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EDUCATION BULLETIN

2018 CASE LAW DIGEST

Welcome to our case law digest for schools in which we review some of the key cases from 2018 impacting on schools in the areas of special educational needs and disability discrimination, judicial review and employment law.

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In *C & C v Governing Body of a School and others* the Upper Tribunal of the Health, Education and Social Care Chamber (Special Educational Needs and Disability) considered whether a pupil with autism who has a tendency to physically abuse others arising from that condition should be protected by the Equality Act 2010.

We also review the decision of the First Tier SEND tribunal which looked at whether the rigid application of a behaviour policy to a pupil with special educational needs was a failure to make reasonable adjustments by an academy trust.

The case of *Governing Body of Lark Hall Primary School v Secretary of State for Education,* concerns a judicial review application by a mainstream school of the DfE's refusal to exempt its special unit pupil performance data from publication.

The High Court considered whether a community school should delay academisation just days before the expected conversion date because it may not have properly consulted on the change in the judicial review case of *R (on the application of Miah) v Governing Body of Avenue Primary School.*

The very interesting decision of the Supreme Court in *Reilly v Sandwell Metropolitan Borough Council* considers whether senior staff in schools may have an implied contractual duty to disclose relationships with sex offenders to assist the governors in their safeguarding duties.

In the case of *Brazel v The Harpur Trust,* EAT considered the correct calculation of holiday pay for a term time only music teacher.

And finally, the EAT's decision in *Guvera v Butler and others* is important for schools as it highlights the TUPE risks for a Multi Academy Trust which takes day to day control of a school before the transfer date.

Can a pupil with Autism be excluded for Aggression?

Disabled children with a tendency to abuse others physically should not fall outside the protection of discrimination legislation

The Upper Tribunal of the Health, Education and Social Care Chamber (Special Educational Needs and Disability) has ruled that a pupil with autism who has a tendency to physically abuse others arising from that condition should be protected by the Equality Act 2010.

Case details

The case of C & C v Governing Body of a School and others concerns L, an 11 year old child who suffers from autism, anxiety and Pathological Demand Avoidance. Over a ten month period a number of incidents of physical aggression by L had been recorded by the school,

including pulling, pushing and grabbing others and pulling the hair of and punching a teaching assistant. L received a fixed term exclusion of 1.5 days for aggressive behaviour.

L's parents brought a disability discrimination claim against the school in the First Tier tribunal, citing unfavourable treatment including the fixed term exclusion. The tribunal decided that L was not protected from discrimination in relation to this exclusion because it sprang from L's tendency to physically abuse others.

The law

Under Regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010 (the Regulations), a tendency to physically or sexually abuse others is to be treated as not amounting to an impairment coming under the definition of disability with the Equality Act.

The effect of this Regulation is that children with certain conditions which give rise to a tendency to physically abuse others and who are, for example, excluded from school because of physical aggression, are not protected against disability discrimination which is related to that aggressive tendency.

The appeal

On appeal to the Upper Tribunal, Judge Rowley overturned this decision. She determined that the Regulations (only in their application to children under the age of 18 in the education context) contravene the European Convention on Human Rights. This was on the basis that the Regulations discriminate against children with particular conditions, such as autism and ADHD, in terms of their right to education.

Judge Rowley concluded that the Secretary of State had not carried out a proper balancing exercise of the impact of the Regulations on certain children with special educational needs against the impact on others such as other pupils and staff in a school. On carrying out that exercise herself, Judge Rowley concluded that the impact of the Regulations on children with special educational needs whose condition led to a tendency to physically abuse significantly outweighed the impact on others in the community. She was particularly

influenced in this decision by the fact that excluding such a pupil does not remove the tendency to physically abuse, but simply moves it to another setting.

Judge Rowley determined that words should be read into the Regulations which meant they would not apply to children in education who have a recognised condition that is more likely to result in a tendency to physical abuse or should be disapplied in L's case.

