WRIGLEYS
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EDUCATION BULLETIN

SPRING 2019

Welcome to our Spring education bulletin.

This is Wrigleys' termly round up of news and updates relevant to schools and academies. In this edition we take a look at some recent case law and share our views on exclusion procedures, the power of local authorities to charge for exclusions, the revised academy connected party rules and gender pay gap reporting.

Our latest podcast is also now available to download from our website.

Finally, may I remind you of our forthcoming events:

- **Employment Breakfast Briefing: An update on handling disciplinary issues.**
  16 April 2019, Radisson Blu, Leeds
  For more information or to book

- **Employment Law Update for Charities**
  18th June 2019, Hilton City, Leeds
  For more information or to book

- **SAVE THE DATE - Northern Education Conference**
  20th November 2019, Hilton City, Leeds

We are always interested in feedback or suggestions for topics that may be of interest to you, so please get in touch.

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Schools and the provision of affordable housing

Assessing the implications of an absence of affordable housing for teachers, and considering how schools' surplus land could provide solutions.

There have been a number of recent references to concerns expressed by schools around the lack of affordable housing and its impact on the recruitment and retention of teachers. Reports in the press have highlighted the plight of teachers threatened by homelessness. The absence of affordable housing does of course have much wider social implications. However, some schools have challenged their own role and whether they can do something positive to help.

Government strategy

The Department for Education published its Teacher Recruitment and Retention Strategy in January 2019 highlighting four key barriers and strategy priorities to address them. Within this strategy is:

- recognition of the budgeting challenges schools face and that more is being asked of them
- a commitment to exploring whether there is a demand from teachers for new homes on surplus school land and whether an extension of permitted development rights is needed to speed up such developments.

This does not, however, include any funding commitments.

The housing issue is not new

The Teachers' Housing Association was established in 1967 and provides rented accommodation for people in housing need, particularly those associated with education. The Teacher's Building Society was founded in 1966 and provides mortgages and savings accounts to teachers. Both organisations are mutuals, owned by their members rather than by commercial investors who would generally be seeking to maximise a financial return. Other housing associations will support keyworkers, that is public sector workers including those in education, with lower-than-market rents. For those in a stronger position, there are various Help to Buy and Shared Ownership schemes.

It is not unusual for new housing developments, or refurbishments, to including planning conditions to make provision for affordable housing. Since 2010 local authorities have been able (and since 2014 are required) to charge a Community Infrastructure Levy on developments, which raises funds for the provision or improvement of local infrastructure (such as school provision). However CIL monies cannot at present be used to support affordable housing; although a 2018 Government consultation opened up this possibility this has not followed through.

So what can a school do?

Again in many ways, this is nothing new. Maintained schools have long provided homes for members of staff, such as caretakers. Academies have inherited many of these arrangements when a caretaker transferred over on conversion, including obligations to rehouse the caretaker on retirement. Similarly the few maintained boarding schools and academies with boarding provision that exist also make provision for housing staff, as part of their boarding duties. Such arrangements may be few and far between, but they demonstrate the principle that maintained schools and academies can and do make provision for housing staff.

The issue is therefore, not can but how schools make provision for housing staff.

Independent schools, many of which are educational charities similar to an academy trust, have long made provision for staff accommodation (for both teaching and non-teaching staff). This includes provision of rented accommodation, assistance with buying local homes through loans (unsecured and secured through second or third mortgages) and private shared-ownership schemes (where the school may jointly own the accommodation bought by the teacher). There are various advantages and disadvantages of such schemes, including tax issues that need to be considered. However, such support was not introduced overnight and independent schools have had a long period of time to establish their local arrangements.

Most maintained schools and academies will not have the luxury of spare cash to be able to finance such schemes, or at least not so that they can be made available to all staff. As noted above, attention has been given to what some schools may have; and that is surplus land.

For a great many years there has been opposition to schools disposing of playing fields, which usually includes any unbuilt land that a school occupies. There are various regulations that govern how any land identified as surplus to a school's requirements can be disposed of.

Land ownership

A significant starting point to be overcome is the simple fact that whilst some maintained schools will own their school site, most do not. Land will be vested in the local authority or perhaps a foundation or diocese. Some academy trusts will own land, but many more will have a lease, either from the local authority or a private landlord, or occupy under a licence, particularly for church schools. Accordingly prioritising housing for staff is very likely to be a collaborative project rather than something that is wholly within the control and power of the school.

Of course, even if sufficient surplus land can be made available, the homes will have to be built. Again most schools would not be in a position to finance such a project. There are options, which include discussions with commercial developers and housing associations. Each party will have different needs, priorities and expectations. Work will be required to ensure that prioritising housing for school staff is a common objective.

A further option is the government-owned property company locatED which it has been suggested could extend it operation to support housing for staff alongside the delivery of new school places.

