

Education Focus



Are you ready for the apprenticeship levy?

Big changes are on the way in April 2017 when the Government's proposed new apprenticeship levy is scheduled to be implemented. The impact on both employers and providers (as employers themselves and as providers of apprenticeships) will be significant. For employers a key message is "use it or lose it". For providers there is a focus on getting the message out to employers, ensuring that contractual relationships with employers are robust to mitigate commercial risk to the provider and being ready to engage in the Government's consultation over the associated Rules.

Under the proposals all employers – including education and training providers – with an annual pay bill of £3 million or more will be required to pay the levy, which in effect is an additional tax imposed on UK employers to fund apprenticeships. The levy has been introduced as part of the Government's commitment to increase the total number of apprenticeship starts to 3 million by 2020; one of the rationale here being that employers who pay the levy will be encouraged to 'get their money's worth' and recruit more apprentices.

The levy will be a sum equal to 0.5% of the employer's annual pay bill. All employers will have an annual allowance of £15,000 to offset against their levy liability, which will operate on a monthly basis with all employers having a monthly allowance of £1,250. In practice this means that employers will pay 0.5% of their monthly pay bill above £250,000 towards the levy.

For those employers who do not use their full monthly allowance – i.e. those with a monthly pay bill below £250,000 – the unused balance will be rolled over into the following month. For example, an employer whose January pay bill is £150,000 will have a January levy liability of £750, which will be covered by the January

allowance. The remaining £500 of the January allowance will be rolled over into February, meaning that the employer's allowance for February will be £1,750.

It is important to note however that this £15,000 is not a cash allowance to be put towards training. Rather, it is a notional allowance that will be offset against an employer's levy liability – i.e. if 0.5% of your total annual pay bill is £8,000, you would have not have paid the levy as a benefit of the allowance, but you would not receive an additional payment of the £7,000 balance at the end of the year in respect of the unused portion of the allowance. Employers should also note that, where they are part of a group, there will only be one allowance for the entire group.

Employers who pay the levy will receive an equivalent sum back by way of electronic funds to spend on apprenticeship training and assessment, plus an additional 10% top-up from the Government. The funds will be accessed by employers using a new Digital Apprenticeship Service accounts system to be put in place by the Government.

Significantly, however, the funds will only be capable of being put towards the cost of the training and assessment

of apprentices who start after 31 March 2017. Any additional costs relating to the employment of an apprentice – such as set-up and managerial costs, wages, travel expenses and costs incurred in connection with work placements – cannot be paid for using the funds; nor can any costs relating to apprentices who started their apprenticeship before April 2017 (who will continue to be funded under the conditions that applied when they started). Also, all levy funds will expire 18 months after being entered on the employer's account.

Continues on page 3...

Also in this issue

Q&A – Academisation

New SFA funding rules

Freedom of Information and test results

National database of governors

Protection of goodwill – restrictive covenants

Term time holidays – the story continues

Durand Academy Trust risks termination of EFA funding

Q&A

Academisation

John Flanagan, Corporate Partner in Rollits' Education Team, answers questions on academisation and the u-turn which wasn't.



What do you think to recent developments in Government policy on academisation?

That's a huge question! Rollits takes the position that it is not for us to judge whether the policies are good or bad – indeed our philosophy is that a rigid blanket answer to any challenge in the sector is rarely if ever going to be the right one for all. For what it is worth, our view is that structures must be secondary to outcomes: you decide what want to achieve then build a structure to support that, and the answer will inevitably vary depending on individual circumstances including capacity and capability of a provider's team, local competition, and the social context of a community.

What about the u-turn on forced academisation?

What u-turn? When the Secretary of State first announced an apparent change to the position set out in White Paper we quickly identified that the practical impact of the change was close to zero. The next day – a Saturday – the Department issued a press release confirming the continued intention that all schools would become academies, just not by being overtly forced. I think the Government realised how badly the phrase "forced academisation" had been received (how could it not have?!) and so the purpose of the so-called u-turn was purely a cover to take the heat out of the situation by removing "forced" from the vocabulary around academisation.

Do you think the Government will achieve its policy of total academisation?

