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EDUCATION BULLETIN

SPRING 2021

Welcome to our Spring education bulletin

As schools return from lockdown and prepare for another summer of exam uncertainty, we highlight updates and some of the legal issues of working within a pandemic.

We are continuing to hold webinars, in place of our education briefings, on topics relevant to schools. To assist, recorded webinars are available for you and your colleagues, governors, trustees, and academy members to access at times that best suit you.

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:

- 13 April 2021, Webinar
  Employment Brunch Briefing
  TUPE Update
  Speakers: *Sue King, partner & Alacoque Marvin, solicitor 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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Employer should have refreshed equality and diversity training as a reasonable step to prevent racial harassment

EAT: assessment of whether employer took all reasonable steps to prevent discrimination should include deciding if a step is likely to be effective.

Under the Equality Act 2010, employers can be vicariously liable for an employee's discrimination, harassment or victimisation of another person. Employers can defend such claims on the basis that they took "all reasonable steps" to prevent the unlawful act from happening. This is sometimes known as "the statutory defence".

What are reasonable steps to prevent discrimination in the workplace?

Reasonable steps might include putting in place and regularly reviewing equality and diversity and anti-bullying and harassment policies; providing regular training on these issues to all staff; ensuring that disciplinary policies and workplace rules make clear that discriminatory acts will be a disciplinary matter; ensuring that managers are aware of how policies and procedures should work in practice; and taking rigorous steps to deal with breaches.

It is of course advisable to deal rigorously with any allegations of harassment or discrimination once they are received, investigating the matter and following a grievance and/or disciplinary

procedure as appropriate. However, "reasonable steps" must be undertaken before the discriminatory act; retrospective action will not assist an employer in using the statutory defence.

There are very few reported cases which consider the "reasonable steps" defence. A recent EAT case has shed light on how tribunals should approach the assessment of whether an employer took all reasonable steps and can therefore avoid liability for an employee's unlawful actions.

Case details: ***Allay (UK) Ltd v Gehlen***

Mr Gehlen, an employee of Allay, was dismissed following performance concerns shortly before he reached one year's service. He brought claims including harassment related to race to an employment tribunal.

The tribunal accepted Mr Gehlen's evidence that a colleague had regularly harassed him in relation to his Indian origin, making comments about his skin colour, suggesting that he should go and work in a corner shop, and asking him why he was in the country. The tribunal also found that Mr Gehlen's colleagues had heard these comments and taken no action. When Mr Gehlen reported the harassment to a manager, the manager told the claimant to make a report to HR, but took no action to report or deal with the issue himself.

Allay argued that it had taken all reasonable steps to prevent the harassment from taking place and that it was not therefore liable for the harassment. It pointed to its equal opportunity policy, anti-bullying and harassment procedure, and the fact that the harasser had undertaken equality training 20 months before Mr Gehlen began to work for Allay.

The tribunal did not accept that Allay had taken all reasonable steps. It found that the harasser and colleagues who overheard his comments had all taken part in the equality training, which included reference to race discrimination. The tribunal found that the training was "stale" and needed to be refreshed. This finding was not based on the time which had passed since the training, but was on the basis that racial harassment had subsequently taken place and that a number of employees had failed to follow the guidance given in the training when they overheard the comments being made.

Mr Gehlen was awarded compensation of just over £5,000. This was on the basis of injury to feelings only and included a reduction of 25% because the claimant had not used the employer's grievance procedure to raise his concerns.

On appeal, the EAT agreed with the tribunal that the training was no longer effective to prevent harassment, and that there were further reasonable steps that the employer should have taken.

The EAT clarified that tribunals should first consider any steps already taken by the employer and whether these were reasonable, and then go on to consider whether there were any other reasonable steps the employer should have taken. When assessing whether a step is reasonable, the tribunal should consider a range of factors, including cost, practicality and whether a particular step is likely to be effective to prevent discrimination. However, there is no need for the step to be more likely than not to prevent the discrimination for it to be considered reasonable. Employers who argue that a step was not reasonable because it was very unlikely to have prevented the discrimination must establish to the tribunal that this was the case, bringing evidence on this point. In this case, the employer had asked the harasser to undergo equality training following the claimant notifying his potential claim to Acas, suggesting that it considered that such training would be effective.

Should employers rely on the statutory defence?

In order to rely on the reasonable steps or statutory defence, it will be helpful for employers to be able to evidence that they have implemented clear policies and put in place good quality

training which specifically reference discrimination, harassment and victimisation and protected characteristics under the Equality Act 2010.

As this case highlights, it will not be sufficient for an employer to point to the simple fact that a policy has been written and training undertaken. The effectiveness, relevance, accessibility, implementation, review and updating of policies and training will all be factors in convincing a tribunal that all reasonable steps were taken to prevent discrimination.

Evidence that colleagues or managers have taken proactive steps in relation to a complaint of discrimination would help to evidence that policies and training are effective and that all reasonable steps have been taken.

It is important to note that it is not always advisable for an employer to run the statutory defence. This is because it in effect cuts adrift the employee who is alleged to have done the discriminatory act. This is of course likely to impact on whether the alleged perpetrator will be able to provide useful evidence as a witness to support the employer's case. It is more common for an employer to defend a claim on the basis that the alleged unlawful act did not take place, or that the treatment of the claimant was for a lawful reason. In such a case, the alleged perpetrator will often helpfully provide first-hand evidence on the reasons for the treatment in question in support of the employer's defence.

Claims under the Equality Act 2010 can also be brought against individual employees and claimants may bring claims against colleagues and their employer as joint respondents. Individual respondents to a claim may need their own independent legal advice where the interests of the employer and the individual could be in conflict and particularly where the employer is arguing that it did all it reasonably could to prevent an employee from doing the alleged act.

Because of the difficulty of navigating these issues, employers should take legal advice when dealing with allegations of discrimination and before deciding to defend a claim on the basis that they have taken all reasonable steps to prevent discrimination from occurring.

Could schools insist that staff take up the offer of a Covid vaccine?

The legal considerations for schools and academy trusts.