Judge Rowley considered in her judgment the March 2016 report of the House of Lords Select Committee on the Equality Act 2010 and Disability which concluded that the Regulations undermine the need to support and encourage schools to make adjustments for those children whose conditions lead to challenging behaviour. Judge Rowley commented that schools will still be able to justify exclusion on the basis of aggressive behaviour in circumstances where the exclusion was a proportionate means of achieving a legitimate aim.

Comment

It has always been important for schools to give careful consideration to whether an exclusion of a disabled child is a proportionate means of achieving a legitimate aim. This involves weighing up the impact on the child, the impact of the behaviour on others and considering whether there is a less discriminatory way to achieve the school's aims, such as maintaining discipline and keeping children safe during their education. In the light of this ruling, schools should carry out this balancing exercise in the same way when dealing with a disabled child whose condition leads to a tendency to physically abuse and who is being excluded (or sanctioned in some other way) for aggressive behaviour. Equally, schools should be mindful of their duty to make reasonable adjustments for such children where they are disadvantaged by their disability, for example by school policies and practices.

This judgment does not mean that schools can never exclude or sanction for aggressive behaviour a child whose disability gives rise to a tendency to aggressive behaviour. However, the exclusion of such a child for such behaviour where insufficient reasonable adjustments have been put in place to support the child is unlikely to be found to be

proportionate by a tribunal. Indeed, a tribunal may find that a child's condition means that they are not in control of their aggressive behaviour and/or that a lack of reasonable adjustments in school has increased the risk of the child reacting aggressively. If this is the case, simply adjusting the behaviour policy to allow the child more chances to comply before being sanctioned may not be sufficient to avoid discrimination.

Chris Billington, Head of the Education Team at Wrigleys adds that "It is important for schools to evidence strategies that have sought to ameliorate the underlying unacceptable behaviour rather than be seen to simply punish such behaviour."

Is the application of zero tolerance behaviour policies to SEN pupils unlawful?

Tribunal criticises academy trust for imposing behaviour policy at the expense of a disabled pupil's education

The TES has recently reported on a decision of the First Tier Tribunal of the Health, Education and Social Care Chamber (previously known as the SEND tribunal). The tribunal found that an academy trust failed in its duty to make reasonable adjustments by imposing its behaviour policy rigidly to the detriment of the education of a child with special educational needs.

The 15-year old pupil (X), who has attention deficit hyperactivity disorder and epilepsy, was given a fixed-term exclusion and was also excluded from a work placement. X was later permanently excluded from the school.

The parents of X argued that the academy trust had failed to meet their son's needs and the exclusions were the result of his disability, which led to challenging behaviour. They went on to claim that X's education suffered as a result of his treatment by the school.

The tribunal, which heard the evidence in February 2018, reported that "the question of [X's] actual education appears to have become secondary to the zero-tolerance policy of the

school". The tribunal noted that the pupil's education was becoming a series of detentions and exclusions and that the behaviour policy was being imposed rigidly, resulting in X being put at a "substantial disadvantage" when compared to non-disabled pupils. The tribunal stated that the school should have made reasonable adjustments to the policy for X rather than continuing with the "inflexible application of its policy".

The tribunal concluded that the school's actions had compromised X's education and ruled that the school should issue a letter of apology to X for its failure to make reasonable adjustments. Additionally, the tribunal recommended that the school organise training for all staff, which should include positive behaviour management techniques. A copy of the tribunal's judgment was also to be placed on X's file. No financial compensation is available in the SEND tribunal.

The Tribunal did not agree that the permanent exclusion of X was itself discriminatory, recognising the exclusion as a proportionate way of achieving a legitimate aim.

This case highlights the need for schools to apply their policies in a flexible manner, taking into account any reasonable adjustments which may be needed for disabled students who would otherwise be disadvantaged by such policies.

The application of "zero tolerance" behaviour policies has been the subject of a recent hearing of the House of Commons Education Select Committee as part of its inquiry into alternative provision. A witness to the inquiry who works to promote the interests of disabled children has commented that such zero tolerance policies may be unlawful as they fail to take into account the needs of disabled pupils. Details of this on-going inquiry are available here.

