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EDUCATION BULLETIN

SUMMER 2019

Welcome to our Summer education bulletin.

In our Summer round up, we take a look at the key findings and recommendations from the Timpson Review of School Exclusion and on academy governance we discuss a recent case which highlighted conduct by a director which was held to be a breach of duty. We also include some reminders about the changes to termination payments and other employment related updates for schools and academies.

Finally, may I remind you of our forthcoming events:

- **Managing Sickness Absence**
  Breakfast Seminar, Leeds, 6th August 2019
  For more information or to book
- **Dealing with employee grievances**
  Breakfast Seminar, Leeds, 1st October 2019
  For more information or to book
- **Northern Education Conference**
  All day conference, Cloth Hall Court, Leeds, 20 November 2019
  For more information or to book

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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Wherever you see the BAILII logo simply click on it to view more detail about a case

What does the Timpson Review of School Exclusion mean in practice?

The key findings and recommendations of the Timpson Review of School Exclusion and the impact on exclusions and behaviour management in practice.

The Timpson Review of School Exclusion, commissioned to explore how head teachers use exclusion in practice and why some groups of pupils are more likely to be excluded, includes findings and recommendations that are important not just for mainstream, special and alternative provision but also for health and social care agencies and the government.

Key findings of the Timpson Review of School Exclusion

The key findings, summarised below, provide a frame of reference for the recommendations that follow.

Outcomes

Of concern is the fact that the outcomes of excluded children are often poor with just 7% of children who were permanently excluded and 18% of children who received multiple fixed period exclusions in 2015/16 achieving good passes in English and maths GCSEs. Only 4.5% of pupils educated in Alternative Provision ("AP") in 2015/16 achieved a good pass in English and maths at GCSE. Excluded children are also at higher risk of becoming NEET (not in education, employment or training) and a victim or perpetrator of crime and are vulnerable to exploitation. There is therefore a pressing need for high quality provision for excluded pupils to ensure they achieve their full potential and keep them safe.

Vulnerable groups

The groups who more likely to be excluded include:

* children with special education needs or and/or a disability ("SEND"), particularly children with social, emotional and mental health ("SEMH") including in relation to attachment and trauma;

* children who have been supported by social care including Children in Need, looked after children and those who have left local authority ("LA") care via adoption, Special Guardianship or a Child Arrangement Order;

* Irish, Black Caribbean, Gypsy and Roma children; and

* children eligible for free school meals, boys and older pupils.

Children who have several characteristics are at even greater risk of exclusion.

Given the range of factors that lead to poor behaviour and exclusion, schools and health and social care agencies therefore need to work together, before and after exclusion, to give children the best chance to succeed.

EHC plans

This is reinforced by the fact that children with EHC plans are 2.8 times more likely to have a fixed period exclusion, when compared with all children, and that exclusion is sometimes used as a tool to ensure a child is assessed for an EHC plan, or given a place outside mainstream school, rather than primarily as a tool to manage poor behaviour. This has the knock on effect of taking AP places at the cost of those in need of the particular support that AP provides.

Variations in practice

Data for 2016/17 shows that 54% of permanent exclusions were in the quarter of highest excluding LAs and only 6% in the quarter that excluded the fewest. Meanwhile, 85% of mainstream schools issued no permanent exclusions with 0.2% of mainstream schools issuing more than 10. Rates of fixed period exclusion also vary across LAs, from 0% to 21.42%. These differences are driven by issues of place (the particular challenges in an area, such as levels of deprivation and gang activity) and policy and practice (the particular means of managing behaviour and thresholds for exclusion).

Guidance

Head teachers also report that current DfE guidance is unclear, leading to variation in practice. This is likely to explain, in part, the range of exclusion rates between schools.

School type

The Review did not find that school types (academies or otherwise) are, as a group, using exclusion strategically to improve results. In fact, the Review found that the type of school will not, in itself, determine how well exclusion is used.

Exclusion in all but name

Of concern, though, is that children have been made to leave their school without access to the formal exclusion process, sometimes perversely incentivised by current accountability measures. This includes children sent home from school for a period of time with no exclusion being recorded, referred to as 'informal exclusion'. It also includes schools that encourage parents to remove their child from school, sometimes under the threat of permanent exclusion, referred to as 'off-rolling'. Both 'informal exclusion' and 'off rolling' risk leaving children in unsuitable education or with no education at all, exposed to criminal activity, gangs and other exploitation. The government therefore needs to understand the scale and impact of the problem. While tackling this could result in a rise in formal exclusions, this should be seen as positive progress.

Special schools

For special schools, the rate of permanent exclusion is lower than mainstream, at 0.07%, while the fixed period exclusion rate is higher, at 13.3%. Special schools also reported poor co-ordination with other schools in their area with a lack of places in specialist settings for pupils with particular needs, often those more likely to be excluded.

Alternative provision

AP also report that places taken by permanent exclusions divert resources from implementing preventative support. Some AP settings are also under pressure to fill places early in the year, where demand is high, meaning they are unable to take referrals later in the year for those in greater need. Meanwhile, there is concern that children are being directed to AP, rather than being formally excluded, meaning the parent or carer does not have access to the independent review process that is available on exclusion. The condition of some AP premises is also inadequate.