Wrigleys' experience

Wrigleys has worked for many years with a range of not-for-profit organisations in the charity and voluntary sector, including community groups which have sought to tackle the lack of affordable housing in different

and novel ways. For most schools wishing to support housing for staff, there will need to be some form of collaboration with others. Other (non-commercial) options do exist alongside registered housing associations, which should be considered.

Community land trusts

Community land trusts (CLTs) are a growing movement, set up for the purpose of furthering the social, economic or environmental interest of a local community by acquiring and managing land and assets. Anyone can become a member of a CLT.

Further background on what a CLT is can be found in an earlier article, available on the *Wrigleys' website*, along with a list of some of our CLT *clients*. A 'local community' can be defined by common interest or geography, such as a group of teachers or a school working with local groups to ensure quality education provision.

An example is London *CLT's St Clements scheme* which offered 23 permanently affordable homes with prices linked to local wages. This is a radical scheme that deliberately decouples the cost of homes from the housing market where Wrigleys acted for a number of the eventual buyers. London CLT is looking at a number of other sites and teachers who are struggling in London would be well advised to look at London CLT to see whether they would be eligible for a property.

There are various projects around the country; one at the stage of buying a site is in *Oxford,* where the intention is to let at perpetually affordable rents, with the support of the local council.

Community-led housing

Community-led housing groups, such as cohousing groups and housing co-operatives, have been around for longer than CLTs (at least in the UK). Again there is an earlier article on what is cohousing on our website *(here).* These organisations can offer an alternative to buying your own property and give members a chance to live at least some of their life communally. Communal living, with the opportunity to close your own front door when you want, can appeal to diverse groups of people, from those moving to a new area to older people who want to live in a supported environment.

A housing co-operative is particularly suited to individuals or couples seeking a smaller, shared house option, although there are larger, multi-unit models.

A number of examples of current cohousing groups can be found on the *UK Cohousing Network's website* and some of those that Wrigleys have acted for recently can be found on our website, for *cohousing* and *housing co-operatives.*

Examples of how these work are project in:

- *Colchester,* which involved around 30 properties with a central communal building (known as a common house) where residents can chose to share kitchen and dining and lounge facilities (although each property does have its own separate facilities).
- *Leeds* involving 20 eco-build homes in a mix of co-operative and cohousing principles, including family and individual rental units.

Schools already support housing for staff

As noted above, schools already support housing for staff. Smoothing the playing field disposal rules and planning process will likely help, but is not an essential first stage for increasing the number of schools supporting staff in this way. Most schools will find it difficult to go it alone and few will, at least initially, have the requisite skills or experience to manage any large scale project. Collaboration will be key and there are existing examples of effective affordable housing schemes from across the not-for-profit sector.

Can an individual be personally liable for dismissing someone because of whistleblowing?

Court of Appeal holds two directors of a company personally liable for dismissal-related losses.

In *Timis and another v Osipov*, the Court of Appeal held that two directors of a company were personally liable for dismissal-related losses for actions which led to the claimant's dismissal.

Mr Osipov was CEO of International Petroleum. He raised concerns about corporate governance at the company and compliance with Nigerien law. Mr Osipov was instructed by the directors not to visit Niger. Such visits should have been a significant part of his role. Mr Timis, a director of the company, then instructed Mr Sage, another director, to dismiss Mr Osipov.

Mr Osipov brought whistle-blowing detriment and automatic unfair dismissal claims against his employer and detriment claims against Mr Timis and Mr Sage. An employment tribunal upheld his claims and awarded him £1,745,000 with the company and the two directors being jointly and severally liable. In this case, the company was insolvent and the two directors benefitted from directors' and officers' liability insurance. The EAT agreed with the tribunal's decision.

The Court of Appeal has now also upheld the decision of the tribunal.

Under whistleblowing legislation, an employee cannot bring a detriment claim against his or her employer where the detriment amounts to dismissal under Part X of the Employment Rights Act 1996 (although a worker can bring such a claim). An employee can of course bring a claim relating to unfair dismissal on the ground of whistleblowing. This claim can only be brought against the employer and not against individuals.

However, this case makes clear that an employee can bring a detriment claim against one or more work colleagues, even where the detriment amounts to dismissal, and those colleagues can be individually liable for losses that follow, including loss of earnings. In this case, the directors were party to the decision to dismiss and their actions in dismissing were motivated by the claimant's protected disclosures. There were therefore personally liable along with the employer for Mr Osipov's substantial losses due to the dismissal.

It is important that employees and officers of an organisation are aware that whistleblowing detriment claims can be brought against them personally. Those responsible for dismissal decisions may be found to have personal liability for losses relating to that dismissal. This is similar to discrimination claims, where individuals can find themselves named as individual respondents.