Chris Billington, Head of Education at Wrigleys comments that: "It is notable that in this case the Tribunal made reference to the various measures that the academy did put in place to support X. However that did not help when it came to the application of the behaviour policy itself. If a series of detentions and exclusions is not achieving the desired change in behaviour then the school has to look at their approach."

The Education Select Committee cites an upturn in the number of exclusions in recent years with 35.2 permanent exclusions per day in 2015/16, up from an average of 30.5 per day in 2014/15. It also notes that pupils with identified special educational needs account for almost half of all fixed term and permanent exclusions.

School's challenge of DfE requirement to publish performance data for all pupils including those in a special unit was unsuccessful

A mainstream school has failed in its judicial review challenge of the DfE's refusal to exempt special unit pupil performance data from publication

The law

The requirement to provide attainment and progress data for publication by the Department for Education (DfE) comes from section 537 of the Education Act 1996. The Secretary of State has the power to make regulations requiring schools (including independent schools and academy trusts) to provide information with a view to assisting parents in choosing schools, increasing public awareness of the quality of education and standards of schools or assessing the efficient management of financial resources in schools.

Under this power, the Secretary of State has very broad discretion to publish the data provided by schools as he or she considers appropriate. Currently, primary schools have to provide data on pupils' attainment and progress in reading, writing and maths by the end of KS2 for publication in performance tables each December.

Special schools are exempt from this requirement. However, the data for pupils with special educational needs attending mainstream schools (whether taught in mainstream classes, or in separate units within the school) must be published along with all other pupil data.

Case details

In *Governing Body of Lark Hall Primary School v Secretary of State for Education*, the Upper Tribunal of the Administrative Appeals Chamber dismissed a school's application for judicial review of the DfE's refusal to disaggregate performance data of pupils in its special unit. Lark Hall Primary School in Lambeth includes the Lark Hall Centre for Pupils with Autism (the CfA). The CfA operates from the same site and shares the same DfE school number. Just under 10% of pupils in the school are exclusively educated in the CfA. In a number of ways however, the school operates as a separate entity: admissions to the CfA are through the council's admissions process rather than the school's; the CfA has its own entrance, building and staff; and pupils in the CfA access a modified version of the national curriculum do not sit SATs.

The school argued that the aggregation of CfA pupil data with those of other pupils at the school provides an incomplete and misleading picture to parents and the community at large. It submitted that the consequences of this were a falling roll, difficulty recruiting staff and putting the school at risk of being identified as a "coasting school".

The decision

The decision of the Upper Tribunal not to grant permission for judicial review was on the basis that:

- It would be difficult to define a special unit within a school sufficiently to be able to exempt it from the publication of data. Special units within schools have no separate legal entity and there are many different arrangements in different schools for this kind of unit. Some are run as separate schools but some have more fluid links between the unit and the school.
- It cannot be assumed that pupils attending such units will be low attainers and outside the assessment regime.
- It is vital to strive for consistency between schools in the publication of data in order for meaningful comparison between schools to be possible.

- A carve-out of special needs pupils from the requirement to publish would mean some pupils would be outside progress measures and this would sit uneasily with Government SEND policy. Exemption for special units may create "perverse incentives" in the way vulnerable pupils are educated.

- Special schools are excluded from the requirement to publish data for "reasons of administrative simplicity" but they are subject to other accountability measures.

- The risk of being identified as a coasting school is an "unfortunate unintended consequence" of the way data is used to judge schools but that did not mean that the decision was open to judicial review.

- The school's falling roll could not necessarily be attributed to the publication of performance tables. Other factors may also be at play.

The school was ordered to pay the DfE's legal costs of just under £4,000.

Comment

This judgment follows a similar judicial review decision from two decades ago involving West Horndon County Primary School. In this recent case, Upper Tribunal Judge Wikeley acknowledged that "there is a respectable body of opinion that considers on balance that the publication of performance tables for primary schools (and especially in the cruder form of ‘league tables’ published in newspapers) does more harm than good". However, he goes on to say that it is a matter for the Secretary of State to decide what should and should not be included in the tables.