This is the subject of heart-felt debate at moment, on all sides of the argument. For those schools who are in difficulty or whose local authority has quality issues the answer is a clear yes. An interesting part of the sector will be those who are doing well but where a tipping point is reached such that Government believes it is not sustainable to continue to allow the local authority to continue to operate schools. It is noteworthy that it is in our experience exactly those schools who are amongst those who are most strongly considering making the move to academisation.

Why do you think some schools who in principle do not want to convert, and who are not technically forced to convert, are actively looking at their options?

I would suggest that it is right for any school to be actively looking at its options – to do otherwise, even if in fact the decision is not to convert, would seem to me to be a mistake given the current environment around schools and academisation. In practice I see very few schools not looking at this from all angles and that must be right. Schools and their Governing Bodies are staffed with talented and committed individuals who want the best for their pupils; how that is achieved is second to actually achieving it. With those who genuinely have the choice at the moment, we are seeing a strong desire to look more closely at academisation options. If anything that interest has intensified since "the u-turn that isn't a u-turn". It is as if they have been shown what the edge of the precipice looks like and did not like what they saw: I don't know if it would be giving the Government too much credit for suggesting this was their plan all along – I suspect it wasn't and that it had much more to do with a relatively powerful small Conservative majority in Parliament. In terms of reasons for looking at voluntary academisation, this has been for a range of reasons but themes emerging include: choose dancing partners before the options are limited because others have already gone elsewhere; form a local MAT to

avoid pressure to join a national one; be at the core of the leadership of a MAT rather than having to join someone else's party even if local; don't get stuck with diminishing levels of local authority services by being a late mover; and take advantage of opportunity that the current Government's policy offers. There may be benefits which are here now but which will be withdrawn later.

What practical issues are you seeing?

A lot. One of the big ones is resource within local authorities. They are simply

not geared up for this and, if anything, we are seeing this problem getting worse as a double whammy of local authority cuts and increasing numbers of academy conversion projects start to bite. Proper due diligence is key for any school looking to convert in order that practical issues such as boundary problems, property issues (think flat roofs, asbestos...), and lack of investment can be revealed and understood. More rarely, in our experience, are there student, parent or staff issues.

What advice would you give to schools right now?

Knowledge is power – it is what education providers do best – so arm yourself with a thorough understanding of what academisation actually means in practice. Marry that up with your own school's priorities, the fast evolving political and social environment and talk to those who have converted or supported conversion. Don't do something because you are told to do it, do it if you believe it's the best outcome within the reality of the environment we find ourselves in.

Freedom of Information and test results

The Centre for Evaluation and Monitoring ("CEM") is a research group within Durham University. It is described as one of the two main commercial providers of 11+ testing in the UK. The test results generated by CEM are used by certain selective secondary schools in order to determine that school's intake of pupils.

CEM is a public authority and it is subject to the Freedom of Information Act 2000 ("FOIA"). A request was made under FOIA for information in respect of raw test results in relation to three schools. CEM held the information but declined to provide it in full relying on the commercial interest exemption in section 43(2) FOIA.

The matter was referred to the Information Commissioner who concluded that the commercial interest exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The appellant appealed to the Information Tribunal, which confirmed the Information Commissioner's decision.

In reaching its decision, the Information Tribunal highlighted a number of factors which would be prejudicial to Durham

University's commercial interests if the information were to be released. Such factors included the claim that CEM's unique selling point was its ability to "tutor proof" its tests so that tutors could not help their pupils prepare for the tests. Revealing raw test material would allow competitors to analyse CEM's methods and would undermine CEM's USP. It was also claimed that CEM's main competitor was a charity which was not subject to FOIA and therefore the impact of FOIA was unequal.

It was agreed that there were a number of public interest factors in favour of disclosing the information, such as transparency over the allocation of school places. However, the majority held that, on balance, factors against disclosure (including the unfairness to public bodies seeking to compete against non-public bodies in a commercial



sector) outweighed the public interest in disclosing the information and so the appeal was dismissed.

David White

Are you ready for the apprenticeship levy? Continued from cover...

Employers who pay for their apprenticeship training using their digital account will not be required to have in place funds to cover the full cost of the apprenticeship prior to engaging the education/training provider. It will be sufficient for them to have an amount equal to the monthly cost of the apprenticeship (based on the total cost of the apprenticeship divided by the length of the apprenticeship). The monthly cost will then be paid to the provider each month over the course of the apprenticeship. Where the monthly cost exceeds the monthly levy, the Government will make an additional contribution to the shortfall but part of the shortfall will need to be paid by the employer.

