Birketts

WELCOME TO THE SPRING 2019 ISSUE OF

Education Matters

IN THIS ISSUE

Welcome to our spring 2019 edition of Education Matters, our newsletter for our clients and contacts in the education sector.

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IN THIS ISSUE

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Brexit uncertainty persists, among other looming economic challenges to the education sector, not least of which is the impending outcome of the *Auger Review* for our higher education clients, and the impact on schools, colleges and some universities of an increase in employer contributions under the TPS. You may wonder if there is room to consider other legal developments. Well there certainly is, and in this issue we tackle some chunky topics. In particular we highlight important recent developments that will be of particular interest to those of our readers whose remit includes HR and estates.

Readers may be frustrated by the lack of certainty arising from the state of the Brexit negotiations, but Clare Hedges will add some much needed clarity for those of you trying to plan for the future staffing and recruitment landscape with her review of the Government's recently published Immigration white paper.

The issue of executive remuneration, especially exit payments, resurfaces as Sonya O'Reilly explains in her article setting out the Government's proposals, currently out for consultation, on introducing a cap under its powers in existing legislation. If you think this is just an issue affecting the so-called 'fat cats', then read on.

Our Head of Education, Abigail Trencher, takes us through the significant changes that are to be implemented to the Information and Consultation of Employee Regulations 2004. She provides some useful guidance for employers wishing to stay on the front foot in response to the forthcoming changes.

Amanda Timcke reminds us that old school sites may not always be an unencumbered asset for owners to deal with when the educational purpose comes to an end on the site and she highlights the specific issues that may arise on school relocations following the recent case of *Rittson-Thomas v Oxfordshire County Council*. Mind the reverter!

Lastly, the summer cheer of new builds and refurbishments to campuses is upon us, but carries a warning to avoid the doldrums of not understanding fully the payment provisions in your works contract, as Tyler Fitzpatrick updates us following the outcome of two recent construction cases.

Our next newsletter will be out in autumn 2019. Clearly, there will be some significant developments in the sector landscape in the meantime. We in the Education Team are standing ready to make sense of it all and we are on-hand to help you navigate. Enjoy the summer!

Preparing for a new immigration system

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The Government plans to implement a new immigration system from 1 January 2021. Their proposals, set out in the White Paper: 'The UK's future skills-based immigration system', are subject to consultation.

Education institutions need to understand what is proposed, so they can prepare for the impact these changes will have on their recruitment of international students and staff.

End of EU free movement

As a result of Brexit, EU free movement rights will end by 31 December 2020 at the latest. EU nationals will become subject to the same visa system as other migrants and should expect to face increased bureaucracy before they can study or work in the UK.

Students

EU nationals will not require visas for visits to the UK and, therefore, EU students on short courses of less than six months, for example to learn English, will be able to come and study without applying for a visa in advance. However, those undertaking longer courses at any level will require a visa. As a result many more students will require sponsorship.

Although a large number of institutions already hold a Tier 4 sponsor licence, many more will need to register. The Government wishes to maintain high levels of sponsor compliance but acknowledges the system needs to be more streamlined. A new digital approach is to be designed in consultation with the sector over the next year.

Students will need to demonstrate academic ability, English language skills and funds for fees and maintenance. The *White Paper* suggests that the 'differentiation' approach, where evidential requirements are relaxed for students from certain countries with a good compliance record, should be continued and the benefits extended to EEA students.

To ensure the UK remains an attractive destination for international students, the Government intends to improve post-study work rights for migrants who complete a degree in the UK. They would be allowed to work for six months post-Bachelors or Masters and 12 months post-PhD. Concessions which facilitate switching to skilled work visas would also be expanded.

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Skilled work

The end of free movement also means more employers will require a sponsor licence. Therefore, the Government hopes to broaden, simplify and speed up this visa route. In particular they plan to remove the cap on the number of Tier 2 visas awarded.

