

WELCOME TO THE WINTER 2018 ISSUE OF

# Education Matters

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## Welcome to our winter 2018 edition of *Education Matters*.



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With less than five months to go until Brexit, we are all being kept on tenterhooks as to whether a deal will be struck (and approved by Parliament), and if so, what sort of deal it will be. Uncertainty is not good for the education sector. In a sector where financial planning has never been easy, and the recent Teachers' Pension Scheme (TPS) valuation will have a significant impact on a large part of the sector, Brexit remains high on most education institutions top risk reports, yet it is proving difficult for education institutions to know what to do to mitigate it. [Clare Hedges'](#) article on the EU's Settlement Scheme aims to offer some clarity on what your EU employees can do, to ensure they can remain working in the UK after Brexit, by taking advantage of the pilot scheme the government is running for higher education institutions with a Tier 4 sponsor licence, between 15 November 2018 and 21 December 2018.

Safeguarding is an area that poses risks for education institutions, particularly schools. Our article on dismissal by association explores the recent decision of the Supreme Court which held that a head teacher had been fairly dismissed on safeguarding grounds when she had failed to inform governors of her relationship with an individual who had been convicted of a child sex offence. We also explore the changes The Childcare (Disqualification) and Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) Regulations 2018 may have on a school's ability to justify dismissal on the grounds of association with an unsuitable person.

Our third article examines the governance structures of academies and academy trusts, which are often misunderstood, and looks at how the current structure may, in part at least, be responsible for the recent wave of criticisms that the academy school sector has attracted and the steps that can be taken to address those criticisms.

Our final article looks at green energy, and seeks to remind education institutions of the ways that may be open to them to reduce energy bills and generate income. Education institutions often have large estates which could provide the opportunity to host solar energy schemes, and tap into a useful income stream which could help to alleviate the financial pressures coming from other directions.

Our next newsletter will be out in spring 2019 – and how will the post-Brexit landscape appear? One thing for certain is that the education sector will continue to face a challenging environment for some time to come, and the [Education Team](#) here at Birketts is on hand to assist you as you negotiate the obstacles you encounter.

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## EU Settlement Scheme: FAQs



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*A new settlement scheme has been launched for EU nationals living in the UK. This is currently being piloted, before opening fully by March 2019. The deadline to apply is 30 June 2021.*

As part of the pilot, the government is inviting EU nationals employed by Higher Education Institutions with a Tier 4 sponsor licence, to apply between 15 November 2018 and 21 December 2018. These FAQs are designed to tell staff about the scheme and help them decide whether or not to apply as part of the pilot.

### How do I apply?

Applications will be made online. You will need to prove your identity and provide evidence of your residence in the UK. If you would prefer not to send away your passport/ID card, you will be able to use an app to upload this. However, this app only works on Android phones (not iPhones).

The government will automatically check HMRC and DWP records for proof of residence. If these are inconclusive then you will be invited to provide further documentary evidence.

A criminal record check is required.

### Will I have to prove I have been exercising EU Treaty rights?

To obtain settled status you just need to have been living in the UK for five years. The Home Office will be looking to grant applications rather than to refuse them.

Whereas those who spent time in the UK as students and self-sufficient individuals currently have to provide evidence that they held comprehensive sickness insurance before they can get a permanent residence document, this is not required for the settled status.

### What if I have not been in the UK for five years?

In this case you will generally get 'pre-settled status' instead. This will allow you to stay in the UK for a further five years, after which you are expected to apply for settled status.

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*Once the scheme is fully open, your dependants will be able to apply with you, but during the pilot phase only qualifying employees can apply.*

### How much will it cost?

The cost will be £65 per person for those age 16 or over and £32.50 for under-16s.

Anyone who already has a permanent residence document, or indefinite leave to remain, can apply for free. There is also no charge to move from pre-settled, to settled status.

Applicants will not be required to pay the Immigration Health Surcharge.

### What documentation will I receive to prove my new status?

You will not receive a physical document. Instead you will be able to get proof of your status through an online service. We are waiting for updated guidance on right to work and right to rent checks to mirror this.

### What will my rights be?

Settled status will mean you are eligible for public services such as healthcare and schools, public funds and pension.

Once you have settled status, you can leave the UK for up to five years and return again with your settled status intact.

