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Education Focus

New Fair Deal and FE/HE Employers

We reported in the previous issue of Education Focus on the introduction of the New Fair Deal policy by the Government, and that it was consulting on the application of the New Fair Deal for members of Teachers' Pension Scheme (TPS) employed by higher and further education institutions.

The Department of Education has now published its response to its consultation on proposals for the New Fair Deal and increases in contributions for members of the TPS in 2014-15. Despite Union responses suggesting that the New Fair Deal arrangements should be applied universally, the Government has confirmed that the New Fair Deal will not be mandatory in the FE or HE sectors, but employers will be able to elect to apply the arrangements should they wish.

This decision was reached partly on the basis that such institutions were not subject to the Old Fair Deal arrangements, and as the guidance is not statutory and applies only to certain public sector bodies, it should not be mandatory within the FE or HE sectors. A review was suggested after two years, to reconsider the issues a look at the number of FE and HE institutions that have elected to participate.

The Government response also provided for amendments to be made to the TPS to enable continued access to the scheme for staff transferring to private contractors, dependent on the participating body and the contracting authority signing a Participation Agreement.

Finally, the response confirmed the member contribution rates to the TPS for the year 2014-15, and the pensionable earnings bands (the same as for the year 2013-14). The proposed structure will result in an average contribution increase of 0.6 percentage points on the rates implemented in 2013, with the lowest earnings band (ie below £14,999) having no contribution increase, remaining at 6.4%, and contributions in respect of the highest band (ie over £100,000) increasing by 1.2% to 12.4%. In addition, the Treasury have proposed an increase in employer contributions from 14.1% to 16.4%. The impact on education providers' costs is obvious and the Association of Colleges is currently lobbying for this to be taken into account in the context of wider funding cuts.

Draft regulations covering the various changes have been published and will take effect on 1 April 2014.

Craig Engleman

SFA Funding Rules 2014/15 published

The Skills Funding Agency has recently published Version 1 of its Funding Rules for 2014/15. Whilst the overall theme is that there is relatively little change to the Rules themselves compared with previous years, there are some important points which providers will be drawing out of the Rules. These include:

- Intermediate Level Apprentices who do not hold Level 2 English and Maths qualifications will be required to take the qualifications during their Apprenticeship in order to qualify for funding. As currently drafted, providers must ensure that they can evidence that the qualifications are being delivered, but there is currently no express requirement for the Apprentice to pass in order for funding to be drawn down.

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Also in this issue

Q&A

Managing absence and capability issues

Ed Jenneson, an employment law specialist in Rollits' Education Team, sets out his thoughts on some of the questions he is most frequently asked by education providers' HR teams when it comes to managing absence and capability issues.

What procedures can be put in place to assist with management of sickness absence?

Ensure clear provisions are in place in the contract of employment and/or a separate sickness absence management policy which could cover such things as the sickness absence reporting procedure, the expectation to keep in touch, acceptable levels of absence in a 12 month period and whether enhanced company sick pay will be paid. Clarity of information relating to sickness absence will help employers deal with absence effectively and consistently as well as putting employees on notice of the standards of attendance and reporting expected of them.

Having policies in place for absence other than sickness may assist in keeping sickness absence to a minimum where such policies relate to allowing paid or unpaid time off to deal with immediate or unexpected emergencies involving a dependant or where arrangements need to be made upon the death of a relative. Monitoring absence patterns will also assist with a consistent approach and allow patterns of sickness to be dealt with efficiently rather than being "swept under the carpet" which causes problems in the future if the employer decides they want to dismiss and the employee has not been warned previously about their sickness absence.

How necessary are return to work interviews?

If employers intend to conduct them it is a good idea to make this clear in the sickness absence management procedure. Employers can choose whether to hold such meetings after every period of sickness absence or after a specific period, for example, one week. This should however be applied consistently for all employees to avoid a complaint that an individual is being singled out if they are seen more frequently.

For some employees return to work interviews can be a disincentive to take sickness leave. The interviews may be very informal and last no more than a few minutes. For employees regularly taking periods of short-term absence, interviews can be an opportunity for management to raise any concerns with them.

What action can be taken if an employee has regular short periods of absence?