Many sponsors are frustrated by the bureaucracy of the resident labour market test. Although this is meant to ensure settled workers are prioritised for vacancies, the reality is that if an employer is determined to recruit a skilled migrant they can usually find a way to do so. Also in many cases even if the role is not deemed to be in national shortage, it may be locally and so running adverts for 28 days is futile. Therefore, the proposal to remove this hurdle is welcomed.

“The Immigration Skills Charge will be retained, to incentivise training of local workers rather than paying for migrant workers.

Instead the Government wishes to use cost to deter employers from recruiting migrants. The Immigration Skills Charge will be retained, to incentivise training of local workers rather than paying for migrant workers.

Currently sponsors can only support visas for roles deemed to be skilled to RQF level 6 or above (degree level). The proposal is to lower the minimum skill level to RQF level 3 (A level). On the face of it this will broaden the type and number of roles that can be sponsored.

However, this is tempered by the Government's confirmation that there will be a minimum salary level for sponsorship. The Home Secretary has suggested this should be maintained at £30,000, which rules out even some RQF level 6 jobs, especially outside London and in the public sector. The minimum salary is subject to consultation.

Temporary work

A new temporary short-term work route would allow migrants to do any job (with no minimum skill level or sponsorship required). But they would be limited to 12 months in this category, followed by a 12 month cooling off period. This is to address concerns raised by employers in a wide range of sectors, who are currently reliant on EU nationals to fill lower skilled roles. However, it could also be used by highly skilled migrants.

This is a transitional measure, to give the economy time to adjust to a post-Brexit world. It will be fully reviewed by 2025 and may actually be suspended earlier depending on economic conditions. There would be restrictions on numbers. Visas would be required and application fees are expected to increase incrementally each year.

Furthermore, 'it will only be open to migrants from specified low-risk countries'. So although presented by the Prime Minister as *“a system where it is workers’ skills that matter, not which country they come from”*, that is not actually the case.

Migrants would be free to move between employers during the year of their visa. This flexibility should help protect them from abuse and encourage competition between employers. However, there would be no right to bring dependants, settle in the UK or access public funds. This may be seen as a way of supressing net migration and reducing the burden on local services. But concerns have been raised that the proposed rules will lead to even greater integration problems and a high turnover of workers could exacerbate problems in some areas.

Youth mobility scheme

The Government wishes to continue the current youth mobility scheme, which allows migrants from designated countries up to age 30 to work freely in the UK for up to two years. More countries could be added to the scheme, for example EU countries. This may help employers fill temporary vacancies for lower skilled work.

“It is essential that institutions participate in the consultation process...

Importance of consultation

It is essential that institutions participate in the consultation process, in particular regarding the design of the new digital system for student visas, the minimum salary level for skilled work visas and the maximum duration and cooling off period applicable to temporary work visas. Otherwise there is a risk that promises to soften the rules and simplify processes will have little impact in practice.

For further information on this article or advice on immigration, please contact Clare Hedges or a member of our Immigration Team.

Capping exit payments in the public sector

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Proposals to restrict the level of payments made to departing public sector workers have resurfaced and will apply to the majority of public sector employees and office-holders, including those employed by publically-funded education bodies.

Back in 2015, the Government first announced its intention to end 'six-figure exit payments' for public sector workers. The power to impose a £95,000 cap on termination payments was introduced by the Enterprise Act 2016 (see our previous article). Draft regulations setting out the detailed provisions were published in November 2015 but were not brought into force and disappeared off the legislative radar.

The regulations have now resurfaced in an amended form, and a further consultation has been issued. Alongside the draft regulations, draft guidance has been published to explain how relevant public sector employers are expected to implement the legislation. The consultation closes on 3 July 2019. No implementation date has yet been announced, but it is rumoured that the proposals will take effect later this year.

> *The cap will eventually apply to the whole of the public sector, but with exemptions for certain sectors such as the armed forces and security services.*

Which public sector employers are covered?

The cap will eventually apply to the whole of the public sector, but with exemptions for certain sectors such as the armed forces and security services. The Government is planning to adopt a phased implementation of the cap, but in effect most public sector employees will be covered in the first stage, including all academies and maintained schools. A full list of the bodies in scope of the regulations is set out in Schedule 1 of the draft regulations.