While schools will continue to wrestle with the unintended consequences of performance tables which do not reflect the nuances of the educational context, SEND policy has for some time been focused on the inclusion of pupils with special needs in mainstream education, including the requirement to be accountable for the progress of SEND pupils.

Wrigelys' Head of the Education Team, **Chris Billington** comments: "It is interesting to read this judgment in the light of recent concerns about alleged "off-rolling" of pupils before they

take GCSEs in order to improve school performance data. It seems that future trends are likely to bring more accountability when it comes to vulnerable pupils. For example, it is possible that measures will be brought in to ensure that schools continue to be accountable for the performance of pupils who are off-rolled, until they appear on the roll of another school."

Parents halt primary school's conversion to academy status

Crowd-funding enables parent group to bring judicial review application following the governing body's decision to join a multi-academy trust (MAT)

Case: *R (on the application of Miah) v Governing Body of Avenue Primary School*

In March 2018, the Administrative Court Queens' Bench Division of the High Court granted interim relief which forced a community school to delay academisation just days before the expected conversion date. The school had been due to become part of Eko Trust MAT at the beginning of April 2018.

The school argued as a preliminary point that the parents had not brought the case promptly enough for the application to have a reasonable prospect of success.
The judgment notes that a number of authorities suggest the particular importance of acting promptly to raise objections to school reorganisation. The judge determined that the application had been made promptly, even though it was brought at the very end of the limitation period of three months after the decision to convert. He was of the view that the parents had not simply done nothing and then brought the application at the eleventh hour. Rather, the parents had raised their concerns with the school and attempted to resolve the dispute without bringing a legal case. They sent a letter before action a month after the decision to convert. They had also had difficulties in funding the application which had led to a change of solicitors and some delay. We understand that the parents' application was crowd-funded following an online appeal.

The judge found that the parents had an arguable case that the governing body had taken the wrong approach to consultation on becoming an academy. A consultant's report stated that a significant minority of parents and staff objected to conversion. However, because a majority of these stakeholder groups had not expressed objections, the consultant advised that there was no need for the governors to reconsider the proposal. The judge held that it was arguably wrong to act on a recommendation to ignore significant minority objections when responses had not been received from all parents and staff and so the view of the majority was not known. Although the governors had clearly considered the objections raised, the minutes of their meeting simply recorded that the consultant's advice had been followed and so it was arguable that they had taken the wrong approach to consultation. The judge considered it arguable that parents had been misled by suggestions during the consultation that the school would have greater independence from the MAT in its governance after conversion than would have been the case. He also noted the lack of record of any parents' comments in the minutes of a consultation meeting and held that it was arguable that parents' comments at this meeting should have been formally fed back to governors as part of the consultation process.

In this kind of interim application, the judge has to consider the consequences to both parties of granting or not granting relief. Because the school was imminently due to convert, the judge noted that if he did not grant relief, the conversion went ahead, and the application was ultimately successful, it would be very unlikely that any court would order that the school return to community school status. He noted that the prejudice to the school in granting relief, on the other hand, would only be a delayed conversion timetable. Arguments by the headteacher that the delay would prejudice the school because of ongoing strike action by staff to oppose academisation were not heeded by the judge as he considered that this was unrelated to the parents' application.

Because this was an application for an interim injunction to stop the conversion going ahead before the judicial review application was fully heard, the judgment focuses on whether the parents had an arguable application for judicial review, rather than deciding on whether the

governors' decision to convert was properly made. However, the judgment makes interesting reading for schools, trusts and key school stakeholders such as staff and parents. Separate, but connected to the application for the interim injunction, the High Court has, subsequently, also granted permission for the judicial review of the governing body decision to convert to proceed; although at this time the written reasons for that decision have not been published.

It has been reported that the court action, along with 19 days of strike action by school staff, has led to a reversal by the governors' of their decision to become an academy. See local news report here.

