rollits

www.rollits.com
Spring 2013

Education Focus

New freedoms for further education colleges to recruit 14 to 16 year olds

At the end of last year, the Department for Education announced new freedoms enabling further education colleges to draw down funding to enrol 14 to 16 year olds directly from September 2013. Colleges will receive roughly the same funding for students aged 14 to 16 years as students aged 16 to 18 years with some adjustments for the costs of providing technical courses and pupil premium payments. Further details will be published shortly by the Education Funding Agency.

The DfE decided against the provision of start-up funding to colleges to develop dedicated provision for young students. As with funding for post-16 students the 14 to 16 funding will be paid to colleges on a lagged basis.

The announcement followed a review which concluded that colleges often have the facilities, policies, procedures and connections with local employers to deliver high quality academic and vocational training. The review also concluded that for some students, taking a vocational route at 14 meant that they performed better in the core academic subjects. The DfE expects colleges directly enrolling young students to be undertaking courses which involve 20% vocational learning and a broad curriculum, including English and Maths (i.e. in line with the statutory Key Stage 4 Curriculum).

Some colleges will not be ready to take advantage of the new freedoms this September because the timing of the Government's announcement has left them with insufficient time to plan and take-up may be greater in September 2014. Colleges wanting to directly recruit students aged 14 to 16 years from September 2013 must:

- have been rated Good or above at their last Ofsted inspection. If a College was rated as Satisfactory (under the old regime), and its last inspection was a number of years ago, it will have to show evidence of improved performance over the past 4 years;
- conduct an assessment of their capability and readiness using the "Readiness to Open" Checklist published by the Government, which includes admissions and safeguarding policies;
- have their finances in good order;
- set aside a dedicated zone on their estates for young students to go for advice and some of the teaching, although the students will have access to all college facilities. The DfE states that the "14 to 16 Centre" does not have to be a separate building, but will be a dedicated area for the provision of education and support to young students; and
- designate a senior member of the teaching staff to be responsible for the 14 to 16 Centre and for ensuring that the students receive good quality education and support.

Colleges operating 14 to 16 Centres will be subject to Ofsted inspections within two years of opening them, under Ofsted's Schools Framework rather than the Post-16 Framework.

Colleges wanting to make provision for 14 to 16 year olds may also wish to consider alternative options to direct enrolment such as sponsoring a University Technical College or setting up a Free School, a Studio School or other type of Academy. A number of our college clients are already involved in the provision of 14

Continues on page 4...

Also in this issue

Q&A – developments in employment law

Academies, independence and charitable status

Education provider allowed to withhold details of training course attendees under FOI personal data exemption

SFA changes subcontracting rules

Localism Act impact on education providers

Q&A

Developments in employment law

Lottie Pigg, an employment law specialist in Rollits' Education Team, looks at forthcoming changes in employment law and their impact on education providers.

What changes do the Government have planned for 2013?

I seem to say this every year but 2013 marks another year of significant change in terms of employment law. The changes planned include a reduction in the minimum duration for collective consultations, the introduction of Employment Tribunal fees, a change to the law on settlement agreements and a cap on compensation for loss of earnings in unfair dismissal claims. The Government has also launched consultations on a number of existing areas of employment law with a view to implementing further changes in 2014 and beyond.

Which of the 2013 changes do you think will have the most significant impact for education providers?

From 6 April 2013, the Government is proposing to reduce the minimum duration for collective redundancies of 100 or more employees from 90 days to 45 days. The Government is also proposing to exclude fixed term employees from consultations (unless the employer is proposing to terminate the fixed term early on grounds of redundancy). This change will have a significant impact on providers in terms of restructures and proposals to change existing terms and conditions of employment; both of which require collective consultation. Due to the nature of this sector, education providers tend to engage high volumes of employees on fixed term contracts. In some circumstances (19 or fewer affected employees) the trigger for collective consultation may be avoided where fixed term employees can be discounted. Similarly, the reduction in the minimum prescribed period should allow change to be implemented more quickly, which is a positive development for education providers who need to react quickly to decreasing funding.

Do you think the introduction of Employment Tribunal fees will impact on the education sector?

The media have gone silent on this topic but commitments made by the Ministry of Justice in 2012 suggest that Employment Tribunal fees will be introduced sometime during the Summer of 2013. Different types of claims (based on complexity) will attract both a fee on issue and a further fee in advance of a hearing. I would hope this would see a marked reduction in the volume of Tribunal claims brought against education providers, especially those brought spuriously or without foundation in the hope of early settlement. The fees will be means tested although the exact level is still to be confirmed.

