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Education Focus

Education Funding Agency aims for greater transparency

As part of the Government's drive to be fair and transparent in relation to how public money is spent, the Education Funding Agency issued its Investigation Publishing Policy over the summer. The Policy sets out the approach which the EFA will seek to adopt when publishing its investigation reports where it has lead responsibility for the education provider which it funds and supports. The reports will be available on the gov.uk website.

The Policy applies to a wide range of reports including: investigation reports; EFA assurance reviews relating to finance and governance issues which have been commissioned by EFA on the basis of concerns that surface from their own information; final notices to improve for Sixth Form Colleges and Academy Trusts; and joint investigation reports where the EFA has lead responsibility.

Whilst highlighting the need for greater transparency, there are a few provisos built into the Policy which would appear to give the EFA an element of discretion as to whether to publish. In particular, the decision as to whether or not to publish will be taken on a case by case basis taking into account the factors identified in the Policy. These include, by way of example, where publication could prejudice a Police investigation. However it also includes where publication would have an acute detrimental impact on a particular individual or group of individuals or risk their personal injury. There is no further definition or examples provided of "acute detrimental impact". What will be considered acute? Will the EFA have regard to financial detriment or risk to reputation? The answers to such questions are, as yet, unclear but it at least gives education providers a hook on which to hang any arguments against publication in circumstances where the provider would prefer the investigation itself and/or the findings to remain confidential.

The EFA recognises the risk of allegations being made against education providers in circumstances where the motives are malicious and it has stated that the outcomes of these investigations are unlikely to be published. However there is no similar provision in respect of investigations where no evidence of fraud or irregularity is found and "for the purpose of greater transparency" these reports will normally be published.

Clearly, for those education providers which are subject to an investigation, the Policy may be a cause for concern. However, for others, the publication of the reports could serve as a useful tool for providers in enabling the sector to look at reports where investigations have taken place, the reasons for those investigations, the findings and any recommended actions. From this information, providers will be able to ensure that their own systems and procedures are rigorous and make any changes which would, in the unfortunate event of an investigation, assist in demonstrating to the EFA that every effort was made to maintain robust and responsive practices and procedures.

Caroline Hardcastle

Also in this issue

Q&A

Pensions in education

Craig Engleman, Pensions Associate in Rollits' Education Team, takes a look at hot pensions topics in the sector.

What are the most significant recent changes in relation to pensions insofar as they affect the education sector?

Pensions not only are very complex and technical, but there has also been a huge amount of legislation and regulation introduced in recent years. Of course the hottest topic in the public eye generally has been the advent of auto-enrolment. This affects (nearly) everyone, and the education sector is no exception. Schools, for example, will largely belong to the Teachers' Pension Scheme (TPS) and the Local Government Pension Scheme (LGPS) – and as such, will be able to rely on those schemes administration for dealing with auto-enrolment. Where education providers have their own pension arrangements, more time and effort will need to be spent on dealing with ensuring that all eligible employees are auto-enrolled.

The other big developments relate to the TPS and the LGPS themselves – 'new' TPS and LGPS schemes have been introduced – the new LGPS from April of this year, and the TPS with effect from April 2015. Both of these schemes are now 'career average' schemes, with benefits based on an average of pensionable earnings rather than final salary. Contribution rates have also changed, as have accrual rates. So both employers and employees will need to get used to the new arrangements.

Yet another big change that affects education providers is the advent of a new 'Fair Deal' policy. This is a non-statutory government policy that deals with the transfer of staff that are compulsorily transferred from a public sector employer to a private contractor. Previously the policy provided that such staff should continue to be provided access to a pension scheme that was 'broadly comparable' to their existing public sector pension scheme. The new policy now means that such employees should continue to have access to their existing public service pension scheme.

Contractors will now enter into admission agreements with the relevant public sector body. The LGPS has already allowed participation (and in fact it is not subject to Fair Deal – there are statutory arrangements in place that apply – although this is due to be reviewed as this only refers to the "broadly comparable" arrangements); the TPS previously did not, and so the new Fair Deal has broadened access to such schemes for academies and employees of other schools not employed by local authorities.

What types of issues have you been dealing with in recent years?

We have dealt with a number of types of transaction in recent years that involve education sector pensions, ranging from transfer of colleges to outsourcing of catering, cleaning and other contracts, to the conversion of schools to academies.

The outsourcing contracts that we have worked on have involved entering into admission agreements – one of the main issues was that whereas when scheme employer clients have previously outsourced contracts to private employers, the admission agreement was often entered into after the commercial agreement, local authority administrators have been insisting on agreeing the admission agreement on or before the date the commercial agreement is entered into. This means that clients need to be thinking about the issue at an early stage. This will continue to be the case under the New Fair Deal when more contractors will be entering into admission agreements.

