Education
Law

NEWS AND ADVICE FROM BIRKETT LONG

Freedom of information and course material

Many universities, colleges and schools will by now have received at least one Freedom of Information Act 2000 request, but it is never easy to know whether you are obliged to provide the information being asked for.

The 2000 Act gave individuals and companies the right to ask public authorities whether they hold certain information and to then be given that information. This is in addition to the rights given by the Data Protection Act 1998 which deals with personal data and the Environmental Information Regulations 2004 which cover environmental information held.

But where do you draw the line?

The Information Rights Tribunal has upheld a decision by the Information Commissioner that course materials (in this case, from the University of Central Lancashire's BSc (Hons) Homeopathic Medicine degree) were not exempt from disclosure under the Freedom of Information Act.

A pharmacologist and research professor who was sceptical of the value of homeopathy had requested the material. The University argued that the course materials were exempt from disclosure on the basis that giving this information to the professor would be prejudicial to the effective conduct of public affairs and the commercial interests of the University.

The Tribunal dismissed both of these arguments. They accepted that, even though it was a charity, the University's interests in teaching materials produced for its degree courses were indeed commercial, but it did not agree that giving the information requested would in fact disadvantage its commercial interests. It felt that competitors were unlikely to exploit the material and copyright infringements were unlikely within the academic community. Indeed they felt that publishing the course materials might in the end prove to be of commercial advantage.

Emily Brown
01206 217317
emily.brown@birkettlong.co.uk

Employment tribunals and the education sector

As I peruse the plentiful supply of decided employment cases emanating from the employment tribunal system, it seems to me that more and more involve educational establishments of one kind or another. That may be because such establishments are increasingly run as a "business", and subject to the open market in much the same way as the rest of us. Then again, it could be that I just follow this sector more closely.

Either way, education cases do make interesting reading, often involving facts particular to the education sector, whilst adding to the broader development of employment law.

In Cumbria County Council and the Governing Body of Dowdales School v Bates 2013, for example, the claimant teacher was found to have been unfairly dismissed. After his dismissal, he was convicted of common assault on a 16 year old girl who was his former pupil and he was sentenced to six weeks' imprisonment.

Initially, the employment tribunal refused to take into account Mr Bates's post-dismissal conduct in assessing his compensation award at the then maximum of £66,200, and how that might affect his future employment prospects. Compensation in this respect should relate to losses attributable to the unfair dismissal.

However, that decision has now been successfully appealed so that his conviction may now be taken into account in assessing the compensation to him, comprising pension loss.

School bursars, in particular, might note the case of Mitchell v St Joseph's School 2013, where the school bursar failed to disclose the parlous state of the school's finances to the Board of Governors, although he did disclose the state of affairs to two members of the Board. However, this did not mean that the Board itself had knowledge of the finances and the question for the employment tribunal (the well established and usual one in an unfair dismissal misconduct case) was whether the decision to dismiss fell within a range of reasonable responses open to an employer in all the circumstances, which the employment tribunal agreed that it did.

The use of fixed term contracts is common in schools and colleges and, while this practice has its advantages, schools, colleges and indeed all other employers need to be aware that the non-renewal of a fixed term contract is still a dismissal which might in certain circumstances, be unfair, particularly where the individual concerned has built up longer continuity of service, perhaps through a number of successive fixed term contracts. Tansell v Henley College Coventry 2013

Bare essentials

Reception class size

A mother has lost her appeal regarding the decision to refuse her son a place in a primary school's reception class.

The primary school's policy was to admit 45 children split between two reception classes, with the same children then being taught in three classes of 30 when they moved up to the next year. When they moved up in this way to years one and two, the classes would be at the maximum number that is permitted under the infant class size limit imposed by the School Admissions (Infant Class Sizes) (England) Regulations 2012. Although admitting the child would not have breached the infant class size limit whilst he was in reception class, in future years his admission was likely to breach that limit.

The High Court held that the panel's decision was lawful and that they were right to treat the mother's appeal as an infant class size appeal under Section 4 of the Schools Admissions Appeals Code 2012. This decision was made for a number of reasons, including that the context of the Code suggested that infant class size limit was an important statutory policy, whilst the wording of the Code suggested that a panel is required to exercise a judgment as to what is to happen in the future. *(R DD) v Independent Appeal Panel of the London Borough of Islington and Another [2013] EWHC 2262 (Admin)*

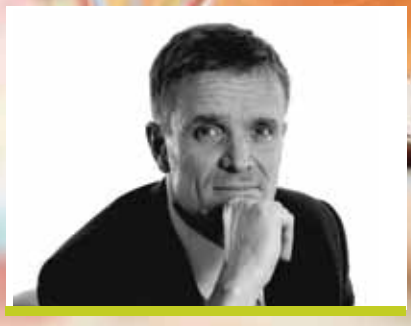
involved the employment of seasonal staff on fixed term contracts for the academic year and is a reminder of this, and how an employer must identify the potentially fair reason for such a dismissal, be it redundancy or some other substantial reason.