Independent review

According to the Review, data also shows that uptake of the independent review, available to parents and children following a permanent exclusion, is low. This may reflect that parents do not want to, or do not believe they have the grounds to, challenge exclusion or they lack the information or confidence to do so. Whatever the position, it is imperative that governing bodies of schools and academy trusts understand their legal obligations regarding independent reviews and exclusions more generally. For

further detail, please see our recent article A guide to the exclusions procedure available *here*.

Governance

In terms of governance, the Review identifies LA-convened forums as a common model for effectively bringing schools and other services together to take joint responsibility for those at risk of exclusion. However, their constitution varies, with some constituted as stand alone forums and others using existing meetings of school leaders, such as Fair Access Protocols, to avoid new layers of governance.

The Review also reinforces the importance of diversity on the governing body of the school and on the academy trust to strengthen their effectiveness and set the tone for inclusion. This chimes with the principles of diversity, integrity and board effectiveness in the Charity Governance Code, produced for organisations with charitable or social purposes, and also chimes with the requirements of the Equality Act 2010.

Meanwhile, the Review considers that good governance of in-school units is critical and encourages schools to carefully consider who oversees and monitors their operation and how their use is kept under review and communicated to parents and carers.

Crucially, the Review reports the need for governors to have the capacity and training to scrutinise decisions to exclude. The training requirements that apply can also be found in our recent article A guide to the exclusions procedure available *here.*

Key recommendations of the Timpson Review of School Exclusion

The key recommendations of the Review are as follows.

Statutory guidance

First, it is recommended that the Department for Education ("DfE") updates its statutory guidance to provide more clarity on the use of exclusion and ensure all relevant overlapping guidance us clear, accessible and consistent.

Joint working

The DfE should also set the expectation that schools and LAs work together and clarify the powers of LAs to act as advocates for vulnerable children. In particular, LAs should be enabled to facilitate and convene meaningful local forums that all schools are expected to attend.

While we agree with the need for greater joint working to safeguard the vulnerable, we do wonder whether the effectiveness of these forums is limited, given the inherent competition in the school system and the limited and shrinking capacity of many LAs. The constitution of the forums also requires careful thought to ensure that maintained schools and academies are suitably represented, which is not always the case at present.

Practice Management Fund

Alongside the above, the Review recommends that the DfE should also establish a Practice Management Fund to support LAs, mainstream, special and AP schools to work together to establish effective systems to identify children in need of support and deliver good interventions. This, though, is dependent on the next Comprehensive Spending Review.

Training

Meanwhile, the Review recognises that well-evidenced, meaningful and accessible training and support is essential for school leaders to develop, embed and maintain positive behaviour cultures and so recommends that the DfE £10m investment in supporting school behaviour should enable leaders to share best practice and facilitate peer support. It also recommends that the DfE should ensure accessible, meaningful and substantive training on behaviour is a mandatory part of initial teacher training and embedded in the Early Career Framework.

SENCOs

Similarly, the DfE should review the training and support available to Special Educational Needs Co-ordinators ("SENCOs") and ensure the training of designated senior leads includes a specific focus on attachment and trauma.

Equality and diversity hubs

According to the Review, the DfE should also extend funding to equality and diversity hubs to increase the diversity of senior leadership teams through training and support for underrepresented groups. Again, this is consistent with the principle of diversity in the Charity Governance Code, produced for

organisations with charitable or social purposes and consistent with the requirements of the Equality Act 2010.

In-school units

As for in-school units, the Review recommends that the DfE should strengthen its guidance so that these are used constructively and are supported by good governance. To our mind, the guidance should confirm the requirement for clear schemes of delegation and terms of reference for the committee with immediate oversight and clear lines of responsibility and reporting for the staff responsible for managing the provision.

Alternative provision

The DfE should also promote the role of AP in supporting mainstream and special schools to deliver effective intervention, recognise the best AP as teaching schools and actively facilitate the sharing of expertise between AP and the wider school system. Alongside, the DfE should take steps to ensure AP is an attractive place to work and career choice, boost interest in and exposure to AP through teacher training placements and develop and invest in high-quality, inspirational leaders in AP who have capacity to drive improvement across the sector. The DfE should also invest significantly in improving and expanding AP buildings and facilities and rename Pupil Referral Units to reflect their role as schools and places to help children overcome barriers to engaging in education.

Accountability

The Review goes onto recommend that the DfE should make schools responsible for the children they exclude and accountable for their educational outcomes and recommends that the DfE consults on how to take this forward including for schools to have greater control over AP funding to allow them to discharge their duties. The DfE has already announced that it will be consulting in the autumn term.

The Review also says the DfE must take steps to ensure there is sufficient oversight and monitoring of schools' use of AP and require schools to submit information on their use of off-site direction into AP through the school census.

The Review further recommends that the DfE should consider and mitigate any possible unintended consequences of strengthening accountability, for example by introducing a 'right to return' period for home educated children to return to their previous school.

Meanwhile, Ofsted is encouraged to address exclusions practice, good or bad, within the leadership and management element of their judgement. Where it finds 'off-rolling', this should in all but exceptional cases result in a judgement that the school's leadership and management is inadequate.