It may be worthwhile having an informal discussion with the individual before implementing the formal procedure. This may have already been done by way of return to work interviews. If this does not have the desired affect then it will be necessary to invite the individual to a formal meeting with the right to be accompanied. The following may be points of discussion in such meeting:

- *The effect of the pattern of absences on the employee's colleagues, department and the employer's business.*
- *The likelihood of continuing absences and the impact they are likely to have.*
- *Whether there are changes to the employee's job or redeployment opportunities that would assist in attendance, reduce the effect on colleagues or the employer's business.*
- *Whether the employee has a disability and, if so, whether there are any reasonable adjustments that could be made. If a potential disability is identified then it may be appropriate to request the employee's consent to obtain a medical report. A further meeting will be necessary to discuss any such report with the employee and the potential implementation of any adjustments identified.*
- *Whether it is appropriate to give the employee a formal warning that their attendance levels need to improve.*

If a warning is given, the employee has the right to appeal and a meeting must be arranged to discuss their appeal. It would be appropriate to consider dismissal on the grounds of capability due to frequent short term absence where the individual has been given all possible warnings, i.e. first and final written warning with the opportunity to improve.

What if sickness absence does not appear to be genuine?

In some cases sickness absence may not be genuine and employers should consider what further investigations should be undertaken (e.g. a medical report may be appropriate) and whether disciplinary action should be pursued instead of action under a capability procedure. Care should be taken if there are such suspicions and investigations must be adequate to show a reasonable belief that such absence is not genuine.

What action can be taken for long term ill health?

Employers are often wary of dealing with individuals who have been off sick for a prolonged period, especially where the cause of their sickness is not clear or they are awaiting diagnosis. However, employers should not allow the situation to drift until it reaches the point where the employee has been off for so long that dismissal starts to look like the only viable option. This can lead to problems under unfair dismissal and disability discrimination law.

The employer should keep in regular contact with the individual from the start of the absence and if it looks like the absence is going to be long term then it will be necessary to have a first formal meeting to discuss the following issues:

- *The likely date of return (arrangements for future contact, further medical review and further meetings under the procedure) and whether the employer can continue to wait for the employee to return.*
- *Whether the employee perceives they can return to their previous job and what adjustments can be made.*
- *What alternatives the employee may wish to explore, e.g.: redeployment or application for employment benefits. This must be dealt with sensitively and put to the employee as an option to consider not a required change which could amount to breach of contract, constructive dismissal or disability discrimination.*
- *The mechanics of a return to work programme.*
- *Whether the person has a disability and, if so, whether there are any reasonable adjustments that should be made. This may require obtaining consent from the employee for a medical report to be produced.*

Further meetings will be required if a medical report is received to discuss its contents with the employee.

What if the employee refuses to consent to a medical report?

An employer might consider such refusal to amount to misconduct. However, it would be extremely risky to rely on this as the reason for dismissal, particularly where misconduct dismissals must usually follow previous warnings. It may be better for the employer to make a decision based on the underlying health issues, and rely on incapacity as the reason for dismissal. If an employer has done all it reasonably can to obtain available medical information and if the individual continues to withhold consent for either an examination or information to be provided to the employer, a decision to dismiss may be within the range of reasonable responses open to it.

What sort of things should I consider when deciding if an adjustment is reasonable?

In consultation with the individual, the employer should consider whether there are any reasonable adjustments open to the employer to enable the individual to return to work in some capacity in the foreseeable future. The employee should be asked for their suggestions, but it is not enough for an employer simply to rely on these. It is safest to take medical advice if there is doubt about the prognosis or the scope of any adjustments that could be made and whether or not they would enable an individual to return to work at some stage.

Employers should consider if there is another job within the business that might be more suitable for the employee. Any discussion of redeployment should be approached sensitively, as an employee may see it as a criticism of their abilities, or a demotion. If the job is in another office the employer will need to consider any relocation arrangements.

Reasonable adjustments may also need to be made to the procedure itself. For example, meetings could take place at the employee's home or other convenient location, the employee might require more notice of meetings than provided for by the employer's policy or more time to read material and prepare for meetings. However, provided an employer is reasonably flexible, it will not be expected to hold off from taking decisions indefinitely.