Teachers and teaching unions are calling for staff working in schools to be offered the Covid vaccine at the earliest opportunity. As we approach full school re-opening on 8 March, such calls are likely to intensify and it is possible that school staff will be offered the vaccine in the short term.

In the health and care sector, employers have begun to consider bringing in policies of mandatory vaccination for staff working in higher risk roles and with vulnerable service users. School employers may also begin to consider whether staff can be expected to take up the offer of a vaccine and how to respond if they refuse.

The question of whether schools can insist on staff having the vaccine when offered is one to which there is not a simple answer. Schools and academy trusts will need to tread extremely carefully when considering a policy of compulsory vaccination. They will need to enter into meaningful consultation with staff and unions and be prepared to make adjustments to any such policy to reduce the risk of grievances, disputes and claims, including claims supported by unions.

Schools and academy trusts who are considering putting such a policy in place should also consider the wider reputational risks of parent, social media and press interest in such a policy, particularly where there is significant opposition to it from employees and their representatives.

Is it reasonable to mandate the vaccine for school staff?

Employers have an overall duty to act reasonably towards their employees, taking into consideration the particular circumstances which apply to the employee and the employer.

Assuming there will come a point where all school staff can access the vaccination, the question of whether compulsory vaccination is a reasonable requirement is one which will need consideration in the round. A requirement to take a vaccine and disciplinary action for any refusal could be unreasonable in some circumstances. For example, where an employee has reasonable concerns about taking the vaccine.

Where employers act unreasonably, there is a risk that employees could resign and bring constructive dismissal claims based on a breach of "trust and confidence". This claim is based on the implied term in all employment contracts that employers and employees must not, without reasonable and proper cause, act in a way which is likely to damage or destroy the relationship of mutual trust and confidence between them.

The question then will be whether the employer has reasonable and proper cause to require the employee to be vaccinated or to take steps to discipline them if they do not. This would include:

- Considering the role the particular member of staff is carrying out – are they working in a higher risk role such as carrying out personal care or working with children with special needs?
- The risks to pupils, parents and other staff which the employer is concerned to mitigate – does the school work with groups or individuals who are particularly vulnerable to the virus and is the infection rate in the local area of particular concern?
- The evidence on which the employer has decided to make the vaccine a requirement – what is the most recent Government or Public Health England advice on the impact of vaccination on transmission, serious illness and death?
- Is there another way of mitigating the identified risks which would have less impact on the member of staff – are the current measures in place in school to control spread sufficient to reduce risk to an acceptable level?

Disciplinary procedures for refusing to take the vaccine

Where a school employee refuses the offer of a vaccine, could an employer start a disciplinary process and even dismiss fairly for this refusal?

One key question here is whether the school has properly put in place a clear policy or contractual obligation on the employee to take the vaccine when offered. As this is likely to be a change to the employment contract, it will be important to reach agreement to the change, following any relevant procedures for collective consultation and agreement with trade unions before finalising the policy. Consultation on such a policy with staff or their representatives will also improve the chances that the policy is widely accepted and address key staff concerns, including consideration for special circumstances and exceptions to the rule.

Where individual employees refuse to comply with any such rule, schools and academy trusts should begin by discussing with those individuals their reasons for not taking the vaccine. Only after considering these particular reasons and circumstances should any formal step be taken, such as issuing a management instruction or following a disciplinary procedure.

Suspending, disciplining or dismissing an employee for a refusal to have the vaccine is likely to lead to grievances, and schools and academy trusts could well face employment tribunal claims for unfair dismissal, constructive dismissal and discrimination after taking such action.

Discrimination claims

It is important to note that some of the reasons why employees do not wish to take the vaccine will be linked to protected characteristics under the Equality Act 2010. The risk of discrimination claims arising from a blanket policy on mandatory vaccination is therefore considerable.

Employees with certain health conditions may not be able to, or may not wish to, take the vaccine and may be able to argue that the policy or action arising from it discriminates against them because of a disability or something connected to a disability.

Advice for pregnant women from the Joint Committee on Vaccination and Immunisation has recently changed to suggest that they can have the vaccine if they are at high risk from the virus. However, those who are pregnant are not routinely being offered the vaccine and may also be able to show that they are indirectly discriminated against by imposing such a policy.

The vaccination may raise concerns for employees with particular religious beliefs or philosophical beliefs, for example because of concerns about products used in the vaccine-making process or because of a belief-based objection to the practice of vaccination itself. In reality, it will be difficult for employers to be able to assess whether an employee's beliefs would be found by a tribunal to be protected under the Equality Act 2010. Case law indicates that a philosophical belief will be protected if:

- it is genuinely held;
- it is not just an opinion or view based on the present state of information;
- it relates to a 'weighty and substantial' aspect of human life and behaviour;
- it is sufficiently cogent, serious, coherent and important; and
- it is worthy of respect in a democratic society and not incompatible with human dignity or conflict with the fundamental rights of others.

More extreme "anti-vaxxer" views may not be protected if they lack coherence and are found not to be worthy of respect in a democratic society. However, proceeding on the basis that a particular belief will not be protected could be risky and lead to significant litigation costs and reputational risks.

Indirect discrimination claims can be defended if the policy in question can be shown to be a proportionate means of achieving a legitimate aim. To succeed in such a defence, employers would need very sound business reasons for mandating the vaccine, supported by documentary evidence of those reasons. Where the employee has good reasons for refusal and the discriminatory impact on the employee is significant, it is unlikely that an employer would be able to justify mandatory vaccination in all cases.

The health and safety duties of school employers

All employers have a statutory duty to protect the health, safety and welfare at work of their employees as far as is reasonably practicable. This includes duties to assess the risks impacting on staff in their work, to consult on health and safety issues with staff health and safety representatives (where these are in place), to create a safe system of work, to ensure that system is properly implemented, and to have a regular programme of review.

Encouraging school staff to accept a vaccination when available and providing them with accessible information about the vaccine will certainly be part of an employer's reasonable steps to manage and mitigate the risks of Covid-19 at school. However, particularly in the short and medium term, encouraging staff vaccination will be only one of a suite of control measures. And, as set out above, there will be a number of categories of school employees who may have good reason not to take up the offer of vaccination.