Costs of proceedings in employment tribunals are generally borne by each party, although not if one party has acted unreasonably or vexatiously or their argument has no reasonable prospect of success. In Nouchin v Norfolk County Council 2013, the claimant was subject to disciplinary proceedings in relation to his capabilities as a teacher, but alleged that these proceedings were only brought against him after he had raised complaints of discrimination. The respondent claimed that Mr Nouchin only raised the discrimination issues to divert attention away from the capability allegations against him.

At the subsequent 25 day employment tribunal hearing, the claimant withdrew all of his claims after nine days. Given that Mr Nouchin did not complain about matters related to race discrimination until after the capability proceedings against him had started, the respondent's application for costs was successful, and at £180,000 would be likely to cause Mr Houchin some difficulty in repaying.

These cases seem to confirm the wider picture that, of those cases going to a hearing, employers actually win most of them.

For further information please contact Tim Ogle. Tim is an employment lawyer specialising in advising schools.



Tim Ogle
01245 453840
tim.ogle@birkettlong.co.uk

Meet the team

Margaret Davey

Margaret is a member of the Dispute Resolution Team at Birkett Long LLP. She has 20 years' experience assisting colleges and schools with debt collection. Margaret has an established and excellent reputation for recovering outstanding debts in both the County and the High Court as well as bankruptcy proceedings.

Margaret is a Fellow of the Chartered Institute of Legal Executives.

> "Thank you for your work in recovering the significant sum of money owing. Several telephone requests at our end failed to produce the money, but one letter from you worked like magic!"
> *A client recommendation*

Margaret Davey
01206 217378
margaret.davey@birkettlong.co.uk

in brief

Education updates from the summer holidays

Pay and conditions

On 1 September 2013 the School Teachers' Pay and Conditions Order 2013 came into force. Teachers' pay is no longer subject to automatic annual increments but instead will be linked to performance. The first performance increments are to take effect from September 2014. The Department for Education has helpfully published guidance on its website.

Behaviour in schools

Over the summer, the DfE also published updated guidance on school behaviour, including guidance for governing bodies, head teachers and other school staff, in particular regarding developing a school behaviour policy and providing guidance on the power that members of staff have to discipline pupils. There is also further advice regarding screening, searching, confiscation and the difficult subject of the use of reasonable force.

Reasons for non-attendance

In the case of West Sussex County Council v C [2013], the High Court decided that a mother's lack of control over her child did not mean that there was an "unavoidable cause" for the child's absence from school. The mother therefore had no defence to the criminal offence under the Education Act 1996 where a parent's child fails to attend school regularly. Magistrates had previously said that the child's chaotic lifestyle was a good enough defence for her non-attendance at school and therefore did not convict the mother. The High Court, however, did not feel that this was an appropriate approach.

Cost effective advice

On 20 August 2013, the DfE updated its guidance "Advice for Effective Buying for your School". This is non-statutory advice but it does highlight areas of spend where schools could make savings – certainly worth a read in these difficult times! It covers matters such as benchmarking and the procurement of ICT, broadband and internet access, photocopiers and temporary supply staff but also provides information as to how procurement can promote sustainability.

School start dates

The DfE has been busy this summer, also publishing non-statutory advice to help admission authorities and the parents of summer born children understand in which year group those children should start school. Under the School Admissions Code 2012, children should be allowed to be admitted in the September following their fourth birthday but a child does not have to start school until they have reached compulsory school age, following their fifth birthday. There is flexibility in the Code if parents consider that their child is not ready to start school in the September following the child's fourth birthday.

Forthcoming events

Employment law breakfasts
12/13/14 November
These breakfasts will explore zero hours contracts and other ways of working.

For more details on this seminar or to register your free place, email seminars@birkettlong.co.uk or visit www.birkettlong.co.uk/events

BIRKETT LONG LLP

PHOENIX HOUSE
CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EX
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

NUMBER ONE, LEGG STREET
CHELMSFORD CM1 1JS
T 01245 453800

E EDUCATIONLAW@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK

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