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Summer 2015

Education Focus

Coming up…

Richard Field and John Flanagan will continue their series on sector mergers and acquisitions by looking at the importance of the disclosure process, where sellers/merger partners spell out what issues might have to be dealt with in the future. If you would like a sneak preview and can't wait until the Autumn Term edition, please visit rollits.com.

New subcontracting rules for education providers

The Skills Funding Agency's Funding Rules 2015 to 2016 come into effect on 1 August 2015. One of the key features is several new rules which have been introduced to ensure stricter regulation of education subcontracting.

That education subcontracting is becoming an increasingly important concern for the SFA is immediately evident by quickly comparing the 2015-16 contents page to its 2014-15 counterpart. The subcontracting section has been 'promoted' to being the first chapter, appearing at page 7 (it previously started on page 105!). Within that section, it is notable that the new rules primarily impose additional responsibilities directly on the provider when considering and managing subcontractors, rather than extra responsibilities which the provider must impose on the subcontractor contractually.

Examples of the new rules are:

Rule 14 – each provider's governing body/board and "senior responsible person" (e.g. chief executive) must be satisfied that all subcontracting meets that provider's strategic aims and enhances the quality of offer to learners;

Rule 15 – providers must only use subcontractors where they have the appropriate knowledge, skills and experience within their organisation to successfully procure, contract with and manage subcontractors;

Rule 16 – providers must only use subcontractors who are determined by the provider's governing body/board and senior responsible person as being high quality and low risk;

Rule 18 – the SFA reserves the right to move subcontractors into a direct contractual relationship with the SFA;

Rule 33 – providers must have a contingency plan in place for learners in the event that a subcontract arrangement ends prematurely (e.g. if one party terminates the subcontract or if the subcontractor enters administration or liquidation); and

Rule 46 – providers must robustly manage and monitor all of their subcontractors to ensure that high quality delivery takes place which meets the specific funding requirements of the relevant programme.

Although the express requirement for top level approval of subcontractors, and the SFA's express right under Rule 18, are new, it is fair to say that the additional rules listed above do not spring any real surprises. We anticipate that the general principles behind the additional rules listed above would always have been recognised by providers as being recommended practice. However, the fact that the SFA has seen the need to codify these principles into additional rules indicates that it feels that not all providers have been abiding to those principles in practice.

The next edition of Education Focus will look at what providers can – and are – doing to try to manage their relationships with subcontractors to ensure a positive outcome for the provider, the subcontractor and most of all the learners benefiting from those arrangements.

James Peel

Also in this issue

Q&A

Smarter contracting within the sector

James Peel, co-author of this edition's lead article, talks about how education providers are making increasingly smarter use of contracting.

Which areas of law do you advise education sector clients upon?

My work within the sector is generally comprised within three core areas – funding and commercial contracts, intellectual property and information law (i.e. data protection and freedom of information). It is often the case however that any one matter can cover all three areas – such as education subcontracts.

In addition to contracts relating to the provision of education and training, I also advise education providers on grant agreements and what could be called 'pure commercial' contracts such as sponsorship agreements, equipment supply and maintenance agreements, waste disposal contracts, venue hire agreements and online store terms and conditions. I also regularly draft and advise upon software development, licensing and other IT agreements (which are further examples of contracts which often come with complex intellectual property and data protection issues). I think that list says just as much about providers as it does about me: in many respects providers are sophisticated and often very substantial and complex businesses working in a sector with specific goals.

What common trends have you noticed in education subcontracting?

One issue which I have found an increasing number of providers require advice upon is the personnel engaged by their subcontracted providers of education and/or training. Under the Skills Funding Agency's funding rules, providers are required to maintain a high degree of control over the actions of their subcontractors and, specifically, are not permitted to allow their subcontractors to themselves subcontract to a second level without the SFA's consent (which will only be given in exceptional circumstances). Over the past couple of years we have received enquiries from several clients in the sector as to whether the use by a subcontractor of "associates" would constitute second level subcontracting. The term "associate" does not have any precise legal meaning. However, in an educational context, in our experience they tend to be individuals who are not employed by the subcontractor but are engaged to provide services for or on behalf of the subcontractor – such as independent consultants.

It is important to note however that, where such "associates" are not employees of the subcontractor, they are likely to be a separate legal entity to the subcontractor and, as such, their engagement by the subcontractor to provider services to the provider is, strictly speaking, likely to be second level subcontracting. Therefore unless the SFA's prior written approval has been obtained (which must be obtained annually), such an arrangement will put the provider at risk of breaching the SFA's funding rules. With such risk comes the threat of the SFA terminating its main contract with the provider and/or seeking to 'claw back' monies that the SFA has previously paid to the provider in relation to that subcontract. Definitely one to be thinking about in my view.