We have successfully negotiated, transactions involving a transfer of colleges, both within the same LGPS fund and also between two different funds, where the existing deficit or some proportion of that deficit is retained by the transferor body. Our transferee client could then complete the transfer without taking on the additional deficit liability, which obviously has benefitted our client colleges.

What pensions issues have you seen academies encountering?

Academies are entitled under to join the Teachers' Pension Scheme as separate employers. They deal directly with the Teachers' Pension Scheme and are responsible for deducting teachers' contributions and paying employer contributions.

They are also separate statutory scheme employers under the LGPS. Non-academic staff who are existing members on conversion to an academy continue to be members and new staff must be offered membership in the LGPS.

But, since they become separate employers, the relevant LGPS fund establishes a separate employer rate that the academy must pay by way of contributions to the LGPS. Because academies are smaller employers with guaranteed funding for only a relatively short period of time, there is a perceived risk of academies becoming insolvent and not being able to meet any pension deficit that they are responsible for. This means that often the employer contribution rate is higher than if it were a local authority maintained school.

Academies may therefore wish to try to enter some form of arrangement for pooling risks or for pooling contribution rate, either with the local authority, or possibly with other academies. The government recently undertook a consultation to determine whether regulations should be made to expressly provide for pooling arrangements. In addition, the government in July

Heads of Terms

How to achieve clarity at an early stage of an acquisition or disposal

In this latest instalment of our step-by-step explanation of the main elements making up a typical education sector merger, acquisition or disposal, we look at the often important role heads of terms can play in bringing clarity to the process.

Heads of terms are commonly used in mergers, acquisitions and disposals and can be considered as part of the standard transaction documentation. They are also often referred to variously as "heads", "letter of intent", "heads of agreement", "memoranda of understanding" and "term sheets".

Heads are usually a short document (typically no more than two to three pages) and outline the main terms agreed between the parties as at that point in the process. As may be implied from the various differing descriptions used for heads of terms, there is no standard format for them. Heads can take the form of a simple letter or can be more complex and carefully drafted agreements.

Heads of terms are commonly entered into during the early stages of a transaction once the parties have agreed the core terms and will typically serve the purpose of:

1. being a written confirmation of the main terms agreed in principle;

2. setting out any assumptions upon which an offer is made (for example that the target company/organisation has the benefit of a certain contract, or a minimum level of assets etc);

3. outlining a timetable going forward (for example in relation to beginning and concluding due diligence, reconfirming offers etc); and

4. confirming any authorisations or clearances which will be needed (e.g. SFA clearances or Competition Commission approval).

Heads should be stated as being "subject to contract" and as such the binding legal effect of them will be limited. Typically some clauses such as exclusivity will be legally binding however the main terms of agreement, as evidenced in the heads of terms, should not be. Heads of terms do however evidence serious intent on behalf of both parties and carry a significant amount of moral force, as well as providing a useful aide memoir of the terms agreed "further down the line" for the parties. They can also be useful in hindering the other side's lawyers trying to go too far off piste!

Points to consider when negotiating Heads of Terms

Whilst heads of terms serve a number of valuable purposes in the context of a transaction, it is also crucial that the transaction is not unduly delayed or held up whilst the heads are negotiated. It is important to maintain a balance between ensuring the main terms of the transaction are understood, agreed and documented within the heads, and making sure that negotiations do not become too complex and bogged down in relation to the minutiae of the proposed transaction. Negotiation of the finer details should be carried out as part of the process of negotiating the main sale and purchase agreement and other transactions documents. The heads of terms should only confirm the principles underlying the main terms/issues.

When negotiating the heads it is important not to make any major concessions without thoroughly thinking through their effect. Clearly whilst there is room for further negotiation down the line, the heads of terms do carry a certain moral weight which may be difficult to argue against later in a transaction.

Each transaction is different and will have its own particular details. A good set of heads of terms will clarify major points such as for example the proposed parties, consideration payable (and when this is payable), timetable, any assumptions upon which the offer is made and process for due diligence. Whilst the outcome of due diligence can affect the price at which a buyer is prepared to buy, having clear assumptions will minimise the scope for any unnecessary arguments. It is also an opportunity to consider how the transaction might impact on key stakeholders such as students, staff and funding agencies.

