case, a DBS check will be required and this will list all previous convictions, including spent convictions. An applicant for a role in an excepted occupation can also be asked if they have any spent convictions.

Since 2013, the rules have been amended to filter out from the DBS check *single* historic convictions for non-violent, non-sexual offences with no custodial or suspended sentence. A job applicant for a role in an excepted occupation with *more than one* spent conviction, however, must disclose all spent convictions regardless of the nature of the offence, the penalty imposed or when the offence took place.

This case concerned a teaching assistant who was convicted of theft and of a further offence of failing to appear in court, both in 1999. Because she had more than one spent conviction, each was disclosable when she applied for teaching assistant roles.

The High Court found that the rules were incompatible with the Convention. A public authority can only interfere with the right to respect for privacy in certain circumstances. The judges decided that the current rules take a blanket approach and do not allow for the proportionality of the interference with the right to respect for privacy in a particular case to be tested.

Teacher training students can bring discrimination claims against a placement school in the employment tribunal

A recent Court of Appeal case has closed a gap in discrimination law for students undertaking vocational training. Previously, trainee teachers and other students on placements could only bring discrimination claims in the County Court against the higher or further education institution at which they are a student. They could not bring a claim against the placement provider.

Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust concerned an indirect discrimination claim brought by a student at Birmingham City University whose placement with an NHS Trust was terminated by the NHS Trust because she was unable to work the required shifts due to her childcare responsibilities. An employment tribunal had

dismissed her claim because it had no jurisdiction to hear it but the Court of Appeal held that Parliament could not have intended placed students to be barred from bringing a discrimination claim against the placement host and read words into the Equality Act 2010 in the light of European discrimination directives in order to close this legal loophole.

Schools which offer teacher training student placements should be aware that a student on placement can now bring discrimination claims against the school in the employment tribunal.

Disclosure of rape acquittal in enhanced DBS check was not a breach of a teacher's human rights

Schools will be aware that a job which entails working with children or vulnerable adults requires an enhanced DBS check. This will include disclosure of spent and unspent convictions and cautions, police reprimands and warnings and other "relevant police information" (information which a chief officer of police reasonably believes to be relevant given the purpose for which the DBS check is being made).

R(AR) v Chief Constable of Greater Manchester Police concerned a qualified teacher who applied for a series of teaching jobs which required an enhanced DBS check. The teacher had been acquitted on a charge of alleged rape. The fact of this acquittal was disclosed as "relevant police information".

The teacher claimed that his right to be presumed innocent under Article 6 of the European Convention on Human Rights (the Convention) and his right to respect for his private life under Article 8 of the Convention had been breached. Both of these human rights can be interfered with by a public authority in certain circumstances.

The High Court found that neither of these human rights had been breached. Upholding this decision, the Court of Appeal stated that disclosing an acquittal did not suggest that the applicant was guilty of the offence and the difficult balance between protecting vulnerable people and interfering with the right to respect for privacy had been correctly considered by the High Court.

Those working in education may take comfort from this decision given the importance of safeguarding young and vulnerable people in their care. However, schools should be aware that acquittals will not automatically be disclosed. Where the allegations are less serious, more historic or considered not to be relevant to the role, the police may take the decision not to disclose.

School's "managing out" of long-serving teacher was unfair constructive dismissal but was not indirect age discrimination

In *Bethnal Green and Shoreditch Education Trust v Dippenaar*, the EAT considered whether a 39 year old PE teacher had been unfairly constructively dismissed and indirectly discriminated against by being managed out and replaced with a younger teacher.

Ms Dippenaar had 13 years' teaching experience and had been highly-rated in internal and external evaluations. Her new Head of Faculty, however, decided that she was performing poorly. Ms Dippenaar felt that she was being "managed out" and offered to leave. She brought a claim for constructive unfair dismissal and age discrimination, arguing that the school had pushed her out with a view to replacing her with a younger and less expensive teacher.