At what point is it fair to dismiss for long term sickness absence?

Where it looks as if the employee will not be able to return to work, or the prognosis is such that it cannot be said when (if at all) the employee might be fit, the employer will need to consider the situation carefully as to whether it is appropriate to dismiss on the grounds of capability due to ill health. This step must only be taken where all other options have been explored and a fair procedure must be followed by warning the employee that dismissal is being considered and meeting with the employee before finally taking the decision to dismiss and giving the employee their right to appeal.

It will usually be unfair to dismiss an employee for long term sickness absence before any entitlement to contractual sick pay has expired.

I have an underperforming employee, what action can be taken?

Care should be taken to identify the reason for the underperformance to make sure there is no potential disability with a need to consider reasonable adjustments.

It may be appropriate to meet with the employee informally in the first instance to discuss the reason for the underperformance and warn that a formal procedure will subsequently be followed if there is no improvement. It would be helpful if the employer has a written capability procedure to refer to at this stage.

Where formal steps are taken the individual must be given the right to be accompanied to further meetings.

The employee must be given detailed information at these meetings as to how they are underperforming and given targets to improve and, where necessary, interim review meetings to check that they are in line to meet the targets set. Failure to improve will result in warnings being given from a first to a final written warning (in relation to which they have the right to appeal) with a warning that failure to improve could lead to dismissal

What are the types of claims a sick employee could bring?

It is important to follow a fair and reasonable procedure when dealing with sickness absence as there are a number of claims an employee could bring if they feel they have not been treated fairly. The most obvious claim is unfair dismissal but such a claim can only be brought with two years' continuous service.

If the employee is considered disabled under the Equality Act 2010 they could bring a disability discrimination claim which has no requirement for two years' continuous service. If the sickness is pregnancy-related, care must be taken as an employee who is dismissed or subjected to detriment because of pregnancy-related illness could bring a claim for pregnancy-related discrimination, again without the need for two consecutive years' service.

SFA Funding Rules 2014/15 published continued from cover…

- Where a provider is intending on claiming discretionary full funding for delivery to unemployed learners there is a requirement on the provider to demonstrate that the education will be of use to the learner's employment prospects and that there is a need for the relevant skills in the job market. This is an example where a provider's Labour Market Information will be key, and we would suggest that enrolment procedures should make it clear that this point has been addressed with the learner.

- If a provider intends on charging for delivery in circumstances where a learner could benefit from delivery with another provider with the assistance of a grant or loan, the provider is under a duty to inform the learner that this is the case. In practical terms, we would anticipate that rather than dealing with this on a case by case basis providers could include a standard statement on their enrolment forms for full cost courses that alternative methods of funding may be available from other providers. Clearly there is a disincentive on providers sending learners to their competitors.

- The annual per-learner funding cap is being strengthened to incorporate a monthly cap in addition. The policy objective behind this appears sound – i.e. that a learner can realistically only carry out a certain amount of learning over a defined period if the teaching and learning is to be of an acceptable quality – but the SFA has so far been light on the detail of how it intends to enforce a monthly cap. More information is promised in future versions of the Rules.

Tom Morrison

OFT warns universities that their terms and conditions could breach Consumer Protection Law

In the Q&A column of our Autumn 2013 edition of Education Focus we highlighted the Office of Fair Trading's investigation into Universities' Terms and Conditions as something to look out for over the next 6 months.

The OFT has been carrying out an investigation into terms and conditions which prevent students from graduating or enrolling onto the next academic year or using University facilities where the student owes money to the University which relates to non-tuition fee debts. Such debts include, for example, accommodation or child care. The OFT published its report setting out its findings in February 2014.

The Report found that of the 115 Universities who provided copies of their terms and conditions to the OFT, three quarters of them had terms and conditions which could prevent students from graduating or re-enrolling for the following academic year. The OFT considered that such terms and conditions are open to challenge as unfair under the Unfair Terms in Consumer Contract Regulations 1999 and/or unreasonable under the Unfair Contract Terms Act 1977. The OFT also considered the practices around the use of such terms could constitute unfair commercial practices under the Consumer Protection from Unfair Trading Regulations 2008. As a result of the findings, the OFT has written to over 170 Higher Education institutions urging them to proactively review their rules and practices and revise them where appropriate.

