

news and articles of special interest for
headteachers and senior managers

Welcome...

to our latest newsletter (no, you haven't missed any – this is the first this year!)

This is not an easy time for a number of schools who are contemplating having to make significant budgetary savings with many feeling forced to take the difficult decision to reduce numbers of staff. Where this involves redundancies (rather than natural wastage) the important factors, as we have mentioned in previous newsletters, are for the employer to understand their obligations (including, vitally, the legal rights of their employees) and to adhere to the correct procedures that require to be followed to ensure fair treatment of the potentially redundant person(s). This involves considerable preparation in terms of drafting an appropriate rationale (detailing the necessity for the changes), arranging union (and individual) consultation and relying on robust selection criteria.

A key point to remember in relation to redundancies is that there are additional pension costs (which may well be significant) attributable to the employer if any member of support staff aged 55 or over is made redundant (and this includes voluntary redundancy).

We are always happy to offer advice on steps in the redundancy process, including: identifying the appropriate 'pool' for selection; seeking volunteers (VR); consulting employees; identifying (in accordance with policy) those members of staff who are eventually to be nominated for redundancy; appeals and dismissals; offering (where feasible) suitable alternative employment; and redundancy payments.



Teacher pay award 2017 consultation

Extract from the Government evidence (in December 2016) to the STRB in relation to the 2017 pay award:

'Given the Government's policy that public sector pay awards should be for an average award of 1% a year for four years from 2016-17, the Secretary of State has asked the STRB to recommend what adjustments should be made to the salary ranges and allowances for teachers in September 2017. The Secretary of State emphasised that there remains a strong case for continued pay restraint and that the

STRB should take into account the affordability of any recommendations within the existing budgets of individual schools. She has asked for recommendations on what adjustments should be made to the salary and allowance ranges for classroom teachers, unqualified teachers and school leaders to promote recruitment and retention within the 1% limit for pay awards for public sector workers.'

Publication of the STRB's report (on which the 2017 pay award will be based) has been delayed this year due to the general election. ■

NJC pay spine

As some of you may know, it was previously agreed, as part of the 2016-2018 pay negotiations, that a review of the pay spine would take place in order to accommodate the introduction of the National Living Wage.

Previous analysis found that almost a third of the points on the current pay spine will be wiped out by the end

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Point of Interest ✓

A professor of human brain research at UCL has found that there are 3 categories of decision-makers:

gunslingers – fast decision-makers;
chickens – people who push their decision-making to the limits;
and **poker players** – probabilistic decision-makers.

The professor said that when faced with any decision you have to take into account the risk, the value of the reward and the distance to that reward and people generally are not very good at understanding the value of something in the future.

Which category do you fall into??

He also said that decision-making is a skill and you can definitely improve it!

continued over »»

of the decade (when the national living wage is set to reach about £9 an hour) and representatives of both unions and local authorities have, at national level, been drawing up proposals for a new pay spine structure to take into account the introduction of the national living wage in April 2016. Amongst other things the increase in remuneration at the lower end of the pay spine has led to an erosion of differentials with the potential to undermine the legitimacy of the spine as a coherent reflection of job grading and evaluation.

In the light of these (ongoing) talks local authorities have been warned they need to plan for an increase in their pay bill of up to 6% over the next few years (over and above that required for normal increments in pay) as a result of reforms to the local government pay spine.

The new pay spine is likely to have around the same number of pay points as the current structure and it has been proposed that this might be introduced over two years, potentially beginning in April 2018 (although this timetable may well be subject to delay). ■

Review of term time working

As part of the 2016-18 pay deal, the NJC also agreed to conduct a review of term time working for support staff. Some terms of reference have been agreed with the national unions of school support staff in relation to this topic. These include consideration of all aspects of term time working in school including: collecting data on the use of term time contracts in schools and the methods used to calculate term time pay; differences between support staff and teaching colleagues; possibility of producing joint guidance in relation to annual leave; time off in lieu of bank holidays; paternity and adoption leave; sick pay and school closures.

educateHR will keep you posted on both of these topics in due course. ■

Employment Status – contractors

All schools will now be aware that since 6 April 2017, changes to the IR35 tax system mean public sector employers will have to deduct tax and national insurance contributions from contractors' pay at source unless the contractor meets the government's definition of (true) self-employment.

The government said it was reforming the IR35 system because it estimated that 90 per cent of the individuals affected in the public sector were not paying enough tax, leading to an annual loss of £400m to the Treasury.

This means that schools and academies who regularly use consultants (whether directly or via an 'agency') can only continue to pay them by settling an invoice if HMRC criteria are met, ie where the supplier of services satisfies the definition of 'self-

employed' as defined by government rules on 'off-payroll' working. All contractors who do not clearly fall within this definition should have tax and NI deducted at source, with subsequent adjustment (where appropriate) being the concern of the individual rather than the school or academy.