Which payments are included in the cap?

The cap applies to payments made in consequence of the termination of employment or office, whether or not a contract of employment is in place. It applies to the following payments, whether made to employees or office holders:

- redundancy payments, whether statutory or contractual (an individual is entitled to receive their full statutory redundancy payment but this counts towards the cap)

- payments to reduce or eliminate an actuarial reduction to a pension on early retirement ('pension strain' payments)
- payments of compensation under a COT3 or settlement agreement (but see below for circumstances when the cap can be relaxed in respect of such payments)
- any severance or ex gratia payment
- payments in the form of shares or share options
- any payment on voluntary exit
- payments in lieu of notice (unless such payment does not exceed one quarter of salary)
- payments to extinguish any liability under a fixed term contract
- any other payment in consequence of termination of employment or loss of office.

The cap imposed under the regulations will take precedence over existing contractual agreements, regulations and other schemes already in place that make more generous provision for exit payments.

Exempted payments and relaxation of the cap

Payments in respect of accrued but untaken annual leave and in respect of death in service or for incapacity as a result of accident, injury or illness are excluded, as well as payments made pursuant to an order of any court or tribunal.

In calculating whether the cap applies, employers must take into account all exit payments received by the individual within a 28 day period, including payments from another public sector employer. However, an individual is entitled to receive a statutory redundancy payment from a second relevant authority, even if this means the total amount exceeds the £95,000 cap.

The regulations also include a power for the cap to be relaxed by a Minister of the Crown (or a delegated authority) in accordance with HM Treasury Directions. Importantly, these directions provide for a mandatory relaxation of the cap in certain circumstances, including where payment is made as a result of TUPE, and where payment is made to settle a whistleblowing or discrimination complaint (provided the employer is satisfied that the claim would be upheld). Discretionary relaxation of the cap is also permitted in exceptional circumstances, subject to prior approval from HM Treasury. Public sector bodies are required to publish information about any decisions to relax the cap, which the guidance suggests should be included in their annual accounts.

"The cap imposed under the regulations will take precedence over existing contractual agreements, regulations or other schemes already in place that make more generous provision for exit payments.

What will be the impact of these changes?

The cap was originally intended to put a stop to large exit payments being made to so-called 'fat cats' in the public sector. In practice, the cap will potentially apply to a broad range of public sector employees, particularly if payments are required to ensure unreduced pension benefits on early retirement. However, the exclusion of payments for incapacity and payments to settle whistleblowing or discrimination complaints will be significant, in view of the potentially unlimited compensation awarded in such cases.

For further information or advice on exit payment caps, please contact Sonya O'Reilly or a member of our Employment Team.

A good plan for information and consultation

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Education institutions generally operate some form of information and consultation (I&C) mechanism. Strong union presence, particularly in the publically funded part of the sector, provides an additional negotiating body.

However, these existing I&C tools may not be sufficient to prevent employees from compelling their education employer to adopt a far more robust and onerous I&C regime which will cover information and issues beyond those which the employer is comfortable to consult on.

Whilst education employers may accept the statutory requirement to inform and consult on matters such as proposed redundancies, health and safety and transfers in and out of certain activities (a 'TUPE' transfer), the I&C mechanisms commonly adopted to deal with other more general matters, beyond these statutory matters, are often seen as part of employee engagement rather than a genuine method and commitment to discuss strategic and commercially sensitive matters. This will change if the statutory I&C regime is implemented.

In December 2018 the Government published the Good Work Plan setting out its proposed legislative changes to implement its preferred recommendations from the Taylor Report.

In December 2018 the Government published the *Good Work Plan* setting out its proposed legislative changes to implement its preferred recommendations from the *Taylor Report*. One of those changes, set to come into force on 6 April 2020, will amend the existing Information and Consultation of Employee Regulations 2004 (the ICE Regulations). This is an interesting development for two reasons:

First, the ICE Regulations were introduced into the UK to implement the European Directive on information and consultation, so at a time when Britain is preparing to leave the European Union, the Government in charge of effecting our departure has sought to augment this European initiative.