Because of the significant reputational and legal risks here, we highly recommend that schools and academy trusts take specific legal advice when considering a policy or risk assessment including compulsory workforce vaccination for some or all staff.

Public sector exit pay cap has been revoked

Regulations introduced in November 2020 have been scrapped due to 'unintended consequences'

The Restriction on Public Sector Exit Payments Regulations 2020 came into force on 4th November 2020 and set a £95,000 cap on exit payments for staff in public sector organisations, including local government, fire services and schools (including academies).

The regulations had originally been brought in to tackle the perceived issue of high earners in the public sector receiving significant, and sometimes repeat, severance payments only to be soon re-hired into a senior position elsewhere and to ensure prudent use of public money.

Concerns were raised by employment lawyers and unions during consultations with the government that the proposed cap of £95,000 would catch a much broader range of public sector workers. The cap was to be applied to pension entitlements, which, when combined with redundancy and notice payments, meant that a broad group of workers risked exceeding the £95,000 cap.

A guidance document published by HM Treasury in February 2021 has revoked the cap on exit payments with immediate effect. A government review of the cap concluded that it may have had 'unintended consequences', without specifying what these are.

The HM Treasury guidance stressed that it was still vital for exit payments in the public sector to deliver value for taxpayers and that employers should always consider whether exit payments are fair and proportionate.

The guidance also encourages employees who have been affected by the cap to approach their former employer directly and encourages those employers to pay affected employees any sums that they would have been due had the regulations not been in place.

Comment

The revocation of the cap barely four months after it was introduced poses a significant headache and financial drain for public sector employers who may now face the need to rectify exit payments made to recently departed employees. On the other hand, revocation recognises the potential impact on public sector staff, with unions highlighting that the cap would affect staff on annual salaries from £25,000 and the broad issues this might create for public sector staff morale and confidence.

Despite the revocation of these regulations, HM Treasury's guidance suggests that the issue has not gone away and that fresh attempts will be made to tackle the perceived problem of 'unjustified exit payments'.

Refusing to work because of fears about Covid-19 - section 44 of the Employment Rights Act

Employers need to be aware of this increasingly important provision.

The emergence of a reportedly much more infectious strain of the coronavirus in the lead up to

Christmas has now led to another national lockdown and raised questions about whether it is safe to come to work. Government guidance has made clear that people should not attend work if they are reasonably able to work from home. In particular, clinically extremely vulnerable people are advised to shield and not to attend work.

In the education sector the latest lockdown has led to partial school closures and a switch to remote learning for many pupils, with children of critical workers and children who are 'vulnerable' being allowed to attend school in person.

Just prior to the new lockdown, teaching and support staff unions advised their members not to attend schools on the grounds of safety and to send 'Section 44' letters to their employers to notify them of this.

This is not just an issue affecting schools. The current infection rates and new strains of the virus are likely to lead employees in all sectors to be concerned about attending work in person. In this article we consider whether employees can refuse to attend work during the latest lockdown.

Section 44 Employment Rights Act 1996

There is a specific protection granted to employees by s.44 of the Employment Rights Act 1996 (ERA). Specifically, s.44(1)(d) and (e) ERA provides that an employee has the right not to be subjected to any 'detrimental' act, or failure to act, by their employer on the basis that the employee left or refused to return to work or took appropriate steps to protect themselves because the employee believed they were in serious and imminent danger.

This protection is qualified in several ways. In order for the protection to apply an employee*:

1) must reasonably believe
2) that they, or other persons, were in serious and imminent danger

3) which the employee could not reasonably have been expected to avert

and so the employee left, proposed to leave, or did not return to, work.

**It is worth noting that recent caselaw supports this protection also applies to workers.*

An employee will also be protected if they take 'appropriate steps' to protect themselves or other persons in these circumstances.

The question of whether an employee had the required 'reasonable belief' is partly subjective as the tribunal will consider what was in the employee's mind at the relevant time. The tribunal will then apply an objective test, considering whether it was reasonable for the employee to hold that belief in the circumstances. We consider below what this might mean in practice.

Importantly, the protection under s.44 is only triggered if an employee can show that they have suffered a 'detriment' either as the result of an action taken or not taken by their employer and that the action/ inaction was on the ground that the employee took the protected action.

Without all these elements, s.44 will not give an employee protection from the actions of their employer.

Will staff be protected if they refuse to work during the current lockdown?

Whether the s.44 protection applies to a particular employee will depend largely on the specific circumstances of the individual and their work environment. It is therefore difficult for employers to be certain that a tribunal would or would not find the employee's conduct to be protected. There

is also very little case law to provide guidance and examples on this issue, and none to date in the context of a global pandemic. This is, quite literally, an unprecedented area of law and therefore it is very difficult to determine with any certainty whether s.44 applies in any one situation.

However, there are some key points which may help employers to weigh up the legal risks if an employee claims protection under s.44.

Reasonable belief of the employee

It is not enough under s.44 for an employee simply to say that they believed they or some other person was in serious and imminent danger which could not be averted. That belief must be reasonable, as determined by a tribunal.

In its assessment, the tribunal is likely to take into account relevant scientific advice about transmission of the virus at the time the refusal to work occurred, the particular risks applying in the workplace, and the risks to the individual who was allegedly in danger (such as any particular vulnerability to the virus). It will also consider any steps the employer has taken to reduce the risks.

In the context of the pandemic, employers are likely to need provide evidence to show that they have followed current advice, performed risk assessments and put mitigation into effect to reduce risks of transmission in the workplace to an acceptable level.

If an employer has rigorously carried out risk assessments, implemented risk mitigation, consulted with their employees / employee representatives about this and taken on board their feedback, it is less likely that a tribunal would find an employee's belief of serious and imminent danger to be reasonable.

Conversely, if an employer has taken steps to mitigate risk but has not informed or discussed this with their employees, an employee's belief in the danger is more likely to be found to have been reasonable.

