

Rollits ^{LLP}

Education

Focus

Schools edition

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Welcome

to the Autumn 2019 schools edition of Education Focus





The start of the new academic year has seen Government promises of long overdue additional funding for schools. Whether or not these promises will come to fruition, given the current issues facing the new Government, is yet to be seen. However, it is hoped, regardless as to who will be or remain in Government that the focus on school funding is carried through.

The importance of careers education remains a key issue on the agenda for schools with the new OFSTED Framework focusing upon the importance of providing students with the necessary knowledge and skills for future learning and employment. I have the fortunate position of being an Enterprise Advisor with the Careers and Enterprise Service and I have seen first hand in schools the role which businesses

can play in ensuring students are work ready. My first planning meeting of the academic year with my school is currently being arranged and I am excited as to what work we can do with the school this year to develop and expand upon the plans which the school already has in place.

Caroline Hardcastle
Partner, Head of Education

The minefield of parental responsibility



“Married with 2.4 children” is no longer considered the “norm” and whilst this may be progressive, it can cause tension and disputes when it comes to schooling and what is in the child’s best interests.

One of the areas where schools are facing more issues is access to information in relation to their child’s education and who is entitled to what information. Throw into the mix, step parents, children who live with grandparents and foster parents and it is no wonder that more and more time is being spent by schools in trying to manoeuvre their way through what can sometimes be quite acrimonious situations.

Seeking clarity as to what information the school can provide to those requesting information in relation to a child is not always easy given that there are various pieces of legislation and guidance to consider.

Who is a parent?

The starting point is the Education Act 1996 (the “Act”), which defines a “Parent” as including someone who is not a biological parent of the child but:

- (a) has parental responsibility for them; or
- (b) has care of them.

It is then, depending on the status of the school, the Education (Pupil Information) (England) Regulations 2005 or the Education (Independent School Standards) (England) Regulations 2010 which give Parents (as defined in the Act) a right of access to certain documents. What documentation the Parents are entitled to is however dependent upon which Regulations apply. The 2005 Regulations permit the parent to have a much broader set of data than the 2010 Regulations (the latter being limited to an annual written report of the pupil's progress and attainment in the main subject areas).

Who has parental responsibility?

To add a further layer of confusion, a person who is defined as a Parent under the Act does not automatically have parental responsibility for the purposes of the Children Act 1989. Parental responsibility cannot normally be gained unless certain legal procedures are followed, which include there being a specific Court Order in place, legal adoption or agreement with the child's parent.

Clarity from the DfE

The DfE issued updated Guidance last September which has sought to clarify the position for both maintained schools and Academies. The Guidance makes clear that everyone who is recognised as a Parent under education law (and therefore under the Act) can participate in their child's education. Further, the Guidance confirms that individuals who have parental responsibility for, or care of, a child have the same rights, when it comes to education, as biological parents. This would therefore permit them to receive information about the child, be asked to give consent and be informed about meetings involving the child.

Whilst the DfE Guidance is just that, namely Guidance, if the Guidance is followed, it would be difficult for a school to be challenged at a later date for an approach which has been taken in line with it.

Court Orders

It is becoming increasingly common for parents to seek to rely upon Court Orders as a reason why schools should not provide information to the child's other parent. For example, an Order may provide that the child is to reside with one parent. This does not however equate to removing parental responsibility from the other parent. There would have to be a very clear and specific Order to do this.

Protecting the school from complaints

Unfortunately a school's obligations are not always aligned with what a parent believes should be the case. This can be a very difficult conversation to have with the parent and there are many instances when the anger and frustration is directed towards the school. It is therefore important in such circumstances that the following key steps are taken:

- All parents, and anybody else with parental responsibility or who cares for the child, should be treated equally (subject to any Court Orders that provide otherwise).
- The school has regard to the related DfE Guidance and relevant Regulations.
- Where the school has a published policy on this issue, it should be strictly adhered to.
- So far as possible any decisions which are likely to be controversial should be explained in writing, with reasons as to why any request can or cannot be accommodated.