Second, the ICE Regulations failed to produce a sea-change in the I&C regimes adopted by employers since their introduction in 2005. The changes to be introduced in 2020, however, could really tip the balance as they will make it far easier for employees to compel employers to introduce I&C mechanisms on their terms.

At present, employees of employers with 50+ employees who wish to trigger a formal I&C request under the ICE Regulations require at least 10% of the workforce to make the request (subject to a minimum of 15 and a maximum of 2,500 employees). From April 2020 that threshold will reduce to just 2%.

The consequences of receiving a valid I&C request are that:

- the employer must, as soon as reasonably practicable, begin to negotiate an I&C agreement with employees. This will include putting in place arrangements for the appointment/election of negotiating representatives and beginning negotiations as to the arrangements that will apply
- after an initial three month period, negotiations on the I&C arrangements may run for a further six months. Whilst this can be extended on agreement if no negotiated agreement is reached within the requisite time, the statutory standard information and consultation provisions (SICP) will automatically apply and the CAC will assume jurisdiction over all disputes relating to I&C going forward
- hefty penalties may be awarded for non-compliance with the ICE Regulations of up to £75,000.

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Most employers would not choose to have the SICP and the jurisdiction of the CAC imposed on them, not least because under the SICP the employer is required to provide information to employees that is likely to be confidential and onerous. It will include information pertaining to:

- recent and probable developments in the employer's activities and economic situation
- the structure and probable developments of employment within the employer's organisation and any anticipatory measures envisaged affecting employees
- any decision likely to lead to substantial changes in work organisation or in contractual relations.

"The best way to avoid this prospect is to take a pro-active approach and introduce a valid agreed I&C arrangement before any statutory request is made.

The best way to avoid this prospect is to take a pro-active approach and introduce a valid agreed I&C arrangement before any statutory request is made. Having a valid pre-existing I&C agreement will make it more difficult for employees to trigger a request under the ICE Regulation as they will only be able to do so where they meet a higher threshold of either 40% of the workforce making the request or 10% of the workforce (reducing to 2% in April 2020) and a majority of the workforce voting in favour in a subsequent ballot.

A valid pre-existing agreement must:

- be in writing
- cover all employees in the undertaking (although this could be done by having different agreements apply to different sections of the undertaking)
- have been approved by employees (this could be satisfied by securing the agreement of all negotiating representatives or else being able to show a majority in favour, perhaps by ballot)
- set out how the employer will provide information to employees and seek their views (but what information is imparted, how, in what frequency, and to whom is all a matter to be agreed between the employer and employees).

If you are concerned at the risk of employees triggering a statutory I&C request, the period before April 2020 provides valuable opportunity for you to agree with your employees a pre-existing agreement, on your terms. Also the additional benefits of having an effective I&C arrangement should not be overlooked as it can, of itself, be a valuable tool for employee engagement as well as providing a standing forum of employee representatives available whenever needed to fulfil other statutory consultative purposes such as on health and safety, redundancy, pensions and TUPE issues.

"... it should not be assumed that having an agreement with a recognised union will necessarily offer the protection of a pre-existing agreement.

Finally, it should not be assumed that having an agreement with a recognised union will necessarily offer the protection of a pre-existing agreement. Many collective agreements are not in writing and/or are exceedingly vague on how the information and consultation process will operate, few cover all employees within an undertaking and it may be difficult to demonstrate that a majority of employees have approved the arrangement. As such employers rely on these agreements to thwart a statutory I&C request at their peril.

If you would like more information on this article or the ICE Regulations please contact Abigail Trencher or a member of our Employment Team.

Schools sites – a fair reminder of the application of reverter

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A recent decision in the Court of Appeal has highlighted the need for local authorities, academies, and other education bodies to be careful when considering how they they proceed with any proposed closures and/or redevelopments of schools sites – particularly sites that have been in educational use for long periods.