Headteacher should have disclosed her relationship with a child sex offender even though she had no statutory duty to do so.

Senior staff may have an implied contractual duty to disclose relationships with sex offenders to assist the governors in their safeguarding duties

The statutory duty to disclose

Under the Childcare Act 2006 and the Childcare (Disqualification) Regulations 2009 (the Regulations), certain childcare providers and those who manage childcare providers are required to be registered in order to provide childcare. Those who have committed certain violent and sexual offences and offences against children are disqualified from working with children in certain settings (see below). Headteachers who manage such childcare provision must comply with the Regulations.

The Regulations apply to staff who provide any care for a child up to and including reception age. This includes education in nursery and reception classes and/or any supervised activity (such as breakfast clubs, lunchtime supervision and after school care provided by the school) both during and outside of school hours for children in the early years age range.

The Regulations also apply to staff who are employed to work in childcare provided by the school outside of school hours for children who are above reception age but who have not attained the age of 8. This does not include education or supervised activity for children above reception age during school hours (including extended school hours for co-curricular learning activities, such as the school's choir or sports teams) but it does include before and after school childcare provision.

Disqualification by association occurs when someone working in a relevant setting lives in a household where someone who is disqualified lives or is employed. In such a case, there is a statutory duty to disclose although it is possible to apply to OFSTED to waive disqualification. The statutory guidance on the Regulations is available here.

Case details

In Reilly v Sandwell Metropolitan Borough Council, the Supreme Court has upheld the decision of an employment tribunal that the decision to dismiss a headteacher who did not tell the school about her close friend's conviction for a child sex offence was fair.

Ms Reilly was a primary school headteacher with an exemplary disciplinary record and a long career in teaching. She had a close relationship with Mr Selwood, who was convicted of making indecent images of children. Ms Reilly did not cohabit with Mr Selwood, nor was she in a romantic or sexual relationship with him, but she jointly owned a house with him and occasionally stayed the night. Following his conviction, she decided that she was not under a duty to disclose her relationship to the school. She sought advice on this point from a number of probation officers. There was conflicting evidence as to the advice she had been given. Later the school governors found out about the conviction. Ms Reilly was suspended, subjected to a disciplinary procedure and summarily dismissed. This was on the basis that she had committed gross misconduct by breaching an implied term of her employment contract under which she had a duty to disclose the relationship.

Ms Reilly brought an unfair dismissal claim in the employment tribunal. The employment tribunal found that the reason for dismissal was not unfair although there were serious

procedural errors in the appeal. However, the tribunal found that Ms Reilly would have been very likely to have been dismissed even if the procedure had been fair and that she contributed to her dismissal by not disclosing the relationship. Her compensation was therefore reduced by 100%.

This decision was upheld by the EAT and the Court of Appeal. The Supreme Court also agreed. Although Ms Reilly was not under a statutory duty to disclose because she was not living in the same household as Mr Selwood, the courts held that the failure to disclose was a breach of her employment contract. The headteacher was under a contractual obligation to "advise, assist and inform the Governing Body in the fulfilment of its responsibilities" which included its safeguarding responsibilities and to "be accountable to the Governing Body for the maintenance of the safety of all pupils". It was also relevant that the disciplinary rules in the contract of employment identified as misconduct a failure to report something which it was her duty to report.

The Supreme Court held that her relationship potentially posed a danger to children and it was not for the headteacher unilaterally to assess the risks to the children in the school. She should have disclosed the facts in order that the governors could assess the risk and decide on the best steps to take in the circumstances. It was also relevant that she did not show any insight into her duty to report this matter during the disciplinary process. The school was reasonable in deciding it was inappropriate for her to continue in her role as headteacher.

Comment

The Supreme Court commented that, "had she disclosed her relationship to [governors], it is highly unlikely that [Ms Reilly] would have been dismissed, still less that the tribunal would have upheld any dismissal as fair. Far more likely would have been the extraction by the governors of promises by Ms Reilly that she would not allow Mr Selwood to enter the school premises and perhaps, for example, that outside the school she would not leave information about pupils, for example stored electronically, in places where he might be able to gain access to it."

