Rollits LLP

Education Focus

Autumn Term 2017
rollits.com

HULL 2017 UK City of Culture

CITY PARTNER

Welcome

Welcome to the latest edition of Education Focus. You may have noticed that we have introduced a new booklet format for this first edition of the 2017/18 academic year. We hope you like it and we would love to hear of any ideas you may have for topics you would like to see covered in future editions in order to help you get the most out of this service.

In terms of recent developments in the sector, it has been an interesting few months with the politicians continuing to evolve policy. Whether it is the Labour Party's proposed National Education Service (in respect of which the Rt Hon Jeremy Corbyn MP remained light on detail at the recent Association of Colleges annual conference when it came to how this would impact upon independent charities such as colleges and academies) or Institutes of Technology (where the Government seems to remain committed but the next step of the application process is, at best, still quite vague), the environment continues to evolve.

For schools, we are seeing a continued acceleration towards academisation in regions which have previously been slower than other areas of the country. For colleges we are seeing a mixed picture when it comes to assessing the impact of both the apprenticeship levy and insolvency regime, and for universities we are seeing issues ranging from the bedding in of the Teaching Excellence Framework through to marketing claims being challenged in an increasingly competitive environment.

In order try to help providers tackle the challenges that lay ahead and make the most of any opportunities those challenges may bring, we are continuing to build upon a packed calendar of training sessions across the country. We are increasingly being asked to present to sector groups and in-house to governing bodies, senior teams and at staff development sessions on a range of issues such as the impending college insolvency regime, good governance and the impact of the apprenticeship levy. Just as we go to print we are running a conference for schools and colleges on what the General Data Protection Regulation means specifically for them. If you were not able to make it and would like to know more please get in touch and we can let you have a copy of the conference pack and answer any questions you may have.

Tom Morrison

Q&A

Providers across the education sector employ very significant numbers of teaching and support staff and so it has always been critical that providers keep themselves appraised of significant developments in employment law and policy. In this Q&A, one of Rollits' employment law specialists Caroline Neadley talks about a high profile Supreme Court decision in relation to a challenge brought against the Government's policy on Employment Tribunal fees. The decision has the potential to have a significant impact on the sector.

Employment tribunal fees

Why were Employment Tribunal fees challenged?

Unison, the public sector trade union, brought judicial review proceedings challenging the lawfulness of the introduction of the fee regime. Their challenge began when the fees were introduced in 2013 and finally made its way to a Supreme Court decision in July 2017.

Unison's challenge was primarily on the basis that the fees regime denied the fundamental right of access to justice for many claimants who could not afford to pay the fees. Interestingly it was also argued that the fees indirectly discriminated against women because the fees for discrimination claims were higher than the fees for claims such as unfair dismissal and statistically women bring the majority of discrimination claims.

What did the Supreme Court decide?

The Supreme Court decision is seen as momentous and it is without doubt one of the most significant employment cases for many years. The unanimous decision was that the Fees Order introduced by the Government was unlawful and so the Court has quashed it.

In an expansive judgment, the Court focused on common law principles which have evolved through case law over time: ensuring access to justice for all members of society. Whilst the Court accepted there were legitimate objectives behind the introduction of fees such as incentivising earlier settlements and discouraging weak or vexatious claims, the Court emphasised that the Lord Chancellor was not permitted to impose whatever fees he chose in order to achieve these objectives.

The fall in the number of Tribunal claims since 2013 was so sharp, so substantial and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable. The Court held it was clear that the fees had been set at too high a level.

Given the finding that the scheme was unlawful, it was not necessary to reach a final decision on the assertion of indirect discrimination, however the Court nevertheless expressed the view that they considered the fees were indirectly discriminatory on the basis discrimination claims attract a higher fee, a higher proportion of women bring discrimination claims, therefore women are placed at a particular disadvantage compared with men.

What happens next?

The Government was quick to accept the Court's ruling. The Justice Minister, Dominic Raab, announced that the Government would immediately stop taking fees and would reimburse all fees paid since 2013. It has been reported this amounts to around £32 million in revenue since the fees were introduced.

The refund scheme is being rolled out in phases over a 4 week period. People eligible for refunds are being contacted individually and invited to complete application forms. The Government will also work with trade unions in respect of multiple claims involving large numbers of claimants who are eligible for reimbursement.