### What about non-EU EEA nationals?

The government intends for the scheme to also apply to nationals of Iceland, Lichtenstein, Norway and Switzerland, but this still needs to be formally agreed. So they cannot participate in the pilot.

### What about Irish nationals?

Irish citizens may choose to apply for settled status, but they will not be required to do so as they have a separate right of residence in the UK that is not related to EU membership.

### Can my family members apply with me?

Once the scheme is fully open, your dependants will be able to apply with you, but during the pilot phase only qualifying employees can apply. If you choose to apply now, your dependants will be able to apply separately at a later date.

### Should I apply as part of the pilot?

There are benefits to applying as part of the pilot. The Home Office is in 'learning mode' and is keen to support applicants and receive feedback on how the scheme is operating. Applying now means you will get a quick decision before we leave the EU and will avoid any issues that might arise later as the process becomes more overloaded.

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*Most significantly, your settled status will not be backdated.*

However, there are some disadvantages. The process is still being developed, so you will be, in many ways, 'a guinea pig'. As noted earlier in this article, your family cannot apply with you.

Most significantly, your settled status will not be backdated. If you have evidence that you have exercised EU Treaty Rights in the UK for over five years and wish to naturalise as a British citizen, then rather than apply for settled status under the pilot, you may be better off applying for a permanent residence card, as this can be backdated. You would then be able to apply sooner for naturalisation as a British citizen.

Please contact [Clare Hedges](#) or a member of our [Immigration Team](#) for advice on your individual circumstances, to identify the best solution for you and your family.

## Dismissal by association: where are we now?

*A recent Supreme Court decision has highlighted the sensitive interplay between criminal law and safeguarding in the education sector.*

In the case of *Reilly v Sandwell Metropolitan Borough Council [2018] UKSC16*, a head teacher's dismissal was upheld, not because she had been personally subject to any criminal investigation, but because of her association with a person convicted of possessing indecent images of children.

### Facts

The head teacher, 'R', had worked for a primary school maintained by Sandwell Metropolitan Borough Council (Sandwell) since 2009 and had an exemplary disciplinary record. In her personal life, R had a close but non-romantic relationship with a man, 'S', and although they did not live together, she sometimes stayed at their jointly owned property.

One morning, prior to her appointment as head teacher, R witnessed the police search the property and arrest S on suspicion of having downloaded indecent images of children online. S was subsequently convicted in February 2010.

When the school became aware of S's conviction they concluded that R's failure to disclose the relationship amounted to a serious breach of an implied term of her contract of



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employment. The school decided that this breach amounted to gross misconduct and R was summarily dismissed.

R claimed she was unfairly dismissed on the basis that she had no duty to disclose her association with S but her dismissal was upheld by the Employment Tribunal. Her further appeals to the Employment Appeal Tribunal, Court of Appeal and Supreme Court were also unsuccessful.

## Supreme Court decision

The Supreme Court considered R's assertion that she had no duty to disclose her relationship in the context of her job description which required her to *"advise, assist and inform the Governing Body in the fulfilment of its responsibilities"* and *"be accountable to the Governing Body"* for the maintenance of pupil safety. On this basis it was decided that the Employment Tribunal was entitled to conclude that the school's decision to dismiss R fell within a range of reasonable responses available to it.

The Supreme Court felt that R's failure to recognise that she had breached her duties indicated *"a continuing lack of insight which... rendered it inappropriate for her to continue to run the school"*. It was held that it was not for R to assess the potential risk that arose as a result of her relationship with S, but rather it should have been assessed by the governors.

The Supreme Court also considered the Childcare (Disqualification) Regulations 2009 (the 2009 Regulations). At the time, under the 2009 Regulations living with a person who would be disqualified from working as a teacher by virtue of being cautioned or convicted of a criminal offence, would result in a teacher being disqualified by association. Although R was not strictly living with S, the Supreme Court stated that Parliament's intention in respect of the 2009 Regulations was relevant. There were extensive obligations to disclose relevant information because *"Parliament has itself recognised that sexual offenders towards children can represent a danger to children not only directly but indirectly by operating through those with whom they associate"*.

## Current position

The 2009 Regulations were replaced by The Childcare (Disqualification) and Childcare (Early Years Provision Free of Charge) (Extended Entitlement) (Amendment) Regulations 2018 on 31 August 2018, and the disqualification by association provisions now only apply in domestic settings, not in schools. This is a significant change, and it means that schools must no longer ask about the cautions or convictions or someone living or working in a teacher's household (although note that other provisions may apply where the third party resides on school premises). It should be noted that the disqualification provisions under the Childcare Act 2006 remain in force.

