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EDUCATION BULLETIN

SPRING 2021

Welcome to our Spring education bulletin

In this issue, we look at ***updated guidance on special severance payments for academy trusts*** and what the additional requirements are for academy trusts. We also highlight the case of ***Flatman v Essex County Council*** and how the lack of manual handling training in lifting disabled pupil was a fundamental breach of contract.

More regular Covid-19 updates and what that means for staff are posted to the news page on our website and linked through Twitter and LinkedIn.

As always, we really welcome feedback and suggestions for further topics that may be of interest to you, so please get in touch.

Forthcoming webinars:

- **7 December 2021**
  Employment Brunch Briefing:
  What's new in employment law?
  ***Speakers**:* Alacoque Marvin & Michael Crowther, solicitors at Wrigleys Solicitors
  Click here for more information or to book

If you would like to watch any of our recorded webinars, please click **here**.

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Updated guidance on special severance payments for academy trusts

Additional requirements for academy trusts considering agreed exits for staff.

The Education & Skills Funding Agency (ESFA) has updated the rules for academy trusts considering making a special severance payment to a member of staff. These rules now reflect the Public Sector Exit Payments Guidance on Special Severance Payments published in June this year and the new Academy Trust Handbook which replaced the Academies Financial Handbook from 1 September 2021.

Further information on the updated Academy Trust Handbook can be found in our previous article (available on our website): Academy Trust Handbook 2021 - what's new?.

The new rules on ESFA / HM Treasury approval

In addition to the normal considerations for academy trusts making severance payments (set out below), trusts are now required to obtain prior approval from the ESFA where the exit package as a whole is £100,000 gross or more and includes a special severance payment; and/or any case where the employee earns over £150,000 gross.

What are special staff severance payments?

Special staff severance payments are payments which fall outside a member of staff's contractual or statutory entitlements when their contract comes to an end. For example, a payment in excess of an employee's entitlement to notice pay, statutory redundancy pay and/or contractual redundancy pay.

Such payments may be made when employment is terminated through mutual agreement, rather than through resignation or dismissal. They might also be contemplated following resignation or dismissal where there is a risk of claims being brought against the trust.

What must academy trusts consider before making a special staff severance payment?

Under part 5 of the Academy Trust Handbook, academy trusts must consider the following issues before agreeing to make a special severance payment of any size:

- whether the proposed payment is in the trust's interests;
- whether the payment is justified, based on a legal assessment of the trust's chances of successfully defending the claim and the likely costs of that defence; and
- a legal assessment of what a court or tribunal is likely to award if the claim were to be successful.

The guidance suggests that special severance payments should not be made in cases of gross misconduct or poor performance unless justified by the risk of claims, or the costs to the trust of taking an employee through performance management / capability procedures.

There are special requirements for ESFA approval for severance payments where one or more of the following are the case. The latter two of these are new requirements from June 2021:

- they include a payment of at least £50,000 gross above contractual and/or statutory entitlements;
- any amount over contractual or statutory entitlements is proposed and the academy trust is under a Financial Notice to Improve or a Notice to Improve;
- the exit package as a whole is £100,000 gross or more and includes a special severance payment; and/or
- the employee earns over £150,000 gross (not taking into account employer pensions contributions) – whether a special severance payment is being made or not.

As the ESFA will refer applications for approval in all these cases to HM Treasury, it is very important to allow time for the approval process before making the offer.

Where ESFA prior approval is required, academy trusts must complete the Academy Trust Severance Payments Form.

Business case and legal assessment required to justify all special severance payments

The guidance makes clear that, for all other special severance payments, academy trusts must still "be able to show you applied the same level of scrutiny to a payment. ESFA expects academy trusts to have a business case for any non-contractual severance payment and to provide this to ESFA in a timely manner if requested."

This means that academy trusts should seek a legal assessment of the risk of claims in order to assess whether a severance payment over contractual and/or statutory entitlements is justified on a value for money basis.

Action taken by ESFA where severance payments are not justified

The ESFA reserves the right to claw back special severance payments which are not justified. The ESFA may, additionally or alternatively, visit the trust and impose sanctions in relation to further severance payments.

It is also possible for the ESFA to issue a Notice to Improve "in extreme circumstances" where severance payments have been made without proper scrutiny.