Individuals who have not been invited to complete an application in this first stage but have paid Tribunal fees can register an interest in applying by email or post, details of which are on the GOV.UK website.

As well as being refunded their original fee, applicants to the scheme will also be paid interest of 0.5% calculated from the date of the original payment up until the refund date.

There is much discussion about the possibility of Tribunal claims now being commenced in respect of claims that are out of time, from claimants who were deterred from pursuing a claim by the fees regimes. We have not yet seen any claims of this nature to date but expect to see some test cases on this point.

Continues on next page...

Q&A: Employment tribunal fees (continued)

What are the longer term consequences of the decision?

Longer term it is not clear whether the Government will consider replacing the fees with a fairer, more proportionate system; for example one that sees claimants and respondents jointly contribute towards the costs of running the Employment Tribunal system.

We consider it is very likely that there will be an increase in the number of Employment Tribunal claims brought. Some of our clients have already experienced unrepresented applicants submitting last minute claims, reminiscent of the old Tribunal system.

We do not however anticipate the number of claims will revert back to the levels experienced prior to the introduction of fees. The ACAS pre-claims conciliation process continues to be a useful tool to try to resolve claims before proceedings are issued. This process will remain in place and its use might be further incentivised now that employers recognise that claimants are free to pursue their complaints to a Tribunal without the financial barrier of fees.

Parties may find that existing claims are slower to proceed through the Tribunal system as the number of claims increases and the Tribunals grapple with the ongoing administrative burdens of unpicking this situation.

Last but by no means least, we think this decision reinforces the importance of employers taking time to properly deal with employment issues when they arise, ensuring procedures are followed and that the focus is on the timely resolution of workplace issues given the increased likelihood of Tribunal claims.

What is the likely impact on the education sector?

It is a feature of the sector that it employs large numbers of people. Some areas of the sector form part of the public sector (such as schools and academies), others (such as colleges and universities) do not, but the sector as a whole is heavily unionised – both in terms of teaching and non-teaching staff. Given the union origins of the case, it is not surprising that we are seeing a marked increase in employment related activity in the sector and we expect this to continue. As with other large scale employers, our advice is for providers to continue to focus their efforts on heading off issues as early as possible and ensuring that proper procedures are followed throughout.

Government report to be commissioned on the assessment of international students in the UK

In August 2017 the Government announced that, as part of its assessment of the impact of international students on the UK, a social and economic impact report is to be prepared by the Migration Advisory Committee.

The Migration Advisory Committee is going to be asked to look at:

- the impact of tuition fees and other spending by international students on the national, regional, and local economy and on the education sector;
- the roles international students play in contributing to local economic growth; and
- the impact of the recruitment of those international students on the provision and quality of education provided to domestic students.

This report comes on the back of, and contributes to, the Government's recent focus on tackling UK education providers with poor immigration compliance; a topic which we have reported on in previous editions of Education Focus.

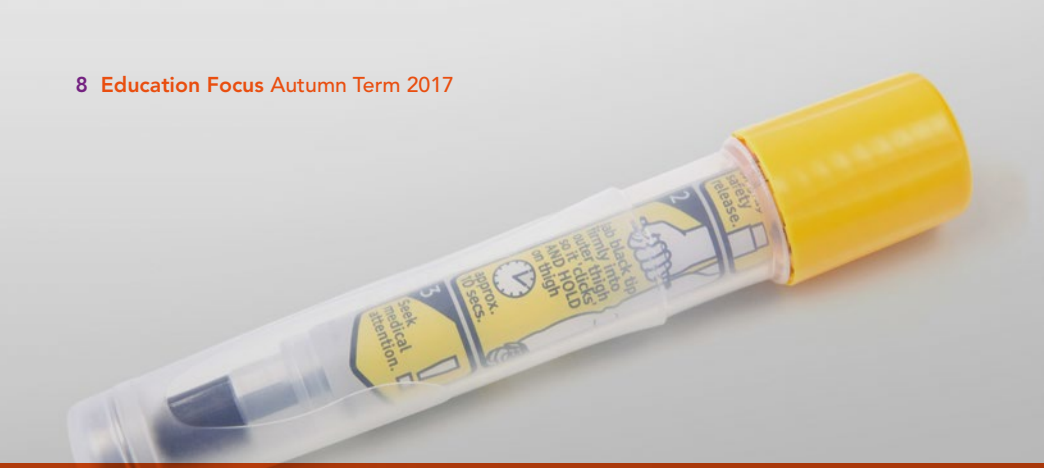
With the UK as the second most popular destination for international study, Home Secretary Amber Rudd said:

"There is no limit to the number of genuine international students who can come to the UK to study and the fact that we remain the second most popular global destination for those seeking higher education is something to be proud of.