Funding

In terms of funding, the DfE should look carefully at the timing and amounts of any adjustments to schools' funding following permanent exclusion to remove any incentive for a school to permanently exclude or refuse to admit a child who has been permanently excluded from elsewhere. The Review also recommends that funding should be sufficient and flexible enough for schools to put in place alternative interventions that avoid exclusion, where appropriate, and fund AP. As things stand, however, there is no indication that additional funding will be forthcoming although we await the outcome of the Conservative leadership contest and the Comprehensive Spending Review.

Governance

In terms of governance, the DfE should work with others to build the capacity and capability of governors and trustees to properly discharge their functions in relation to exclusions and managed moves, including training and guidance. Governing bodies, academy trusts and local forums should also review exclusions data to identify local trends and gaps in provision.

Previously looked after children

Similarly, the DfE should publish the number and rate of exclusion of previously looked after children.

Exclusions data

The DfE should also review the range of reasons that schools provide for exclusion when submitting data and make changes to more accurately capture this data.

Managed moves

Meanwhile, the DfE should consult on and issue clear guidance on how managed moves should be conducted, so that they are used consistently and effectively.

Multiple exclusions

Similarly, the DfE should consult on options to address children with multiple exclusions being left without access to education, including by limiting the total number of days a pupil can be excluded for or requiring AP to be arranged in these circumstances.

Vulnerable children

The Review goes onto recommend that regulations and guidelines should be changed so that social workers must be notified when a Child in Need is moved out of their school (by managed move, home education or direction to AP) and be involved in any process for challenging, re-considering or reviewing decisions to exclude.

Real-time data on exclusions and other moves out of education should also be routinely shared with Local Safeguarding Children Boards and their successors, Safeguarding Partners, so they can assess and address any safeguarding concerns, such as involvement in crime.

Youth Endowment Fund

Alongside, the Review recommends that the government's £200m Youth Endowment Fund, which tests interventions to prevent children from becoming involved in a life of crime and violence, should be open to schools, including AP, to support early intervention and prevention for those most at risk.

Wrigleys' comment

The Timpson Review of School Exclusion is thorough and compelling with the findings and recommendations spanning exclusions, education provision, safeguarding, governance, inspection, accountability and equality. If you require further information or advice on any of these areas, do get in touch. As education sector experts, we routinely advise on these areas.

In the meantime, we await the implementation of the DfE response including the further consultation schedule for the autumn term, and of course the Comprehensive Spending Review and, before that, the outcome of the Conservative leadership contest, which could change everything!

Work experience for children and young people

What do you need to know about employing children?

Earlier this year The Federation of Small Businesses called for the reintroduction of compulsory work experience for children (which ended in 2012) to help them be 'work ready' when they enter the work environment.

This note is intended as an overview of the main issues that employers and/or schools need to consider when providing work experience opportunities to children and young people.

How do I know if my employee is classed as a child or young person?

The law differentiates between a 'child' and 'young person'.

A 'child' is any person of compulsory school age or who is under the minimum school leaving age (i.e. up to the age of 16), as per the Education Act 1996 ('EA'96'). Although young people are required to be in education, training or apprenticeship up to the age of 18, that requirement can be achieved outside of 'school' and has not altered the definition of compulsory school age.

A 'young person' is defined in the EA'96 and the Working Time Regulations 1998 ('WTR'98') as someone over the compulsory school age who has not reached their 18th birthday.

Also 'employment' in this context covers any person who assists in a trade or occupation carried on for a profit, even if they receive no payment (as defined in the Children and Young Persons Act 1933 ('CYPA'33')). This is a wider test than whether the individual is an employee in law, e.g. for the purposes of unfair dismissal and other employment rights.

Accordingly schools will be concerned for any child or young person on its school roll.

Statutory restrictions on the employment of children and young persons

There are various statutory restrictions on the employment of children and young persons covering the following:

Age limits

The general position is that children are not permitted to be in full time employment. Children aged 14 and

above can be in part-time employment subject to restrictions, as referred to below.

Children under 13 can undertake performance roles such as modelling or acting where the relevant Local Authority ('LA') has issued the employer a performance licence for that child.

Local Authority ('LA') byelaws (see below) can extend permission for part-time work to children aged 13 and can also extend the type of work and hours of part-time work children aged 13-16 can undertake. An employer will require a child work permit unless offering work experience arranged by a school.

Above compulsory school age there are no prohibitions on working, although restrictions on type and hours of work will still apply. From the age of 18 employment rights will apply.

Type of work

Children can only be employed to do 'light work' unlikely to be harmful to the child's safety, health or development, or their school participation.

All employers have a duty to ensure the health and safety of their employee's, regardless of their age. However additional considerations must be given to children and young people as a consequence of their lack of experience, maturity and their being unaware of risks. Employers are also under a duty to inform parents or guardians of any child of possible risks and measure in place to mitigate them, although this can be done verbally.