Court of Appeal decision on the correct calculation of holiday pay



The recent decision of *Harpur Trust v Brazel* is relevant to all organisations that employ employees who work part-time and irregular hours or varied work patterns. It is of particular significance to the education sector which often employs teachers and support staff on a varied work pattern.

The Court of Appeal has considered how the holiday entitlement of part-time workers on permanent contracts should be calculated when the working pattern varies during the course of the year.

Ms Brazel was a music teacher whose teaching duties were term time only. Her work pattern varied during the course of the year.

In line with both the Government and ACAS guidance, the school adopted a calculation for holiday pay which averaged working hours across the year and paid her holiday pay equal to 12.07% of annual pay. The percentage figure of 12.07% of pay is equal to 5.6 weeks (the statutory holiday entitlement under the Working Time Regulations) divided by 46.4 weeks (the remainder of the year after deduction of 5.6 weeks leave).

However, the Working Time Regulations 1998 and the Employment Rights Act 1996 state that where an individual does not have normal working hours, and pay varies according to the number of hours worked, then holiday pay should be calculated based on average earnings over the 12 week period prior to the holiday.

In Ms Brazel's case this calculation would have entitled her to a higher amount of pay, 17.5% of her annual earnings.

It was noted that the Working Time Regulations calculation could produce odd results in certain cases, including part-time employees being entitled to a higher proportion of annual earnings than full time employees. However it was highlighted that there was no

requirement within any legislation to ensure full time employees are not treated less favourably.

The Court held that to apply the calculation in any other way than the 12 week average, including incorporating a set pro-rata figure (e.g. 12.07%), would involve "doing violence to statutory language".

What does this mean for the education sector?

Unison intervened in this case on the basis that they considered it had wider implications for hundreds of thousands of part-time workers and those working irregular hours, not just in the education sector.

It is significant to highlight that the requirement to use average earnings to calculate holiday pay only applies when there is no normal working hours. If there are fixed hours of work then holiday pay should be paid at the same rate the individual earns for their normal week's work.

It is advisable to check calculations for any employees who have no normal working hours. If you are currently using the pro rata calculation of 12.07% and the employee is entitled to a higher rate of pay by calculating their average pay over the previous 12 weeks, the employer would be liable for the balance.

Employers should therefore check the holiday pay calculation to consider any potential financial exposure and the options to deal with this.

Caroline Neadley

Is your estate in order?

In the current education climate there has never been a more prominent time to ensure that your school's estate is in order. We have set out below a list of steps which should be undertaken and issues considered to enable any future transactions to be dealt with quickly and efficiently.

1. Consider property ownership

If your school has a number of sites, it would be useful to prepare a schedule of properties setting out the property address, whether the property is freehold or leasehold, the title numbers for each property and whether there are any leases or other occupancy arrangements and if so with who. A list of any rights, covenants, options, overage provisions and other documentation could also be entered onto the schedule.

2. Locate the title deeds

You should ensure that the location of any title deeds for each property, including the lease for any leasehold property, is known. If the location of the title deeds is unknown, make enquiries with your current, and any previous solicitors and any lender to locate the deeds.

3. Register any unregistered land

The Land Registry currently has a considerable backlog and first registration applications are taking in excess of one year. It is therefore advisable to voluntarily register any unregistered land, and deal with any title issues now, so that problems do not arise when any future transactions are entered into. This will also enable any future transactions to be dealt with quicker and more cost effectively.

4. Check extent of registered titles

It should be ensured that the whole extent of each property owned by the school is registered and that the actual boundaries of each property match the boundaries of the title plans for the property and adjoin the public highway. Any discrepancies can then be dealt with.

5. Deal with any title issues

Any known title issues or disputes, for example persons exercising a right of way over the property, should be dealt with expeditiously so that any issues do not escalate further and do not delay any future transactions.

6. Formalise any informal arrangements

Any informal rights, covenants or occupational arrangements, such as the use of a property by a third party, should be formalised in writing to ensure such arrangements are valid and registered against the title to the property (if appropriate). This will reduce the likelihood of any future disputes regarding the nature and extent of any informal arrangements and in particular how to terminate the arrangement if required.

