

ISBA & VWV Employment Law Bulletin 2/2017

July

KEY EMPLOYMENT UPDATES:

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The Independent Schools' Bursars Association (ISBA) has worked with Veale Wasbrough Vizards (VWV) to produce this bulletin which we trust will give a timely update to ISBA member schools. It will also be made available through the Independent Schools Council (ISC) for onward communication to schools.

Links included within the content will direct readers to guidance published on both the ISBA (www.theisba.org.uk) and VWV (<https://www.vwv.co.uk/compliance-onstream/login>) websites.

This publication is generic in nature and advice should be taken in respect of your specific circumstances.

E6/17 ISBA REFERENCE LIBRARY UPDATES

The following employment-related template documents have been reviewed and updated, and are now available to members in the ISBA reference library:

- A briefing note on how to calculate a day's pay:
<https://members.theisba.org.uk/member-tools/reference-library/human-resources/staff-management/calculating-a-days-pay.aspx>
- Guidance on calculating deductions from salary in response to strike action guidance: <https://members.theisba.org.uk/member-tools/reference-library/human-resources/staff-management/calculating-deductions-from-salary.aspx>
- A briefing note on National Minimum Wage (NMW) breaches:
[https://members.theisba.org.uk/member-tools/reference-library/human-resources/staff-management/national-minimum-wage-\(nmw\)-breaches.aspx](https://members.theisba.org.uk/member-tools/reference-library/human-resources/staff-management/national-minimum-wage-(nmw)-breaches.aspx)
- NEW ISBA template child protection and safeguarding model policy:
<https://members.theisba.org.uk/member-tools/reference-library/pupils-and-parents/safeguarding-children/child-protection-policy.aspx>
- ISBA model staff handbook: <https://members.theisba.org.uk/member-tools/reference-library/human-resources/staff-management/staff-handbook-complete-isba-model-staff-handbook.aspx>
- Bursar's template contract of employment: <https://members.theisba.org.uk/member-tools/reference-library/legal/staff-contracts/bursars-contract-of-employment.aspx>
- Head's template contract of employment: <https://members.theisba.org.uk/member-tools/reference-library/legal/staff-contracts/head-contract-of-employment.aspx>
- Support staff's contract of employment: <https://members.theisba.org.uk/member-tools/reference-library/legal/staff-contracts/support-staffs-contract-of-employment.aspx>
- Teacher's template contract of employment: <https://members.theisba.org.uk/member-tools/reference-library/legal/staff-contracts/teachers-contract-of-employment.aspx>

The next review of the model staff handbook and template contracts of employment is due in April 2018 and will take into account the new GDPR.

E7/17 WHISTLEBLOWING - IS IT UP TO EMPLOYERS TO DECIDE IF DISCLOSURE IS PROTECTED?

When considering whether to dismiss an employee, schools should be cautious not to underestimate any disclosure made by an employee and whether this may amount to a protected disclosure under whistleblowing legislation. Even where a school genuinely believes that the disclosure is not protected, the courts may take a different view.

Beatt v Croydon Health Services NHS Trust - the facts

Dr B (Dr B) was employed as a Consultant Cardiologist at Croydon University Hospital NHS Trust (the Trust) in what had once been described as a 'dysfunctional' cardiology department. Following an incident in which a patient tragically died, Dr B made a number of disclosures, including concerns about the Trust's decision making and the safety of its patients.

The Trust considered that Dr B's claims were vexatious and unsubstantiated and did not consider that they amounted to a protected disclosure under whistleblowing legislation. The Trust considered that Dr B's actions were part of a campaign against a colleague, vexatious, and calculated to hamper the safe and effective running of the department. The Trust accordingly instigated disciplinary proceedings against Dr Beatt, which resulted in his dismissal for gross misconduct.

The case reached the Court of Appeal (CA). The CA concluded that Dr B had made protected disclosures and that this was the principal reason for his dismissal.

In rejecting the Trust's case, the court identified two key questions:

- Is the making of the disclosure the reason for the dismissal?
- Is the disclosure in question protected within the meaning set out in the Employment Rights Act (ERA)?

How this applies to schools

Whilst all employees may be faced with protected disclosures, we are seeing this increasingly often in the education sector, for example, in relation to employees raising safeguarding concerns.

Action

Schools should not allow their view of an employee as a difficult colleague or an awkward personality to cloud their judgment about whether the disclosures are protected under whistleblowing legislation. This will ultimately be assessed objectively by an Employment Tribunal.

Where a member of staff has made disclosures which may fall within the scope of whistleblowing protection then it is has become extremely difficult to lawfully terminate their employment for reasons which relate to this, even if you disagree with the manner in which they have done so or conducted themselves.

Where an employee has made disclosures and there are unrelated independent reasons to bring their employment to an end, then it is essential that care is taken to establish an evidence trail that support the reason for the school's decision and that this is unrelated to the disclosures. A full procedure should also be followed.