Guidance to help Employers close the Gender Pay Gap

The Government Equalities Office publishes new guidance as 2019's gender pay gap reporting deadline approaches

As the deadline draws close for 2019 reporting on the gender pay gap, for those employing over 250 staff, the Government Equalities Office ("GEO") has published two new pieces of guidance.

Whilst gender pay gap reporting has its critics, GEO research suggests the new reporting obligation has seen an increased awareness and understanding of issues which can impact on the gender pay gap, has facilitated discussions including significantly at board level and has increased the number of employers who view closing the gap as a priority.

Eight Ways to Understand Your Gender Pay Gap suggests questions to help identify different potential causes of the gender pay gap; looking at recruitment, promotion and advancement and the rate and percentage of men and women leaving, at different levels of seniority.

This remains a generic approach but does enable employers to delve deeper into their particular sector and identify wider societal issues that underlie any imbalance.

Understanding the reasons for your particular gender pay gap is key in identifying what you can reasonably do to tackle that gap. This is the first of Four Steps to Developing a Gender Pay Gap Action Plan, which draws together the experiences of employers who have already successfully developed and implemented effective action plans. The guidance highlights the importance of engaging with staff, with clear buy-in from senior people which will help embed any actions so that they become part of your culture, your normal way of working.

All action plans will evolve and require sufficient time to do so through monitoring, review and regular re-evaluation with the support of an identified champion within your organisation to drive this process.

Should applicants for work with children or vulnerable adults have to disclose spent convictions

Supreme Court upholds decision that the rules on disclosing multiple spent convictions in an enhanced DBS check are disproportionate and incompatible

When do spent convictions have to be disclosed?

As a general rule, spent convictions and cautions do not have to be disclosed to a prospective employer. However, if a candidate is seeking work in an "excepted occupation", including roles working with children or vulnerable adults, an enhanced DBS check will be required and this will list all previous convictions, including in some cases spent convictions.

In 2014 the rules were revised to filter out single convictions for non-violent, non-sexual offences with no custodial or suspended sentence after 11 years (or five and a half years where the offence was committed under the age of 18). A job applicant for a role in an excepted occupation with more than one spent conviction, however, must disclose all spent convictions regardless of the nature of the offence or penalty imposed.

Case: *R (on the application of P) v Secretary of State for the Home Department*

The joined applications included that of Ms P who has for some time unsuccessfully sought work as a teaching assistant. In 1999, she was convicted of theft for stealing a book worth 99p and of a further offence of failing to appear in court. Because she had more than one spent conviction, each was disclosable in her applications for work with children. She committed these offences when she was suffering from undiagnosed schizophrenia. Her condition has since been diagnosed and is successfully controlled by medication. She has not offended again. Ms P has been faced with the difficult decision of having to disclose her medical history in order to explain the circumstances of her convictions.

Another applicant, Mrs Gallagher, was convicted in 1996 for two offences: failure to wear a seatbelt while driving and for failing to ensure that her children were wearing theirs. She was convicted once again in 1998 of similar offences. In 2014, she applied for a social work role which required disclosure of multiple spent convictions. Mrs Gallagher disclosed her 1996 convictions. She failed voluntarily to disclose her 1998 convictions but these were

disclosed on the enhanced DBS check. Mrs Gallagher's job offer was withdrawn on the basis that she had been dishonest in her application.

The Supreme Court decision

The Supreme Court agreed with the lower courts that the rule on disclosing multiple spent convictions is incompatible with the European Convention on Human Rights (the Convention). A public authority can only interfere with the right to respect for privacy under Article 8 of the Convention if that interference is in accordance with the law and is necessary in a democratic society (for example to protect public safety, to prevent crime and for the protection of health or morals). The judges noted that the disclosure rules apply no matter the nature of the offences, their similarity to each other, the number of occasions involved, or the intervals of time separating them. They decided that this interference with the right to privacy could not be regarded as a necessary or proportionate means of informing employers about the likelihood of an applicant offending in the future.

The Supreme Court also determined that the rules are disproportionate in the way they deal with warnings and reprimands given to young offenders. The judges commented that such warnings should have a wholly instructive purpose and that their use as an alternative to prosecution was designed to avoid unnecessarily blighting a young offender's later life and career. They held that having to disclose such warnings to an employer is inconsistent with this purpose.

Comment

Where legislative rules are declared incompatible with the Convention, the rules continue in force, but the matter will go back to the Government to reconsider the rules. It is therefore likely that changes will be made in the future to the rules on disclosing multiple spent convictions and cautions received during childhood.

Employers who work with children and vulnerable adults will be well aware of the safer recruitment rules. However, it is important that applicants are not rejected because of a criminal record without considering the particular risks of employment. Employers should carefully consider: whether the conviction is relevant to the position applied for; the seriousness of the offence; the length of time since the offence was committed; whether there is a pattern of offending; whether the applicant's circumstances have changed since the offending behaviour took place; and any explanation offered by the applicant.