The EAT upheld the Employment Tribunal's finding that the teacher had been unfairly constructively dismissed but overturned a finding of indirect discrimination. It held that the tribunal had failed to establish the existence of a practice of replacing more experienced teachers with less experienced ones as it had not examined evidence on this point but had rather relied upon unclear statistical evidence and "rumours" of the practice in witness evidence.

This case also includes interesting comment on how far a tribunal can go in questioning the judgment of a professional in evaluating a colleague. The EAT stated that often such evaluation will not be suitable for examination by the tribunal and that judges must always remain aware that they are "not Ofsted inspectors".

EAT rules Tribunal wrongly awarded school site controller over £80,000 for unpaid NMW

Recent case law has shown that workers on a "sleep-in" or "stand-by" shift may be found to be actually working and so to be entitled to have these hours taken into account when calculating NMW.

The case of *The Governing Body of Binfield Church of England Primary School v Roll*, concerned, a site controller at the school. Mr Roll worked contractual shifts but was required to be available at night and weekends to respond to emergencies. He was given subsidised accommodation on site and it was recognised that his presence acted as a deterrent to intruders.

Mr Roll claimed he was required by contract to live on site and to be available 24 hours a day, 7 days a week. He stated that he was actually working for the whole of this time regardless of whether he was at home or carrying out tasks under his contract. The Employment Judge agreed with this analysis and awarded him £81,532.37 in unpaid salary based on NMW over a number of years.

The EAT disagreed and held that the Tribunal had failed to take into account the following: Mr Roll was allowed to leave the school site outside his core shift hours (as long as he did not go too far away); he was able to attend social functions away from the site; if he gave 14 days' notice, he could be away from his accommodation over the weekend; his presence on

site was not fulfilling any statutory obligation of the school to have someone present on site; and Mr Roll was not in fact disciplined for being off site outside his shifts (although he may have been disciplined for not responding to emergency calls).

Teacher suffered detriments over a series of fixed-term contracts

The case of *Ibarz v University of Sheffield*, Mr Ibarz worked as a teacher of Spanish and Latin American studies at the University of Sheffield over a period of nine years. He taught specific modules lasting a few weeks each, with regular and some lengthy gaps over holiday periods during which he was not contracted to work. Following the expiry of the last of these contracts, Mr Ibarz brought claims alleging detriments relating to holiday pay, regrading, pay progression and access to pension and wages.

The employment tribunal found that Mr Ibarz was out of time for all claims save for those relating to his most recent contract. The EAT disagreed, ruling that detriments which are suffered during a series of separate contracts can form "a series of similar acts".

Employers should take note that those employed under a number of fixed-term contracts with gaps between each may still bring detriment claims under the Fixed-Term Employees Regulations for losses dating back to earlier contracts, as long as the claim is brought within three months of the most recent contract.

ADHD will not necessarily be a disability under Equality Act

In *JC v Gordonstoun Schools Ltd*, the Additional Support Needs Tribunal for Scotland (equivalent to the SEND Tribunal in England and Wales) considered whether a school pupil's ADHD was a disability under the Equality Act 2010.

The pupil was a boarder and was caught having sexual intercourse with another student. She was permanently excluded by the school. The pupil's mother brought a claim to the Tribunal, arguing that the exclusion was disability discrimination.

Both the Tribunal and the Court of Session on appeal agreed that the pupil's ADHD was not a disability because it did not fall into the Equality Act definition. That is, the condition did not have a substantial and long term adverse effect on the pupil's ability to carry out normal day to day activities. While it was acknowledged that the condition affected the pupil's social skills, these were found to be in the "normal range". Furthermore, no link was found between the sexual act and the ADHD, so the claim of discrimination because of something arising from disability would not have succeeded even if the pupil had been found to be disabled.

The SEND Tribunal will similarly consider the impact of a condition on a pupil when deciding if it qualifies as a disability. Each case is determined on its own facts, including the impact of

any recognised condition, such that in other circumstances, a Tribunal may find that ADHD does have a significant enough impact on a pupil to qualify as a disability.

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