To assist employers in deciding which individuals will require to have tax and NI contributions deducted at source the government has developed an online Employment Status Service tool: <https://www.tax.service.gov.uk/check-employment-status-for-tax/setup>. General advice can be found at: <https://www.gov.uk/guidance/check-employment-status-for-tax>.

Tangential to the above a recent employment tribunal case, (Smith v Pimlico Plumbers) highlighted the issues of an individual's employment status and their legal rights. An 'employee' is entitled to the full range of rights, including unfair dismissal protection, maternity/paternity leave and sick pay, whereas a 'worker' has a more limited set of rights such as the national minimum wage, holiday pay and protection from discrimination.

In this particular case although Mr Smith was a self-employed plumber and paid his own taxes the Court of Appeal determined that he should be classed as a 'worker'. The reasons given were that Mr Smith was under an obligation to provide his services personally and there was no express right for him to engage a substitute in his place, in addition to which he was obliged to complete a minimum number of hours a week and was also subject to onerous restrictive covenants. All of these findings were inconsistent with the status of self-employment.

A point to note – it is good practice to review contracts and arrangements on a regular basis. The longer the relationship lasts, the more scope there is for it to drift from what was set out in the original contract. You must act with care when terminating any working arrangements with individuals who could potentially have employment rights in respect of unfair dismissal. ■

Prohibition checks on teaching assistants

As you are all aware the Secretary of State has jurisdiction to make a prohibition order against anyone who is appointed or engaged to carry out teaching work. A person subject to a prohibition order may not carry out teaching work in any school (whether independent, free, academy or maintained) in England. However, some schools are still uncertain whether they should be carrying out prohibition checks on teaching assistants.

The extract from the 'Ofsted Inspection Update' (November 2016) states: "The purpose of the regulatory requirement to check prohibition is to prevent a person from working in a role that would contravene any prohibition order in place, ie a role that would require them to carry out unsupervised/directed

teaching work. That is why there is no statutory requirement for a prohibition check to be made on applications for any school staff position, unless they will carry out unsupervised/undirected teaching work. This means that, generally, when appointing into teaching assistant (TA) positions, prohibition checks will not be required".

However, the document goes on to state that sometimes a TA role will change over time to include (in non-maintained schools) 'teaching work' and in such circumstances schools need to ensure that no prohibition order is in place. ■

Leave of absence requests

One area that many school leaders and managers find difficulty in addressing successfully is that of dealing with requests for leave of absence. We are often asked how the school or academy should respond to differing reasons for such requests. The process should always involve following your policy and being consistent in its application at all times.

It is usually the case that class based or pupil driven roles actually (by definition) require such staff to be present at work whenever school is in session (and of course there are 13 weeks in the year in which staff are able to take their holidays). Authorised leave will normally be unpaid (there is no statutory entitlement to pay if the absence requires to be **authorised**, as opposed to merely being **notified** (such as for sickness absence or maternity leave) and if schools or academies feel inclined to sanction paid leave (which will be the exception rather than the rule) great care must be taken to ensure that such rulings are made on a consistent (and objective) basis.

As a general principle, the headteacher or senior manager should deal with these requests without reference to the governing body – such decisions are day to day school matters to be decided by senior management rather than governors. ■

Data Protection

The General Data Protection Regulation (GDPR), which will come into force (irrespective of Brexit) on 25 May 2018 constitutes the biggest reform to information security since the Data Protection Act 1998. GDPR will bring significant changes to the law concerning the sharing and controlling of information and it is anticipated that schools and academies will have to ensure that their individual policies on data protection are updated appropriately to reflect the new legislation in relation to many aspects of control and retention of all types of information which relate to identifiable personnel.

educateHR will endeavour to keep you updated on this topic before the critical date. ■

Two ticks disability changes

You may be aware that since 2016 the disability confident symbol (right) has replaced the 'two ticks' symbol and (if you haven't already done this) you should amend your recruitment documentation to remove the old logos.



You can use the disability confident symbol on adverts to show that you encourage applications from disabled people. However, you will need to sign up as a disability confident committed employer first – it's free.

The disability confident scheme has 3 levels that have been designed to support you on your disability confident journey. Each level must be completed before moving on to the next.

More information about becoming 'Disability Confident' is available on the government's website: <https://www.gov.uk/guidance/disability-confident-how-to-sign-up-to-the-employer-scheme> ■

Flexible working requests/indirect sex discrimination

We all know that employees making flexible working requests have no right to demand their employer accepts their proposal. Rather, the legal right is restricted only to the right to make the request, and to have it given serious consideration. Where a flexible working request is refused, an employee is able to bring an employment tribunal claim if they can demonstrate that the employer has not dealt with their request properly. Perhaps of greater concern to an employer is the risk that an indirect sex discrimination claim will flow from the refusal of a flexible working request.