Further information

Our previous articles on this topic can be found on our website:

Severance payments and the academy trust: what you need to know - Part 1

Severance payments and the academy trust: what you need to know - Part 2

Given these compliance requirements and the rules concerning the taxation of termination payments (outlined in Part 2 of our previous article above), we strongly recommend that academy trusts take legal advice in good time before making a settlement offer.

From acorns large oak trees grow – diversity among academy trust leaders

Equality, Diversity and Inclusion - what is behind the words?

Equality, Diversity and Inclusion (EDI) is on the agenda of many boards nationwide. Organisations are working out what EDI means in the context of their own sector and how they can work towards encouraging a more equitable culture. Following on from the impact of George Floyd's death and movements like "Everyone's invited" it is to be expected that academy trust boards will be challenged about diversity and equality.

The Covid-19 pandemic has had a disproportionally negative impact on some communities and widened the learning gap further. A study by Camden Learning highlights recurring themes which impact on learning including overcrowding and language barriers. BAME students and students from disadvantaged communities found it difficult to adapt to home learning, with limited resources at home and the lack of support where parents speak English as a second language.

For all these reasons schools and academy trusts are under pressure to pursue diversity. They need to be tackling potentially discriminatory practices, non-inclusive behaviours, and the unfairness of learning gaps to ensure they are fully engaged with, and credible in, the eyes of the communities they represent.

There are many and varied ideas of what EDI means but it is a label we need to look behind if we really want to see a fairer society. The concept of equality may be familiar to us through examples like the Equality Act, designed to protect people with protected characteristics by making discriminatory practices unlawful. However, the concept of equality alone does not necessarily advance the prospects of disadvantaged people.

Equality of opportunity will not necessarily result in equality of outcomes because some people start from a more disadvantageous place and others from a more unconscious advantageous position. To level the playing field we need to introduce 'equity' to provide tailored support to address the systematic barriers that create the advantaged and disadvantaged in society. Progress has been made in the education sector and elsewhere but that there is still a long road ahead.

Diversity is the presence, in a setting such as an academy trust, of people who together have various elements of human difference, such as gender and gender identity, race and ethnicity, faith, sexual orientation, disability classification, and class. However diversity alone is not enough which is why inclusion is so important.

Inclusion refers to actions that invite and support 'difference' in a setting. An inclusive organisation enables all of its people to fully participate in and shape the collective, for example by supporting people to be themselves, to speak out about concerns and to be heard. Diversity that does not

sit in an inclusive environment will look like tokenism; to avoid this an organisation needs to live its values and call on the principles of equity to ensure a person from an under-represented or disadvantaged background who succeeds is supported to continue to achieve.

To inform and lead the sector in addressing EDI among academy trust leaders, Forum Strategy published the first national research report into EDI among Chief Executives of academy trusts at its National #TrustLeaders CEO Conference on 29 September 2021. The report identifies successes but more so the challenges and details how EDI can be improved.

Why is EDI important?

There are moral and societal reasons why tackling inequity in the workplace and our education system is important. From a moral perspective, increasing diversity among trust leaders will help to put schools and academy trusts in a better position to tackle society's diversity issues. This practical argument for increased diversity is highlighted in research from the YMCA on the young black experience of institutional racism in the UK in which it found:

- 95% of young black people report that they have heard and witnessed the use of racist language at school;
- 49% of young black people feel that racism is the biggest barrier to attaining success in school

There are also organisational advantages to diverse trust leadership. As recommended by the **Charity Governance Code** (Principle 6 EDI) www.charitygovernancecode.org having a diverse board will make it more effective by drawing on a wide spectrum of perspectives, experiences and skills. A diverse board will have lived experiences so it will understand the barriers that prevent both staff and pupils reaching their full potential. With this knowledge the barriers may be dismantled to the benefit of all.

The responsibilities of trust leaders at all levels

The Charity Governance Code Principle 6 clearly sets out the responsibilities of individual trustees and the board collectively. The rationale behind Principle 6 is to guide an organisation towards balanced decisions to benefit the entire community under its governance.

A trust board should be supporting EDI through its own practices to set standards and embed EDI values in the whole trust. Then it should set a strategy to deliver its purpose and inclusive values and culture, reduce obstacles to participation and to become more effective by reflecting different perspectives, experiences, and skills.

Boards are advised to extend their duties to the collection of data to assess the state of EDI in their organisations. However, as Forum Strategy has identified, trust boards alone will not drive a change in culture and increased inclusion in their schools. The entire trust has a role to play and CEOs are key players in the implementation of policy across schools. CEOs remain pivotal in assessing the policy roll-out as well as monitoring how effective these policies are upon implementation. Trustees rely on CEOs to implement their strategic vision. In pursuing diversity, the duties of trustees and CEOs must work hand-in hand.