Negotiating and signing heads of terms can be a valuable exercise which often proves its worth if differences of opinion as to the major terms of a transaction are encountered later in the process. Equally if the parties are not on the same page it is almost always preferable to flush this out at an early stage so that a resolution can be reached or the transaction aborted before a disproportionate amount of resource has been committed. Our standard recommendation that there are very few transactions in the sector where it is not worth taking a short amount of time during the early stages to agree heads with any potential buyer, seller or merger partner.

Richard Field and John Flanagan

2013 announced that it would provide a guarantee that on closure of an academy, any outstanding LGPS liabilities that arise would not fall back on to the relevant LGPS fund. It is hoped that this would mean that employer contribution rates could be set at similar levels to local authority maintained schools. The government will be monitoring how the guarantee affects the setting of contribution rates with a view to introducing further measures, such as those set out in the consultation on pooling.

What can we look forward to in the future in terms of pensions?

One area of concern that the education sector has raised, and specifically which the AoC has brought into the limelight, is the increase in employer contributions that is to be implemented for the TPS following its upcoming valuation. The AoC has commented that the expected rise, from 14.1% to 16.4%, which will be implemented from September 2015 after the final rate is determined, will increase college costs of employing a teacher by about 5%, and therefore is another funding issue that will need looking at in the context of continuing falls in grant.

An increase in the contribution rates for staff has also been confirmed, which could reduce the take home pay of academic staff. Final changes in the TPS are awaited from the government going forward.

Of course we have an election coming in 2015 and the continuing fall-out from the result of the Scottish independence vote so there is every chance further changes will be proposed. There is always something lurking around the corner in pensions that will change the way pensions in the education sector are dealt with and so it remains a challenging area!

Whistleblowing for maintained schools

Whistleblowing procedures are important in any organisation. They are effectively designed to protect employees who report colleagues or organisations believed to be doing something wrong or illegal, or who are neglecting their duties. Examples of whistleblowing can include damage to the environment, a criminal offence, failure to observe legal requirements or covering up wrongdoings.

On 28 August 2014, the Department for Education (DfE) published guidance for maintained schools on what they should do when setting up their whistleblowing procedure. The guidance states that every maintained school should have a whistleblowing procedure in place (which is the same as for any provider). The procedure must ensure that the staff members who make disclosures are protected.

The guidance confirms that governing bodies are responsible for agreeing and establishing maintained schools' whistleblowing procedures. In doing so, the governing body should appoint at least one member of staff and at least one governor who staff members can contact if they wish to report concerns or "blow the whistle". There is a duty to inform every member of staff (including temporary staff and contractors) of the whistleblowing arrangements, including telling them who they can contact with any concerns they may have, and what protection is available to them if they report another staff member for some form of malpractice within the organisation. It is important for all providers to ensure that this is fully documented and the governing body minutes reflect the importance with which the arrangements are regarded.

It is critical to ensure that whistleblowing policies are adhered to and that employees are protected from suffering a detriment should they "blow the whistle". Claims of detriment are becoming more and more common as employees do not require any period of continuous service to bring a claim that they have suffered a detriment – this can include a claim that they have suffered less favourable treatment in light of their disclosure or that the reason for their dismissal relates to a disclosure. It is therefore vital that the policies are in place, followed and periodically review to ensure that the risks of successful claims are minimised.

Ed Jenneson

The 2014 Academies Financial Handbook:

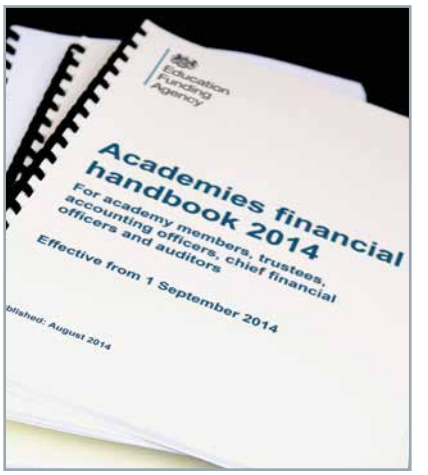
impact on special staff severance payments and settlement agreements

The Education Funding Agency has issued an updated edition of its Academies Financial Handbook, setting out the financial management, control and reporting requirements with which Academy Trusts must comply. This latest edition, which came into effect on 1 September 2014, introduces significant changes to the regime allowing Trusts to pay special staff severance payments outside of normal contractual or statutory requirements where such payments are under £50,000. For non-contractual payments of over £50,000 the Trust must seek prior approval from the EFA using the specific academies severance payments form. Although severance payments under £50,000 do not require prior approval the Trust must be able to show the application of the same level of scrutiny to such a payment as if it were over that amount.

