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EMPLOYMENT LAW BULLETIN

MARCH 2023

Welcome to Wrigleys' Employment Law Bulletin, March 2023.

TWe start this month with a look at "Returnerships", a programme announced in the Spring Budget designed to encourage those over 50 to return to work after a career break or early retirement.

We report this month on the case of ***McQueen v General Optical Council*** which considered the tricky question of whether the claimant's aggressive conduct arose as a consequence of a neurodiverse condition qualifying as a disability under the Equality Act 2010.

For our education sector readers, we take a detailed look at the compliance requirements to be aware of before offering a payment to staff which goes beyond contractual or statutory entitlements. We also consider how trust leaders can effectively engage with staff and wider stakeholders to weather the current storms of the cost of living crisis and industrial action.

Our next **free virtual Employment Brunch Briefing** takes place on **4 April** and will focus on handling capability procedures including where there are health and disability-related issues. It would be great to see you there. Please click on the link below to book your place.

We are delighted to announce that our annual **Employment Law Conference** will this year be an in-person event for the first time since 2019. It will take place in Leeds on **29 June**. Our key note speaker is Ruth Busby, People and Transformation Director for Great Western Railway and Network Rail Wales and Western. Ruth has extensive experience in dealing with diversity and inclusion, organisational change and Trade Union relations. Ruth also acts as a trustee for a national charity and has worked in senior HR positions in the civil service and higher education. Click on the link below to book your place. Please note this is a paid for event. **Our early bird booking offer ends 31 March**.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

4 April 2023 | 10:00 - 11:15 | Virtual
Wrigleys' Employment Brunch Briefing
Capability procedures: how to manage health and disability issues fairly
Speaker: Michael Crowther, solicitor at Wrigleys Solicitors
Click here for more information or to book

29 June 2023 | 09:00 - 16:30 | In-person conference
Wrigleys' Annual Employment Law Conference for Charities
Leading Through Change
Key note speaker: Ruth Busby, People and Transformation Director for Great Western Railway
Click here for more information or to book

If you would like to catch up on previous recorded webinars, please follow this link.

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Government publishes guidance on encouraging people to return to work after a career break

Article published on 31 March 2023

Update to guidance follows budget announcement of support for returners over 50.

The Spring Budget published on 15 March, announced £63 million in additional funding for "Returnerships", a programme to encourage the over-50s to return to work following a career break or early retirement.

The programme aims to provide better access to training and retraining, promoting accelerated apprenticeships, sector-based Work Academy Programme placements and Skills Bootcamps. The focus will be on providing flexible ways to re-skill and up-skill, taking into account previous experience to reduce the length of retraining.

Updated guidance

The Government published Employer guidance: helping people return to work on 17 March. This provides advice for employers who wish to encourage people of all ages to return to work after a career break. It was updated from guidance which was particularly focused on people returning to work after taking an extended break from work due to caring responsibilities.

The Guidance makes clear the advantages of encouraging returners, including tapping into a mature, experienced workforce, tackling skills shortages and creating a more diverse and inclusive workplace.

Top tops for helping people return to work

The Guidance suggests a number of top tips to encourage those returning to work including:

- Championing returners at senior leader level
- Changing recruitment practices – including offering flexible / part-time working and mentioning that the post is suitable for returners in advertisements, and asking for number of years' experience rather than recent experience
- Making changes to on-boarding practices to overcome barriers for returners
- Promoting coaching, mentoring and peer support networks
- Having points of contact for wellbeing support
- Offering site visits, career reviews and practice interviews

Further information on flexible working

For more on the subject of flexible working, please see our recent article: Has Covid-19 changed how we work?

You may also be interested in our article considering the practicalities of flexible working in the education sector: Is flexible working really an option in schools?

Employee's aggressive conduct did not arise from disabilities

Article published on 29 March 2023

EAT confirms Tribunal decision that challenging the claimant's confrontational behaviour was not discrimination under s.15 Equality Act.

Awareness of neurodiversity in UK workplaces has grown considerably in recent years thanks to the efforts of a number of campaign groups and government initiatives seeking to promote inclusiveness.

There are many positives to a neurodiverse workforce, with employers being able to benefit from a workforce that approaches and sees issues and problems differently, which in turn can lead to new and innovative approaches and problem solving. More broadly, there are societal benefits of an inclusive workforce.

Employers of course need to be aware of the potential for discrimination when policies and procedures are applied to neurodiverse staff. Dealing with performance or conduct issues means careful thought needs to be given to the potential risk of discriminating against neurodiverse staff when the employer knows or suspects neurodiversity is a factor.