It is also worth noting that it is not enough for an employee to say there was a danger – it must be serious *and* imminent and not capable of being averted, for s.44 to apply.

For this reason, it is hard to say if a tribunal would find a particular employee's belief that the danger was imminent to be reasonable. Imminence is likely to require a sufficient closeness in time and possibly space between the employee and the specific risk. We know from related case law that a potential or hypothetical risk is unlikely to be sufficient.

For the risk to be 'serious' it is likely that an employee will need to show that they believed there was more than merely a danger, but that the danger was serious to the person exposed to it. This belief of serious danger will also need to be objectively reasonable. Given the current number of hospital admissions and deaths due to Covid-19, and concerns in relation to the impact of 'long-Covid', it is possible that a tribunal would consider it reasonable to believe the danger was serious.

Applying this reasoning it is easy to see how the seriousness and imminence of danger could be met. But this will still depend on an individual's circumstances. For example, is the coronavirus both a serious and imminent danger to a 19 year-old employee with no underlying medical conditions when their employer has implemented and communicated the mitigation efforts it has taken at the workplace to make it 'covid secure' in line with government guidance?

Would the same conclusion be met if the individual were older and/ or had underlying health conditions and either were or were not categorised as clinically extremely vulnerable?

It is worth repeating that s.44 also applies to dangers which 'other people' are exposed to, which may mean that employees who have vulnerable family members and refuse to attend work can be

protected under s.44.

Detrimental treatment because of a protective act taken by the employee

For the protection afforded by s.44 to apply, an employer must subject an employee to a detriment 'on the ground' of the employee's act to avoid danger. In essence, the employer must be shown to have victimised the employee on the balance of probabilities for an act covered by s.44. In practice, this means the burden is placed on the employer to show that they were not materially motivated by the employee's protected actions. A material motivation is one which is 'more than minor or trivial'.

A detriment is anything which is disadvantageous to the employee and might cover a decrease in pay, the loss of an opportunity or promotion, the withdrawal of certain benefits or being moved to a different role or department. Whatever the detriment is it must be shown to be significantly influenced by an action taken by the employee's protected conduct. It will not be enough for an employee to merely show they suffered a detriment, which means that there may be circumstances in which an employee may suffer a detriment and not succeed with a claim for breach of s.44.

For example, if an employee refuses to attend work because there is an imminent and serious danger of contracting Covid-19 and they are subsequently furloughed on reduced pay, the employee may have grounds to say the employer has breached s.44 if they can show their being placed on furlough on reduced pay was because of their refusal to attend work. An employer may defeat such a claim if it can show, for example, that regardless of the employee refusing to attend work the employer had decided to place the employee on furlough and can provide evidence for this (for example, because they furloughed employees in the same position who did not refuse to attend work on those grounds and there were clear wider business reasons for placing those employees on furlough).

Dismissing an employee for an act covered by s.44 is automatically unfair under s.100 ERA. Employers will therefore need to be careful to document the reason for any dismissal to show that the decision to dismiss was taken for another, potentially fair reason, in the event the employee claims protection under s.44.

Risks for employers

Whilst recent trade union advice to workers in the education sector to not attend work on health and safety grounds has grabbed a lot of headlines, in our view it is not possible to make blanket assertions about whether or not an employee can rely on s.44 ERA to refuse to attend work, not least because meeting the requirements of that protection will depend on the particular circumstances of the individual and the workplace.

Ultimately, the question of whether s.44 protection applies can only be determined by a tribunal or court following what is likely to be a protracted and costly legal process.

Employers should be aware that there is no cap on compensation where an employee is found to have been automatically unfairly dismissed for health and safety reasons under s.100, unlike in ordinary unfair dismissal claims. It is also possible for an employee to bring an unfair dismissal claim under s. 100 before they reach two years' service.

Tribunals can make financial awards for successful detriment claims under s.44 and in doing so will take into account the nature of the employer's infringement and any loss to the employee attributable to the employer's act or omission. It is possible for tribunals to also make injury to feelings awards based on the distress suffered by the claimant.

Employers will also need to be mindful that employees may alternatively claim protection via a health and safety whistleblowing action which will open up the possibility of injunctive relief

(where a court is petitioned to order the employer to do or not do something). This may be tactically beneficial to employees who might otherwise face a lengthy wait to see their s.44 and/or s.100 ERA claim be processed through an employment tribunal, particularly during the pandemic.

Reducing the risks

From an employer's perspective the key actions and priorities to reduce risks of a claim will be the following:

- carry out risk assessments and identify and put into effect mitigation efforts;
- consult on risk assessments and mitigation with employees and their representatives including clear communication of and seeking feedback on risk assessments and mitigation;
- review risk assessments regularly and respond to changes in external and internal circumstances;
- if an employee refuses to attend work, be mindful of the risks of doing or not doing anything that would subject that individual to a detriment where this refusal is one of the reasons for the detriment;
- be clear about why decisions are made which might disadvantage the employee and set out these reasons in writing; this will be vital to evidence that the detriment is not linked to a refusal to attend work on health and safety grounds;
- consider what remote/home working the employee can support, since the refusal to attend work does not mean a refusal to work; and
- if furlough is an option, employees could be furloughed on full pay to avoid the detriment of reduced pay and benefits;
- if furlough is not available or appropriate, consider alternatives such as suspension on medical/health and safety grounds on full pay.

It is important that employers are aware that, due to the broad scope of sections 44 and 100 ERA, their relative infrequency to date, and the lack of case law, a s.44 or s.100 claim could lead to significant management time and attention and legal costs. There are also employee relation issues and reputational risks in facing a tribunal claim based on health and safety concerns.

Academy Trust Governance During Covid - Where Next?

We explore what we have learnt about Academy Trust Governance during Covid-19.

Wrigleys recently took part in an online Roundtable discussion organised by Forum Strategy for academy trust chairs of trustees, looking at what we have all learnt about governance during Covid.

