July 2016 issue 014

HRfocus

news and articles of special interest for headteachers and senior managers

Welcome...

to our last newsletter of this academic year.

In terms of HR issues, this last year has been relatively stable with no changes of significance in best HR practice nor any earth shattering government changes to teacher pay or conditions. There are, of course, updates to the safeguarding document KCSIE 2016 which are summarised in this issue (a more detailed analysis of the changes has been circulated to our policy subscribers) whilst in this connection there is also an interesting case of a teacher dismissal which was recently judged to be unfair, and which related to a safeguarding concern with relevant points to note for managers conducting investigations.

Teacher pay

Consultation on STPCD 2016 has been delayed this year as release of the (26th) School Teachers' Review Body report, normally due in late April, was deferred due to government 'purdah' (initially in relation to local elections but extended to include the subsequent referendum campaign). Our understanding, however, is that the government are felt unlikely to want to introduce any radical changes to current teacher terms and conditions, in addition to which they will, of course, have their hands full following the vote for Brexit!

One point of interest will be the government's stance on pay uplift for teachers. The DfE previously increased the minimum (and maximum – apart from M6 which rose by 2%) of each pay range by 1% (in line with the treasury's edict that wage inflation in the public sector must be limited to this figure overall for each of the next few years) yet at the same time stated categorically (if incompatibly) that they ruled out any increase in remuneration in recognition of the cost of living and were insisting that any pay award must be based on performance.

The DfE is also (it is thought) keen to refrain from responding positively to requests to supply pay points for the different teacher pay ranges. Last year they abolished the interim points for pay ranges leaving only the minimum and maximum points in furtherance of their contention (not shared by unions) that schools and academes should best determine how to remunerate their teaching staff, and it will be interesting to see whether they make further attempts to dilute the concept of national bargaining in relation to teachers' pay. ■

In this **Issue:**

Keeping Children Safe in Education 2016

The revised document contains guidance which will come into force on 5 September 2016. There are certainly some alterations both in emphasis (such as reinforcing the concept that safeguarding is **everyone's** responsibility and stressing the importance of 'early help' when concerns are identified) and in the order of presentation but there are in fact relatively few significant changes.

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Point of Interest ✓

Happy in your job?

An employee in France recently took his employer to a tribunal on the grounds that his job was so boring that it had damaged his mental and physical health, and that the failure to provide him with a sufficiently varied workload constituted harassment – the case continues.

A brief summary of the main elements: schools should ensure that 'mechanisms are in place to assist staff to understand and discharge their role and responsibilities' ie there is an obligation to do rather more than just ensuring that staff read Part 1 of the guidance. Refresher training for DSLs (and any deputies) must be undertake every 2 years with an *additional* safeguarding update (whether this is by email, bulletins, staff meetings or any other medium) at least yearly (which **all** staff should receive). Emphasis is placed on the responsibility of all school staff to be prepared to identify children who may benefit from early help by recognising the signs (and the complexity) of abuse. Online safety for pupils is now within the remit of this document and it reminds school managers/governors to avoid internet filters that may be 'over blocking' sites and thereby restricting what is taught. The section on safer recruitment covers section 128 requirements and the use of prohibition checks (via the new Teacher Services system) to ensure that there is no restriction on teaching currently in place within another EEA country and there is, in addition, an important reminder of the legal requirement that all governors now have to undergo a DBS check. ■

Disqualification by association – consultation

Disqualification by association was introduced with the intention of preventing an individual from working with young children, where the individual may be under the influence of a person who lives with them and who is likely to pose a risk to children.

According to the DfE, the guidance they produced in February 2015 had been widely considered to be helpful, however, concerns continue to be raised about the inconsistency of approach in applying the arrangements. "It remains a widely held view that the complexity of the legislation continues to result in differing interpretations of the arrangements amongst employers, and that this would be best addressed by simplifying the arrangements as much as possible.

Most of the concerns raised with the department relate to the fairness and proportionality of these arrangements on childcare workers in schools and other non-domestic registered settings."

The department is seeking views on three separate options which are intended to improve the fairness of the current arrangements, the consultation closed on 1 July.

These proposals are:

Option 1 - remove disqualification by association in schools and non-domestic registered settings

Option 2 - retain disqualification by association, but introduce a new right to make representations to Ofsted before the disqualification takes effect

Option 3 - retain disqualification by association, but reduce its scope as well as introducing (as above) a new right to make representations to Ofsted before the disqualification takes effect

Implementing any of these options will require amendments to regulations 9 and 10 of the Childcare (Disqualification) Regulations 2009 ("the Regulations").

According to the DfE, in proposing changes to the arrangements their aim is to ensure these are proportionate to the risk posed and strike the right balance between ensuring that individuals receiving childcare are protected, whilst at the same time ensuring the fairness of the arrangements for those who provide childcare. ■

Recruitment and discrimination

In our support for schools undertaking recruitment exercises we feel that we must remind all recruiters to ensure that their processes are sufficiently robust to be able to defend any potential legal challenges in relation to discrimination claims. There is a worrying impression that some schools and academies may struggle to defend their processes if challenged.