The Government has stated that it is committed to continued membership of the Convention and individuals will continue to be able to take cases to the European Court of Human Rights, even after a "no deal" exit from the EU. However, there remains some uncertainty over the way human rights cases will be dealt with in UK courts in the future. The Government has suggested that it will replace the UK Human Rights Act 1998 with a UK Bill of Rights, but it has postponed any such major change to constitutional legislation while the Brexit process is underway.

Can local authorities charge schools and academies for exclusions?

Looking at the increasing trend for local authorities to charge for exclusions and the legality of this under the relevant funding regulations.

In our work with schools and academies, we have seen an increasing number of local authorities seeking to charge schools and academies where a pupil is permanently excluded and moves to another school/academy or a pupil referral unit. These charges are often presented as part and parcel of the allocation of funding which is required to follow the pupil when they are excluded; equally, they are presented as an additional charge (or even as a fine). The rationale often given by local authorities for these charges is that the money is needed to fund local authority-run pupil referral units. Given the climate of austerity and financial constraint, this approach is understandable. However, it is not one which local authorities are permitted to take under the legal framework which governs school funding and exclusions.

The Relevant Legal Frameworks for Exclusions:

The Legal Framework for Maintained Schools

The legal framework for maintained schools is set by Section 47 of the School Standards and Framework Act 1998 (the "SSFA") and Regulation 27 of the School and Early Years Finance (England) (No 2) Regulations 2018 (the "Funding Regulations"), where Regulation 27 requires a local authority to make an adjustment to the delegated budget for a maintained mainstream school where a pupil is permanently excluded from that school and moves to another maintained school.

The Funding Regulations provide the relevant statutory formula which determines the amount by which the delegated budget is adjusted.

However, the Funding Regulations do not permit a local authority to levy any additional charge on a maintained school where a pupil is excluded from that school. The principle is that that the pupil's relevant funding, or more precisely a balance of the funding for the remaining academic year, follows the pupil.

T**he Legal Framework for Academies**

The legal framework for academies is set by their funding agreement which provides that mainstream academies and special academies which admit pupils without statements of special educational needs must, if asked by a local authority, enter into an agreement (the "Exclusion Agreement") which has the effect that, where:

- the academy admits a pupil permanently excluded from a maintained school or from an academy with whom the local authority has a similar agreement;
- the academy permanently excludes a pupil;

the arrangements for payment will be the same as if the academy were a maintained school under the Funding Regulations. In other words, the budget for that academy will be adjusted so the balance of funding follows the permanently excluded pupil.

The amount by which the budget is adjusted should accordingly follow the statutory formula provided under the

Funding Regulations.

Neither the funding agreement nor the Funding Regulations permit a local authority to levy any additional charge on an academy where a pupil is excluded from that academy. In fact, the funding agreement makes clear that the general annual grant is paid to the academy trust 'towards the normal running costs or capital expenditure' of an academy. An academy trust is therefore not permitted to pay its general annual grant towards the operating costs of a local authority-run pupil referral unit and/or for any other provision for a pupil who is not on their roll.

A breach of the funding agreement may lead to a Financial Notice to Improve being issued by the Education and Skills Funding Agency ("ESFA") which, if not complied with, would entitle the ESFA to terminate the funding agreement.

A further point on the Exclusion Agreement

As noted above, an academy trust is required (by its funding agreement) to enter into an Exclusion Agreement if invited to do so by the local authority. We have seen situations where local authorities have insisted on a particular form of agreement, which either replaces the Funding Regulations formula or includes an obligation to make additional payments, i.e. over and above the payments required by the Funding Regulations.

A local authority cannot insist that the academy agrees such provisions. An academy is not required to agree whatever the local authority presents (even if the agreement is in the same form that has been signed by other academies); only one which complies with the Funding Regulations. However, should the academy sign up then, regardless of the position under their funding agreement and the Funding Regulations, the academy becomes contractually obliged to pay the additional charges, i.e. the academy has agreed to the levy.

In some of those agreements, we have seen the local authority give itself the power to determine what the level of payment from the academy will be in the future, bypassing the Funding Regulations completely.

There is a separate point whether the individual who signed the Exclusion Agreement on behalf of the academy may have acted in breach of authority, breached the academy's scheme of financial delegation or be subject to some other charge of misconduct.

What about the schools forum?

When challenged on the levying of charges to schools and academies for permanent exclusions, local authorities may suggest that the charges are required to fund local authority-run pupil referral units, have been approved by the schools forum and are being implemented on this basis.

Section 47A of the SSFA states that the purpose of a schools forum is to advise the local authority. Regulation 10(1)(b) of the Schools Forums (England) Regulations 2012 (the "Schools Forums Regulations") also provides that a local authority must consult the schools forum annually in respect of the local authority's functions relating to the schools budget including arrangements for paying top-up funding to pupil referral units and other providers of alternative provision.