A summary of the Roundtable Report is now available on the Forum Strategy website, covering the following issues:

- How has the work of boards changed in recent months?
- What has changed regarding governance delivery? and
- Looking ahead, what are boards identifying as their key strategic priorities?

During the past year, colleagues from Wrigleys' Education team have posted articles to our website and to various forums intended to flag existing academy trust responsibilities and how those apply as part of the changing circumstances of any trust's Covid response, including:

- Covid-19, disability discrimination and the return to school;
- Safeguarding and remote learning in the time of Covid-19;
- School staffing levels and the impact of Covid-19.

We have also posted articles to highlight relevant changes in legislation, including:

- What does the remote education direction mean for schools and trusts?

However, in terms of where next for academy trust governance, a key message is that from a legal perspective, so far as possible, it is business as usual.

It is DfE mantra and a basic principle of good governance that trustees should be 'eyes on, hands off'. A natural human reaction to the continuing Covid crisis has been to help as and where we can. For some trustees (and local governors) that has meant physically turning up at schools. Now more than ever the governance separation between trustees and senior leadership teams (SLTs) is critical. It is absolutely right that SLTs and all school-based colleagues feel supported; staff and pupil welfare has been at the top of many trust's board agenda. But staff must be allowed to get on with their jobs.

That does not mean that trustees cannot attend school, but when they do it must be for a necessary reason which adds value to their role.

Trustee meetings is one example of where governance has adapted quickly and positively. There is significant flexibility in an academy trust's governing documents (its articles of association) which allows for remote meetings for both trustees and members. Many other charities are struggling with this issue.

Whilst remote meetings have helped, they are not in themself a complete answer. The type of device, internet connection and a lack of familiarity with relevant technology present a challenge. As do the now familiar 'Can you hear me?', 'Can you see me?' interruptions and sudden silences as we work out that a speaker has finished.
And yet, a remote meeting is felt to open up possible wider trustee recruitment, bringing in those who live further away or those who may otherwise have had difficulty with the number, timing, or length of meetings. Co-ordinating a more disparate group of trustees and building a proper effective and efficient governance team is putting significant pressure on chairs of trusts.

We have previously looked at related issues in Agile governance in schools and academy trusts, a copy of which is still available on our website.

By now all trusts will have refreshed their risk assessments to deal with the practical issues around Covid response, social distancing, and remote learning. A very quick pause for thought will have highlighted just how unfit for purpose many risk assessments at that time were. Trustees are responsible for forward thinking strategic planning, so this is something of a reminder that no matter how well prepared we think we are, we can do better.

Trusts have not stood still or wallowed during the past year. They have learnt and are now much better prepared, including the delivery of remote learning. Clarification of the new legal obligation and managing parent expectations has significantly helped with this. There remains an urgent need for the funding to be put in place to ensure that quality remote education can be both delivered and accessed, but also for funding of the Covid response cost being borne by schools, and in general for funding of the nation's education.

There are further lessons to be learnt here, in that some trusts have been more successful than others in mobilising local community support, including access to funds and re-cycled equipment. It would be helpful to understand how much this is a reflection on those trusts that have been able and willing to invest in those relationship and are now reaping some reward.

In determining 'where next' for governance at your trust, it is helpful for you to reflect on the challenges you have faced over the last year. Not so much the issues themselves but how you have managed them. What has worked, or not worked, for you? Where are the pinch points in terms of your effective governance? Remote working will continue for some time yet, for many it will become an integral part of the governance meetings in a post-Covid world.

Wrigleys can support you with an independent external review of both effective governance and compliance. Our website has further details. Alternatively, do call for a no-obligation chat.

Lockdown 3: What does this mean for special schools and alternative provision?

We look at the position for special schools and alternative provision following last night's televised address by Boris Johnson.

Last night's televised address by Boris Johnson confirmed a further national lockdown, requiring all schools and colleges to close (except for vulnerable children and children of key workers) and provide education remotely until the February half term. The Government's National Lockdown: Stay at Home guidance confirms the position. However, neither the guidance nor Boris Johnson's televised address distinguishes between mainstream settings, on the one hand, and special schools and alternative provision (AP) on the other. So what is the position for special schools and AP?

The short answer is that the position is unclear. The televised address and guidance appear to include special schools and AP in the above school closure requirements. However, the first lockdown expressed school closure in similar terms but then required special schools to remain open and advised AP to remain open where it was feasible to do so. Special schools and AP therefore need the Department for Education to clarify the current position as a matter of urgency. In the meantime, special schools and AP should risk-assess each child in consultation with the local authority and parents to identify whether they need to be in school or can safely have their needs met at home. Where neither is possible, the local authority remains under a statutory duty to arrange for their education to be provided by other means.

Coronavirus and lesson observations: legal considerations for school employers

What should schools and academy trusts consider before observing remote and face to face lessons in the Covid-19 crisis?

The pandemic has brought untold change and disruption to schools and academy trusts, but it has also brought in new and arguably more effective ways of working which are likely to become part of good teaching practice for years to come. How lesson observations take place and are used within schools and beyond is just one of these areas, giving rise to both threats and opportunities. In this article we consider the key legal considerations for schools and academy trusts in their planning for and use of lesson observations in the current crisis.

Observation and recording of remote teaching

The move to providing live-streamed and recorded lessons opens up fantastic opportunities for teachers to share and analyse the good practice of their own colleagues and their counterparts in other schools. There will be much to be gained for teachers at all stages of their careers and perhaps especially for trainee teachers in having access to a bank of recorded lessons or being able to join a remote teaching session as an observer.

There are of course a number of legal considerations for schools when planning such observations and recordings. These include ensuring that data protection and safeguarding protocols are in place and rigorously implemented. For more on this, please see our previous article on the topic of safeguarding and remote learning. Schools planning to disseminate recordings of lessons

must plan ahead to ensure that children will not be visible or that the child's / parent's consent is obtained prior to using their personal data in this way. It will be important to be clear with staff, pupils and parents at the outset on the purpose for which any broadcast or recording is made and with whom it will be shared. Schools should comply with their current data protection policies and refer to relevant privacy notices before embarking on initiatives of this kind.