Employers need to be mindful of the application of section 15 of the Equality Act 2010 (EqA) which provides protection against unfavourable treatment because of something 'arising in consequence' of a disability. This could, for example, mean that disciplining a neurodiverse employee for conduct which arises from their condition may be a breach of s.15 EqA.

A recent decision by the Employment Appeal Tribunal considered such a case.

Case: McQueen -v- General Optical Council [2023]

M has dyslexia, symptoms of Asperger's Syndrome, left-sided hearing loss and neurodiversity. These combine to create difficulties for M with workplace interactions. In situations of stress, anxiety or conflict, M would raise his voice and adopt aggressive mannerisms with inappropriate speech and tone. M had medical evidence to support the link between these issues and his conditions.

Whilst at work in 2015 M challenged the instruction of a senior colleague in a rude and disrespectful manner, described as being wholly inappropriate. M was warned that repetition of this behaviour may lead to disciplinary action and he was referred to occupational health. Changes were made to his method of working. Whilst employed by GOC, M insisted that he be allowed to stand up to speak, which was not agreed.

Another confrontation between M and the same colleague occurred in 2016 which left his colleague in tears. M asked that his colleague undertake some disability awareness training.

Further disagreements followed and in 2017 M was subject to disciplinary action which was not upheld. M brought a grievance about the disciplinary charges made against him. This became protracted and M eventually brought claims to the Employment Tribunal. M raised claims of discrimination on the grounds of race, sex and disability, victimisation and harassment. He alleged that he had been subject to unfavourable treatment because of something arising in consequence of his disabilities under s.15 EqA.

At Tribunal GOC accepted that some consequences followed from M's disabilities. For example, M needed verbal communications to be followed by written instructions. However, GOC denied that M's requests to stand to speak and conflicts with colleagues arose from his disabilities such as dyslexia or Asperger's, and therefore when he was disciplined for this he was not subjected to unfavourable treatment arising as a consequence of a disability. The Tribunal agreed, finding that M's temper and resentment at being told what to do were the cause of these. Only the claim for victimisation was upheld.

Appeal

M appealed the Tribunal's decision, arguing, amongst other things, that the disability does not necessarily need to be the sole or even the main reason for the 'something' that arises in

consequence of it for the purposes of s.15 EqA – instead, a significant or more than trivial influence would meet the test.

The EAT upheld the Tribunal's decision, noting that the reasoning used was not flawed by any error of legal principle. The Tribunal had noted the disabilities and made findings about their extent and effect. The Tribunal was found to have been clear when M's disabilities related to the problems he faced at work and when they had not. Where M's disabilities were found not to be the cause of his conduct, the issue of whether the treatment M received was 'because of' a disability did not arise.

The EAT held that whilst M submitted that his disabilities played a major role in his loud and aggressive behaviour, the Tribunal was not bound by his self-assessment. It also held that the Tribunal was entitled to reject some aspects of the medical evidence regarding the effects of M's disabilities.

Comment

The EAT's decision in this case will provide some reassurance for employers, showing as it does that Tribunals will take care to study the facts and claims made and the causal links between a disability and the "something" which arises from it – here the conduct of the claimant.

When undertaking disciplinary processes where mental or physical health issues may have led to the conduct in question, employers should seek a medical opinion on whether or not the conduct arose from a disability.

A claim under s.15 EqA can be defended if the unfavourable treatment (for example carrying out a disciplinary process) can be justified as a proportionate means of achieving a legitimate aim. Employers will need to be able to evidence their legitimate aim in treating the employee in this way, and that the action taken was proportionate when balanced with the impact of the treatment on the employee.

The EAT noted in this case that the Tribunal's decision lacked clarity. To assist in these matters, the EAT outlined how Tribunals should structure decisions for the purposes of s.15 EqA, as follows:

i) what are the disabilities?

ii) what are their effects?

iii) what unfavourable treatment is alleged to have taken place within the time limit for the claim and is this proved?

iv) was the unfavourable treatment 'because of' an effect or effects of the disabilities?

This framework will also prove useful for employers and their advisers in helping to assess claims.

What should academy trusts consider before making a settlement offer to school staff?

Article published on 21 March 2023

Ensuring compliance with ESFA guidance on severance payments.

Entering into a settlement agreement with a member of staff can sometimes be in the best interests of an academy trust. They can provide a measure of certainty and closure where there are risks of a claim arising from employment or termination. However, there are significant compliance requirements which should be carefully considered before entering into settlement discussions.

Academy trusts should ensure that any offer of an agreed exit complies with Education and Skills Funding Agency (ESFA) guidance on severance payments set out in the Academy Trust Handbook. Making an offer to a member of staff before consulting this guidance can lead to unrealistic expectations, damaged staff and union relations, and a breakdown in without prejudice negotiations.