Research has shown a lack of diversity amongst trust CEOs which boards are encouraged to address. This will be an organic process with roots in the recruitment and support of NQT and junior staff from diverse communities. They will only thrive in an inclusive culture; so the strategy must be to encourage fairness at all levels of the trust and not only from the top down. In this way from small acorns oak trees will grow.

Boards should assess their own understanding of EDI before considering what must be seen across the trust as a whole. Any gaps in understanding at board level should be met by discussion,

learning, research or seeking information.

Boards should then assess their own diversity and recruitment processes before setting context-specific and real targets in its plans for the trust. Once the strategy is in place the board should put in place arrangements and resources to monitor and achieve the EDI plans and targets including those relating to the board and tackle any organisational or board inequalities and gaps that have been identified.

To conclude we can see that diversity alone in the school setting is not enough. Without the right mentoring and support and without creating an inclusive culture it is almost bound to fail. The way forward lies in nurturing diversity at the top focusing on trust CEOs and throughout the academy trust structure whilst cultivating inclusion and equity from the bottom up and sideways too. Trust boards must work with academy trust CEOs; rather than diversity measures being lost in the pipeline, CEOs can take trustee strategies and deliver them within the academy trust framework. In this way, trust leaders can be held accountable for the delivery of their diversity policy.

Guidance for schools on rollout of Covid vaccination programme for 12-15 year olds

School Aged Immunisation Service will be legally responsible for the rollout.

The Government announced on 13 September its decision to offer the Covid vaccine to all children aged 12 to 15. Since then, schools and academy trusts have found themselves in the middle of a debate as to whether the programme, which will largely take place in schools, is in the best interests of children. Many schools and trusts have received letters and emails from campaigning groups warning that head teachers may be held personally liable if harm arises to a child from vaccination at school, or if vaccination goes ahead without parental consent.

The Government has now published guidance for schools on the covid-19 vaccination programme for children and young people. This guidance makes clear that the programme will be run in the same way as other immunisation programmes for this age group, through the School Aged Immunisation Service (SAIS).

How involved will schools be in the vaccination rollout?

There are likely to be variations in the way SAIS teams in each area administer and run the rollout. However, in all cases the SAIS should work closely with schools and trusts in order to make plans for the vaccination programme, including the logistics of vaccinating children at a school venue and in school time. The guidance suggests that schools may be asked to disseminate the relevant information leaflets and to provide to the SAIS a list of eligible children. They may also be asked to assist with sending out consent forms to parents and guardians. In some cases, however, the usual SAIS online consent process will be followed, in which case schools will have even less involvement in these administrative steps.

Parents will be asked to provide consent to vaccination in the first instance. If there is a disagreement between parent and child, the child can consent to the vaccine if they are “Gillick competent”, in other words is able to understand fully what is involved in the medical procedure. The guidance makes very clear that schools will not be required to secure parental / child consent, to make decisions about whether a child is Gillick competent, or to mediate between parents and children if they disagree about whether the child should have the vaccine. It will be the SAIS which is responsible for these processes.

Could schools and school staff be personally liable for harm arising from the vaccine?

The guidance offers reassurance that the SAIS will have legal and contractual responsibility for delivery of the vaccination programme in schools.

Given that the Government has followed the recommendation of the Chief Medical Officers in offering the Covid vaccine to this age group, and that the SAIS will be responsible for making decisions concerning vaccination of individual children, it is highly unlikely that a particular school, academy trust, individual employee or trustee would be found to be liable for any harm arising from vaccination carried out at school.

However, that is not to say that parents may not try to bring such a claim. In such a case, schools and trusts should contact their insurers. Individual staff receiving allegations that they are personally liable for harm to a particular child may wish to take their own advice, for example from their union.

Avoiding stigma and less favourable treatment based on vaccination status

The vaccine is not mandatory and schools will of course need to be prepared to deal equitably with vaccinated and unvaccinated children and to be sensitive about the reasons behind consent decisions. Schools should consider their data protection obligations. Vaccine status will be special category data for the purposes of the UK GDPR and information about a child's vaccine status should not be shared without having the proper lawful bases to do so.