Some schools may already have a "drop-in" culture where colleagues and senior leaders visit lessons informally to observe what is going on and lend support where necessary. It will be important to give teachers notice if there is to be a similar approach to "dropping in" remotely to live-streamed lessons. The purpose of such a drop-in should also be made very clear in advance. If the purpose is, for example, to identify and share good practice in maintaining pace during remote teaching, it is important that such drop-ins are not then used for another purpose, such as a performance management or capability process, without prior notice.

The use of lesson observations in the current crisis

Although there is no longer any statutory limit on the number of lesson observations which can take place within a year, teaching unions have issued policy advice that teachers should have no more than three lesson observations per year for any purpose, totalling no more than three hours.

NASUWT has recently issued coronavirus-specific recommendations that schools should not carry out "discretionary lesson observations, learning walks and drop-ins" (i.e. those which go beyond contractual appraisal requirements) due to health and safety and workload concerns. It does however note that NQTs will still require a programme of lesson observation and in-class coaching and mentoring.

Schools and trusts should of course take into consideration the additional pressures on teachers at the moment and ensure that any lesson observation, whether formal or informal, is purposeful (with the purpose being shared in advance), focused on key school priorities, and above all supportive of staff and students.

Adapting lesson observation for performance management during the crisis

Some lesson observation is of course part of the normal annual appraisal process. The pay progression of teachers whose contracts incorporate the School Teachers' Pay and Conditions Document must be decided yearly on an assessment of the teacher's performance. All schools must apply the trust's or local authority's pay policy and appraisal arrangements and appraise teacher performance in line with the requirements of the Education (School Teachers' Appraisal) (England) Regulations 2012. NQTs will continue to be subject to induction policies and their performance must be assessed in accordance with the Education (Induction Arrangements for School Teachers) (England) Regulations 2012.

It will however be important for schools to adapt their normal processes to ensure that the appraisal procedure is fair and non-discriminatory in the very different circumstances encountered in schools throughout 2020.

The most recent guidance for full opening of schools states that schools should continue to follow any contractual pay progression regime linked to performance management. However, the guidance states that schools are expected to "use their discretion and take pragmatic steps to adapt performance management and appraisal arrangements to take account of the current circumstances". It highlights that schools should ensure that teachers are not penalised as a result of any decision to restrict pupil attendance at schools.

This of course goes further than taking into account the disruption to pupil assessment when considering a teacher's pupil progress-related targets. The impact of the virus on the school will need to be factored into appraisal against targets related, for example, to the use and

dissemination of particular teaching techniques, lesson structure and pupil feedback. Where lesson observations have not been possible or where the content of lessons has been hampered by coronavirus protocols or absences, appraisers will need to make allowances for this in their judgements.

Key employment law considerations

Employers have an overall duty to act reasonably towards their employees, taking into consideration the particular circumstances which apply to the employee and the employer. Where employers act unreasonably, there is a risk that employees will resign and bring constructive dismissal claims on the basis of a breach of "trust and confidence". This claim is based on the implied term in all employment contracts that employers and employees must not, without reasonable and proper cause, act in a way which is likely to damage or destroy the relationship of mutual trust and confidence between them. Although it may be more risky for staff to resign from their roles in the current climate, there is a risk of claims where schools place unreasonable demands on staff during appraisal and performance management processes, including imposing lesson observation requirements without making adaptations to take current circumstances into account. Short of any formal claim any perceived unfairness could also have significant effects on the morale of staff.

Where a performance management or capability process may end in dismissal, it will be very important that managers adapt their expectations, improvement targets and deadlines to take account of the current challenges for classroom teachers. If an unfair dismissal claim is brought, the employment tribunal will consider whether the dismissal was fair in all the circumstances. This includes an assessment of whether the process followed was fair and is likely to involve an examination of how judgements were made about the teacher's performance against targets for improvement and whether these adequately took into account what the teacher could realistically achieve in school during the pandemic.

Additionally, there may at present be an increased risk of claims relating to performance management processes where the employee could argue that decisions about dismissal or other sanctions were made because of a protected characteristic such as sex, pregnancy / maternity or age, or where employees have sought to exercise statutory rights in relation to Health and Safety. Employees who might have a condition which qualifies as a disability under the Equality Act 2010 could argue that they have been dismissed or subject to unfavourable treatment because of something arising from a disability, such as prolonged absence from work or a reluctance to take part in certain activities.

Where remote teaching is used as a covert means to monitor staff performance or conduct, employees may additionally seek to argue that their right to privacy has been infringed. For more on this area, please see our article on employee monitoring and Covid-19.

Because of the complexity of this area, we highly recommend that schools and academy trusts take specific legal advice on ensuring a fair process for dealing with performance concerns. This will help school employers to reduce and assess the risk of claims, especially during this unusual and challenging period for all those working in schools.

What can trusts learn from the DfE Governance Investigative Report?

We look at the key highlights for multi academy trusts from the DfE's School and Trust Governance Investigative Report.

Background

The Department for Education (DfE) has published the School and Trust Governance Investigative Report. The DfE commissioned the National Foundation and for Educational Research (NEFR) to research school and trust governance and provide evidence to inform future policy and resources. So what are the key findings for multi academy trusts?

Constitution

The average size of boards and local governing bodies (LGBs) is 9.6 and 10.3 respectively, which is consistent with good practice. However, trustees and LGB members are largely female, white, over 40 and in employment, which exposes a gaping chasm in diversity. We should therefore expect the DfE to focus policy and resources in this area. Trusts can also follow the recommendations of the Charity Governance Code and implement a diversity strategy, monitor progress and publish an annual diversity report.

The report also highlights a notable degree of overlap with people holding multiple governance roles. This will be disappointing for the DfE given their focus on separation but is not unexpected given the perennial recruitment challenge.

What is disconcerting is the misunderstanding of roles and status which still persists, with board members calling themselves members and members behaving like trustees. Proper training and clerking is therefore a pressing need.