Education and training providers delivering apprenticeships should be

aware that this creates a potential credit risk for them, in that they will be agreeing to deliver apprenticeships without any security of payment. It will therefore be important for such providers to ensure that their contracts with employers are updated to address this and other issues. In effect, the employer largely becomes the funder in place of the Government. The employer will be obliged under the Funding Rules to ensure that there are certain provisions in its contract with a provider to ensure that the provider can draw down the levy.

It remains to be seen what (if any) impact Brexit will have upon the proposals. Skills Minister Nick Boles recently announced a delay in the publication of the first raft of additional guidance until later in the Summer. Although Mr Boles had

reportedly suggested pre-referendum that the apprenticeship levy could be jeopardised by a 'Leave' victory, he has since confirmed that the levy proposals will not change in any significant respect in light of the referendum result. Further guidance is scheduled for release in October 2016 and December 2016.

So the Government still has a significant amount of work to do to get ready for the launch of the new system. An employer's guide has been available for some time. The provider guide is frustratingly overdue and, together with the detail around the additional financial contributions all sizes of employers will have to make to co-fund apprenticeships, we are awaiting a lot of answers to some very important questions.

James Peel and Tom Morrison

National database of governors

The Government is committed to increasing transparency on who governs schools. The recent White Paper *Educational Excellence Everywhere* sets out the Government's plans to implement a national database of all those involved in the governance of academies, multi-academy trusts and maintained schools by extending the information collected via Edubase. This will also enable the DfE to more quickly and accurately identify individuals who have a role in governance.



This second set of data will not be publicly available, will be encrypted within the system and access will be restricted to a small number of users who need it to fulfil their official responsibilities. The email address of the Chair of the Board will be made available to Regional Schools' Commissioner Offices on request where they need direct contact with the Chair. Subject to successful pilots, the DfE will also use the email address to send to Chairs information about the issues that national performance data suggests the Board needs to address with its Senior Leadership Team.

It is important that in collating these details and that in keeping Edubase up to date that academy trusts comply with data protection legislation. Governors/ trustees and members will need to understand that information they provide will be shared with the DfE, the reasons why the information is being collected and the purposes for which it will be used.

Gerry Morrison

From September 2016 the Academies Financial Handbook will require academy trusts to provide information about their members and trustees as well as (in the case of multi-academy trusts), those sitting on any local governing bodies that may be in place.

Academy trusts' funding agreements already require information to be provided to the Secretary of State as and when requested about the academy trust or individual academies. Edubase has already been pre-populated with information provided by the Education Funding Agency's Information Exchange. From 1 July 2016 the system is live for academy trusts and multi-academy trusts to check their entries, update these where necessary and populate any empty fields.

Edubase will be developed by September 2016 to enable multi-academy trusts to record details of any committees that operate between the Trust Board and local governing bodies at individual academy level (e.g. overseeing a cluster of academies within the multi-academy trust). Academy trusts will also be required to update Edubase as those involved in governance change (e.g. as and when new trustees and members are appointed).

Information to be collected

For all maintained school governors, academy trustees, members and local governors the data which will be collected in Edubase and made publicly available is:

- full name (including title)
- appointing body (eg Board, Foundation, parents, etc)
- date of appointment
- date term of office ends/ended if in last year
- for maintained schools whether they are the Chair of governors or a member of the governing body, and for academies whether they are a trust member, a trustee, the chair of trustees, or a local governor on a local governing body.

In addition for all these individuals collected within Edubase, the following details will be collected but not published to help the Government to identify specific individuals:

- postcode
- date of birth
- previous names
- nationality
- direct email access for Chair

New SFA funding rules

On 1 August 2016 the Skills Funding Agency's latest funding rules will come into force. One of this year's most apparent changes is the way in which the rules are presented – last year's 138 page document has been replaced by a shorter set of common funding rules (applicable to all SFA funding), with additional documents setting out the SFA's rules in respect of specific areas such as apprenticeships, adult education budget and advanced learner loans.