This is particularly relevant where employees have less than two years' service and the school may ordinarily dismiss a difficult employee with relatively little process. This itself can prevent appropriate dialogue between the employee and the school whereby it may become clear that the employee considers their dismissal is as a result of their disclosure and that

their disclosure is protected. Where a dismissal may be as a result of a protected disclosure, schools would be advised to follow a formal process with the employee, particularly as the school could be penalised at a later date if a claim is brought and the school did not act in accordance with the relevant ACAS code.

Another point to note, is that whistleblowing claims are particularly high risk for employers as the dismissed employee may make an application to an Employment Tribunal for interim relief in addition to any substantive claim based on the legality of their dismissal. If interim relief is granted, this will result in the school having to continue to pay the employee's salary as normal up until the time of the hearing (whether or not it is agreed that the employee can return to work). Significantly, there is no requirement to re-pay this if the employee is ultimately unsuccessful in their claim.

E8/17 PAY AVERAGING AND THE NATIONAL MINIMUM WAGE

You may be aware of recent high profile cases involving retailers such as John Lewis, Argos and Tesco in which the payment of the national living wage (NLW) has been questioned. The national living wage has replaced the national minimum wage for workers aged 25 and over and is set at £7.50 per hour from 1 April 2017.

Potential shortfalls have arisen mainly due to technical issues or administrative errors where pay falls below the requisite level because of pay arrangements or where employees opt for benefits in kind instead. One area which creates a particular risk is where staff work irregular hours across the year, including term-time only working arrangements, but have annualised pay arrangements so they receive their income in 12 equal monthly instalments, irrespective of the hours worked that month. It is important to be aware of this as allegations of failure to pay the NLW are likely to attract adverse media attention, and usually draw unwanted comparisons with the perceived affluence of the school and the fees charged.

An issue can be created as a result of the manner in which it is determined whether the NLW has been paid. This is usually assessed by dividing the pay received in the pay reference period (e.g. the month) with the number of hours worked in that month. This means that where pay is spread across a 12-month period, for administrative convenience for both sides, it can fall below the NLW when the working hours are not also spread out evenly across all months of the year. For example, a term time only worker, or casual worker with peak working times. This can result in a technical breach and a potential claim for the shortfall. It does not matter that the payment method is agreed and welcomed by the majority of the workforce in order to provide a steady and reliable monthly income.

There is an exception to this if a worker is performing "salaried work" then the hours can be calculated by way of an average. If the conditions for salaried hours work are satisfied it does not matter how many hours the worker actually works in a particular week or month.

For the worker to be doing salaried hours work certain conditions must be met. These are that:

1. They are paid under their contract for an ascertainable basic number of hours per year (the basic hours);
2. They are entitled to an annual salary for the basic hours;

3. They are entitled to no other payment for the ascertainable basic hours (except a performance bonus); and
4. They are paid either in equal weekly or monthly instalments or by varying monthly instalments resulting in the worker being entitled to be paid in equal amounts each quarter.

Action

To ensure that these conditions are met it will be necessary to have documented the annual hours, using the working weeks in the year and the number of hours. It should be confirmed that they receive a salary for these hours (rather than payment of an hourly rate). Although there is no set requirement that the working hours are in the contract we consider that it would always be helpful to avoid ambiguity and to demonstrate compliance with the NLW.

E9/17 QUEEN'S SPEECH - THE KEY IMPLICATIONS FOR INDEPENDENT SCHOOLS

The Queen's Speech set out the government's agenda for the coming season, outlining proposed policies and legislation, but what are the key implications for independent schools?

National Living Wage

The National Living Wage (NLW) will increase to 60% of median earnings by 2020. Thereafter it will continue to rise in line with average earnings. This needs to be taken into account in the budgeting process, including all the associated on-costs. One of the challenges for schools is that as the NLW increases, a broader range of roles are caught by this, and it becomes harder to maintain pay differentials and recruit and retain staff to certain roles.

Taylor Review - "worker" status and rights

The Government restated its commitment to the Matthew Taylor Review of Modern Employment Practices commissioned in October 2016.

The Review is due to be published in the next few weeks and is expected to provide clarification as to the distinction between self-employed, worker and employee status. The Government described this as an important step towards ensuring fairness for everyone in work and stated that it looks forward to receiving the report shortly.

Most schools engage casual staff as exam invigilators, sports coaches and music teachers who may be affected by the outcomes of the Taylor Review.

Data Protection Bill

A new Data Protection Bill will be introduced to replace the Data Protection Act 1998. This will implement the provisions of the EU General Data Protection Regulation (GDPR), which comes into force in May 2018, and will enable the UK to maintain its ability to share data with EU member states after Brexit.

Immigration Bill

The Immigration Bill will create new national rules on immigration and will enable the Government to repeal EU immigration law, in particular the free movement of persons within

the EU. It will confer new powers regarding the immigration status of European Economic Area (EEA) nationals.