What about 'problem' subcontractors?

Where disputes arise with subcontractors, efficient contract management could often have reduced the impact of such a dispute or led to the dispute being avoided in its entirety. We sometimes find that providers have included robust contract management provisions in their subcontracts but they only seek to enforce those provisions when it is too late. Robust contract management from the outset should hopefully reduce the risk of issues arising in the future – and, where a subcontractor simply isn't up to scratch, should enable the provider to identify and manage the problem quickly and reduce the impact on learners.

What issues can you see on the horizon?

As referred to in our lead article, the SFA is hardening its position further in relation to education subcontracting and regularly updates its rules on the subject – providers will need to ensure they keep up-to-date with these changes as and when they happen.

Away from subcontracting, the importance of data protection compliance will only ever increase as learners, staff and other individuals are becoming more aware of their information rights. Although it has been in the pipeline for a while, the new EU Data Protection Regulation is finally intended to come into force within the next couple of years. The overriding purpose of the Regulation is to make our existing data protection legislation even more robust, with proposed reforms including a mandatory requirement to notify data breaches within a short timeframe and an increase to the maximum fine that can be imposed upon a data controller for a serious breach. Given that most education providers process a significant amount of personal data, I can see this having a huge impact.

On top of this is the ever more challenging funding environment. Providers will continue to adapt and find other ways to work more efficiently and generate more diverse income streams, including through collaboration with each other and with the private sector. Managing those relationships through effective contracting will be key to their success – as will continuing to work with the LEPs on issues such as targeting local priorities and maximising opportunities for skills capital funding.

Dealing with information requests for staff salary information: the King's College case

King's College London (the College) received a Freedom of Information request from a Mr Lubicz for the job titles, departments and salary bands of senior staff earning more than £100,000 per annum. The College disclosed salary information but withheld information on specific job titles relying on the exemptions in the Freedom of Information Act 2000 (FOIA).

The matter was referred to the Information Commissioner's Office (ICO) who disagreed with the College's application of the FOIA exemptions and found in favour of the Requestor. The College appealed the decision to the First Tier Tribunal: Information Rights (the Tribunal).

The exemptions relied on by the College

The College put forward the following arguments:

1. Disclosure of personal data would breach the first data protection principle (Section 40(2) FOIA)

The College argued that the requested information is personal data of the individuals it relates to. If disclosed, the information would allow the individuals concerned to be identified and the processing of such personal data would be unfair under the Data Protection Act 1998 (DPA). The College highlighted that it had not previously published salary data for individual post holders (with the exception of the Principal) and the individuals involved would not expect such information to be disclosed.

2. Disclosure would prejudice the commercial interests of the College (Section 43(2) FOIA)

The College stated that disclosure would prejudice its commercial interests for three reasons. Firstly, it would allow competitor universities to consider the salaries offered by the College, enabling them to make higher salary offers. This would increase costs of recruiting and retaining staff. Secondly, salary negotiations would be hindered by staff bidding for higher salaries based on posts they consider comparable. Thirdly, if there is a reduction in the senior staff as a result of the above, the quality of the College's research would be reduced which would have an adverse effect on the amount of research funding the College receives.

The ICO's findings

The ICO agreed that the information requested is the personal data of the individuals to whom it relates as it could lead to such individuals being identified. However, it highlighted that under the data protection principles, personal data could be disclosed in fair and lawful circumstances.

The ICO balanced the expectations of the data subject and the potential consequences of disclosure against the public interest in disclosing the information and, referring to previous guidance on this point, stated that "anyone paid from the public purse should expect some information about their salaries to be made public."

The ICO held that there should be an expectation by the College's senior staff, those earning above £100,000 and those in a public facing role that some information about their salaries would be made public. Therefore, on the basis that public interest in transparency outweighed the individual's right to privacy, the ICO held that it was not unreasonable for the College to disclose the requested information.

With regards disclosure prejudicing the College's commercial interests, it was held initially that the College had not produced sufficient evidence to establish likelihood of prejudice. The ICO later changed its position on this point in respect of information relating to the College's academic staff.

The Tribunal's decision

The Tribunal was asked to rule on whether disclosure in respect of information relating to the non-academic staff earning over £100,000 per annum would breach any data protection principles, and whether disclosure would be likely to prejudice the commercial interests of the College.