For more information, employers and parents should read the Health and Safety Executive's online guidance *'What the law says about young people at work.'*

Hours of work

Under CYPA'33 children cannot be employed:

* if on a school day, before the end of a school day (this if often relaxed via LA byelaws);

* before 7am or after 7pm;

* for more than 2 hrs on a day that they have to go to school, or a Sunday;

* for more than 12 hrs in any school term week (which is seven consecutive days);

* if they are under 15, for more than 5 hrs on a Saturday or, if 15-16 for more than 8 hrs on a Saturday;

* if under 15 and during the school holidays, a child cannot work for more than 25 hrs in the week (i.e. max 2 hrs on Sunday and 5 hrs otherwise) or, if aged 15-16 for more than 35 hrs in the week (max 2 hrs on Sunday and 8 hrs otherwise); and

* without a one hour rest break after working four hours in any day.

Under WTR'98 a young persons working hours must not exceed 8 hrs a day or 40 hrs a week. Employers must take all reasonable steps to ensure that young persons comply with their working time limits and keep records to show that the limits are being complied with. There are some exemptions to these limits covering young persons in certain excluded sectors, domestic workers in private households or workers in the armed forces.

Pay

Children are not entitled to the national minimum wage, but young persons are entitled to the 'young workers' national minimum wage rate.

Holidays

Children must be given a two-week break from any employment in each year, but there is no statutory right to paid annual leave.

Local Authority byelaws

In addition to the statutory restrictions on employing children (above) the CYPA'33 grants LAs the power to make byelaws concerning a number of those restrictions.

Permits

A set of model byelaws was produced in 1998 which require LAs to issue work permits for the employment of children. The model byelaws are not mandatory, but many LAs do use them. It is therefore advisable for employers to check if a permit system is in operation with their LA.

Work experience schemes

The EA'96 allows children of compulsory school age in their last two years of school to take part in work experience schemes that would otherwise be prohibited or limited. The effect is to dis-apply the relevant provisions of CYPA'33 and LA byelaws.

However, the EA'96 provides that children on work experience should usually work no more than eight hours per day and no more than 40 hours per week. Certain restrictions continue to apply, e.g. employment that is:

- beyond the child's physical or psychological capacity;
- in heavy industries (e.g. mining, quarrying and manufacturing);
- in premises where alcohol is sold and the child is unaccompanied.

Safeguarding

Employers need to be especially sensitive to their duties in respect of DBS checks and reporting if they are, or are considering, employing children or providing work experience placements to children. It is a criminal offence for employers to fail in these duties.

Schools also need to consider their safeguarding duties in respect of children put into work experience placements. Being pro-active and asking for proof of safeguarding measures from prospective work placement employers is best practice.

Schools should also consider requesting evidence from prospective work experience providers to show that they have performed the necessary risk assessments and ensuring parental consent to place the child on work experience is received.

In regard to children and young persons in work, schools will need to have regard to their safeguarding duties for the child's general welfare and safety. As noted above, the CYPA'33 provides that a child cannot participate in employment that is likely to risk the child's safety, health and development or school participation. If a school becomes concerned about any of these aspects it is best advised to raise concerns in the normal way in conjunction with safeguarding partners. If the concern arises in relation to any work placement, then the school must consider terminating that placement.

Wrigleys Summary

For employers and schools the starting points to consider are:

* To check with their LA to see what byelaws are in place and whether a permit is required to employ a child;

* Children as young as 13 (depending on local byelaws) can perform 'light work' within a for-profit organisation;

* Children in the final two years of compulsory schooling can engage in work experience;

* Employers must have regard to the special health and safety requirements involved in employing children and young persons; and

* Safeguarding remains crucial and both schools and employers need to be sensitive to their obligations.

Work experience can provide considerable added value, but only as a part of a properly managed scheme given suitable school support and resources. Unfortunately cuts to school budgets and other priorities have seen many such schemes stop. The Federation of Small Businesses call for compulsory work experience for children does not include any particular proposals or ways to add support or resources.

However, there are existing external providers which already support schools develop work experience programmes including those that work in partnership with local employers (an example is the Ahead Partnership).

What are academy directors' legal duties?

And what to do when directors go rogue…

The recent case of Stobart Group Ltd v Tinkler: a salutary reminder to directors of multi-academy trusts of their duties under the Companies Act 2006.

Case details

The case concerned a disgruntled director who shared confidential financial and other information about the company and made approaches to key stakeholders without the board's knowledge or approval (referred to as "briefing against the board"), including taking steps to ensure his own re-election and attempted

appointment as chair of directors.

The court was asked to look at a range of governance issues, including the exercise of the powers of a director for their proper purpose, acting in good faith in the company's best interest and exercising independent judgement.

Current Department of Education policy (in accordance with governance best practice) is for a clear separation between the members of a MAT and its directors, avoiding overlap and potential conflicts between the separate roles and responsibilities of members and directors. That allows for a similar scenario as appears in this case to arise; in particular, where members are not treated equally when it comes to information being disseminated from the board and personal relationships between members and directors. The issue can frequently be exacerbated when a board is comprised of individuals with other commitments and potential conflicting interests, whether as employees of the MAT, as parents, as nominees of the local authority, diocese or foundation, or simply with their own business or other personal interests within the local community.