Special severance payments are sometimes paid to employees, contractors and others outside of normal statutory or contractual requirements when leaving employment in public service whether they resign, are dismissed or reach an agreed termination of contract. The Handbook requires that the following considerations are taken into account when making a special severance payment, including:

- A wider pool of people is now needed to approve special severance payments to help the trustees in their determination that they reasonably consider the proposed payments to be in the interests of the Trust. The Trust must also demonstrate value for money and ensure efficient and effective use of the Trust's resources.
- The Trust must consider if a severance payment is justified based on a legal assessment of the chances of the Trust successfully defending a case at Tribunal were the payment not to be made. Specifically, if there is a significant prospect of losing the case then a settlement may be justified especially if the costs in maintaining a defence are likely to be high.

The Handbook requires that all special staff severance payments be disclosed both in total and individually in the audited accounts for the period from 1 September 2014. Further clarification is awaited as to whether the individual employee needs to be named in the accounts given the data protection issues that would inevitably go with such publication. The Handbook also provides that confidentiality provisions in a settlement agreement must not prevent an individual's right to make public interest disclosures.



The Handbook directs trustees to take into account guidance on the gov.uk website, which includes recommendations to:

- take and document legal/HR advice;
- clearly document the management process taking account of the Trust's own internal processes and employment law;
- consider the appropriate level of payment; and
- ensure that any non-financial considerations can be supported with evidence e.g., that pupil performance has been affected by a lack of continuity of teaching due to absence and the associated need to teach using temporary staff.

If the Trust is unable to show that it has treated the payment correctly, the Treasury is entitled to claw back the amount of the payment.

Ed Jenneson

The relationship between charitable education providers and their non-charitable subsidiaries

It is increasingly common for charitable education providers to set up subsidiaries to carry out projects which cannot be carried out directly because of the constraints of charitable status (e.g. non-educational/ commercial trading activities) or to ring-fence risks and liabilities associated with a new or higher-risk type of activity. Education providers with charitable status (such as further education corporations, higher education institutions and academy trusts) are required have regard to the law in respect of their relationship with their non-charitable subsidiaries.

We always recommend that charitable education providers with subsidiaries or that are thinking of setting up subsidiaries give careful consideration to the relationship between the two organisations and initiate changes if required to ensure that they stay on the right side of the law. A commercial arm's length relationship must generally be maintained between a charity and a non-charitable subsidiary; any funding which flows from a charity to its non-charitable subsidiary is regulated by charity law and specific legal principles must be observed to uphold the arm's length principle. There must be an appropriate power of investment and a charity cannot subsidise the non-charitable activities of a subsidiary on non-arm's length terms. Therefore if a subsidiary requires working capital from the charitable parent it is necessary to consider the mechanism by which this will be provided (e.g. a loan agreement on commercial, arm's length terms). Equally if the charitable parent is making available the time and expertise of its staff this must be recharged under a cost recovery agreement.

There will be a requirement for a sufficient number of independent directors on the board of the subsidiary who are not also occupying fiduciary positions at the charitable parent to enable any conflicts of interest to be adequately managed. It is therefore important that not all the directors of a subsidiary of a further education corporation, for example, are also Governors of that corporation. A robust written conflicts of interest policy also needs to be put in place to enable effective management of potential conflicts whilst not being so cumbersome as to detract unnecessarily from the purpose of the arrangement in the first place.

The consequences of breaching these principles are primarily breaking charity law and risking H M Revenue & Customs clawing back charity tax reliefs. These issues are by no means insurmountable and the trading subsidiary structure is common, but careful thought needs to be given in respect of the legal relationship between the provider and its subsidiary to avoid being inadvertently on the wrong side of the law. Setting up the structure itself is the easiest part; it is getting the detail of the legal relationship correct that is crucial. Equally if a provider thinks that an existing arrangement might not be wholly compliant then it is better to act to correct the situation now rather than allow the risk to continue to grow.

Gerry Morrison

With university complaints on the up, the Court provides a timely reminder of its role in determining student complaints

In the Q&A of the December edition of *Education Focus* Caroline Hardcastle, Partner in Rollits' Education Team, highlighted the potential for an increase in the number of student complaints following the introduction and increase in tuition fees with students consequently having a greater stake in wanting to ensure that they receive good value for money. Unsurprisingly, research undertaken by the BBC has found that the number of students making complaints and taking appeals to their universities has increased, being 10% higher in 2012/13 than in 2010/11.