It goes without saying that those providers who sub-contract the delivery of education and training will need to ensure that their sub-contracts are up-to-date in light of the latest rules. For example, the latest rules require providers to ensure that their subcontractors comply with the prescribed rules on document retention, publicity and horizontal themes set out in the Funding and Performance Management Rules for the 2014 to 2020 ESF Programme (which were introduced during the 2015/16 academic year).

James Peel

Protection of goodwill – restrictive covenants

In the final part of our step by step guide to acquisitions and disposals in the sector (for example of training providers) the corporate members of our Education Team look at how to best protect the goodwill of a business after it has been purchased.



Following a potentially lengthy and costly acquisition process the worst case scenario is that that goodwill of (say) the training provider acquired is instantly eroded by the actions of the sellers post completion (for example by setting up a rival competing business). The most common way in which a purchaser protects the goodwill it has acquired is by requiring a seller (or sellers) to comply with restrictive covenants post completion. Restrictive covenants are common place in employment contracts, and also in sale and purchase agreements where they can often be enforceable for longer periods of time due to the fact that a purchaser has paid what can be a significant amount for the goodwill of a business. In such circumstances a purchaser has a tangible interest to protect, which the seller has been compensated for.

Types of restrictive covenant

Whilst restrictive covenants will be drafted to suit the particular circumstances of each transaction they can broadly be seen as falling into three different categories, and seek to prevent a seller from carrying out any of the following actions:

- soliciting customers – such as employers – from the business (that has been sold);
- soliciting employees of the business; and
- competing with the business.

Duration and reasonableness

Typically restrictive covenants will last for two or three years, although the period of time is dependent upon each individual transaction. Case law has shown that in order for restrictive covenants to be enforceable they must not be contrary to the public interest, and must protect a buyer's legitimate interest (that is they should be "reasonable" in the circumstances).

Facts taken into account when considering the reasonableness of a restrictive covenant include:

- the geographical area purported to be covered by the restrictive covenant;
- the nature of the business being protected; and
- the length of the restriction.

It is therefore crucial to carefully think about the drafting of restrictive covenants; simply approaching this area

with a view of obtaining as far reaching a covenant as can be written into an agreement may ultimately be a mistake if they are later shown to be unreasonable in the circumstances.

Remedies for breach of restrictive covenants

A breach of restrictive covenant should be dealt with as soon as possible by a purchaser. The typical right of action is through a breach of contract claim and an application can be made for injunctive relief to prevent a breach from continuing; there is also possibility of an award of damages being made for a breach. Of course in such circumstances a court will initially look to the reasonableness of the covenants and the burden of proving such reasonableness will be on the party seeking to enforce the covenant i.e. the buyer.

John Flanagan and Richard Field

Term time holidays – the story continues

In May this year the Court ruled that a father who had taken his daughter out of School for a family holiday did not have to pay a fine which had been imposed upon him by Isle of Wight Council. The Council issued the father with a fine which was unpaid and subsequently brought a prosecution for failing to ensure that his daughter attended School regularly contrary to the Education Act 1996. The father argued successfully that even taking into account the absence due to the family holiday, the daughter's attendance remained above 90%, being the threshold for persistent truancy as defined by the DfE. The Court agreed with him, finding that he had no case to answer as, overall, his daughter had attended School regularly. The High Court subsequently refused the Council permission to appeal but the Council could make its own application to the Supreme Court – a step which appears to have the support of Government. The issue of term time holidays is clearly an issue of general public importance, a view shared by Lord Justice Lloyd Jones.

Whilst we await any further decision from the Supreme Court the position in relation to unauthorised term time absences remains unsatisfactory for many Schools trying to enforce the Government's strict policy in this area.

Caroline Hardcastle



Durand Academy Trust risks termination of EFA funding

The Education Funding Agency has issued a pre-termination warning to Durand Academy Trust (DAT) including a list of final demands, some of which must be met by 1 August 2016 if it is to continue operating under its existing funding agreement with the EFA.

Concerns centre on the structure of DAT and potential conflicts of interest in respect of its relationship with other organisations including Durand Education Trust (which owns land occupied by Durand Academy in Lambeth and which is being investigated by the Charity Commission) and London Horizons Limited (which runs the school's leisure facilities pursuant to a commercial arrangement).