Academy directors legal duties

Academy directors should at all time be mindful of their company law duties under sections 170 to 177 of the Companies Act 2006, which include:

* the duty to act within powers (i.e. in accordance with the company's articles of association);

* the duty to exercise independent judgment;

* the duty to promote the success of the company;

* the duty to exercise reasonable care, skill and diligence;

* the duty to avoid conflicts of interest;

* the duty not to accept benefits from third parties; and

* the duty to declare an interest in proposed transactions

With regards to the exercise of independent judgement, the case confirmed that this does not allow a director to simply "go off and do his own thing". A director may, and should (in fact it is essential that they) feel able to, raise a dissenting opinion. Having raised a dissenting opinion, however, a director must be careful of their responsibilities to the collective decision making body and should not make approaches to individual members or others to air their views, or dissatisfaction.

It is not the case that a dissenting director is obliged to resign. It is entirely appropriate that a dissenting director accepts that the collective decision of the majority of the board has been genuinely taken in the best interest of the company. Decisions of the board are generally taken as a majority recognizing that there is no need or expectation of unanimity.

The directors' duties as referred to above are due to the company as a whole and not to any particular member (or even a majority of members), for that oversteps the boundaries of the company's separate legal personality as distinct from its members. Promoting the interest of some members gives preference to those members distinct from all members and distinct from the interests of the company.

In this case the court held that:

* the dissenting director should not have aired his concerns to selected stakeholders without having first raised them with the board. Even if members had prompted the issue the director should have maintained the collective line instead of disclosing his personal position and views. "Briefing against the board" was in breach of the duty of loyalty; and

* divulging confidential and misleading information (to members and employees) was a breach of loyalty and the duty to exercise independent judgement.

This is not to say that a dissenting director cannot make their concerns known. If necessary this should be done in an open and transparent way, ideally led by the board as a whole, which treats all members equally and fairly and which thereby enables the members to reach a considered position, with the benefit of all relevant information, in accordance with their own duties to the company.

What can MATs do prevent rogue directors?

MATs can take steps to prevent "briefing against the board", such as putting in place a code of conduct setting out the relationships between directors, governors, members of the MAT, staff other stakeholders and the wider community. A code of conduct could also cover formal and informal communications and delegated functions, as well as provisions reminding directors of their obligation to act in the best interests of the MAT, rather than for any personal gain.

Wrigleys Comment

Chris Billington, head of the education team at Wrigleys comments: "To avoid the potential for issues such as those which came before the court in this case arising, MAT boards should aim to promote a culture of clear communication and appropriate channels for discussion amongst the board. In circumstances where it appears to the board that they have no alternative option but to remove a director who has breached their duties, the board should take care to ensure that any such removal is in accordance with internal policies, the MAT's articles of association and the applicable company law and that at all times the board is acting in what they genuinely consider to be in the best interests of the MAT."

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

An agreed exit for school staff via a settlement agreement may be trickier than you think…

An agreed exit may seem like an easy option to smooth the departure of a member of school staff. Settlement agreements can provide peace of mind and value for money in some circumstances, but it is important that all parties go into the negotiation process with their eyes open so that expectations are not falsely raised and financial and governance obligations overlooked. Having the right information at your fingertips when opening off the record settlement negotiations with staff and their trade union representatives can save considerable time, money and conflict later in the process.

In this two-part article, we look at the key things which academy trusts considering severance payments should know.

Education and Skills Funding Agency (ESFA) compliance

Trustees of academy trusts must comply with the most recent *Academies Financial Handbook (AFH)*. As set out in section 1.3.4 of the AFH, the trustees of an academy trust must ensure regularity and propriety and achieve value for money in the use of trust funds. It is sometimes overlooked that this duty falls on the trustees themselves, including the rules on severance payments. It is important to ensure that any decision to make an offer of a severance payment is properly made in compliance with the AFH and with trust governance procedures. If the decision is not to be made by the full board of trustees, there should be specific delegated authority from the board for the individual or committee in question to decide on the offer and agree final settlement terms.

We have been issued with a Financial Notice to Improve

Trustees should note that, when a Financial Notice to Improve is issued, the academy trust loses its delegated authority from the ESFA to make autonomous financial transactions. This includes its authority to make decisions about severance payments. In the case of a Notice to Improve, all severance payments must have approval from the ESFA.

How much will we pay?

The trustees' obligations with regard to severance payments appear at section 3.3 of the AFH. Where the trust is considering a payment (over and above contractual / statutory entitlements) of £50,000 gross, ESFA approval must be obtained. However, it is important that trustees are aware that their obligations do not stop there.

If an academy trust is considering making a staff severance payment at any level above statutory or contractual entitlements, the trustees must consider whether:

* the payment would be in the interests of the academy trust;

* the payment is justified in the light of a legal assessment of the merits of any claim and the costs of defending a claim; and

* the level of payment is justified in that it would be lower than the potential court or tribunal award.

Where payments are proposed which fall below the £50,000 trigger then, whilst ESFA approval is not required, the AFH still expects academy trusts to apply the same level of scrutiny to the proposed payment.

The guidance states that severance payments should not be made where they could be seen as a reward for failure (for example in cases of gross misconduct or poor performance). However, this is to be balanced

against consideration of the potential costs of a claim where there have been procedural errors in managing a disciplinary issue, or where the time and cost of taking someone through a performance management or capability procedure outweigh the costs of settlement.