Neither the SSFA nor the Schools Forums Regulations provide that decisions of a schools forum are binding on a local authority. The fact that a schools forum confirms it is content with charges proposed by a local authority during consultation does not therefore mean that the charges are approved and are to be applied or that they are a legitimate activity by the local authority. Certainly, an agreement with the Schools Forum about what charges can be made relating to an excluded pupil can't override the Funding Regulations.

What happens on a review of a permanent exclusion?

Whilst local authorities are not permitted to change the statutory calculation required by the Funding Regulations, the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 do permit a review panel to order

- an academy trust to pay to the local authority or
- a local authority to adjust a maintained school's budget by

the sum of £4,000 if, following a decision by the panel to quash the original decision to exclude, the academy trust or the governing body (in the case of a maintained school) reconsiders the exclusion and decides not to reinstate the pupil or fails to reconsider the exclusion. These are the only circumstances where a charge may be levied in relation to exclusion.

In summary

The increasing trend for local authorities to levy charges on schools and academies for permanent exclusions, whether to fund local authority-run pupil referral units or otherwise, is not permitted by the Funding Regulations or by an academy trust's funding agreement, even where the Schools Forum is content with the charges proposed by the local authority.

Local authorities need to come clean about how and why these charges are made and not mislead schools and academies about the power of the local authority to raise such charges, if not under the Funding Regulations.

While schools and academies may understandably feel morally obliged to pay the charge to ensure there is suitable alternative provision for excluded pupils, there are therefore clear grounds why the charges need not be paid, particularly in the current climate of austerity and financial constraint which affects schools and academies, as well as local authorities.

However, schools and academies, and the Schools Forum, must also recognise that they do have the right to challenge any perceived inefficiencies in the delivery of alternative local authority provision which may be one cause of the increase in levies the schools and academies are called upon to pay.

A guide to the exclusions procedure

The key elements of the, often either misunderstood or not properly implemented, exclusions procedure for maintained schools and academies.

In our work with schools and academies, we encounter situations where exclusions procedure is not correctly implemented or is simply misunderstood. This article summarises the key elements of the exclusions procedure for maintained schools and academies under the Education Act 2002 (the "Act") and the School Discipline (Pupil Exclusions and Reviews) (England) Regulations 2012 (the "Regulations"). The procedure for pupil referral units and alternative provision academies is different and so not covered.

In this note, references to "governing body" include the governing body of a maintained school and the board of directors/trustees of an academy trust, as applicable.

Key elements of the exclusions procedure

Stage 1: Head teacher decision

The head teacher decides whether to exclude a pupil for a fixed period or permanently and, when establishing any fact, decides whether that fact is established on the balance of probabilities.

A pupil may not be excluded for one or more fixed periods if the result would be to exclude the pupil for more than 45 days in any school year.

It is key that any decision takes proper account of any possible disability discrimination and the duty to make reasonable adjustments.

Stage 2: Head teacher informs

Without delay, the head teacher must inform the parent (or pupil, if aged 18) of:

the period of exclusion and the reasons for it;

that they (and the pupil, if aged under 18) may make representations to the governing body; and

the procedure for making representations.

Where the exclusion is permanent or the pupil will be excluded for more than 5 days in any term or miss a public exam or National Curriculum test, the head teacher must also inform the governing body and local authority of the period of the exclusion (with reasons) and inform the parent (or pupil, if aged 18) that they may attend the governing body and be represented and accompanied by a friend.

Stage 3: Governing body decision

Governing body informed by head teacher

Where the head teacher has informed the governing body of

- a permanent exclusion,
- an exclusion where, as a result, the pupil would be excluded for a total of more than 15 school days in any term or would lose the opportunity to take a public exam or a National Curriculum Test or
- an exclusion where, as a result, the pupil would be excluded for a total of more than 5 school days in any term and the parent (or pupil, if aged 18) makes representations to the governing body,

the governing body must decide whether the pupil should be reinstated and, if so, whether immediately or by a particular date and do so:

- within 15 school days of a permanent exclusion or an exclusion for a fixed period where the pupil will be excluded for more than 15 school days in any term or miss a public exam or National Curriculum test; or
- within 50 school days of an exclusion for a fixed period where the pupil will be excluded for more than 5 (but not more than 15) school days in any term and the parent (or pupil, if aged 18) has made representations to the governing body.

When making its decision, the governing body must:

- consider the pupil's interests and circumstances;
- have regard to the interests of other pupils and persons working at the maintained school or academy;
- consider any representations made to it by or on behalf of the parent (or pupil, if aged 18), the head teacher or (for a maintained school) the local authority; and
- take reasonable steps to arrange a meeting to consider the exclusion when the head teacher, the parent (or pupil, if aged 18), the local authority (in the case of a maintained school) and, if requested by the parent (or pupil, if aged 18) at an academy, their representative or friend and a representative of the local authority are able to attend and make representations.