Background

Throughout the nineteenth century, to encourage individuals to donate land for certain charitable purposes including educational, legislation was enacted to entitle the original owners and their heirs to the return of their land (a 'reverter') if it was no longer used for the purpose for which that donation was made.

The legislation is considered complex and has been subject to much litigation. This article concerns the 2019 decision of *Rittson-Thomas v Oxfordshire County Council.*

Land was gifted under the School Sites Act 1841 for use as part of the Nettlebed Primary School, title of which ultimately became vested in Oxfordshire County Council. When the council decided to relocate and redevelop the existing primary school, the decision was taken to close the existing school, and part-fund the relocation and development by the sale of the old school site.

As would be expected, the new site was built and the children moved into it. This was secured by the Local Authority entering into a conditional contract for the sale of the school subject to completion of the new school. The children moved out of the old school site in February 2006 but the sale did not complete until September 2007. Before the old school site sale completed, the site was empty. This meant the site was no longer used for charitable educational purposes.

The question was whether closure of the school, therefore, triggered the application of section 2 of the 1841 Act, a reverter of the title to the original owner or its heirs.

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The case was brought by the beneficiaries of the estate of the original owner, claiming their entitlement to the majority of the proceeds of sale of the old school site.

Decision

The Court of Appeal had to consider two issues:

1. the application of s14 of the 1841 Act which permits land donated for charitable purposes to be sold or exchanged and the proceeds of sale retained and applied to the purchase of a replacement site
2. whether s14 did not apply, as the charitable use of the land ceased prior to sale or could the situation be saved by the Council's plan to sell the land and use the proceeds of sale to reimburse the cost of constructing the new school.

In its consideration of the legislation the Court of Appeal analysed a Law Commission Report from 1981. In this the Law Commission reiterated:

"The power of sale under section is exercisable only in order to enable the trustees to move the school: it does not allow the trustees to close the school, as an institution... In order to have the desired effect, a sale under section 14 has always had to be carried out before the closure of the school. This is because, once a reverter has occurred, the trustees have no title (or at least no beneficial interest enabling them to employ the proceeds in furtherance of the sale...)"

Applying that principle the court held that the council did not retain the rights to the proceeds of sale as it had closed the school prior to sale. It was unrealistic to determine that the gifted land continued, following the closure, to be used as a school site or otherwise for the purposes of education. Reverter had taken place and, therefore, almost £1.3m was due to the beneficiaries of the original landowner's estate and not to the council.

Practical implications

"The decision has potential implications for any owners of older school sites.

The decision has potential implications for any owners of older school sites. If a sale or relocation is proposed, consider the title carefully, particularly whether the site may have initially been donated under the 1841 Act. If the Act does or may apply, consider carefully and take advice on the options as to how best to structure the timing and funding of any relocation proposal in order to avoid unintended consequences. If it is not clear if the 1841 Act applies, it may be advisable to consider whether to advertise any proposed site sale widely and check for beneficiaries prior to determining a way forward; additionally or alternatively, it may be possible to insure the reverter risk depending on the circumstances.

For further information on the contents of this article or for general property advice please contact Amanda Timcke or a member of our Commercial Property Team.

Summer of construction

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The summer term is now in full swing, and it's not just students who are looking forward to the summer break. Many of our clients operating within the education sector, including local authorities, have been diligently preparing their respective 'summers of construction'.

Undertaking construction works within the summer break brings with it a string of issues which are not always found in the private sector, not least a tight timeframe with an immovable deadline.

Ensuring these construction projects have the necessary contracts in place and understanding those contractual obligations can be a daunting task, but is a must. A failure to have sufficient contractual provision and/or an inability to understand the obligations imposed by the contract can lead to costly and unnecessary disputes – as these two cases illustrate in the context of rights to payment.

> *"A failure to have sufficient contractual provision and/or an inability to understand the obligations imposed by the contract can lead to costly and unnecessary disputes...*

ISG Construction v Seevic College [2014]

Seevic College instructed ISG to carry out works at the college and duly entered into a JCT Design and Build Contract 2011. Under the terms of the contract, ISG were entitled to interim payments – a standard feature of construction contracts that cannot be contracted out of where works are likely to take more than 45 days. ISG duly submitted its interim application for payment 'No. 13' in the sum of £1,097,696. Seevic disputed that valuation, thinking that nothing was due. But it failed to serve a pay less notice detailing that.