It will be important to ensure that unvaccinated children are not stigmatised or treated less favourably because of their vaccine status. Parents may seek to bring claims on behalf of their children for discrimination (for example on the grounds of belief or disability), alleging that their child was subjected to detrimental treatment because they decided not to have the vaccine.

How should schools deal with communications from campaign groups, complaints and protests?

The guidance offers some advice on dealing with pressure from campaign groups and protests outside schools. It suggests that engaging with anonymous correspondents and campaigning groups may simply encourage further communications. It recommends that schools communicate with the SAIS team who will be able to advise on security procedures. Schools are advised to alert the SAIS provider, the Local Authority and their police contacts to discuss the best way safely to manage planned protests or disruptive activity.

If formal complaints are received from parents about school involvement in the programme or about the conduct of school staff, these should be dealt with under the relevant complaints policy. Where the complaints involve decisions or actions of the SAIS, parents should be referred to the relevant SAIS contact.

Schools are to some extent being caught in the crossfire in an emotional and divisive issue. It will be important to maintain a balanced view, to maintain good lines of communication with parents and children, and to ensure that appropriate procedures are followed. Taking legal advice at an early stage on communications and complaints can provide schools and trusts with the confidence to respond (where necessary) in measured and informed way.

The benefits of good governance

We look here at the benefits of good governance for schools and academy trusts.

Schools and academy trusts have been through the mill in so many ways over the last 18 months.

Their understanding and implementation of good governance has been put to the test, like never before. So what are the key benefits of good governance that will stand schools and academy trusts in good stead as they emerge from the pandemic?

Common purpose

The vision sets the direction of travel for any school or academy trust. It captures what they want to be and achieve. For some, covid will have caused them to review and re-set their vision, with governors and trustees enthused by a new sense of purpose. For others, their vision will have held them firm through the pandemic, with governors and trustees more convinced of their shared endeavour. Either way, we have seen how a clear, shared vision enables schools and academy trusts to unite around a common purpose.

Strategic focus

We have also seen how the pandemic has required boards to retain a strategic focus while supporting staff and students. This has not been easy. However, a strategic plan that identifies the key priorities and deliverables, the required resources and how key challenges will be resolved, helps governors and trustees in this endeavour. It provides a strategic framework for policies, procedures and other metrics, so that staff and local governors can also play their part in delivering the collective vision.

Shared values

Meanwhile, life teaches us that our values derive from who we want to be and what we see as important. The same is true of schools and academy trusts, where values derive from the vision. As with the vision, values are most powerful when they are written down, shared and owned by everyone, not just governors or trustees. In this way, the whole community understands what's expected of them in pursuing the common good.

Good behaviour

Expectations are particularly important among governors and trustees, if they are to function effectively. A code of conduct plays a key role in recording expected behaviours by codifying what works well and/or setting new expectations. Governors and trustees know what's expected of them, meaning they all pull in the same direction. Others see what's expected, which facilitates the recruitment of like-minded individuals.

Effective teamwork

This supports effective teamwork at board level, where having the right skills and experience also means everyone has a valid contribution to make. An effective chair ensures each voice is heard while keeping everyone focussed on the task in hand. They also build team between the board and senior leadership, ensuring the two work together to deliver their shared vision. Both play an equal part. The same goes for the members and local governors of an academy trust. Everyone plays their part when roles and responsibilities are understood and embraced.

Clear delivery

Effective teamworking is reinforced by policies and procedures that are informed by independent advice, best practice and what works well. Front and centre is a scheme of delegation that clearly records the division of responsibility between the members, trustees, senior leadership and local governors. A full set of other policies and procedures builds on the scheme of delegation by recording how functions are to be discharged. Together, they ensure clear delivery and limit the risk of legal challenge.

Risk management

They also manage the risks that present themselves and so form a key accompaniment to the risk register which records the key risks and where these can be managed. Where this is not possible, decisions can be taken to avoid or cease a course of action and so ensure the future success of the school or academy trust.

Robust decisions

The timely receipt of suitable reports, information and advice plays a key role in informing risk management and also decision-making. We've seen this during the pandemic. Decisions informed by the right advice and information are more likely to be robust and stand up to external scrutiny. Internal challenge by the board, committees and auditors also place decisions under the spotlight so these are made for the right reasons.

Trust and confidence

Where minutes of board and committee meetings are published on the website, this enables the public to see the integrity and care with which decisions have been made. Publishing information such as the scheme of delegation, policies and procedures and register of interest also enables others to see how things work in practice. This builds trust and confidence and wider support for the school or academy trust.