As you all know, employment tribunal claims in this area generally tend to relate to discrimination on the grounds of disability and/or sexual orientation and/or age. Therefore you need to be able to show that any shortlisting was carried out without bias and that anyone who is not shortlisted was excluded from further consideration on the basis that they failed to meet the essential criteria for the post.

The application form is a key document. It should be set out in such a way as to separate personal details which include, name, date of birth, gender, sexual orientation etc from the actual application ie qualifications, CPD, work history and personal statement with the latter providing the opportunity to set out how they meet the job specification etc.

This is crucial to guaranteeing the elimination of bias (whether overt or subliminal) in the recruitment process. This means ensuring that paperwork is completed correctly in that there is on record a clearly annotated matrix laid out to demonstrate each numbered (anonymous) applicant's score against the 'essential' and 'desirable' criteria. This material will be requested in the event of any ET claim. Headteachers will often ask HR or administration staff to see the full application form prior to shortlisting and it may be difficult to resist this request, however good practice states that to avoid any pitfalls in this part of the recruitment stage, such suggestions should be declined!

Capability/health and age – one of the key principles behind the age discrimination legislation is that you should not make assumptions about a person's capability based on their age. In addition, the Equality Act 2010 means that employers can only

seek medical information relating to recruitment or promotion in very limited circumstances (and these do not depend on the age of the individual). ■

Immigration Act 2016 – provisions in force

Provisions of the Immigration Act 2016 which will be brought into force on 12 July 2016 increase the penalties on employers who employ staff who have no right to work in the UK. This Act also allows earnings to be recovered from illegal workers and makes it a criminal offence for illegal migrants to undertake employment.

Measures include the following:

- The existing criminal offence of knowingly employing an illegal migrant is extended to the situation where an employer has 'a reasonable cause' to believe that a person is an illegal worker and the maximum penalty will increase from two to five years.
- The establishment of a Director of Labour Market enforcement who will oversee the relevant enforcement agencies ie the Gangmasters and Labour Abuse Authority, the Employment Standards Inspectorate and HMRC.
- The power to seize illegal workers' earnings as the proceeds of crime under the Proceeds of Crime Act 2002. ■

Managing the use of drugs in the workplace – new legislation

Due to the abuse of so-called 'legal highs' becoming so prevalent the government has recently introduced 'The Psychoactive Substances Act 2016', which renders these substances illegal. However, there are exemptions in the Act to cover certain items such as medicinal products, foodstuffs, caffeine, alcohol and nicotine. The Act sets out a number of offences including intentionally or recklessly producing or supplying a psychoactive substance and makes clear that supply within the vicinity of a school will be an aggravating factor.

Employers have a duty to ensure the health, safety and welfare of their employees whilst at work. Alcohol and drugs policies should encourage users to seek help for their problems and be sympathetic to any concerns raised. The use of alcohol is not illegal, yet most companies will have a ban or limit on alcohol consumption during working hours. Reference to new psychoactive substances should be built into alcohol and drugs policies, and current wording may require to be reviewed and/or revised. ■

Trade Union Act 2016

Employees and their unions have legal protection against certain claims from employers if industrial action is taken in furtherance of a trade dispute. The unions must comply with certain complex requirements around ballots and notification for industrial action in order to be protected. The Trade Union Act 2016 adds to these requirements and introduces new obligations as follows:

For a ballot to support industrial action, at least 50% of those entitled to vote in the ballot must vote. This is a significant additional requirement in that previously only 50% of those actually voting needed to support action (which can often be a relatively low figure if the turn-out is poor).

Additionally, for those in important public services, as well as a majority of votes cast, at least 40% of those who are entitled to vote must vote in favour of industrial action. At present it is understood that this will include primary and secondary (but not further) education.

A mandate for industrial action (following a ballot of union members) will lapse after six months (or nine months if the employer and the union agree to extend the timeframe) and this gives unions a limited period in which to exert their powers.

Following a successful ballot the union must give two weeks' notice of when industrial action will commence – doubling the previous period. This affords the employer time to negotiate, prepare for the strike, or inform those affected (such as parents).

Some of the hardest fought elements of the Act related to 'check-off' (payroll deductions of trade union subscriptions by public sector employers) and facility time in public bodies. The Government originally proposed to put an end to 'check-off' but accepted an amendment from the House of Lords to allow this practice to continue provided that certain conditions are met.

In relation to the education sector, the changes to notification and the validity of ballots are likely to significantly alter the dynamics of disputes. ■

Employment Tribunal Fees

The introduction of fees for a claimant to bring an employment tribunal claim has clearly had a deterrent effect as the number of such claims, since their introduction in July 2013, has fallen dramatically. Fees relating to complex claims such as unfair dismissal, discrimination and equal pay claims cost £250 (issue fee) plus £950 (hearing fee). The Court of Appeal has previously dismissed the challenge to the introduction of employment tribunal fees, finding that the Secretary of State had not acted unlawfully.