ISG referred the matter to adjudication where it was decided that ISG were entitled to the full amount of nearly £1.1m, plus interest (the 'first award'). Adjudication is a construction-specific dispute resolution method which can see a decision reached in 28 days or less (extremely speedy for the law…), and parties to a construction contract cannot avoid it. The first award was focussed solely on the payment mechanisms in the contract and the lack of pay less notice – a procedural tactic that is known as a 'smash and grab' adjudication.

In response to the first award, Seevic commenced a new adjudication asking the same adjudicator to carry out a proper valuation of ISG's works. The adjudicator decided that the true value of the works was £315,450 (the 'second award').

ISG disputed Seevic's ability to rely on the second award though. It argued that the first award trumped the second award, and was successful in doing so. The court stated that by failing to issue a pay less notice, Seevic had effectively agreed to the value of the works claimed in interim application for payment 'No. 13'. This prevented Seevic from claiming that the true value of the works was less than £1,097,696. The court said the second adjudication was merely an attempt by Seevic to *"frustrate or reduce the impact"* of the first award.

Leeds City Council v Waco UK [2015]

Similar to Seevic, Leeds City Council (LCC) instructed Waco UK to construct a new modular classroom building and entered into a JCT Design and Build Contract 2005 (rev 2 2009) (the 'contract'). Again, the contract provided that Waco would make interim applications for payment.

Throughout the course of the contract, Waco had made a large number of irregular applications, generally a few days late. Neither LCC nor the contract administrator had objected to these, and duly paid the sums applied for. Following practical completion, Waco made an application for payment, in the sum of £484,759.50, this time earlier than the contract said. LCC did not pay and Waco referred the matter to adjudication, with the dispute eventually been referred to the court.

> *"There was, however, no basis to rely on the same course of dealing to establish the same 'unavoidable inference' in respect of an early payment application.*

The court had to decide on the validity of the early payment application made by Waco. It stated that an application for payment would ordinarily be invalid if served out of time. However, by the time the disputed application came around, the parties had established a course of dealing which meant late payment applications would be accepted. This was an 'unavoidable inference' from what had occurred.

There was, however, no basis to rely on the same course of dealing to establish the same 'unavoidable inference' in respect of an early payment application. The court, therefore, agreed with LCC and said that the application was invalid, so there was nothing to pay.

Conclusion

Because of the failure to issue the right notices, Seevic had to pay out nearly £800,000 more than the 'true value' of the works – and couldn't recover that overpayment on an interim basis (while the law has since been clarified to allow earlier recovery, it would still require payment of any 'smash and grab' award first, causing potential cash flow issues). As well as that, it had the distraction value of proceedings to deal with, and professional fees. All of this had a substantial effect on its budget, which could have been avoided had the right notices been issued – a requirement that exists by law in almost every construction contract, and was clearly set out in the contract that had been agreed.

A failure to exercise due diligence when entering into a construction contract or, at the very least, to understand what is required of them can have costly, but easily avoidable, consequences.

Unlike Seevic, LCC 'got away with it'. But it was a close run thing, and its failure to exercise the strict terms of the contract earlier, were nearly its undoing. Had it not been lucky, it would have left it, like Seevic, having to pay out a large sum of unbudgeted money because of the simple failure to get the right notices served.

It might be said that at least Seevic and LCC had contracts in place – that isn't always the case, and where there isn't a contract, payment and other obligations can exist by implication, placing parties at even more risk. But fundamentally, both cases show that schools, academies, universities, colleges, and other public authorities are held to the same standard as the private sector. A failure to exercise due diligence when entering into a construction contract or, at the very least, to understand what is required of them can have costly, but easily avoidable, consequences.

For further information on the contents of this article or for general construction advice please contact Tyler Fitzpatrick or a member of our Construction and Engineering Team.