The EFA is demanding that DAT severs its links with its Chair of Governors and former Executive Head, Sir Greg Martin, who faced criticism from MPs after it transpired he was paid more than £400,000 in salary from DAT and management fees from London Horizons Limited. DAT is also being required to ensure that none of its other directors are on the Boards of Durand

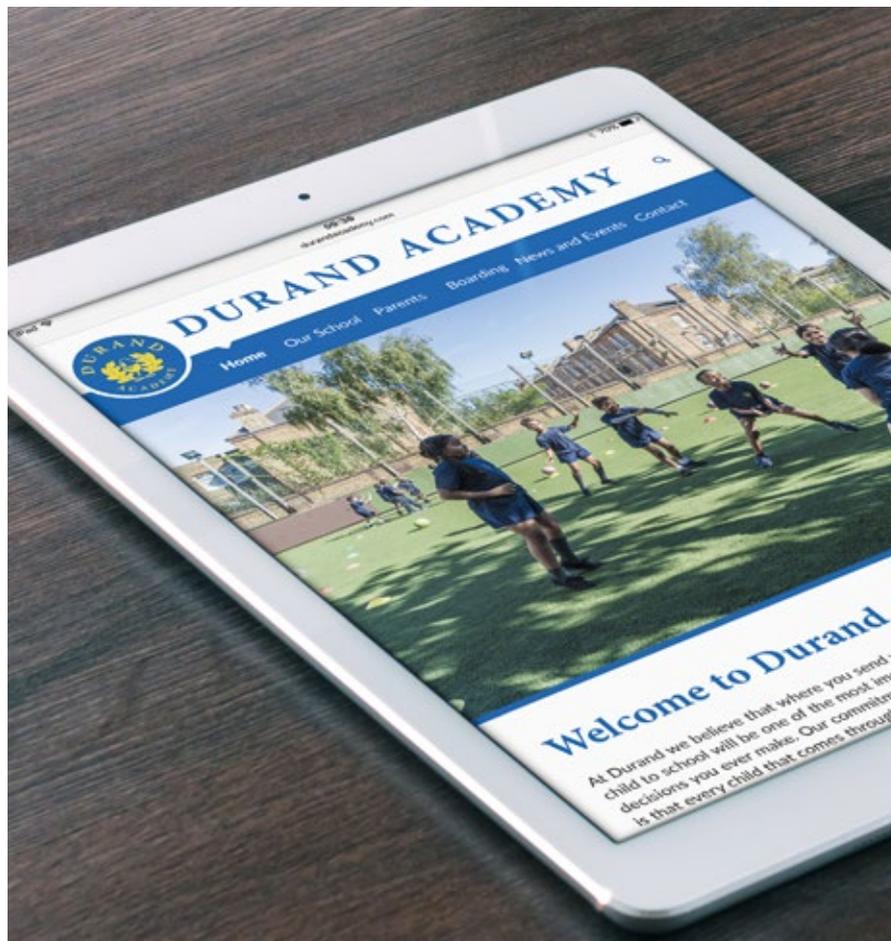
Education Trust, London Horizons Limited or GMG Management Resource (UK) Limited, a company owned by Sir Greg Martin. Furthermore DAT is required to appoint two new directors or trustees with no previous connection with DAT or Durand Academy in Lambeth who have the appropriate experience and skills to assist DAT to deliver excellent education, governance and financial management.

The case highlights the need for academy trusts to ensure that they have robust governance in place. Adequate procedures must identify and effectively manage conflicts of interest and to ensure that the Academies Financial Handbook is complied with. The failure to identify and effectively manage conflicts has been the undoing of other academy trusts and the DfE takes this very seriously

because it goes to the heart of public trust and confidence in academies. It is a legal requirement for conflicts of interest to be effectively managed and failure to do so can have serious consequences not only for trustees personally and in respect of breach of company and charity law, but also in academy trusts and multi-academy trusts' relationships with the EFA.

We would advise all academy trusts to provide training to their trustees and members and in particular, to make new trustees aware of their legal duties to manage conflicts of interest and the requirements in the Academies Financial Handbook.

Gerry Morrison



Information

If you have any queries on any issues raised in this newsletter, or any education matters in general please contact Tom Morrison on 01482 337310.

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Citadel House, 58 High Street, Hull HU1 1QE.

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