Recruitment

Barriers to recruitment continue to be the perceived workload of a trustee or LGB member and the lack of time to give to the role. An effective clerk can relieve the burden by simplifying the paperwork, while eliminating duplication in decision making between boards and LGBs can also help.

Boards also struggle to fill their skills and knowledge gaps in community engagement. This can be addressed by recruiting candidates from parents and LGBs, which is why strong relationships between boards and their LGBs are essential.

Meanwhile, a lack of succession planning into the role of chair is a concern, with people asked to take the role when they're not ready or suited to the position. The report therefore recommends that vice chairs receive training and share the chair's workload so that they're able and willing to step up when the time comes. The same approach can be extended to trustees to ensure succession planning for the vice-chair.

Delegation

Most multi academy trusts (MATs) have committees (85%) and LGBs (82%) while only 18% have regional cluster groups. In most cases, delegated decisions are reported to the board for scrutiny or approval which is core to effective governance. However, some boards and LGBs perceive the allocation of responsibilities differently, for example regarding the appointment of the headteacher. This highlights the need not just for a clear scheme of delegation (SoD) but also for the SoD to be presented in different formats given the various ways we each prefer to receive information. LGBs should also receive training to ensure they understand the SoD and have the skills and confidence to discharge their functions. For example, the report highlights a particular need for training in financial management and planning and in-school data.

Clerking

Most boards are supported by clerks who are employed by the MAT (85%) with an average salary of

£9,197.90. Where the clerk isn't an employee, the average charges are £29.33 (hourly) and £188.44 (per meeting). However the clerk is engaged, trusts must benchmark the cost to ensure they are providing value for money (VFM) in keeping with the Academies Financial Handbook. This must include the support provided by the clerk. Here, 31% support 6 to 10 boards and 38% support 2 to 5 LGBs. Where VFM is not being provided, it may be appropriate to regrade or restructure, in the case of an employee, or re-tender the contracted service.

Crucially, 25% of clerks don't see providing or signposting legal advice as part of their role. As this is a core component of the clerk's role, as confirmed by the DfE's Clerking Competency Framework, this a major concern and one we can fully expect the DfE to address. Trust's must also review the job description or contract for their clerk and consider whether training may be appropriate to support the role.

Most clerks also report not being performance managed by the chair or at all. Trusts must address this priority to ensure the support and service they're receiving is fit-for-purpose.

Effectiveness

Board effectiveness remains an issue with trustees believing they have the necessary skills and knowledge in school improvement and education policy while the executive disagrees. Chairs therefore need to co-ordinate between the board and the executive to avoid mixed perceptions and a lack of confidence in the board's ability to support and challenge the executive. That said, the report confirms that boards do in practice lack skills and knowledge in these areas. This heightens the need for regular skills audits and relevant training to ensure boards are able to perform their role effectively. This extends to other identified skills and knowledge gaps in wellbeing and HR which are particularly critical during the pandemic.

Boards also display too much focus on operational matters. This is understandable given the added focus on compliance and pupil and staff wellbeing during the pandemic. However, boards must maintain their focus on the strategic and leave the executive to manage the operational. In this way, they will help relieve the burden on the executive and support them during this unprecedented time.

Boards do evaluate their effectiveness. However, they focus on self-evaluation against trust plans, key performance indicators and guidance, and by skills audits and away days. These are important and all have their place. However, boards must also engage external support as required and no less frequently than once every 3 years for an independent assessment of their effectiveness and how they can improve. If your board is in need of an independent governance review, do get in touch. The governance review service provided by Wrigleys Solicitors and Satis Education offers the advice and support needed.

Training

Finally, the report confirms that boards and LGBs tend to receive their training from the trust, the National Governance Association, The Key and/or their local authority. All these sources have their place. However, care should be taken to ensure that the training and support provided by the local authority understands the legal and policy context for trusts, not just as those relate to maintained schools.

Boards are less likely to receive training and support from a National Leader of Governance (NLG) or mentor or by observing other boards. These perspectives can be invaluable and needn't cost the earth.

The report further identifies particular skills gaps in financial management and planning, school data, statutory policies, and staff management. The DfE and trusts will need to give these their added focus.

Given the time pressures on trustees and LGB members and the cost sometimes involved in securing training, the report identifies the need to signpost guidance and make this as accessible and digestible as possible. It may help to summarise the key points, perhaps in a checklist. An effective, professional clerk can help with this and so ease the burden on the rest of the executive.

MAT's already invest in and support CPD for their staff. It is important to recognise the need to do so for their governors, trustees and members.

Summary

The School and Trust Governance Investigative Report identifies and reinforces key governance challenges for trusts. Many of these are interconnected and so require a co-ordinated response. We need the DfE to provide clear and effective policy and targeted resources to support trusts as they continue to address these challenges. Trusts will also address the governance challenges by drawing on their own hard-earned experience and expertise and by collaborating with each other, which they've done admirably during covid.

Value-for-money and procurement considerations for academy trusts and their CEOs

Value-for-money is a daily concern, driven by funding constraints and compliance. So what are the key considerations for academy trusts and CEOs?

Background

Despite the £2.6bn DfE funding increase for the 2020/21 academic year, schools and academy trusts continue to see a downward pressure on finances, aggravated by the additional costs incurred in response to the covid-19 pandemic and DfE guidance for which there is limited additional DFE funding. Meanwhile, academy trusts and CEOs continue to be held accountable for the use of public funds under the Academies Financial Handbook (AFH) with academy trusts also subject to procurement law. So what does this mean for academy trusts and CEOs?

Value for money

Under the AFH, academy trusts must achieve value for money, meaning the best possible educational and wider societal outcomes through:

- economy – obtaining an outcome for the least possible input of resources;
- efficiency – obtaining the best possible outcome for the resources input;
- effectiveness – obtaining the desired outcome;
- the avoidance of waste and extravagance; and
- prudent and economical administration.

The CEO, as accounting officer, must be able to assure Parliament and the public of value for money and must demonstrate how their academy trust has secured value for money in the governance statement included in the audited accounts.