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However, notwithstanding this change, schools should still consider and determine whether there are safeguarding concerns in respect of a teacher and/or their associations, particularly if the teacher is a senior manager. Schools should also follow the safer recruitment procedures set out in Keeping Children Safe in Education 2018 (KCSIE) and ensure that safeguarding procedures comply with KCSIE.

As a result, schools should inform staff of the change (if this has not already been done), ensure that safeguarding policies are updated and consider any historic data concerning the living arrangements of staff, and destroy information that is no longer required. Schools should continue to promote a culture of openness so that staff feel able to talk about any relationships (both inside and outside of the school) which may have safeguarding implications for children of the school, in order to seek to minimise any potential risk to pupil safety.

It should also be noted that, in this case, R was seeking to argue that her dismissal was unfair in the Employment Tribunal and it did not focus solely on the question of disqualification under the 2009 Regulations. Indeed the 2009 Regulations did not disqualify R from being a head teacher, as referred to earlier, the Supreme Court considered them to the extent that they demonstrated a Parliamentary recognition that sex offenders could represent a danger to children directly and indirectly, and that R's relationship with S created a potential risk to children. The change in law would not necessarily change this position and, in any event, the Supreme Court also considered R's seniority and her failure to acknowledge that she had breached her contractual duty to assist the governors of the school in its safeguarding obligations. Therefore, despite the change in law, a future case could be similarly decided in the context of whether a dismissal was fair and within the range of reasonable responses.

For further information about this article please contact [Nicholas West](#), [Josie Beal](#) or another member of our [Employment Team](#).

## Choppy waters for academies: is the academies model working?



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*In the wake of a recent spate of press articles and the Labour Party's criticism of the academies model, we ask whether there are fundamental governance issues that might – at least in part – be to blame.*

*The Times Teaching Educational Supplement (TES)* has recently published a number of articles criticising the academies model. There is firstly the issue of what Labour calls 'fat cat salaries' to the chief executives. *TES* reported that the Department for Education (DfE) has named 125 academy trusts which paid at least one salary of more than £150,000 last year, and that the DfE has written a series of letters to academy trusts demanding explanations for these high salaries.

On 9 November, *TES* also published an article based on information in the DfE annual report on the academy schools sector in England, highlighting the fact that the number of academy trusts that are closing 'has almost quadrupled in the space of a year'. A recent high profile example of a failing academy trust is the closure of the Bright Tribe Trust, reported in the national press (including the *BBC*, *Schools Week* and *TES*).

Bright Tribe was founded by businessman Michael Dawn and originally ran ten academies in north and east England, but was investigated following allegations of financial mismanagement of £1m in government funding. The investigation found that the trust had made undisclosed payments and broken rules regarding related-party transactions. The trust is expected to close and the DfE and relevant Regional Schools Commissioners are seeking new sponsors for all of the trust's schools.

The failure of Bright Tribe Trust is not an isolated case, so one has to ask what is going wrong within the sector and whether Angela Rayner's criticisms of the governance of academies and free schools in her speech to the Labour Party conference on 24 September were justified.

Rayner criticised the salaries of executives in multi-academy trusts (MATs), and said that the governance structure places no obligation on trusts or sponsors to step in to help 'zombie' academies (i.e. where a trust stops maintaining an academy), and criticised the model for excluding the voice of local communities. She also highlighted increasing evidence of financial mismanagement within MATs. Rayner stated that *"the next Labour government will give power back to communities so that our schools are run by the people who know them best - parents, teachers and local communities."*

Rayner confirmed Labour's intention to scrap the free schools programme and end the 'forced conversion' of maintained schools into academies if it wins the next general election. Labour plans to enforce national pay rules, allow local authorities to bring 'zombie'

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*MATs are charitable companies that are independent of local authorities, with responsibility for two or more academy schools...*

academies back under their jurisdiction, and it seems that Labour's longer term plan is to create a National Education Service and bring existing academies under its authority.

We have asked ourselves whether there is any substance to these criticisms: is there a fundamental issue with governance within academy trusts?