We understand how important students around the world are to our higher education sector, which is a key export for our country, and that's why we want to have a robust and independent evidence base of their value and the impact they have".

In October 2017, the Migration Advisory Committee announced a call for evidence stating the approach it will be taking in responding to the Commission and how stakeholders can be involved in this process. The final report is expect to be published in September 2018.

Caroline Hardcastle



Parents welcome change in the law

Parents with children who suffer from allergies which can cause their child to go into anaphylactic shock have welcomed a change in the law that allows schools to obtain and administer potentially life saving allergy pens.

Anaphylaxis, the onset of anaphylactic shock caused by an allergic reaction to (for example) certain foods is severe, sudden and sometimes life threatening.

The change to the Human Medicines Regulations 2012 means that with effect from 1 October 2017, with an order signed by the Principal or Head Teacher, schools are permitted to buy auto injector pens without a prescription (such as the EpiPen) that automatically injects a dose of adrenaline into the affected pupil. Provided the consent of the pupil's parent and doctor has been provided, staff that are trained to use the pens are now permitted to administer the dose to a pupil in an emergency. Previously, a pupil needed a prescription to have one of the pens in school.

The change follows a two year long campaign by the British Paediatric Allergy Immunity and Infection Group and the Royal College of Paediatrics and Child Health.

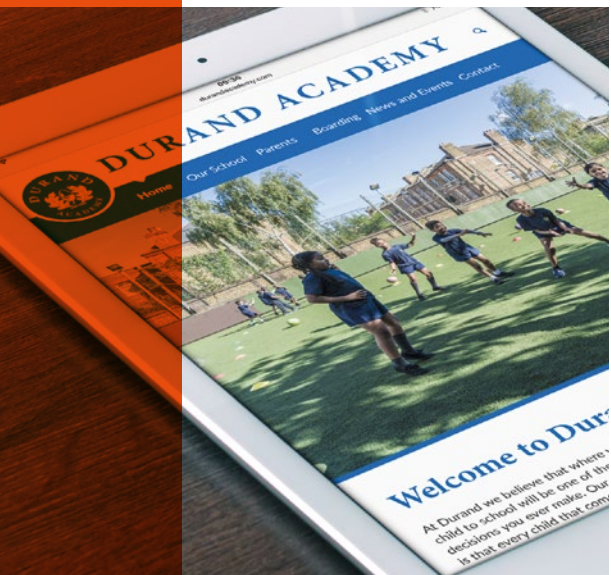
If a child's device does not work, cannot be located quickly enough or an extra dose is required, it is thought that the availability of pens at school will prevent avoidable deaths in a situation where time can be critical.

Jennifer Sewell

The Durand Academy Trust successfully takes on Ofsted

We have reported in previous editions of the Education Focus on the plight of the Durand Academy Trust (DAT) and the issues it has faced with the Education & Skills Funding Agency. However, in recent months, DAT has received some positive news following its successful application for judicial review against Ofsted.

Following Ofsted's Report which found DAT to be inadequate, DAT brought judicial review proceedings arguing, amongst other things, that Ofsted's Stage 2 complaints procedure was unfair. The complaints procedure provided "*If your complaint is about the inspection of a school that was judged to have serious weaknesses or to require special measures, the judgements made will not be reconsidered under step 2 of this policy. This is because all such judgments are subject to extended quality assurance procedures…*". DAT challenged the fairness of this complaints procedure arguing that it did not have an effective opportunity to change the outcome of the inspection.



The Court was robust in its criticism of Ofsted's complaints procedure. Whilst Ofsted sought to argue the process was fair and rational, asserting that there were rigorous quality assurance processes in place to make sure that errors were picked up and addressed, Judge McKenna did not agree. It was his view that "*A complaints process which effectively says there is no need to permit an aggrieved party to pursue a substantive challenge to the conclusions of a report it considers to be defective because the decision maker's processes are so effective that the decision will always in effect be unimpeachable is not rational or fair*". He went on to state that "*the absence of any ability effectively to challenge the report renders the complaints procedures unfair and in my judgement vitiates the report*".