Compliance

All the above create a culture and way of working geared towards compliance. This minimises the risk of a legal or regulatory breach and, in the case of an academy trust, helps avoid additional scrutiny from the ESFA or RSC.

Continuous improvement

An independent external review of governance, whether before growth, where concerns arise or otherwise on a routine basis, can also help boards navigate significant change, overcome difficulties, and review established practices, all with a view to continuous improvement.

Information on the governance review service Wrigleys provide can be found on our website here. If you would like to discuss how our work can help support and equip your academy trust, do get in touch.

In summary

The benefits of good governance are wide-ranging and clear to see. These will serve schools and academy trusts well, whatever their circumstances. Perhaps the summer break will be an opportunity to reflect on what has worked well and where change may be needed?

Will school children be offered Covid vaccines…and if so what duties will schools have?

Schools are already dealing with concerns about the possibility of vaccinating pupils.

Wrigleys' education team is aware that many schools and multi-academy trusts have recently received correspondence from campaigning groups expressing concerns about the possible participation of schools in any rollout of the vaccination programme to school age children and young people.

It is our understanding that no decision has been taken as yet about whether vaccinations will be offered to under 18s in the UK. We also understand that there has been no communication from the Department for Education (DfE) or Public Health England to prepare schools for any such rollout or to clarify what part schools might be asked to play.

Since the Pfizer vaccine was approved for 12-15 year olds in the UK by the Medicines and Healthcare products Regulatory Agency (MHRA) at the beginning of June, press reports have suggested that children may be offered the vaccine as early as the Autumn term. However, recent reports (such as this from the BBC Covid: Children aged 12-17 unlikely to be offered vaccine in UK) suggest that the upcoming statement from the Joint Committee on Vaccination and Immunisation (JCVI) is unlikely to recommend the vaccine is automatically offered to children in the near future.

Consenting to the vaccine

The rules around consent to vaccination for children are the same as those for consent to medical treatment. Briefly, those aged 16 and above are usually entitled to consent to their own medical treatment. Younger children who are "Gillick competent" (in other words they have the intelligence and competence to understand what is involved in their treatment) can consent to their treatment. Otherwise, someone with parental responsibility can consent on their behalf. Further details can be found at the following links:

https://www.nhs.uk/conditions/consent-to-treatment/children/

https://www.gov.uk/government/publications/consent-the-green-book-chapter-2

DfE guidance on Covid testing and the use of face coverings for children in schools has not been mandatory and no school can refuse to educate a child on the basis that they do not wear a face covering or fail to undergo non-symptomatic testing. If the vaccination programme is rolled out to school aged children, it will be highly unlikely to be a mandatory requirement for school attendance.

Whether schools may have any involvement in the delivery of any such vaccination programme is a separate whilst related point.

In relation to both, we would also expect detailed guidance, including on child and/or parental consent issues, to be shared by the DfE as part of any rollout programme.

The duties of the school or academy trust in relation to any vaccine rollout to school children

Schools and academy trusts must take DfE guidance (including any Covid-related guidance) into account when taking decisions about policy and practice. The trust, school or local authority (in the case of maintained schools) also have common law and statutory duties to protect as far as reasonably practicable the health and safety of staff and pupils. This includes an obligation to carry out risk assessment, to consult with staff representatives on health and safety matters, and to review and revise risk assessment and mitigation measures when circumstances change. Academy trusts must by statute have a health and safety policy which is reviewed at least annually. The Government also expects large employers (with 50 or more staff) to publish their risk assessments on their website (although this is not a statutory requirement).

Schools and trusts will need to assess the risks of any steps they are asked by the DfE to take in relation to the vaccine rollout, if and when proposals are formulated by the Government. This may include hosting vaccination clinics and helping to disseminate authoritative and accessible information to families so that they can make an informed choice. Ultimately, it is for the Government to determine whether vaccination will be mandated for school attendance (as is currently proposed for staff working in older age care homes) and it will be for parents and children (where they can provide consent) to decide whether to comply with any mandatory rules or to

accept any offer of a vaccine. It is not for schools and trusts to compel compliance or acceptance.

During this period of uncertainty, we recommend that schools and trusts inform the DfE of any campaigning correspondence they receive on this issue and push for sector-wide advice from the DfE. Where concerns are expressed by parents, these will need to be sensitively handled and the relevant usual processes followed. Should vaccination be offered to school children, it will be important to ensure as far as possible that children are not disadvantaged by not taking up the offer and that it does not impact on their access to education.