The Tribunal dismissed the College's appeal in respect of the non-academic staff on the senior management team requiring the information to be disclosed, but allowed

the College's appeal in respect of all other non-academic staff – i.e. their information in particular could be withheld from Mr Lubicz.

The King's College case highlights the complexity of dealing with FOIA when the information requested relates to individuals such as members of staff. Requests for salary and expenses information are becoming increasingly common, not least from trade unions and journalists and this case highlights that whilst there are potentially legitimate expectations there cannot be a "one size fits all" approach.

Tom Morrison and David White

UCAS forced to revise application form following ICO investigation

The Information Commissioner's Office (ICO) has required the Universities and Colleges Admissions Service (UCAS) to make changes to its application form. Following an investigation, the ICO found UCAS to be in breach of the Data Protection Act and the Privacy and Electronic Communications Regulations.

The breaches centred around direct marketing. Prospective students would be signed up to commercial mailing lists unless they unticked three opt-out boxes on UCAS' application form. If those boxes were unticked, the prospective student would also not receive information about career opportunities or education providers. The ICO felt that the net effect was that prospective students felt obliged to let UCAS use their information for commercial purposes, otherwise they would risk missing out on important information about career or education opportunities. In such circumstances, consent could not be said to have been freely given as is required by law.

UCAS has agreed to address the issue by updating its form and privacy policy.

Whilst the case concerned UCAS, it serves as a timely reminder for providers to consider their enrolment and other forms to ensure that they are fully compliant with the laws around marketing and other uses of personal information.

Tom Morrison

Updated guidance on the protection of playing fields

The Department for Education (DfE) has issued updated guidance *Advice on the protection of school playing fields and public land*, which explains when consent of the Secretary of State for Education is required to dispose of, or change the use of, playing fields used by schools and how the Secretary of State will consider such applications.

Section 77(1) of the School Standards and Framework Act 1998 (SSFA) provides that consent is required from the Secretary of State prior to the disposal of a playing field which is currently used by a maintained school for the purposes of the school, or which has been used within 10 years of the date of disposal. It applies to disposals made by local authorities, governing bodies of maintained schools, foundation bodies, and trustees of foundation, voluntary or foundation special schools.

Section 77(3) of the SSFA further provides that consent is required from the Secretary of State prior to the taking of any action which is intended or is likely to result in the change of use of a playing field, which is currently used by a maintained school for the purposes of the school, or which has been used within 10 years of the date of the change of use.

Where a local authority makes playing field land available for an academy by way of a lease, the SSFA will continue to apply for 10 years from the date the land was last used by the maintained school which is usually the date the school converted to academy status. Once 10 years has passed the SSFA will no longer apply and the academy will be governed by Schedule 1 of the Academies Act 2010.

For ease of reference the rest of this article refers to a disposal or change of use of a school field as a "Change".

The general presumption of the Secretary of State is that there is no need for a Change to take place, especially if the school is to remain open. The guidance advises that applicants must have no expectations that their application will be approved and further warns that no works should be commenced before consent is obtained.

Applicants must show they have exhausted all other options before considering a Change, and where an application is made by a governing body, trustee or foundation body the applicant must prove that the local authority does not object to the Change.

The Secretary of State will grant or refuse consent, in light of the following criteria:

School's needs – there is a legal requirement that outdoor space must be provided for physical education together with non-statutory recommendations as to the size of a playing field. The applicant must show that the outdoor space and sports needs of the school can continue to be met;

Other schools' needs – where a local school does not have the recommended outdoor space, the applicant must prove it has offered that school the option to use the area subject to the application;

The curriculum – the applicant must provide an assessment of the impact of the Change on the curriculum and prove that the curriculum can continue to be met following the Change;

Community use – any formal community use of the playing field will be taken into account in addition to any after school activities. The applicant must assess the affect of the Change on these activities and investigate whether the activities can be relocated;

Finance – the applicant must assess the financial consequences of the Change and explain what the proposed funds will be used for. The Secretary of State will require that the funds are used to improve sports and educational facilities;

Equal opportunities – the needs of pupils with disabilities should be assessed;

Consultation – applicants must consult on their proposals prior to making an application for at least 6 weeks, 4 weeks of which must be in term time; and

Other information – such as the future use of the playing field if the application is rejected.

The DfE's guidance expressly states that their advice does not influence or affect the procedures for applying for planning permission. The applicant will therefore also need to apply to their Local Planning Authority for planning permission, if required for any development or change of use. Sports England will be consulted during the planning process and is likely to impose restrictive conditions in any successful grant of planning permission.

Libby Clarkson

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 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 June 2015.

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