Gender Pay Gap and Discrimination

The Speech referred to a number of past measures, such as gender pay gap reporting, shared parental leave, and extension of the right to request flexible working, all intended to promote equality and diversity in the workplace. The Government has pledged to make 'further progress' to tackle the gender pay gap and discrimination against people on the basis of their race, faith, gender, disability or sexual orientation.

It is not currently clear whether 'further progress' in respect of the gender pay gap will include the introduction of enforcement powers in The Equality Act (Gender Pay Gap Information) Regulations 2017 which were brought into force in April.

Apprenticeships

The Government has committed to creating millions of apprenticeships and ensuring that they are of high quality, so that employers get access to the skills they need. The Government will continue to work towards making it easier for young people to take technical and vocational routes, so that they can make effective choices about how these will benefit their careers and future study. With the apprenticeship levy now in place all schools are encouraged to consider how they might appropriately engage apprentices to ensure that benefit is gained from the levy.

And what was left out?

It is worth highlighting that there was no mention of the proposal to lift the ban on the opening of new grammar schools or any further mention of the charitable status of independent schools. It is likely that such controversial measures would not make it through the Parliamentary process given the lack of a clear majority Government.

E10/17 CAN A SCHOOL'S FAILURE TO PAY ENHANCED SHARED PARENTAL PAY CONSTITUTE DIRECT SEX DISCRIMINATION?

With the introduction of shared parental leave and pay, one of the fundamental and unanswered questions was whether it was a requirement to offer enhanced shared parental pay, if as a school you offered enhanced maternity pay schemes.

Given the view that this did not constitute direct discrimination (as men and women opting for shared parental leave would both receive the same pay), and in the absence of government guidance to the contrary, the majority of schools opted not to enhance shared parental pay.

Recent case law has cast further doubt on the position.

Ali v Capita Customer Management Ltd - the facts

Mr Ali joined Capita Customer Management Ltd (Capita) in July 2013. Mr Ali's daughter was born on 5 February 2016 and he was allowed to take two weeks' paid paternity leave immediately after her birth. Whilst on paternity leave, Mr Ali informed Capita that his wife was suffering from post-natal depression and that she had been advised by a medical

professional to return to work to assist her recovery. Mr Ali returned to work on 7 March 2016 and requested whether he could take further leave to care for his wife and daughter. Capita informed Mr Ali that he was eligible for shared parental leave (SPL), but that he would only be paid statutory shared parental pay (ShPP) during this period. Having discussed this with his female colleagues, Mr Ali asserted that he was entitled to receive the same pay as his female colleagues who were taking 14 weeks' maternity leave.

Mr Ali then brought proceedings in the Employment Tribunal (ET), alleging direct and indirect sex discrimination. In particular, he claimed that Capita's treatment of him amounted to direct sex discrimination by choosing to pay women more than men when taking time off to care for their children, particularly when it was open to parents to choose which one of them would take leave to care for their child.

The ET upheld Mr Ali's claim for direct sex discrimination and rejected his claim for indirect sex discrimination.

The ET concluded that Mr Ali was entitled to compare himself with a hypothetical female colleague who took leave to care for her child after the two-week compulsory maternity leave period. This was because the child-caring role that Mr Ali wished to perform was not a role exclusive to a mother and men are being encouraged to play a greater role in caring for their babies. Whether that happens in practice is a matter of choice for the parents - depending on their personal circumstances - but this should be free from any generalised assumptions that the mother is always best placed to undertake that role and, correspondingly, the mother should receive full pay because of that assumed exclusivity. By refusing to provide Mr Ali with full pay during his period of extended leave, Capita were subjecting him to less favourable treatment by reason of his gender. In this case, Mr Ali was best placed to care for his child, given his wife's post-natal depression and Capita were aware of these circumstances.

How this applies to schools

Many independent schools offer enhanced maternity pay but only statutory shared parental pay. Whilst the ET in this case held that the employee had been subjected to direct sex discrimination, this decision is very fact-specific. It is not clear whether the ET's approach to the issue of a comparator was correct. For example, should the comparator have been a female wishing to take SPL?

It is also important to note that the decision contrasts with a previous case, *Hextall v Chief Constable of Leicestershire Police*, which was decided on similar facts. In *Hextall*, the tribunal found that it was not discriminatory to offer enhanced maternity pay but only statutory shared parental pay. The two employment tribunals reached different decisions. In *Hextall*, the comparison was made between a man taking SPL and a woman taking SPL, rather than a man taking SPL and a woman taking maternity leave - and the decision reached was different.

It is not clear what the best authority is on this point and both cases are in the process of being appealed.

Action

Schools do not need to rush to change their policies as a result of this decision, but we recommend that a watching eye is kept on the appellate decisions. It is likely that we will

see some definitive case law soon. Until further and more definitive guidance is received from the courts, schools should tread carefully if an employee challenges their approach to shared parental pay.

Please note the next issue of the employment bulletin will be published on 19th August 2017.