Libby Clarkson



Pensions update

The cost of pensions for educational institutions has risen, as the rate of contributions paid by employers into the Teachers' Pension Scheme (TPS) has been increased by the government, following a consultation earlier this year. The new contribution rate that schools, colleges, and post-1992 universities must pay from September is 23.68%, an increase of more than 40% from the previous rate of 16.48%.

Additional funding, amounting to £848 million, will be paid by the government to local authority-maintained schools for the seven-month period to March 2020 (and for academies for the five months from April to August 2020), based on a government-produced table of rates for schools. A supplementary fund of £22 million will also be available for schools whose grant allocation based on those rates is less than their actual pension costs. Such amounts will be paid to local authorities by the Education and Skills Funding Agency for maintained schools, with the local authority responsible for paying the individual schools, and will be paid directly to academies.

These payments are part of a funding increase package announced by the government, which includes £4.4 billion for schools over three years to cover the rise in pension costs. However, the additional funding does not apply to independent schools, leading several to notify the Department for Education of their intentions to withdraw from the TPS, as such schools are not obliged to join the TPS. However, as it stands, if such a school withdraws from the TPS, all of its teachers would cease to be members. The government has now issued a consultation considering whether to allow independent schools to phase the withdrawal from the TPS by closing it to new teachers employed by an independent school, but allowing teachers who are currently members to remain in the scheme.

The government may, however, face further funding issues, as they may be subject to legal challenges from teachers on the grounds of age discrimination, following the Court of Appeal ruling that the pension schemes for judges and firefighters discriminated on grounds of age. The TPS is similar, in that younger teachers were moved from final salary arrangements to a career-average arrangement in changes effected in 2015, meaning that those younger teachers belong to a less beneficial scheme.

Experts suggest that there could be up to £7 billion in past service costs payable by the government if the claims are successful. This could lead to further changes to the TPS as the government looks at options to recoup those increased costs over time.

Pension costs in education therefore continue to be a major concern for education providers.

Craig Engleman





Managing the relationship between academies and connected non-charities

The Charity Commission published guidance on 29 March 2019 for charities who are connected with non-charities. This guidance also applies to academies who deal with non-charities – for example, academies which use a trading subsidiary or are sponsored by a non-charity. Trustees should ensure that they familiarise themselves with the publication by The Charity Commission which is aptly named “*Guidance for charities with a connection to a non-charity*”.

Academies may use a trading subsidiary to provide services that are not directly connected with the academy trust or the provision of education to its students such as catering to other schools and academy trusts and IT and HR services. Trustees should therefore keep the Commission’s guidance principles in mind when dealing with non-charities.

The guidance highlights the importance of the trustees understanding the connected non-charitable organisation’s business and indicates that trustees

should manage any relationship with a non-charity effectively. A charity could struggle to fulfil its charitable purposes if its association with the non-charity is not effectively managed; if the non-charity faces financial hardship or damage to its image and brand, the charity could also be exposed to those risks.

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Managing the relationship between academies and connected non-charities (continued)



Similarly, when a charity is associated with a non-charity, trustees must ensure that conflicts of interest are avoided. The two entities should be distinct and the activity carried out must always be in the charity's best interests. Trustees should ensure that the charity's activities are in line with its charitable objects and for the public benefit. Trustees of academy trusts should also have regard to the Academies Financial Handbook.

An academy trust must operate in the furtherance of its educational

purposes. Charity Commission guidance encourages trustees to keep the relationship between a charity and its trading subsidiary or connection to a non-charity under review. To assist with review and monitoring, The Charity Commission makes several recommendations in its guidance on how to "protect your charity" and trustees should abide by these principles when working in close proximity to non-charities.

The Commission's guidance clearly applies to academies with trading subsidiaries or those that are sponsored by non-charitable organisations. However, it is important to keep the guidance in mind even if a charity does not currently have this type of arrangement but may do so in the future. The Charity Commission guidance can be found here: gov.uk/guidance/guidance-for-charities-with-a-connection-to-a-non-charity.

Gerry Morrison and Harriet Wheeldon

Information

If you have any queries on any issues raised in this newsletter, or any education matters in general please contact:

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The law is stated as at 16 September 2019.

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