These considerations and a cost analysis of the options available to the trust should be recorded in writing before the decision is made on whether to make an offer and on the level of the payment. Severance payments which have been made during the year must be disclosed in the trust's annual accounts, giving both a total figure and a figure for individual payments.

The use of confidentiality clauses

Readers may be aware of the recent media focus on non-disclosure agreements in employment contracts and settlement agreements which seek to silence employees' complaints, particularly about sexual harassment. As the law stands, such clauses are unlikely to be enforceable to stop someone reporting a crime or blowing the whistle but there is nothing to stop an employer failing to make this clear in an agreement. The *Government consultation* on the use of confidentiality clauses has recently closed and a response is awaited. Wrigleys' contributions to the consultation are available to view *here*.

Interestingly, the AFH already explicitly states at section 3.3.7 that trusts must ensure that confidentiality clauses in settlement agreements do not prevent an individual's right to make protected disclosures or "whistleblow".

How this could all this work in practice – meet Mrs Best

Mrs Best is a MFL teacher who has been going through a capability process for some months due to poor performance in lesson observations and poor value-added data in her classes. The academy trust would admit that there have been some gaps in the process due to a lack of management time and resources. Mrs Best has submitted a formal grievance about the process and has raised sex discrimination allegations. She has complained that a man in her department has not been placed onto a capability procedure even though his results are just as poor as hers. She has now gone off sick with work-related stress. Her trade union approaches the trust to discuss an off the record settlement.

The trust consults its solicitors. The solicitors warn that there is a risk that Mrs Best could succeed in a discrimination claim and unfair dismissal claim (if she is dismissed) or a constructive dismissal claim (if she resigns before being dismissed).

The trustees consider the costs and management resources which would go into trying to continue the capability process and managing her sickness absence. They take into account the cost of covering Mrs Best's classes and responsibilities for the likely period of absence. They also consider the potential tribunal awards and the costs of defending a claim. Balanced against this, they consider the legal costs of settlement and the potential severance payment. They take into account the interests of the trust more broadly, giving thought to whether settling would encourage others to expect a pay off in cases of poor performance.

The trustees record these considerations, including the legal assessment, and decide to offer a severance payment which represents value for money in the use of public funds.

Part 2 now available *here*

The new tax rules on notice pay and how offering Mrs Best a "tax free lump sum" could seriously damage settlement negotiations.

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

May 2019

An agreed exit for school staff via a settlement agreement may be trickier than you think…

An agreed exit may seem like an easy option to smooth the departure of a member of school staff. Settlement agreements can provide peace of mind and value for money in some circumstances, but it is important that all parties go into the negotiation process with their eyes open so that expectations are not falsely raised and financial and governance obligations overlooked. Having the right information at your fingertips when opening off the record settlement negotiations with colleagues and their trade union representatives can save considerable time, money and conflict later in the process.

In the second part of our two-part article, we look at the key things which academy trusts considering severance payments should know.

Please click *here* to read Part 1 on compliance with the Education and Skills Funding Agency (ESFA) rules on severance payments.

The new tax rules on termination payments (from 6 April 2018)

The most important point to take away from this article is that the effect of the new tax rules is that notice pay or its equivalent is a**lways taxed as earnings**; whether as contractual pay in lieu of notice (PILON) or as a non-contractual payment. It is irrelevant how the payment is labelled by the employer. Any rounding up of a payment based on notice pay (as might have been proposed under the old rules) will also have no impact on the application of the new rules.

If the contract includes a right to a PILON

In this case, notice pay under the contract will be subject to deductions (as was previously the case) and the new rules will not apply.

Where there is no contractual PILON

It is most often the case that teachers' and school support staff contracts do not include a PILON. In this case, the amount which would have been paid for any unworked notice must be calculated (based on actual pay during the last pay period). This is called Post-Employment Notice Pay (PENP). Any PENP within a severance payment will be subject to tax and National Insurance contributions (NICs). The notice period in question is the notice the employee would be entitled to from the employer.

How will this work in practice?

Let's take an example. Mrs Best is an MFL teacher who has been going through a capability procedure and has raised complaints about the process, including discrimination complaints.

Mrs Best would be entitled to 3 months' notice from the academy trust. She earns £3,000 gross per month. A settlement agreement is proposed including a severance payment of £15,000. No notice will be worked. There is no right to pay in lieu of notice in her contract. £9,000 of the payment (pay for the three month notional notice period) will be subject to tax and NICs, reducing considerably the amount Mrs Best actually receives. The remaining £6,000 will be exempt from tax as a payment in connection with termination coming within the £30,000 tax exemption threshold under sections 401-416 Income Tax (Earnings and Pensions) Act 2003.

Where some or all notice is worked

If the member of staff works the full notice period, there will be no "Post-employment Notice Period" and no PENP. In that case, any termination payment is likely to be payable without deductions. Academy trusts should ensure that they have a paper trail showing that notice was given and worked.