For further information on a recent European Court of Human Rights case on childhood vaccination, please see Compulsory vaccination scheme was not a breach of european convention on human rights. For further information on whether schools can insist that staff are vaccinated and some of the potential legal risks, please see Could schools insist that staff take up the offer of a covid vaccine?. Both articles are available on our website.

Learning support assistant was constructively dismissed in relation to health and safety failings

Lack of manual handling training in lifting disabled pupil was a fundamental breach of contract.

Duty to take reasonable care of employees' health and safety

Employers have a duty to take reasonable care of the health and safety of their employees, to take reasonable steps to provide a safe workplace and to provide a safe system of work. This duty arises from statutory obligations under the Health and Safety at Work Act 1974 and a number of health and safety regulations, the common law duty of care, and a contractual duty implied into every employment contract.

Constructive dismissal and health and safety failings

Employees can claim constructive dismissal where they resign in response to their employer's fundamental breach of contract. One of the key questions in such cases will be whether the employer's act or failure to act is serious enough to be a fundamental breach of contract. Where the employer fails to comply with its health and safety obligations, the tribunal will consider the nature of the breach. Some health and safety failings will be serious enough to be a fundamental breach entitling the employee to resign as a consequence and to bring a constructive dismissal claim.

After a fundamental breach has occurred, employees can sometimes "affirm" the contract by doing something which shows they are putting up with the situation and acting as if the contract still exists. The case law shows that this question will be very fact-specific, but affirmation can happen where an employee fails to complain about the situation and/or delays too long after the breach before resigning.

A recent case in the EAT considered whether employers can do something to "cure" a fundamental breach of contract after it has occurred but before resignation takes place.

Case details: *Flatman v Essex County Council*

Ms Flatman worked in a maintained school as a Learning Support Assistant. Her role was to give support to a disabled pupil and included daily weight-bearing and lifting of the pupil. Over a period of around 8 months from September 2017, Ms Flatman made repeated requests for manual handling training. Although the school managers assured her that steps would be taken to arrange this, no training was put in place. In December 2017, she developed back pain and reported this to the school.

At the beginning of May 2018, the Claimant was signed off for three weeks with back pain. The head teacher informed Ms Flatman that she would not be required to lift the pupil on her return to work and that she was considering moving Ms Flatman to another class in the next school year. The head also assured her that manual handling training was being organised for her and other staff in the following few weeks. Ms Flatman resigned at the beginning of June 2018 and she brought a claim for constructive unfair dismissal.

An employment tribunal found that the local authority employer was in breach of the Manual Handling Operations Regulations 1992, but that it had not fundamentally breached its duty to provide a safe system of work. This conclusion was based on the fact that, before the resignation, the head teacher had shown a genuine concern for Ms Flatman's health and safety and taken steps to ensure that she would not be exposed to danger in future. The employment tribunal therefore decided that Ms Flatman was not constructively dismissed.

On appeal, the EAT overturned this decision and held that Ms Flatman had been constructively unfairly dismissed. It made clear that it is not possible for an employer to "cure" a fundamental breach of contract after it has taken place. The tribunal should have considered whether at any point before the resignation the employer had fundamentally breached the contract and should not have taken into account the actions or assurances of the head teacher in May 2018.

According to the EAT, it was clear in this case that the failure over a number of months to put manual handling training in place was a fundamental breach of the duty to provide a safe system of work. In making this decision, the EAT took into account the facts that occupational therapists and physiotherapists visiting the school considered that this training was required, that Ms Flatman had made repeated requests over a number of months, and that she had actually developed back pain, but the training was still not actioned at the school.

The EAT decided that a tribunal could not have properly decided that Ms Flatman had affirmed the contract in this case. It pointed to the fact that she had persistently and repeatedly complained about the lack of training throughout the entire period. It was also relevant that the school had given her assurances which were not fulfilled, and that she had then escalated her complaints. The EAT stated that "this was not a case of an employee who had decided to live with the situation, but of an employee who had, hitherto, soldiered on for a time, because she had hoped that the promised action would occur; but instead the breach was prolonged and exacerbated".

Comment

Although in this case the head teacher was found to have genuine concern for the employee's health and safety just prior to her resignation, the employer's delay in putting in place required manual handling training was a serious breach of the employment contract which entitled the employee to resign. The plans put in place some 8 months after manual handling duties began came too late: the breach of contract had already taken place and could not be cured.