When establishing any fact, the governing body must decide whether that fact is established on the balance of probabilities.

Where the pupil will miss a public exam or National Curriculum test, the governing body must, so far as is reasonably practicable, decide if the pupil should be reinstated before the date of the exam or test.

Governing body not informed by head teacher

Where the head teacher is not required to inform the governing body of the exclusion (with reasons) - because the pupil has been excluded for less than 5 days in any term and will not miss a public exam or National Curriculum test - but the governing body receives representations from the parent (or pupil, if aged 18), the governing body must consider those representations.

Stage 4: Reinstatement

Pupil reinstated

If the governing body decides that the pupil should be reinstated, it must (without delay):

direct the head teacher to reinstate the pupil; and

inform the parent (or pupil, if aged 18) and the local authority of itsdecision (with the reasons) in writing.

The head teacher must comply with the direction by the governing body.

Pupil not reinstated

If the governing body decides not to reinstate the pupil, it must (without delay) inform the parent (or pupil, if aged 18), head teacher and local authority of its decision (with the reasons) in writing.

Where the pupil is permanently excluded, the governing body must also confirm to the parent (or pupil, if aged 18) in writing:

- that the exclusion is permanent;
- that the parent (or pupil, if aged 18) may apply for the decision of the governing body to be reviewed by a review panel and may require the local authority (in the case of a maintained school) or the academy trust (in the case of an academy) to appoint a special educational needs ("SEN") expert to advise the panel);

- the role of the SEN expert in relation to the review;
- the procedure for applying for a review;
- that the parent (or pupil, if aged 18) may appoint someone to represent them at the review; and
- that the parent (or pupil, if aged 18) may claim under the Equality Act 2010 (with the time period for a claim) where they believe there has been unlawful discrimination.

Stage 5: Review panel

Arrangements

Where the parent (or pupil, if aged 18) applies for a review within 15 school days of receiving notice of the governing body decision, the local authority (in the case of a maintained school) or the academy trust (in the case of an academy) must:

- make arrangements for the review of the governing body decision; and
- if requested by the parent (or pupil, if aged 18) when they apply for a review, appoint an SEN expert to advise impartially on how SEN may be relevant to the exclusion.

Constitution

The review panel must consist of 3 or 5 members appointed by the local authority (for a maintained school) or the academy trust (for an academy) from:

- persons who have never worked in a school in a paid capacity ("Group 1");
- head teachers (or persons who have held that position during the last 5 years) ("Group 2"); and
- persons who are or have been a governor of a maintained school, a member of a pupil referral unit management committee or a trustee/director of an academy trust where they have served in that capacity for at least 12 consecutive months within the last 5 years and have not been a teacher or a head teacher in any school in the last 5 years ("Group 3").

For a panel of 3 members, one member is drawn from each Group.

For a panel of 5 members, one member is drawn from Group 1 and two members are drawn from each of Group 2 and Group 3.

The panel may not include:

- any member or director of the local authority or the governing body (in the case of a maintained school) or the academy trust (in the case of an academy);
- the head teacher of the maintained school or academy in question (or any person who has held that position within the last 5 years);
- an employee of the local authority or the governing body (in the case of a maintained school) or the academy trust (in the case of an academy) other than the head teacher of another maintained school or academy); or
- anyone who has had any connection with the parent (or pupil, if aged 18), the pupil, the incident leading to the

exclusion or the maintained school, local authority or governing body (in the case of a maintained school), orthe academy or academy trust (in the case of an academy) which might reasonably be taken to raise doubts about that person's impartiality.

Training

During the last 2 years, each member of the review panel must have received sufficient information and instruction to know and understand:

- the requirements of legislation and statutory guidance governing exclusions;
- the role of the chair of a review panel;
- the role of the clerk to a review panel;
- the relevant effect of the Equality Act 2010;
- the requirement to act compatibly with human rights under the Human Rights Act 1998 and the Convention for the Protection of Human Rights and Fundamental Freedoms; and
- the need to observe procedural fairness and the rules of natural justice.

Clerking

The local authority (for a maintained school) or the academy trust (for an academy) may appoint a clerk to advise the review panel and the parties to the review on the procedure for the review and the law and statutory guidance relating to exclusions.

The clerk must have received sufficient information and instruction, during the last 2 years, to meet the above training requirements for panel members.

The clerk must make reasonable efforts to provide all parties with copies of relevant documents at least 5 school days before the start of the review.

Decision

The review panel may:

- uphold the decision of the governing body;
- recommend that the governing body reconsiders the exclusion; or
- if it considers that the decision of the governing body was flawed in light of the principles applicable on application for judicial review, quash the decision of the governing body and direct them to reconsider the exclusion.