Chris Billington, Head of Education at Wrigleys comments: “Senior leaders in schools must err on the side of caution and disclose relationships with convicted sex offenders even where they are not under a statutory duty to do so. Such a disclosure will of course trigger a difficult assessment for schools. Governors and trustees should ensure that they consider (and carefully document as evidence of undertaking their safeguarding role) the particular circumstances. However, that does not mean schools should automatically look to suspend or dismiss as a knee-jerk reaction as this could be a breach of contract and/or unfair dismissal.”

Are your school's term time only workers paid the correct amount of holiday pay?

Paying holiday pay at the rate of 12.07% of pay may not always comply with contractual or statutory entitlements.

The minimum statutory holiday entitlement for workers under the Working Time Regulations is 5.6 weeks. For full time workers, this is 28 days' leave. It can be tricky to calculate holiday entitlement for workers who do not work full time or all year round. Often, employers use a calculation of 12.07% of hours worked to work out holiday leave entitlement. This calculation is based on a standard working year of 52 weeks minus 5.6 weeks (46.4 weeks): 5.6 is 12.07% of 46.4 weeks.

It is also common for employers to use this calculation for holiday pay and so simply to pay 12.07% additional pay as holiday pay. However, as the case below highlights, this calculation will not always be compliant with the statutory rules for holiday pay set out in the Employment Rights Act 1996. Under these rules, a week's pay should be paid for a week's leave. Where a worker has variable hours, a week's pay is the average weekly pay over the last 12 working weeks before the holiday was taken. This calculation ignores any weeks during which the worker received no pay.

The case: Brazel v The Harpur Trust

In this case, the EAT considered the correct calculation of holiday pay for a term time only employee. It held that the term time only employee should have holiday pay calculated on the basis of the last 12 working weeks' pay rather than on the basis of 12.07% of pay.

The facts

Mrs Brazel worked under a term time only zero hours contract as a visiting music teacher at Bedford Girls' School. She worked between 32 and 35 weeks per year. Her contract entitled her to 5.6 weeks' paid annual leave. This was not stated to be pro-rated. She was required to take all her leave during school holidays. Her holiday pay was calculated as 12.07% of her pay and was paid three times a year at the end of April, August and December (because these were noted to be periods during which she taught fewer lessons and so would have received less pay).

The employment tribunal decision

She brought a claim for unlawful deductions from wages, arguing that her holiday pay should be calculated under the week's pay provisions set out in the Employment Rights Act and not by paying her an additional 12.07% of pay. In the case of a term time worker this would mean holiday pay is based on the average pay over the last 12 working weeks, excluding any school holiday weeks. If Mrs Brazel worked 32 weeks in a year, the tribunal calculated that she would, by the 12 week average calculation, have been paid holiday pay at a rate of 17.5% of annual earnings. The tribunal dismissed the claim, determining that words should be read into the legislation to ensure that the statutory entitlement to holiday pay is pro-rated, in effect capping holiday pay at 12.07% per cent of annualised hours.

The EAT decision

The EAT disagreed and remitted the case back to the employment tribunal to calculate by how much Mrs Brazel had been underpaid for her holiday leave. It stated that the contract clearly set out Mrs Brazel's entitlement to 5.6 weeks' leave, and that the Employment Rights

Act contains a clear mechanism for calculating a week's pay where there are variable hours. There was no basis on which to read words into the legislation to pro-rate the 5.6 week entitlement.

It made clear that there is no requirement to ensure that full-time workers are not less favourably treated than part-time workers. It pointed out that legislative protection works the other way around to protect part time workers from being less favourably treated than full-time workers.

Wrigleys' Comment

Chris Billington, Head of Wrigleys' Education team, noted that "School employers who employ term time only workers should carry out a check to see whether their holiday pay is compliant with their contracts and with the statutory minimum entitlement. The lesson from this case is that using a blanket calculation of 12.07% of pay may not always result in the correct holiday pay amount."