However, there are risks for both the employer and the employee in giving notice unilaterally. If the school gives notice, this is effectively a dismissal and could give rise to an unfair dismissal claim if the settlement agreement is not ultimately agreed. If the employee gives notice, this is a resignation. The risk for the employee is that the school might accept this without going on to agree any settlement terms. There is also a question as to whether the school would have any basis on which to make a severance payment where a resignation had already been received under the ESFA rules (see *Part 1 of this article* for details). To protect both parties, it is therefore advisable for the settlement agreement itself to record that notice has been given on the date of the agreement. You should be aware that HMRC may seek documentary evidence to support the academy trust's tax treatment of any severance payment.

Where some but not all the notice period is worked, this will reduce the impact of the new rules. If Mrs Best were to work one month of the three month notice period, the amount subject to deductions would be £6,000 (two months' pay).

Employees on reduced pay

PENP is based on the amount the employee earned as basic pay in the last pay period before termination. Broadly, where pay is reduced, this is the figure which is used for the calculation. If Mrs Best were to be on half pay, for example due to sickness absence or contractual maternity pay, in the last month before termination, the calculation would be based on half pay for three months and so deductions would be lower. If pay has reduced to nil, the PENP calculation will also be nil.

There is some uncertainty as to whether Statutory Sick Pay or Statutory Maternity Pay should be included in

the PENP calculation. HMRC guidance indicates that these payments should be included as part of basic pay, but commentators have suggested that this may not reflect the meaning of the tax legislation. As a very new area of the law, such uncertainties have yet to be tested in the tax tribunal or courts.

ACAS settlements and tribunal awards

The new tax rules extend beyond settlement agreement payments to any "relevant termination award". This includes payments made during and after the early conciliation process through an Acas COT3 agreement. It is also likely to include awards made in tribunal.

Redundancy Pay

The main exception to the new rules is that the amount due to a redundant employee as statutory redundancy pay (SRP) can be paid tax free.

Contractual enhancements to SRP are not exempt. This means that tax and NICs will have to be deducted from any amount paid over SRP.

Managing expectations

Employees are unlikely to know about this recent change to the tax rules. It is also possible that some trade union representatives do not have full information about the implications of the rules.

Teaching staff, who may be entitled to a full term's notice from the academy trust, will be particularly impacted by these rules. In many cases, the whole of a settlement sum will be subject to deductions. It is therefore essential that any settlement offer is clearly stated to be subject to tax and NICs and that you make clear that this can have a significant impact on take-home sums. Trusts should be aware that increasing the amount of an offer simply to mitigate the tax impact on an employee will not be justifiable under the ESFA rules. If the impact of the new tax rules is overlooked at the outset of negotiations, raised expectations may mean agreement is very difficult to reach.

Further guidance

This is a technical area of the law. We recommend that academy trusts take tax and legal advice on specific cases. It is also possible to refer a particular arrangement to HMRC for advance clearance where there is doubt about the application of the new rules. HMRC guidance on the new rules can be accessed *here.*

What should an employer do if an employee presents evidence of a disability at an appeal against their dismissal?

A recent case highlights the difficulties employers face when new evidence comes to light at appeal

A few weeks ago we published an *article* about the best use of probationary periods and the risks of claims arising from this early stage of employment. Discrimination claims can be brought without any minimum length of service. However, in the early days of an employment relationship, an employer may not be aware of the employee's protected characteristic. In the following case, the employer only found out about a probationer's disability during a dismissal appeal.

Case details: *Baldeh v Churches Housing Association of Dudley & District Limited*

Mrs Baldeh worked for CHADD as a support worker. She was dismissed at the end of a six-month probationary period in June 2015 on the basis of poor performance and behavioural issues. Mrs Baldeh appealed the decision and explained at the appeal hearing that she experienced depressive episodes that affected her short-term memory and that could make her act aggressively towards others as a result.

Mrs Baldeh's appeal was not upheld. She brought a tribunal claim against CHADD alleging, amongst other things, her dismissal was the result of unfavourable treatment arising as a consequence of her disability under s.15 of the Equality Act 2010 ('EqA').

The law

Section 15 EqA provides an employer facing such a claim with two main defences:

(i) the employer did not know or could not reasonably have been expected to know (i.e. 'actual' or 'constructive' knowledge) that the employee had the disability; or

(ii) the employer can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

The decision

The tribunal dismissed all of Mrs Baldeh's claims but the EAT found a number of errors with the tribunal's reasoning relating to the issue of s.15 EqA disability discrimination.

First, the tribunal found that CHADD did not have actual or constructive knowledge of Mrs Baldeh's disability at the time the decision was made to dismiss her. The EAT found this was wrong: at the time of the appeal decision confirming dismissal, the employer did have actual knowledge of her disability.

Second, the EAT held that the tribunal had wrongly focused on the fact that there were other reasons why Mrs Baldeh had been dismissed apart from those arising from her disability. The key question according to the EAT was whether something arising from her disability had a material influence on the dismissal.

Third, the EAT noted that the tribunal had identified legitimate aims for CHADD. These were 'maintaining standards required of individuals working with vulnerable people' and of 'maintaining a workforce where staff can work amicably in a pressured environment'. However, the tribunal had completely overlooked whether the action taken was proportionate, failing to weigh up the impact on the claimant of losing her job against the needs of the employer.

The EAT ordered that the case be sent back to a fresh tribunal.

Wrigleys comment

There are some useful lessons to be learned in this case, particularly in relation to employers taking appropriate action where disability issues arise at the later stage of a process.