Academy Trust Handbook guidance on severance payments

Trustees of academy trusts must comply with the most recent Academy Trust Handbook (ATH). The trustees of an academy trust must ensure *regularity* and *propriety* in use of the trust's funds, and achieve economy, efficiency and effectiveness – the three elements of *value for money*. These principles apply to decisions about any offer to make a payment to a member of staff which goes beyond their contractual or statutory entitlements.

Can a severance payment be justified?

The first question is whether there is a good rationale for entering into a settlement agreement in any particular case.

The ATH states that severance payments should not be made where they could be seen as a reward for failure, such as gross misconduct or poor performance. It states that a severance payment will only be justifiable in a gross misconduct case where legal advice indicates that the member of staff is likely to succeed in an employment tribunal because of errors in the procedure dealing with the case. In the case of poor performance, the guidance suggests that there may be some cases where a severance payment could be justified when the cost of settlement is favourable compared with the time and cost of working through performance management and capability procedures.

The settlement figure

£50,000 or more

Prior approval from the ESFA *must* be obtained before offering a severance payment including a non-statutory/non-contractual element of £50,000 gross. Trusts should ensure that plenty of time is allowed for this process as the ESFA will refer any application for approval to HM Treasury.

£100,000 or more / high earners

There is also a requirement to comply with HM Treasury's Guidance on Public Sector Exit Payments by obtaining prior ESFA approval for severance payments where the exit package includes a non-contractual / non-statutory payment and totals £100,000 (gross) or more; or in any case where the member of staff earns over £150,000 gross per annum.

Any level of severance payment

Even where the level of severance payment proposed falls below the limits above, academy trusts must consider the following before making a binding offer to a member of staff:

- whether the proposed payment is in the academy trust's interests;
- whether the payment is justified, based on a legal assessment of the trust's chances of successfully defending the case at employment tribunal; and
- if the settlement is justified, the trust should consider the level of payment – this must be less than the legal assessment of the likely award in tribunal.

Academy trusts sometimes overlook the clear requirement set out in the ATH to apply the same scrutiny to payments over contractual and statutory entitlements as those where ESFA approval

is required. This means that a written business case justifying the settlement figure should be prepared in every settlement case. The ESFA approval form should be referred to in order to frame the business case.

Any staff severance payments must be disclosed in the trust's audited accounts, both as a total figure for the year and as individual payments.

It is important to note that all severance payments of any value must be approved in advance by the ESFA where a Notice to Improve has been issued.

Who makes the decision to offer a severance payment?

Responsibility for deciding on a severance payment ordinarily falls to the board of trustees. It is important to ensure that any decision to make an offer of a severance payment is properly made in compliance with the ATH and with the trust's own governance procedures. If the decision is not to be made by the full board of trustees, there should be specific delegated authority from the board for the individual or committee in question to decide on the offer and agree final settlement terms.

The use of confidentiality clauses

The ATH also states that academy trusts must ensure that any confidentiality clauses in a settlement agreement do not prevent an individual's right to make disclosures in the public interest – to make a "protected disclosure" or "blow the whistle".

A term of a settlement agreement which purported to prevent such disclosures would not be valid. However, it is good practice to state explicitly in the agreement that it does not prevent the individual from making protected disclosures. It is also good practice to state that the parties are not prevented by the agreement from disclosing concerns to medical or legal advisers, the regulator, or law enforcement agencies.

Seeking timely advice

Academy trusts should seek legal advice at an early stage where one option being considered is a settlement agreement including a severance payment. This can provide the required legal assessment of potential claims along with a point of reference for deciding on the level of any payment. Before discussions with staff or representatives begin, advice should also be sought on the best approach to without prejudice negotiations and/or protected conversations about termination to reduce the risks to the trust.

How can trust leaders continue to effectively engage with staff and wider stakeholders to thrive in the current climate?

Article published on 10 March 2023

We explore how trust leaders can further engage with stakeholders and foster unity within the constraints of funding and government guidance.

"Leadership is the ability to facilitate movement in the needed direction, and have people feel good about it", says Tom Smith from Culture Partners. The current public sector pay debates and industrial action across a range of sectors show that many people are seeking pay and conditions that take account of increased cost pressures and increased workloads. But this is not the complete picture. We know that when it comes to workplaces, as important as fair pay and conditions are, people need much more alongside. They want to feel valued, recognised and to feel that they contribute significantly to the sector and organisation they work within. They also want to feel communicated with and that they have an avenue through which they can be heard too. These

aspects have been highlighted all the more as we see the growing challenges in recruiting, engaging and retaining good employees. Being clear on the trust's role and its decision making powers (and constraints), including legal considerations, can be a helpful tool in communications and in shaping discussions around potential solutions and support on offer.