Competitive tendering policy

The AFH also requires academy trusts to implement and apply a competitive tendering policy. This should reflect the academy trust's legal obligations and how these are to be implemented in practice. Such a policy starts with a simple three quotes, incorporates conflicts of interest and must allow for more complex, and high value, tendering requirements.

Procurement law

As organisations established to provide education which are principally financed by the DfE, academy trusts are "contracting authorities" (as defined under procurement legislation) and so must comply with EU and UK procurement law when awarding contracts. This obligation is also confirmed by the AFH.

Principles

Under procurement law, contracts must be awarded fairly, transparently and without discrimination on the grounds of nationality, with all potential bidders treated equally. Key elements are highlighted below.

Which contracts?

Procurement law applies to contracts in writing for the purchase of goods, works and services, except where:

- the academy trust controls the provider in a similar way to its own internal operations;
- more than 80% of the provider's activities are performed for the academy trust or for other entities controlled by the academy trust; and
- there is no direct capital participation by the academy trust in the provider.

Depending on the circumstances, the award of a contract to a wholly-owned subsidiary, for example to provide estate management services, will therefore be exempt although the usual checks and balances around best value and conflicts of interest will need to be observed. The award of a contract to a company (or other legal entity) jointly controlled by more than one academy trust, for example through the exercise of voting rights, will also be exempt where the academy trusts are jointly represented on the board and jointly exert decisive influence over its strategic objectives and significant decisions. This may, for example, include a teaching school alliance and teaching school hubs, depending upon how it has been structured.
The procurement rules also do not apply to contracts between academy trusts where:

- the academy trusts are co-operating with a view to achieving their common objectives;
- the agreement is governed only by considerations relating to the public interest, which will be the case where the provision of education is concerned; and
- the joint activities comprise less than 20% of those activities in the sector as a whole.

With advice and planning, a contract between academy trusts to share back office functions, such as HR, payroll and estates management, could therefore be exempt from procurement rules.

Works contracts, which an academy trust subsidises by up to 50%, are also excluded. For example, it may be that an academy trust will match or part fund a capital project where the capital grant available will be insufficient to cover the costs.

Framework agreements

An academy trust can establish their own procurement framework agreement, set one up in partnership with another academy trust (or anther contracting authority) or join an established procurement framework.

A procurement framework agreement seeks to establish a list of pre-approved providers, covering either specific, or a range of, goods and, with agreed terms of supply and prices. The academy trust, as a member of the services framework, can then call off what it needs, when it needs it without having to undertake a full procurement compliant tender process each and every time.

Thresholds

Whether an academy trust is looking to award a contract or framework agreement, different rules apply depending on the contract value. Low value contracts are either exempt from procurement rules, or subject to less formality. Threshold values are calculated net of VAT and include renewals or extensions and aggregate smaller agreements or lots which the contract has been divided into.

The current thresholds are

- £189,330 (goods)
- £4,733,252 (works)
- £189,330 (most services)

For example, a 5 year ICT support contract valued at £38k pa, will have a value of £190k and therefore meet the threshold for procurement rules to apply.

Above threshold

Where the contract value equals or exceeds the relevant threshold, an academy trust will normally need to publish a contract notice in the Supplement to the Official Journal of the European Union (OJEU) in a form available on the EU's SIMAP website. In some cases, a Prior Information Notice (PIN) may be published, in which case a contract notice is not required.

The different procedures which academy trusts may use are:

- **open** where anyone can bid and tenders will be easy to evaluate;
- **restricted** where at least 5 bidders are shortlisted and invited to tender;
- **competitive dialogue** with at least 3 shortlisted bidders to develop a solution;
- **competitive procedure with dialogue** where there is negotiation on improved offers; and
- **innovative partnership** for the development of an innovative product, service or works.

Each procedure comprises the following stages:

- Contract notice;
- Pre-qualification (except open procedure);
- Invitation to tender/dialogue/negotiate;
- Dialogue or negotiation (except open and restricted procedures);
- Tender submission;
- Tender evaluation;
- Contract award;
- Standstill period (10 days) in case unsuccessful bidders wish to challenge the process; and
- Completion of the contract, following which the contract is then performed.

Award criteria used to evaluate the tenders and identify the successful bidder must select the most economically advantageous tender. This provides the academy trust with some flexibility to establish its own tender parameters and priorities to reflect price, cost-effectiveness, quality and the organisation, qualification and experience of staff. The criteria must be accompanied by a specification, to enable the academy trust to compare and evaluate the tenders, and must be shared with bidders along with any weightings that will be applied to the criteria.

Light touch

Where an academy trust is purchasing education and training services, a light touch regime applies such that a contract notice or PIN must be published in OJEU but the academy trust is otherwise free to determine its procedure provided it complies with the principles of transparency and equal treatment and time limits are reasonable and proportionate.

Below threshold

Where the contract value falls below the relevant threshold, an academy trust must publish a contract notice on OJEU and, in some cases, publish the contract details on Contract Finder. They may use appropriate and proportionate questions to select those invited to participate.

Otherwise, academy trusts may decide the terms on which they wish to purchase the goods, works or services provided the contract is awarded fairly, transparently and without discrimination on the grounds of nationality, with all potential bidders treated equally and the terms are included in the academy trust's competitive tendering policy.

In broad terms:

- contracts of up to £40,000 tend to be procured by inviting three suppliers to tender against a specification and awarding the contract by evaluating each bid against the same criteria such as price, quality and whether they meet the specification;
- contracts over £40,000 tender to be procured by advert, inviting expressions of interest, issuing the invitation to tender (including the specification, award criteria and contract terms), evaluating each tender against the criteria and awarding the contract to the supplier whose tender best meets the criteria and is most economically advantageous.

In summary

Value-for-money and procurement compliance are key legal obligations of academy trusts and their CEOs. For trustees and CEOs, these sit among a much wider range of responsibilities and priorities which compete for their time and attention. It's therefore helpful to have an overview of the key considerations to help navigate the landscape. That said, trustees and CEOs should note that procurement law is inevitably more complex than the summary above and so should ensure they have the necessary procurement expertise and/or seek professional advice.

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

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