What else is in the pipeline for 2013?

The Government has also drafted the Enterprise and Regulatory Reform Bill which is currently working its way through Parliament. Amongst other things, this Bill proposes to make offers and discussions of settlement inadmissible in any subsequent Employment Tribunal proceedings and also proposes a cap on the level of compensation for lost earnings that an employee can recover in Employment Tribunal proceedings.

The introduction of a statutory footing for settlement agreements and associated negotiations will allow providers and employees the opportunity to have informal discussions in a common-sense way with a view to terminating the employment relationship. Provided that there is no "improper behaviour" on either part, these negotiations will be inadmissible in Employment Tribunal proceedings even if no settlement agreement is reached. This represents a positive step for providers in terms of responding quickly to a need for change in the workforce without fear of being misquoted or having to rely upon "without prejudice" conversations.

The proposed cap on loss of earnings will mark a really positive step forward for providers. We regularly see Claimants with unrealistic expectations which makes early settlement of Employment Tribunal complaints at commercial level difficult to achieve. I think this cap plus the proposed fee structure should hopefully see a reduction in claims brought against providers.

What do you think 2014 will bring?

The Government has launched a number of consultations which demonstrate intent for 2014 which I think will be interesting for education providers. Insourcing and outsourcing activities have always caused a headache for providers. Under the existing framework of TUPE the majority of insourcing/outsourcing activities are automatically caught under the provisions relating to a "service provision change". Amongst other proposals the Government is considering removing the express definition of a service provision change; instead allowing each situation to be judged on its own facts.

This may not give any comfort to education providers as I anticipate it will reduce certainty and leave room for arguments between the parties around the applicability of TUPE in a potential service provision change. It could also lead to unanticipated costs for example in an outsourcing situation where a provider had anticipated that employees would transfer automatically to a new

contractor thus avoiding notice and statutory redundancy payments. The anticipated lead time for the introduction of any change is between 1-5 years. We are keeping a close review on the proposals so that we are able to advise providers on updating their contractual arrangements in advance of any change to avoid unnecessary costs.

The Government has also committed to the establishment of a health and work assessment and advisory service some time in 2014. Amongst other things, the advisory service will deliver state-funded assessment by occupational health professionals for employees after four weeks on sick leave. This will be a welcome cost saving for providers for whom sickness absence is unfortunately a reoccurring problem.

Have you seen any trends during the past year following previous changes to the employment law framework?

Since the increase in the qualifying period from one to two years' employment we have seen an increase in the number of discrimination-based and whistleblowing-based unfair dismissal claims. This is because if an employee can claim their dismissal was on these grounds they do not require a minimum level of continuous employment. There is no easy answer for education providers. Maintaining robust policies such as on Equal Opportunities and Whistleblowing that are actively applied, and providing regular training, tackles the behaviours that can be misinterpreted which hopefully mitigates the risk of a claim.

Why do you think that the Government is constantly changing employment law framework?

It does feel as though employment legislation is constantly changing. The driving force behind the majority of these changes has been to ensure that our legal system is aligned with that of the European Union (although sometimes we have a tendency to go even further). In addition to this, the Government has also sought to try to remove some of the red tape in place to stimulate the economy during recession.

SFA changes subcontracting rules

The SFA has recently announced that prime contractors will be required to publish details of their subcontracting arrangements including the level of management fee and, if relevant, reasons for any differentials in management fees charged to different subcontractors. Whilst the move has been supported by the AoC, the requirement to publish this information may cause some colleges concern and could lead to difficult conversations with their subcontractors, particularly if the college is charging differing management fees.

It is clear that some subcontractors may need to be "managed" more than others, and therefore it is entirely proper for colleges to charge different fees. However, colleges will need to ensure that where this is the case, the reasons for the differential are clear and, if possible, documented.

Clearly the scope of services which the subcontractors are going to provide will have an impact upon the level of management fee, for example, if subcontractors source students or deliver additional programme elements. However, it may not be as clear cut in other areas, particularly the level of administrative support which a college will need to provide throughout the duration of the contract to ensure the learning is delivered and the funding can be drawn down correctly.

Colleges will be able to gain a greater understanding of the level of support which may be required if appropriate due diligence checks are undertaken.