The cost of living crisis is undoubtedly impacting academy trusts, their staff and communities and creating a challenging environment. Options such as remote working and flexible schedules, which may be readily available in other organisations, can often be difficult to provide to the same extent in academy trusts – the lights have to stay on, the staff have to work from the schools the vast majority of the time, and the education of young people must come first. Working with a range of stakeholders (including students, parents and carers, staff, unions, the Department for Education and the Education and Skills Funding Agency) means diverse opinions, and requires trust leaders and trustees to make difficult decisions under pressure which are unlikely to please everyone. Keeping all stakeholders engaged and giving a transparent, realistic view of the trust's circumstances and potential ways forward, will help those stakeholders to understand why a decision has been made and any next steps. Sometimes a trust may have to say "no" – perhaps to something which does not fall within their objects, or which they are not permitted to do, or where there simply aren't the funds available. Matters which might fall for consideration in this category include the trust being asked to carry out additional activities, or to provide wider welfare services for the community.

Telling a powerful story about the trust's activities (for example, in the annual report and accounts, in newsletters to parents, and in website and social media posts) can engage those who might otherwise be dismissive or unaware of the bigger picture. Keeping clear, open, and regular lines of communication between all stakeholders is vital to a cohesive, collegiate and community-focused trust. This includes communication between senior leaders and staff, staff and parents, the trust and its students, as well as between senior leaders and trustees. For example, senior leaders have operational responsibility and understand intimately the strengths, needs and challenges of their trust on a day-to-day basis, whilst trustees know that they carry ultimate responsibility and have the strategic oversight of the trust's direction. Regular updates from all sides can help to weather any storms, and give both senior leaders and trustees a sounding board and a supportive ear.

Aside from clear communication, there are various ways in which trusts can seek to engage, and retain, staff. For example, salary sacrifice schemes can provide a benefit to staff with limited additional cost to the trust. Cycle to work and electric vehicle schemes have the added bonus of demonstrating a trust's environmental commitment. Continuing to trial and champion innovative, flexible ways of working to pool resources, streamline labour-intensive admin and reduce workload can also benefit both the trust and teaching staff. Ensuring that each member of teaching staff has properly allocated directed time and protected PPA time should assist with individual work-life balance, but should also enable the trust to plan better for contingencies and to utilise available staff on payroll rather than incur the expense of supply staff, which trusts are finding hard and increasingly costly to secure.

That said, issues surrounding pay cannot be ignored. A number of trusts have already sought accreditation from the Living Wage Foundation and pay the 'Real Living Wage' to staff across all areas of the trust. It is possible for trusts to pay the Real Living Wage and still operate within nationally agreed pay scales. There is a financial cost, to be considered alongside the trust's ethos and values.

The Real Living Wage is independently calculated based on the cost of living rather than adhering to the (lower) government-set minimum wage. New rates were set in September 2022 for implementation by 14 May 2023, as confirmed by the Living Wage Foundation. For trusts who are already accredited, they will need to review their existing pay structure and identify whether any changes are required, and for trusts considering accreditation they will need to consider whether a pay increase makes accreditation a viable prospect when balanced with the challenge of retaining staff. A Living Wage accreditation also takes into account regularly contracted staff in addition to

directly employed staff, which offers an opportunity for trusts to assess partners and organisations they work with regularly and ensure that such organisations fit with the trust's ethos and values.

When considering staff payments, trust leaders also need to be aware of the pay gap reporting requirements. Gender pay gap reporting has been in place for some time and trusts with over 250 employees should already be reporting. The report not only indicates where there may be inequalities in the trust (and therefore potential disgruntlement among staff), but can be used to open the discussion regarding salaries. Trust leaders should also be aware of the possibility of mandatory ethnicity pay gap reporting being introduced. There is no requirement to report as yet although consultations have been undertaken and a trust may choose to report (or make its own, alternative assessment) voluntarily. The disability pay gap has also been discussed as a potential future area of focus.

The staffing landscape in the sector is fast-changing and potentially precarious. Industrial action and staff discontent has the potential to lead to a long-term "us and them" mentality, which can be a challenge when all need to come together to deliver the educational purpose of the trust and to deliver in the best interests of the children they serve. However, trust leaders can seize this opportunity to review their communications and interactions with staff and other stakeholders. Working on staff re-engagement and fostering unity of purpose and direction, can help trusts to better weather the current and future storms.

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