In light of these findings we would urge all education providers to review their terms and conditions, having regard to the findings of the OFT, in order to reduce the risk of them being challenged in the Courts.

Caroline Hardcastle

Rollits chosen for elite education sector legal panel

Rollits LLP is proud to have been chosen by Crescent Purchasing Consortium to join its elite panel for legal services. Crescent, also known as CPC, is owned by the Further Education sector and as such is dedicated to ensuring that its members have access to the highest quality suppliers with proven expertise.

The panel, which is to operate under a framework agreement for at least three years, has been constituted to be compliant with procurement legislation and allows for members to engage suppliers on the panel directly or pursuant to a mini-competition. In addition to being available to all colleges in the country, the panel is available to other organisations such as academies and all members of the North Eastern Universities Purchasing Consortium.

Commenting on Rollits' appointment Tom Morrison, Partner and Head of our Education Team, said: "*We are immensely proud to have been chosen by CPC to join its panel following what was a rigorous and highly competitive tender process. We have been chosen as one of the top five firms in both Yorkshire & Humber and the North East. CPC's confidence in us is testament to the hard work and dedication of our Education Team, but more importantly it is a recognition that we are fortunate to work with fantastic clients in the sector. As part of the tender process we had to demonstrate our track record in the sector and we were only able to do that by virtue of the exciting work that we get to do with our clients. We are extremely grateful for their support.*

"*This past year has been an exciting time for Rollits in the sector, as we continue to work closely with a range of education providers and being recognised by independent bodies such as CPC, Legal 500* (which has rated Rollits for its expertise in the sector for the fourth year running) *and Westlaw* (which has asked Rollits to become the authors for several chapters on education law in one of its key legal publications)."

Neale Walker, Specialist Contracts and Procurement Officer at CPC said: "*We are pleased to welcome Rollits to our panel of suppliers. CPC offers education providers a guaranteed way of complying with EU and UK procurement legislation by putting in place panels formed from suppliers who have undergone our competitive tendering processes. Because we are owned by and dedicated to the education sector, we understand its needs and exist solely to ensure that the sector gets the level of service it deserves. Other panels include insurance, audit and property valuation.*"

Sector acquisitions

Share Purchase v Business Purchase

Having considered in the previous Education Focus the wider cultural and strategic "fit" issues which need to be considered when acquiring and also disposing of the whole or part of another organisation in this article we will look at how a typical acquisition or disposal can be structured in terms of whether a share purchase or a business and asset purchase is more appropriate. We are assuming for the purpose of this article that a limited company owns the target business, although of course businesses can be conducted through multiple entities including sole traders, partnerships, companies limited by guarantee and limited liability partnerships. Other models, such as joint venture arrangements, can always be considered but are outside the scope of this article.

An asset purchase is often more complex than a share purchase due to the need to transfer each of the separate assets which constitute the business. It is likely that more consents and approvals will be required than would be on a share purchase as, for example, contracts with customers and suppliers will be with the seller of the business. With a share acquisition the contracts with customers and suppliers will be with the company itself which is being transferred.

The other key commercial difference between an asset purchase and a share acquisition is that on a share acquisition the buyer is acquiring the company itself within which the business runs as a going concern. As a result the trading and tax history of the company is inherited on acquisition. In an asset purchase contracts this history and the existing trading arrangements will not automatically transfer to the buyer.

Some further issues for consideration when making the decision of an asset or share purchase include:

1. Due diligence
On a share acquisition a buyer is advised to carry out extensive and wider ranging due diligence on the company which it is intending to acquire. All liabilities of the company will transfer to the buyer and as such a buyer would be well advised to carry out as much commercial, financial and legal due diligence as is appropriate. In an asset acquisition as the nature of the assets and liabilities being acquired is regulated by the asset purchase agreement usually the volume of due diligence required is less which can have a cost benefit to a buyer.