The due diligence exercise clearly will not be a "tick box" exercise; the answers will prove invaluable in showing why there are discrepancies between subcontractors. In particular, colleges should be asking the subcontractors how they will deliver the programme, how they plan to finance delivery and what systems the subcontractor has in place to track learner progress from enrolment through to achievement. Supporting evidence should also be requested. The answers to all these questions should support the college in demonstrating that there are valid reasons for the differential in any management fees.

With the introduction of the new Rules in August, now is an ideal opportunity for colleges to review their existing due diligence procedures not only to ensure that the questionnaires are sufficient but that there are appropriate systems in place to enable the college to adequately evaluate the responses.

Caroline Hardcastle

Academies, independence and charitable status

Concerns have recently been raised in the sector about academies and charitable status, in particular whether they are sufficiently independent from the Government. Academies are exempt charities pursuant to the Academies Act 2010 (i.e. as with Further Education Corporations they are exempt from having to register with the Charity Commission, but have legal charitable status and still have to comply with charity law). We have set out our in-depth analysis of the issues on our website; just go to the Articles area in the News and Events section of our website and feel free to contact Gerry Morrison if you would like to share your views on the subject.

Gerry Morrison

Education provider allowed to withhold details of training course attendees under FOI personal data exemption

The First-Tier Tribunal (Information Rights) – the body which hears appeals against decisions of the Information Commissioner's Office – has held that Sheffield Hallam University was not in breach of the Freedom of Information Act 2000 when it withheld information about the identities of employees who attended leadership training courses run by the charity Common Purpose, and of staff who administered the courses and processed payments to the charity.

The specific objective of the courses was personal development: the attendees would take the additional skills gained to future roles, including with other employers. In relation to the administrative staff, the requested information would reveal the nature and location of their work and the decisions they had made, which was also personal information.

The University's own Personal Data Code was held to have raised a reasonable expectation that information of the type requested would not be made public, particularly in circumstances where (as was the case) Common Purpose had been the target of hostile web-based campaigns. Disclosure of the individuals' identities would cause distress and possibly professional damage to the staff involved, and was unnecessary in the light of the fact that a redacted version of the information provided by the University fulfilled all the legitimate objectives of the requester without revealing the identities.

The case is a useful reminder to many education providers caught by the freedom of information regime to review their data protection policies and staff consent forms, taking into account the

fact that a third party may one day ask for disclosure of information which the provider, and its staff, thought would be kept confidential. Stating that information is confidential will not in itself protect it from disclosure, but as the Sheffield Hallam case demonstrates, appropriately drafted statements and policies can usefully set the scene for arguing that an exemption applies.

Tom Morrison

Localism Act impact on education providers

From an estate manager's point of view, one of the most relevant sections of the Localism Act 2011 is the one dealing with the rights of local voluntary and community groups to request that land is placed on the local authority's List of Assets of Community Value. The rules are complex, and there are a range of exceptions, but generally the owner of any land on the List is unable to dispose of it until local voluntary and community groups are given an opportunity to bid. An education provider hoping to complete a quick disposal of land placed on the List might be frustrated by these provisions, which will inevitably delay matters. Education providers are at risk of having their land nominated to be placed on the List by local voluntary and community groups, particularly if they open up use of their land to local groups and the wider public: all providers should therefore ensure they have adequate procedures in place to seek a swift review if notice is served upon them that a local group has nominated their land to be placed on the List.

Chris Crystal

New freedoms for further education colleges to recruit 14 to 16 year olds continued from cover…

to 16 education through one of more of these alternative delivery options.

The requirement to set up a 14 to 16 Centre as a dedicated space on a college's campus may impact upon the number of students that some colleges can directly enrol. Some colleges may also wish to review their relationships with local secondary schools, including any Academies which may perceive the college as competition. It raises potential conflict of interest issues for colleges which sponsor local Academies although many are adopting a collaborative approach with Academies they sponsor, and also other schools to refresh students' options.

Colleges may for example enrol students from secondary schools which are unable to provide courses that attract smaller significant numbers. It will also widen choice for students, in terms of whether it would be in their best interests to transfer to a further education college at the age of 14 with the additional progression routes available.

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 / 01904 625790 or email tom.morrison@rollits.com

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.

The law is stated as at 1 March 2013.

Hull Office
Wilberforce Court, High Street,
Hull HU1 1YJ
Tel +44 (0)1482 323239

York Office
Rowntree Wharf, Navigation Road,
York YO1 9WE
Tel +44 (0)1904 625790

www.rollits.com