If evidence of disability is presented at appeal after a decision to dismiss has been taken and the employer had no knowledge of the disability prior to dismissal, the employer cannot ignore the new information. It is advisable for the employer to carry out further investigation of the employee's mental or physical condition, seeking information from a medical professional or occupational health advisor and asking particularly whether any disability relates to the reasons for the dismissal. This information should be taken into account when making the appeal decision.

Probationary periods in employment - an overview of the implications and potential pitfalls

Probationary periods are a common feature of employment – but what exactly are the implications of one?

The idea of probationary periods is simple enough – they provide a period of time in which the employer and employee can see what it is like to work with each other and if either party isn't happy, they can terminate the contract on minimal notice and move on.

However, there is no statutory or common law right to a probationary period and no common legal process setting out how they should be performed. They are entirely the creation of the employment relationship between employer and employee which means that, in reality, a 'probationary period' is really an umbrella term that can vary from employer to employer.

What does this mean in practice?

Drafting an appropriate probationary period clause for the employment contract is tricky. On the one hand an employer could clearly set out how the probationary period works to suit the specific job or role and make clear on what basis an employee will pass it or fail it. On the other hand many employers will avoid doing this to limit the risk of a breach of contract claim. Another problematic issue is the time and attention required - one role can be so different to another, even within the same organisation, that bespoke drafting might be required for each role. In practice, some employers still fail to provide any contract at all.

It is therefore not too surprising that the use of generic and vague references to a probationary period have become widespread.

Why does this present a problem?

A probationary period should not present a problem to employers who actively monitor and manage new employees. However, either due to oversight or lack of resources, many employers will not do so.

Consider a busy employer who checks various metrics towards the end of a probationary period and finds that the employee on probation is falling well short of expected standards. The employer has a small window to take advantage of the shorter length of notice commonly provided for during probation, but also realises the identified performance issues have not been raised with the employee and they won't get the chance to raise them in the window available.

An employer could take the view that, even if the employee felt the decision was unfair, there is no real prospect of an unfair dismissal claim due to a lack of service. Further still, because it is implied by a probationary period that the employee's performance is monitored, even if no reason is given at the time of dismissal it is arguable that the dismissal is for 'performance reasons'. Might an employer be tempted to think 'why take the time to explain the reason? Why not just dismiss and simply state 'performance reasons'? or give no reason at all?'

How risky is it to dismiss an employee during their probation without giving reasons, or for vague reasons?

This approach raises far greater risks if the employee has done a protected act or has a protected characteristic, giving them a potentially automatic unfair dismissal or discrimination claim which does not need a qualifying period of service. Here, the dismissed employee could understandably be suspicious of their employer's motives and bring a claim.

Even if the employer is comfortable the real reason for dismissal falls under one of the potentially fair reasons for dismissal (e.g. conduct, capability or some other substantial reason), if the employee has not been actively managed, it will still seem suspicious to the employee to be told they are dismissed for 'performance reasons'.

Automatic unfair reasons for dismissal do not require the employee to have two years' continuous employment to qualify to bring a claim. Even if the employer was acting reasonably the following reasons for dismissal are automatically unfair, including dismissal during a probationary period:

- pregnancy and maternity;
- family matters, including parental leave, paternity leave (birth and adoption), adoption leave and time of for dependants;
- acting as an employee or trade union representative or trade union membership;
- being a part-time or fixed-term employee;
- asserting statutory rights relating to pay and working hours, including annual leave and the National Minimum Wage; and
- whistleblowing.

Consider an employee under probation who has poor timekeeping, attendance or general performance. Without appropriate monitoring during probation the cause of any performance issue could go undetected; e.g. a family matter or an illness which covers an underlying disability.

The employer will find themselves on the back foot if they face an automatic unfair dismissal or discrimination claim and they have minimal evidence to show that the dismissal was for a potentially fair reason. Even if a claim may ultimately fail, it is not uncommon for it to progress past the initial sift at tribunal if an employer lacks evidence in their defence. This is especially true in discrimination cases where tribunals are reluctant to dismiss such claims without hearing evidence from the parties and the employer cannot immediately show a clear non-discriminatory explanation for the alleged treatment. There is likely to be scant evidence available if the employer did not actively manage the employee during probation. This will also be true if the employer can only point to dismissal stated as being for vague 'performance reasons'.

Therefore, the risk of providing vague reasons or no reason for dismissal is that it makes it much more likely that the employer will face the costs of defending or seeking to settle an automatically unfair or discrimination claim. Depending on the circumstances, there is the risk that the employer could lose such a claim.

Wrigleys comment

Performance monitoring is always going to form a key part of any probationary period, whether or not that forms part of any clause in the employment contract. Best practice will always be for employers to ensure that there is some process put in place whereby good and bad performance can be discussed with the employee. This need not be onerous.

Employers should also not shy away from actively managing new employees for fear of uncovering any issues that add complexity, such as a protected characteristic. An employer will be better positioned to protect itself against subsequent claims by taking a proactive approach to identify issues and any legitimate concerns and to make it clear that the employer is not acting on the basis of any protected act or characteristic.

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 **Elizabeth Wilson** on **0113 244 6100**

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