However, there have been recent cases where the employer has been successful in not acceding to the employee's request. In the case of 'Whiteman v CPS Interiors Ltd and others' the employer accepted the claimant's request for a reduction in hours but it turned down her request to work from home (apart from occasional office visits) and to do most of her work in the evenings (after 6pm).

The employer considered that, although working at home primarily in the evenings might have been possible, it could not accommodate the homeworking request because its collaborative way of working often involved designers together in a room looking at technical designs; and designs often had to be changed at short notice, something that would be difficult if the employee worked only at home in the evenings.

Once again it must be stressed to all employers that if a request for flexible working is to be refused this can only be on the basis of one or more of the 8 business reasons specified in the relevant legislation. The rationale for refusal must be capable of standing up to scrutiny ie there must be clear objective reasons why the request cannot be accommodated – there is always the potential to be indirectly discriminatory on the grounds of sex when considering a flexible working request and employers should be mindful of this. ■

Constructive dismissal

We are aware that many headteachers and business managers are not necessarily inconsolable if an employee threatens to leave their establishment when things are not going their way, but if the employee actually submits a resignation letter citing their reasons for leaving this alters the dynamics, and some managers become overly alarmed by the possibility of receiving a subsequent claim for constructive dismissal.

It is worth remembering that any employee who resigns with the intention of claiming constructive dismissal has to be able to show not only that the breach (allegedly) performed by the employer was fundamental but also that they (ie the employee) tried (before lodging a claim) to deal with the matter informally, or alternatively submitted a grievance with regard to the 'breach'. In a constructive dismissal claim the onus is on the employee to show that they had no choice but to resign.

Timescales are an important factor which many employees fail to recognise. If employees leave it too long after the 'breach' occurred it is highly likely that an employment tribunal (if the matter gets that far) will consider that the employee had in fact accepted the breach (of contract) by continuing to work under those circumstances. ■

Failure to advertise

An employment tribunal case highlights the need for openness in the advertising of internal job opportunities. In **Uddin v Westex Carpets Ltd** Mr Uddin had worked for twenty years as a night shift manager. He was hoping to apply for a promotion when one of the senior managers retired. Unfortunately the vacancy was never advertised and another man (who happened to be white) was selected for the promotion, seemingly without any proper selection criteria being applied.

Mr Uddin, who was of South Asian ethnicity, complained to the tribunal that he had been overlooked for promotion on account of his race. The tribunal, which also noted that Mr Uddin was the only non-white manager from a workforce which was 50% non-white, was able to draw an inference of race discrimination.

There is always a risk when an appointment is made without following a fair process, which involves advertising (if only to a limited extent) the availability of a post. ■

Governor database

Not every school appears to be aware of (or at the very least not every school appears to have complied with) the Department for Education's initiative to maintain a national database of school governors.

The white paper Educational Excellence Everywhere set out the plans to implement a national database of all those involved in

governance by extending the information collected via Edubase. This is part of the government's drive to increase transparency on who governs our schools, and the initiative is seen as enabling DfE to more quickly and accurately identify those individuals who have a role in governance.

Since September 2016 the Academies Financial Handbook requires academy trusts to provide information to the DfE (via the governance section of Edubase) within 14 days of a member or trustee being appointed (or vacating an appointment), including (in the case of MATs) membership of any local governing bodies that may be in place. Governing bodies of maintained schools will be under a similar duty to inform the DfE under section 538 of the Education Act 1996. ■

Disability and dismissal

This is a reminder that when a school or academy is facing the prospect of a member of staff not returning to work due to health issues, and dismissal is under consideration, before initiating any dismissal proceedings the employer must be in possession of an occupational health (or equivalent medical) report generated **within the last 3 months**.

Prior to proceeding to dismissal a number of factors must be considered including (this list is not exhaustive) the following: giving the employee an opportunity to state their own views on the matter; offering alternative types of employment; the length of time the employer can wait for them to return to work; and informing the employee of the final step in the process. However, it often proves possible, in many of the cases that educateHR deal with, to resolve the situation by agreeing a mutual termination of employment without any requirement to complete the actual process of dismissal. ■

HR and Payroll Services

Consultancy Services – a reminder that we continue to offer this service on a 'pay as you go' (ie non-contractual) basis. However, if you prefer to enter into a retainer (fixed fee) we are happy to provide a quotation on request.

Administration and Payroll – we continue to offer both HR Administration Services and Payroll services and can provide quotations on request.

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

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