Employers should of course be mindful of their health and safety obligations and the multiple risks of a failure to take reasonable steps to protect employees. A failure to provide a safe system of work can lead to a number of legal claims, including personal injury and employment tribunal claims. Aside from constructive dismissal claims, employees might seek to bring claims in the employment tribunal for health and safety related detriments (on this issue, please see our recent article Refusing to work because of fears about covid-19 - section 44 of the Employment Rights Act which is available from our website).

Whistleblowing claims can also arise where employees have raised concerns in the public interest about safety in the workplace and then been dismissed or subjected to some disadvantage. These claims do not require two years' service and are not subject to a statutory cap on compensation. Health and safety breaches can also trigger reports to regulators, the possibility of criminal prosecution, and serious reputational risk.

Battle continues over free speech at universities

New proposed measures continue debate on free speech on university campuses.

The education secretary, Gavin Williamson, recently announced plans to introduce legislation enabling academics, students or visiting speakers who are no-platformed to sue universities for compensation, where they feel they have suffered because of infringements to their right of freedom of speech.

What new measures are proposed?

Williamson's proposals are part of a raft of new measures the government is seeking to introduce to fulfil its manifesto commitment to protect perceived threats to free speech and academic freedom in universities in England.

Further proposals include:

- appointing a 'free speech champion' to investigate potential infringements of free speech in higher education;

- making access to public funding contingent on universities adhering to a new free speech condition and giving the Office for Students, the higher education regulator in England, the power to impose fines in case of breaches;

- a new free speech duty applying directly to students' unions, requiring them to take steps to guarantee the right of free speech to their members and visiting speakers; and

- introducing a new statutory tort for breaches of the free speech duty, enabling academic staff or students who have been expelled, dismissed or demoted to seek redress through the courts.

The measures outlined above will impact all students' unions in England, if they successfully pass through parliament.

Are these measures really necessary?

Universities already have a legal obligation to take 'reasonably practicable' steps to ensure freedom of speech within the law for their members, students, employees and visiting speakers, under the Education Act 1986. As public bodies, they also have a duty to comply with Article 10 of the European Convention on Human Rights, which states that everyone has the right to freedom of expression. Useful guidance published by the Equalities and Human Rights Commission (EHRC) in February 2019 aimed to clarify the rules.

The legal framework to protect free speech on university campuses therefore already exists. Banning certain groups or individuals from campus could potentially infringe a university's duties to uphold freedom of expression on campus. If a student group blocks a particular speaker, their institution may therefore step in.

Although students' unions are not themselves subject to these duties, as independent charities, they are subject to other legal duties and responsibilities which concern free speech. Students' unions generally have charitable purposes framed around the advancement of education, and as charities must remain politically neutral. Encouraging debate and giving voice to a broad range of perspectives on topical issues is a core part of this. Banning certain speakers would potentially conflict with these duties.

However, student groups occasionally do use no-platforming and safe space policies as grounds

to refuse invitations to speakers to their events. This is clearly permissible under the existing legal framework. These policies can play a key role in encouraging people to express views free from harassment and discrimination, fostering understanding and respect between the diverse communities co-existing on university campuses. Preventing certain speakers from having a platform may in some cases be necessary to uphold an SU's duty of care towards their student beneficiaries, especially where it may result in violence on campus. Any such decision would need to be weighed up against their duty to maintain their resources, particularly where it risks damage to their reputation.

In any event, in reality there have been relatively few instances of no-platforming. The Office for Students published a paper in September 2018 arguing that there is limited evidence of universities failing to confront these issues and that the majority of students engage respectfully in exercising their rights and determining what they deem acceptable. A report on free speech in universities by the parliamentary Joint Committee on Human Rights, published in March 2018, reached a similar conclusion.

Despite this, Williamson's new proposals build on the perception that there is a free speech 'crisis' at universities. However, the 'crisis' is more media hype than anything, and the need for new legislation is questionable. We await more details on the proposals to know how extensive they will actually be, and to assess the likely impact on the students' union sector.

Nonetheless, Williamson's intervention suggests this topic will remain controversial. Students' unions implementing a no-platform policy should therefore expect accusations of restricting free speech to continue, however unjustified these accusations may sometimes feel.

If you would like any further information, please contact Chris Billington or Graham Shaw on 0113 244 6100

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EDUCATION response from WRIGLEYS