Following the Supreme Court's decision in February 2016 granting Unison permission to continue its legal challenge against the imposition of ET fees, the date has been set for a judicial review. The case of 'R (Unison) v Lord Chancellor and another' will be heard in the Supreme Court on 7 and 8 December 2016. ■

Safeguarding and discrimination

A teacher who stood by her sex-offender husband has succeeded in an indirect religious discrimination claim. In Pendleton v Derbyshire County Council and the Governing Body of Glebe Junior School,

the Employment Appeal Tribunal (EAT) in April 2016, held that dismissing a teacher for standing by her husband after his conviction for voyeurism and for downloading indecent images of children, equated to indirect religious discrimination under the Equality Act 2010.

Mrs Pendleton, an Anglican Christian, was a junior school teacher at Glebe Junior School when her husband (who was in fact the headteacher of another school) was arrested and charged with these offences. She decided to stay with her husband, provided he demonstrated unequivocal repentance, and maintained that this was consistent with her marriage vows made in the presence of God to stay with her husband "for better or worse".

At a meeting with the LADO in January 2013, the Headteacher said that it would be difficult to support Mrs Pendleton if she remained with her husband. Mrs Pendleton was suspended when her husband was convicted and was warned that there would be consequences if she stayed with her husband, the school's primary concern being her ability to carry out her safeguarding responsibilities.

Mrs Pendleton believed that she did not present a risk to children as she had done nothing wrong and there were no existing safeguarding concerns about her.

Following a disciplinary hearing Mrs Pendleton was dismissed without notice. It was decided that her decision to stay with her husband had destroyed the school's trust and confidence in her ability to carry out safeguarding duties in the future and was in direct contravention of the school's ethos.

Her internal appeal was dismissed and she subsequently brought claims for unfair dismissal, wrongful dismissal and indirect discrimination on the grounds of religion or belief. The employment tribunal (ET) found the dismissal unfair as there was no potentially fair reason for dismissal, although the claim for indirect discrimination on the grounds of religion or belief was, however, rejected.

On appeal, the employment appeal tribunal (EAT) considered that whilst anyone in a loving committed relationship would have suffered a disadvantage as a result of the application of this practice, those who shared Mrs Pendleton's beliefs would suffer a greater disadvantage. It held that Mrs Pendleton had therefore suffered indirect discrimination on the grounds of her religious beliefs.

Such cases put employers who have a responsibility to safeguard and promote the welfare of children in a difficult position. However, employers must nonetheless approach all disciplinary matters with an open mind and judge each case on its facts. In particular, employers must avoid conduct or comments (whether verbal or written) which could be interpreted as pre-judgment before appropriate internal processes have been completed. In this regard employers should be mindful that comments made in, for example, LADO meetings (for which minutes are produced) are likely to be disclosable in any future litigation.

Employers must (as ever) be mindful of any protected characteristic that an employee offers in explanation of their actions and must factor this into the conduct of internal procedures. It is important to consider whether the way in which a disciplinary process is conducted could establish a practice which disadvantages a particular group of people who may have a protected characteristic. Judging each case on its individual merits may help to avoid such outcomes. In this case the school failed to demonstrate the existence of a legitimate risk in relation to the continued employment of the teacher. ■

Whistleblowing

In relation to whistleblowing legislation, the wording on what might qualify as a 'protected disclosure' (to qualify for legal immunity) changed (in 2013) from giving a degree of protection to disclosures made 'in good faith' to the alternative wording of 'in the public interest'. Several legal cases have recently turned on the precise definition of the latter phrase (which appears to be nebulous) and it is not currently clear whether ongoing case law will, in time, determine a useful definition or whether additional legislation may be required. In the meantime, all employers (and employees) should be aware of the uncertainty on this point. ■

HR Services

A reminder for those schools and academies that wish to purchase our HR Consultancy/Advisory service – we are continuing to offer this service on a 'pay as you go' basis without any ongoing contractual commitment. This allows you to control your expenditure to suit your individual and budgetary requirements.

However, for organisations that prefer to enter into a retainer (fixed fee) contract for a defined period we are happy to provide competitive quotations on request.

Contact details IMPORTANT REMINDER

Much of educateHR's communication (other than this newsletter) is done electronically, but we are aware (by the return of 'undelivered' emails) that schools do change their systems, and email addresses, from time to time, and often this results in key individuals no longer being able to receive invitations to seminars and/or other items of potential interest. If you or your school have recently changed email address, or you haven't received an email from us in recent weeks (or aren't on our electronic mailing list but would like to be) please email Gill Meeson and we will ensure your details are added to our database.

For further information visit our website: **www.educatehr.co.uk** or please contact:

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