The legal structure of an academy trust is very different to that of a maintained school. The governance structure of a maintained school is relatively simple: the local authority oversees all of its schools, but each school has a governing body with responsibility for that school, and a head teacher who makes most of the decisions in relation to the operation of the school.

The position for MATs is very different. MATs are charitable companies that are independent of local authorities, with responsibility for two or more academy schools (and/or free schools). The governance structure for MATs is significantly more complex: each school within the MAT still has a 'local governing body' and head teacher, but sitting above them is a chief executive (and senior management team), board of trustees and finally a board of members. This complex and multi-tiered governance structure, made up of a mixture of paid and unpaid individuals, often results in uncertainty regarding roles and responsibilities.

The members are supposed to be 'eyes on, hands off' (unless the board is clearly dysfunctional), but often mistakenly believe they have the power to override the decisions of the trustees where they disagree. The board of trustees is made up of volunteers (with some exceptions) who are often experienced governors but do not have an understanding of company law, charity law or how to manage a substantial business. The trustees of the MAT are much further removed from the day-to-day operations of each academy school than are the governors of maintained schools, yet most individuals on boards of trustees were formerly governors and it can be difficult for them to understand their new role. There is also often a lack of accountability within MATs, with little control over delegated authority and inappropriate oversight of activities at board level, resulting in issues going unnoticed and becoming exacerbated.

In our experience there is a pervasive lack of understanding within the sector of the legal structure and governance requirements. However, we have seen how improvements in governance are capable of turning a failing trust into a thriving trust. The challenge facing the sector is that the obligations for trustees of MATs are onerous, the regulatory framework is constantly changing, and yet trustees are all volunteers with many other pressures on their time. So, we are not sure whether it is right to say that the model is fundamentally flawed, but we do consider that improvements in governance can result in effective MATs. Perhaps the answer is not to scrap the programme, but to invest more in the education and training of individuals sitting on the boards of MATs and maybe even to reconsider the voluntary nature of the role?

If you have concerns about the governance within your MAT and would like to discuss how we can help, please get in touch with [Liz Brownsell](#) or another member of our specialist [Education Team](#).

## Solar resourcing



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*For years now, education institutions have had to look more dynamically at their budgets and consider with their finance committees ways in which they can make savings and increase income.*

Nevertheless, even by reducing staff levels and making more flexible use of all available space, even institutions with healthy reserves have seen these shrink, with financial forecasts remaining on a downward curve. This bleak picture has been further heightened by the valuation of the Teachers' Pension Scheme this autumn which will lead to a huge hike in the level of employer pension contribution required to be paid from next year.

One way in which some education institutions have already sought to make savings is through their energy bills. This has the additional bonus of facilitating, particularly in schools, educating students on the importance of energy efficiency, the effect of greenhouse gases and the plight of the environment, whilst also highlighting the benefits of green energy, particularly solar renewal energy, as a growing and sustainable alternative.

It has, therefore, become highly desirable for education institutions to employ a better level of sustainability and environmental awareness by projects such as installing LED lights to increase energy efficiency and solar panels in order to generate their own electricity.

Whilst we understand that more than 1,000 schools have installed solar power in recent years to both address educational and revenue stream issues, we are aware that many landlords, including educational authorities, may place restrictions on such developments, particularly given issues with ownership of panels, business rates and the feed-in tariff system. This has been just one factor which has added to the strength of argument for schools to convert to academies.

Education premises with large buildings, often spread over multiple sites, should be encouraged to consider solar schemes, given the financial as well as educational and environmental benefits they can offer. Education institutions that are of a mind to explore it further should do so as soon as possible, given the proposed end of the current feed-in tariff system in March 2019. However, even after the demise of that scheme it may still make financial sense to do so for education bodies with lots of available space that provides the ability to optimise the return on investment.

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*... now is certainly the time to 'think outside the box' and look to exploit all available income generating sources.*

With the mounting financial pressures on education institutions showing no sign of abating now is certainly the time to 'think outside the box' and look to exploit all available income generating sources. Members of our [Commercial Property Team](#) are on hand to assist you with any concerns you may have on the restrictions your institution may have on the use of its buildings for schemes, such as the installation of solar panels, or any other change of use of part of your estate you may be exploring.

For any further information on the contents of this article or general property advice please contact [Amanda Timcke](#) or a member of our [Commercial Property Team](#).