So what does the outcome of this decision mean for providers who are assessed as inadequate? For DAT, the Ofsted report has been quashed. For others, the case should result in Ofsted revisiting its complaints procedure to take account of the Court's findings, otherwise it is at risk of further challenges to the fairness of its complaints procedure and thereby the findings of its inspections.

Caroline Hardcastle

Employees occupying dwellings

Service tenants or service occupiers?

Many education providers permit caretakers to reside at dwellings on site as part of the terms and conditions of their employment, on the basis that the occupation of the dwelling will assist the caretaker in carrying out their duties in managing, safeguarding and maintaining the site. Other examples of employees occupying properties belonging to providers include staff working at boarding schools who reside there as part of their employment package. Whilst such arrangements can provide mutual benefits, and indeed are sometimes essential to the smooth running of the provider, they can have extreme unintended consequences for an education provider if the arrangement is not considered and/or documented correctly.

The occupation of a dwelling by an employee may be classed as a "service tenancy" or a "service occupancy" depending upon the employee's terms and conditions of their employment. A service occupancy agreement will arise where it is fundamental for the better performance of the employee's duties for the employee to reside at the dwelling. This will depend on the facts of each case but would be satisfied, for example, if a caretaker was required to provide 24 hour assistance on site. On the other hand, a service tenancy will arise where it is not fundamental for the employee to reside at the dwelling for the better performance of their duties.

Whether the arrangement is a service occupancy or a service tenancy will depend on the facts of each individual case. The contract of employment does not necessarily need to expressly state that the employee is occupying the dwelling for the better performance of his/her duties, as this will be implied if the arrangement is a true service occupancy; however, it would be preferable for a term to be included in the contract of employment.

A service occupancy arrangement grants an employee a personal licence to occupy the dwelling until such time as their contract of employment comes to an end, at which time the service occupancy will automatically terminate and the employee must vacate the dwelling. A personal licence is not an interest in land and therefore the employee will have no security of tenure (i.e. will not be entitled by law to remain in the dwelling).

A service tenancy arrangement however will grant the employee an interest in land. This means that when the employee's contract of employment comes to an end, the service occupancy will not in turn terminate and the employee will be entitled to remain in the dwelling. If the employer then wanted to remove the employee from the dwelling they would need to follow the relevant statutory procedure (depending on the type of tenancy granted) and this is likely to be both time-consuming and expensive.

With a large amount of structural change occurring across the sector, we are increasingly encountering issues relating to the employees who occupy dwellings owned by a provider. For example, where a school is converting to become an academy or two colleges merge and a site has a resident employee, it is essential to consider what type of arrangement the employee may have, as the Transfer of Undertakings (Protection of Employment) Regulations 2006 provide that the employee will transfer to the transferee subject to their existing terms and conditions of employment – which would include any right to occupy the dwelling. This means that, if an employee had a service tenancy and an interest in land, the academy trust or merging college would take the property subject to the burden of this right and would take on responsibility (including the cost) of removing the employee if required.

Legal advice should always be sought when entering into a new contract of employment with a resident employee to ensure the arrangement is a genuine service occupancy. Further, where a provider is accepting the transfer of a property subject to a resident occupier who is also an employee, due diligence should always be conducted to ascertain what type of arrangement the employee has so that appropriate steps can be taken to mitigate any risks.

Libby Clarkson

Rollits' Education Team recommended by Legal 500

We are delighted to have again been recommended for our work across the education sector in the latest edition of The Legal 500, an independent guide to law firms in the UK, based on in-depth market research, positive client feedback and interviews with lawyers, solicitors and barristers. This year the editors have highlighted our further education expertise in supporting colleges throughout the Government's programme of Area Reviews for post-16 provision, our work across the academies sector and our specialisms in handling sector specific commercial and dispute resolution issues. We are privileged to be working with some of the most ambitious and hard working teams at academies, colleges, universities and other providers across the sector and we are fiercely proud of our clients' achievements, always in pursuit of the best possible outcomes for learners. Thank you to all our clients across the sector for your continued support; it means a great deal to every member of the Education Team.

Tom 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.

The law is stated as at 1 December 2017.

Hull Office
Citadel House, 58 High Street,
Hull HU1 1QE
Tel +44 (0)1482 323239

York Office
Forsyth House, Alpha Court,
Monks Cross, York YO32 9WN
Tel +44 (0)1904 625790

rollits.com