The review panel must consider the pupil's interests and circumstances and have regard to the interests of other pupils and persons working at the maintained school or academy.

When establishing any fact, the review panel must decide whether that fact is established on the balance of probabilities.

The decision of the review panel is binding on the parent (or pupil, if aged 18), the governing body, the head teacher and the local authority.

The review panel may direct the governing body to place a note on the pupil's educational record.

Stage 6: Reconsideration by governing body

Where the review panel

- recommends that the governing body reconsiders a decision not to reinstate a pupil who has been permanently excluded or
- quashes the governing body decision and directs the governing to reconsider the matter,

the governing body (within 10 school days of receiving notice of the review panel decision) must reconvene to reconsider the exclusion.

When establishing any fact, the governing body must decide whether that fact is established on the balance of probabilities.

The governing body must inform the parent (or pupil, if aged 18), the head teacher and the local authority of their reconsidered decision.

Where the panel quashed the governing body decision but the governing body reconsiders the exclusion and decides not to reinstate the pupil or the governing body fails to reconsider the exclusion within 10 school days of receiving notice of the review panel decision, the review panel may order the local authority (for a maintained school) to adjust the school's budget share by £4,000 or order the academy trust (in the case of an academy) to pay £4,000 to the local authority.

Closing remarks

Given the recent media spotlight on the high rate of exclusions, including the higher incidence of exclusion of disadvantaged and SEND pupils, it is more important than ever for schools and academies to follow the correct procedure when excluding a pupil, reviewing that exclusion and reconsidering the exclusion following a review panel decision. Given that the actions by a governing body following the decision of a review panel can have financial consequences for the school or academy, there is also a financial incentive for schools and academies to follow the correct procedure which cannot be overstated in the current financial climate.

Teacher's suspension was not in breach of contract

Court of Appeal: employer had reasonable and proper cause to suspend pending investigation of allegations of unreasonable force against children.

Can suspension be a breach of contract?

Suspending an employee in some circumstances can be a breach of contract. Suspension can be in breach of the implied term of mutual trust and confidence when there is no reasonable or proper cause for suspending in the circumstances of the case.

What is the implied term of mutual trust and confidence?

Employers and employees must not, without reasonable and proper cause, act in a way which is likely to destroy or seriously damage the relationship of trust and confidence between them.

If an employer does act in this way, the employee is entitled to resign and can bring a claim based on constructive dismissal.

Case details: *London Borough of Lambeth v Agoreyo*

Ms Agoreyo worked as a year 2 teacher at a community primary school in Lambeth for a total of five weeks. Two of the children in her class showed challenging behaviour. Very early in Ms Agoreyo's employment, she communicated with other members of staff to ask for help in managing these children.

Over a two week period there were three incidents during which it was alleged by other staff, including a teaching assistant working with the class, that Ms Agoreyo had used unreasonable force to remove the children from the classroom. It was alleged, for example, that Ms Agoreyo had dragged a child "very aggressively" and picked a child up in a "heavy-handed" way.

During this period, Ms Agoreyo asked for help from the headteacher in encouraging other staff to provide support in dealing with these children. The headteacher assured her that support would be put in place. Following the last of the three incidents, the headteacher outlined the steps she proposed to take to support Ms Agoreyo.

Four days after this communication from the headteacher, and before some of the support plan had been put in place, the executive head suspended Ms Agoreyo pending investigation of the incidents. Ms Agoreyo resigned on the same day. She brought a claim for breach of contract in the County Court.

The County Court did not agree with the claimant. In the light of the seriousness of the allegations and the employer's overriding duty to protect the children in its care, the judge concluded that there was reasonable and proper cause for the suspension and so no breach of the implied term of mutual trust and confidence.

The claimant appealed to the High Court which overturned the judgment of the County Court. The High Court decided that there had been a breach of contract as there was no necessity to suspend the claimant in circumstances where the headteacher had inquired about two of the incidents and concluded that no more than reasonable force had been used.

On further appeal to the Court of Appeal, the decision of the County Court was reinstated. The Court of Appeal held that the High Court judge had applied the wrong test. The key question is whether the employer has reasonable and proper cause to suspend. There is no requirement for the suspension to be necessary. The Court of Appeal held that the County Court judge was entitled to find that there was reasonable and proper cause for the suspension in this case.

Is suspension a neutral act?

Many employers will use template suspension letters which include a statement that suspension is a "neutral act". Employers should be aware that this is not the way a court or tribunal will view the matter. Case law makes clear that suspension can be an act which is likely to destroy or damage the relationship of trust and confidence between employer and employee. This may be particularly the case where the employee is working in a sector such as teaching, where professional reputation could feasibly be destroyed by speculation on the reasons for suspension.