2. Employees
In an asset acquisition the employment contracts for employees of the business automatically transfer to the buyer under the provisions of regulations known as 'TUPE'. This is an area which needs careful attention as a breach of the regulations can be expensive. Careful pre-planning is needed as the requirements of TUPE will need to be built into the acquisition timetable at an early stage. Subject to the specific terms of employee contracts, in a share acquisition the employees' contracts are not usually affected as their employer remains the same (being the company itself which is being acquired).

3. Warranties and indemnities
In an asset acquisition the level of warranty and indemnity cover provided by a buyer to a seller is usually less than with a share acquisition. This is because the assets and liabilities being transferred are specifically identified and as such any comfort given by way of warranties and indemnities need only cover these areas. As all of the assets and liabilities (the history of the company) are being transferred under a share acquisition then it is common for a larger number of warranties and indemnities to be sought by a buyer as there are a significant greater number of issues in respect of which a buyer will seek comfort.

Share acquisitions/disposals are often more attractive for a seller as the entirety of the company is disposed of and becomes the property of a buyer. With an asset sale a company, if it is the seller, receives the consideration for the assets being sold which then may have to be distributed to shareholders and to deal with closing down the company if that is what is required.

Our experience shows that the majority of education sector acquisitions are carried out by way of a share acquisition. Whilst there are advantages and disadvantages to this, so long as a thorough and proper due diligence process is carried out and supported by robust legal documentation protecting the buyer's position, then the increased risks associated with a share acquisition can be managed. It is always worth considering alternative structures, as there might be a compelling taxation or other reason to depart from the norm. Equally, the decision should always be revisited and confirmed or changed once the outcome of the due diligence has been considered, which we will cover in a later edition of Education Focus.

Richard Field/John Flanagan

Supreme Court Decision: A warning to Education Providers delegating the provision of learning

In the July 2012 edition of the Education Focus we reported on the Court of Appeal Decision in the case of *Woodland v Essex County Council* where the Court of Appeal dismissed attempts by the father of a pupil injured during a swimming lesson to extend the boundaries of negligence by finding that the School owed a non-delegable duty of care.

Very briefly, the facts were that a pupil attended swimming lessons as part of the Local Authority's requirement to provide physical activity of various kinds, including swimming. The School was under the control of Essex County Council but the pool was operated by a different Local Authority. The swimming lessons were provided by a third organisation which in turn, employed its own lifeguard and swimming teachers. As a result of an incident during a swimming lesson, the pupil suffered severe brain injury. The child's father has sought to argue that the Local Authority's duty was not merely a duty to take care but there was also a duty to provide that care was taken by others. The Court of Appeal rejected the argument.

However, in November 2013, just after Education Focus had gone to print, the Supreme Court overturned the Court of Appeal's decision. The Supreme Court found that there could be a non-delegable duty of care which would justify a departure from the general principle that a party is not liable in negligence for the negligent actions of an independent contractor.

The decision of the Supreme Court is not a blanket rule. Lord Sumption set out defining features which he identified would typically give rise to the non-delegable duty of care. These include where:

1. the Claimant is a patient or a child or some otherwise vulnerable or dependent person;

2. there is a pre-existing relationship between the Claimant and the Defendant which puts the Claimant in the care of the Defendant who has a positive obligation to actively protect the Claimant from harm;

3. the Claimant has no control over the Defendant's performance of the obligation (for example, by performing core functions of the National Curriculum);

4. the Defendant has delegated the performance of some function to a third party who has assumed some custody or care of the Claimant (it was made clear by the Court that the essential element is not the control of the environment in which the Claimant is injured, but control over the Claimant); and

5. the third party has been negligent in the exercise of that delegated function.

The case is not yet at an end as the Supreme Court has referred the matter back to the High Court to determine whether there was negligence on the part of the parties who led and supervised the swimming lessons. If it is found that they were negligent, the Local Authority will be liable under its non-delegable duty of care. The hearing is due to be listed some time in 2014.

So what is the effect of this decision in terms of Local Authorities to provide their core functions? There is a risk that some Local Authorities may not be as willing to outsource some of their core functions. Unfortunately, for some pupils this may mean that, where a Local Authority does not have the ability to deliver a function internally, it may not be prepared to offer the variety of services which it would otherwise have done.

Caroline Hardcastle

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 31 March 2014.

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