Paying "rolled up" holiday pay, that is making an additional payment during the weeks that the employee works rather than paying a worker when they are on holiday is unlawful. Where employees receive their full leave entitlement and pay, the risks to employers of paying holiday in this way are, however, low.

Schools often pay term time only workers an equal amount in every month of the year. An employment tribunal found in 2012 that the practice of paying term time only workers in equal instalments through the year did not equate to "rolled up" holiday pay (Gee and others v Governing Body of the Haberdashers Aske's Boys' School ET/3304122/10).

However, schools which pay term time only workers in equal instalments through the year should carry out a check to ensure that the National Minimum Wage is being paid in every pay period. To avoid the risk of underpayment in some months, schools are advised to follow HMRC guidance by ensuring that term time only workers' contracts include the number of annualised hours.

Could a TUPE transfer occur before a school transfers into a MAT?

We consider the potential TUPE risks for a Multi Academy Trust which takes day to day control of a school before the transfer date.

It is becoming common practice for a Multi Academy Trust (MAT) to assume some control of a school prior to its conversion or transfer to the MAT. A principal and/or other senior leaders employed by the MAT may take on leadership of the school under a secondment agreement, consultancy arrangement or school to school support contract. MAT policies may be adopted by the school well in advance of the transfer date. While the school is still officially under the control of the local authority or its own trust, significant financial, strategic and operational decisions could be made by employees and trustees of the MAT.

A recent Employment Appeal Tribunal case highlights the possible TUPE risk where one organisation takes on responsibility for running another prior to any official transfer.

Case details

In *Guvera v Butler and others*, the EAT held that a TUPE transfer had taken place following a share sale (to which TUPE would not ordinarily apply) because the acquiring company had assumed day to day control of the business in a way that went beyond the mere exercise of ordinary supervision or information gathering by a parent company.

Blinkbox was a music streaming service which was acquired by Tesco in 2012. In January 2015, Guvera UK bought the shares in Blinkbox from Tesco. A share sale constitutes a change of ownership but does not usually effect a change of employer. In May 2015, an employee of Guvera took day to day control of Blinkbox, making key business decisions including deciding which creditors to pay and implementing redundancies.

An employment tribunal found that Blinkbox staff had transferred under TUPE to Guvera on the date where Guvera had effectively taken over conduct of Blinkbox's day to day activities. Guvera was therefore held liable for claims made by employees who were subsequently dismissed.

The EAT agreed, dismissing Guvera's argument that it had not taken responsibility for paying Blinkbox employees and so could not be their employer. The EAT made clear that the key test is whether there has been a change in the legal or natural person who is responsible for carrying on the business and who by virtue of that fact incurs the obligations of an employer.

Considerations for MATs

Chris Billington, Head of Education at Wrigleys notes that ″Where a MAT takes control of a school prior to transfer, it is likely that a TUPE transfer is envisaged in the fairly near future. However, MATs must consider whether their pre-transfer involvement in another school is so significant as to be effectively "stepping into the shoes of the employer.″

If MAT staff are making financial, budgeting, employment and other day to day business decisions for the school, the Guvera case raises a distinct possibility that a tribunal would find employment of staff at the school had transferred to the MAT from the date on which such control was assumed. In that case, the MAT would take on the obligations and liabilities of the employer before the formalities of the transfer process had taken place, raising the potential for the MAT being liable for employment-related claims it was not expecting.

Wrigleys is a specialist law firm advising schools, academies and other education establishments on employment and other legal issues.

If you would like to discuss any aspect of this article further or if you have any questions relating to disability or tribunal claims, please contact **Alacoque Marvin** or **Sue King** on 0113 244 6100.

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Forthcoming event

Employment Breakfast Briefing - 5 February 2019

Annual TUPE Update

Tuesday 5th February, 2019 | 08:30 - 11:00

Raddison Blu, Leeds