Where complaints cannot be resolved internally by the university, students may look to the Office of the Independent Adjudicator of Higher Education (the "OIA") to seek redress. If they still fail to achieve the desired result, students may refer the decision to the Court for Judicial Review in the hope that this time, they may get the answer that want. However, students should not forget the limited role of the Court in reviewing earlier decisions. The Court is not there to hear all the evidence afresh and make its own decision as to the original compliant.

In a recent Judicial Review Application, the Court was invited to consider a decision of the OIA in respect of a number of complaints from a university student. Sitting as a Deputy High Court Judge, Philip Mott QC was at pains to point out the role of the Independent Adjudicator and that it was certainly not the Court's role to carry out a further trial of the original complaint. It was made clear that whilst decisions of the OIA are amenable to Judicial Review, the Independent Adjudicator has a broad discretion to determine how to approach a particular complaint and that the Court should have regard to the expertise of the Independent Adjudicator. The Court went further to make clear that as a result of that expertise and the broad discretion given to the Independent Adjudicator, the Court would be slow to accept that the Independent Adjudicator's choice of procedure was improper and it would not be easily persuaded that the Independent Adjudicator's decision and any consequent recommendation was unsustainable in law. Provided that there was adequate reasoning behind the decision, the Court would be slow to interfere with any decisions.

The principles laid out in this recent Decision are not new. They are, however, a useful reminder to students who may not be satisfied with an outcome that they will not necessarily get a further bite of the cherry if they apply to the Court for Judicial Review of the OIA's decision. The Court has made clear that the OIA is the body with the appropriate expertise and that if the Independent Adjudicator's decision is adequately reasoned, the Court will be reluctant to interfere.

Caroline Hardcastle

Planning permissions – a word of caution

Education providers have been looking to maximise the value of their estates and to make the most of whatever limited capital funds are made available from central pots. Most funding rounds routed through LEPs have included a requirement to spend the grant quickly, leaving many providers in a position of having to get works shovel ready within exceptionally short timeframes. One area not to cut corners on, however, is planning because a failure to comply can have a serious impact on any development.

In order for a planning permission to be valid and not lapse, all pre-commencement conditions must be discharged before both of the commencement of any development and the expiry of the planning permission. Pre-commencement conditions can be identified by wording such as "Prior to the commencement" or "Before any works commence" or "No development shall commence until."

The commencement of development, by virtue of section 56 Town and Country Planning Act 1990, means the earliest date on which any "material operation" comprised in the development is carried out. A material operation means works that relate to the planning permission involved and includes works of construction in the course of erecting a building, demolition works, the laying of any pipe or works relating to the foundations – leaving not very much work which can be done before a development is deemed to have commence.

A legal doctrine known as the Whitley Principle applies where a condition is not discharged. This provides that works carried out in breach of a condition cannot amount to a material operation. Therefore, unless all of the pre-commencement conditions are discharged before the expiry of the planning permission, the commencement of development will not legally occur and the planning permission will lapse. The implications of this principle are that the land will not benefit from planning permission and there will be a breach of planning control. The Local Planning Authority may, if they consider the breach merits enforcement, take action regarding non-compliance or breach of condition within 10 years of the start of the breach by issuing a breach of condition notice or an enforcement notice.

A number of cases have provided that the Whitley Principle only applies if the condition is a "true condition precedent". This means that the wording of the condition must make it clear that the condition must be discharged before the commencement of development and the condition must go to the heart of the planning permission so that failure to comply makes the entire development unlawful.

Where the breach has continued for over 10 years then the Local Planning Authority cannot take enforcement action (subject to a number of exceptions). The landowner may apply for a certificate of lawfulness of existing development to confirm that operations which have been carried out are lawful. The onus is on the applicant to prove lawfulness on the balance of probabilities.

Education providers face huge demands on their time when developing their estates whilst at the same time minimising the impact on their students' studies. Given the severe consequences of the Whitley principle, it is always advisable to obtain written evidence from the Local Planning Authority that pre-commencement conditions have been discharged or satisfied.

Mark Dixon

Rollits' Education Team rated by Legal 500

We are proud to report that Legal 500 has again rated Rollits' Education Team for its specialist education sector expertise and experience, highlighting in particular our ability to provide advice on strategic and commercial issues to the further and higher education sectors. Legal 500 is one of the UK's leading legal directories and features independent editorial and recommendations of law firms following independent research. Firms are only included if they are supported by their clients and peers with hard evidence. The Team at Rollits is extremely grateful for the support shown by clients from across the sector. We remain determined to continue to deliver the best level of service using a highly experienced, impassioned and dedicated team of solicitors working hard as part of a sector which carries such great importance for the prosperity of generations to come.

The LEGAL 500

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, Wilberforce Court, High Street, Hull, HU1 1YJ.

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