The Court of Appeal in this case suggested that it is effectively irrelevant whether suspension is described as a neutral act or not. The relevant question is simply whether there is reasonable and proper cause to suspend. That question can only be answered by looking at the circumstances of the suspension.

Employers should note that the *ACAS Code of Practice on Disciplinary and Grievance Procedures* stipulates that employers should make clear that suspension is not a disciplinary sanction. It is important that suspension letters make this clear and state that suspension does not imply any assumption of guilt.

When will there be reasonable and proper cause to suspend?

The decision to suspend should not be "knee-jerk" or automatic. Because of the risk of breaching the employment contract, an employer should give careful thought to whether it is reasonable to suspend on a case by case basis. It is likely to be reasonable only where the employee's presence at work will pose a risk to the organisation, its staff or the people it works with; or where there is a risk that the employee will interfere with the investigation. It is important to carry out an initial investigation before suspension in order to be able to assess these risks.

Alternatives to suspension should be considered such as moving the employee temporarily to different work or increasing supervision. If the decision is made to suspend, it is advisable to make a written note of the reasons for this decision. Suspension should be for as short a period as possible and should be regularly reviewed. It could also be in breach of contract to keep someone on suspension after facts come to light suggesting there is no risk in them being at work.

The Court of Appeal made reference to the case of Gogay v Hertfordshire County Council [2000] EWCA Civ 288. In this case a residential care worker was suspended following allegations of sexual abuse from a "troubled" child in a children's home. It was held that suspension of Ms Gogay before further investigations were carried out and without considering alternatives to suspension was in breach of the implied term of trust and confidence. In Agoreyo, the court pointed to the fact that the allegations against Ms Gogay were rather unclear, came from the alleged victim, and were not corroborated by others. By contrast, the allegations against Ms Agoreyo had been made by two members of staff and related to three separate incidents concerning two children. In this case, it was reasonable for the school to believe from initial investigations that there would be a risk to children if Ms Agoreyo was not suspended.

Employers should also be aware that the unreasonable use of suspension could found other claims. For example, it could be argued to be unfavourable treatment in a discrimination claim, particularly where other employees have not been suspended in similar circumstances. In an unfair dismissal claim, an employee could argue the suspension itself, or the way it was managed, made the dismissal procedurally unfair. In that case, the tribunal would consider whether the use of suspension was fair in the circumstances. Having a contemporary note of the employer's very good reasons for suspension will help employers to defend such claims.

Council's "evisceration" of details in a child's Education and Health Care Plan was unlawful

School successfully challenges council's alteration of an Education and Health Care Plan and naming of an unsuitable school.

Local authority obligations

When dealing with EHCPs, local councils have various statutory obligations. For example, councils have a duty to make sure that the EHCP provides for mainstream education for a child or young person unless that is incompatible with the wishes of the child's parent or the young person themselves, or it is incompatible with the education of others. Further, the local authority has a duty to ensure that the specified educational provisions outlined in the EHCP are provided. EHCPs must be reviewed every 12 months and must be re-assessed in certain circumstances, including when the named school requests it.

The *SEND Code of Practice 2015* sets out at section 9.69 what should be included in an EHCP. Section F of the EHCP should include the detailed and specific educational provision required by the child.

Case details

Upon the child, who suffered from Autism Spectrum Disorder, moving to Medway from Greenwich, the EHCP that was previously in place was transferred to Medway Council. The council asked a school to accept the child, but they refused on the grounds that they were unsuitable, as they were unable to provide for the child's needs identified in the EHCP, such as lego therapy, a sensory room, and staff trained in signing and Picture Exchange Communication System (PECS).

Medway Council subsequently amended the EHCP, removing large sections that gave details of required provision for the child. It also named the school in the EHCP so that it would be legally bound to accept the child.

The school argued against the council's actions on two main fronts. First, that the changes that were made to the special educational provisions section of the EHCP were beyond what could be reasonably made. Secondly, due to the lack of detail in Section F, it was impossible for the council to comply with its legal duty to consult with the school on its suitability for the child.

The decision

The High Court held that the local authority acted unreasonably when it "eviscerated" the ECHP and named the school, despite it being unsuitable for the child. Consequentially, the Court ordered the ECHP to be quashed, and the previous version re-instated, whilst the local council arranged for the child's attendance at an appropriate school.

Comment

This is a rare example of a judicial review challenge of a local authority's decisions relating to special educational needs provision.

Chris Billington, Head of Education at Wrigleys comments: "This judgment makes interesting reading, particularly in clarifying the qualified right of a child with special educational needs to attend a mainstream school. It is important to note that, where there is no mainstream school in the area which is suitable for the child, the local authority has an obligation to make a mainstream school suitable at the cost of the local authority."

Wrigleys have been working with a number of academies to review governance and company compliance.

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

www.wrigleysschools.co.uk

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