

EDUCATION LAW UPDATE

KCC Legal Services

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ISSUE 4

This Education Law Update has been produced by the KCC's Litigation, Employment & Education Team. It features articles which address some of the common legal issues that schools encounter.

These articles aim to provide a practical guidance to schools. They are not intended to provide legal advice. The circumstances of each problem are different and legal advice will vary in accordance with the circumstances. KCC Legal Services offers an insurance scheme (Schools Legal Insurance Scheme) which for an upfront annual premium of £350 allows schools to access 5 hours legal advice on the full range of legal issues faced by schools. If more than 5 hours advice is required by a school subscribing to the scheme, additional legal time will be charged at a very competitive rate. If you require legal advice please contact any of the education lawyers at the end of this newsletter.

Disciplinary hearings – when can teachers bring lawyers to represent them? R (on the application of G)-v-Governors of X School and Y Council

This case established that where a professional's future career is at risk by potential disciplinary action, they will be entitled to legal representation at disciplinary and appeal hearings. To not allow legal representation would amount to a breach of their right to a fair trial. In this case a teaching assistant at a primary school faced an allegation of gross misconduct for allegedly having kissed a 15 year old work experience trainee. If found guilty of gross misconduct they would be reported to the Independent Safeguarding Authority which would record their unsuitability to work with children and vulnerable adults without the opportunity to put their case at a hearing.

The Court of Appeal's decision in this case is of interest also because it concerned a teaching assistant who would not normally be considered to fall within the definition of a 'professional'. The implication is that where any staff member faces a disciplinary sanction that will likely lead to an end of their career will be able to ask for legal representation.

The Government recently announced plans to reform the ISA. However such reforms will abolish the need for all children and adult workers (including volunteers) to be registered with the ISA. The reforms will not affect local authorities' duties to report individuals that are considered through their conduct to be unsuitable to work with children and vulnerable adults. Therefore the proposed reform of ISA's

will not affect this new right to legal representation.

ABDUS CHOUDHURY – TEAM LEADER

Working with children – the new framework

The aim of the Safeguarding Vulnerable Groups Act 2006 established two new lists – “the children barred list” and the “vulnerable adults barred list” replacing the previous barring lists (POVA, POCA and List 99) and administered by the Independent Safeguarding Authority (ISA). Notwithstanding the new Government's intention to review the plans for compulsory registration referred to above, the barring regime and the existing requirements concerning CRB checks remain in place.

Sexual or violent criminal offences against children will result in automatic inclusion in the children barred list. Employers who knowingly employ barred individuals to carry out activities will face criminal penalties. Anyone working frequently in a school (such as secretaries, minibus drivers or caretakers) will need to be checked as will school governors. Employers are also under a duty to notify the ISA if it removes someone from a regulated activity (on either a permanent or a temporary basis) *and* believes that the person poses a risk of harm or has engaged in activities related to children. This is most likely to be the case where the outcome of an investigation is known. A fine of up to £5,000 will be incurred if, without reasonable excuse, the employer fails to refer to the ISA.

KATE CURL - SENIOR SOLICITOR

Secret recordings

Secret recording of meetings by parents or employees is becoming increasingly commonplace.

Parents may wish to make such recordings to use as evidence before the Special Educational Needs and Disability Tribunal. Employees might wish to record a disciplinary meeting to use as evidence before an Employment Tribunal.

Admissibility

Whilst secret recordings are usually inadmissible in courts, tribunals will follow the following rules-

1. A secret recording of a meeting/hearing with all the parties present is admissible.
2. The tribunal will respect the need for parties to obey the 'ground rules' of the meeting and a secret recording of private deliberations will only be permitted in evidence where:

a decision has been made with no reasons being given; the only evidence of discrimination taking place is that of the secret recording; and that evidence is incontrovertible as to do otherwise would inhibit the frank discussions of those tasked with reaching a decision.

Steps that you can take.

1. Adopt clear arrangements for minutes to be taken of sensitive, important or official meetings (such as those under the disciplinary procedure) at which the subject matter or outcome is likely to be disputed and at which parents or employees will be in attendance e.g. a minute-taker or the meeting could be officially taped by the school.
2. Incorporate these procedures into the disciplinary or incapability procedures or into the school rules relating to meetings with parents.
3. Make it clear that employees and parents are explicitly prohibited from recording meetings.
4. When dealing with employees consider taking disciplinary action if you discover that an employee has been making secret recordings. There is a fairly strong argument that such covert behaviour constitutes a breach of the implied duty of mutual trust and

confidence and constitutes grounds for disciplinary action.

MARK RADFORD – CONSULTANT

Practical Tips for disclosure

Disclosure is a procedure within the Civil Procedural Rules ("CPR") requiring parties involved in litigation to disclose documents which hinder or hamper their case. Lay professionals understandably lack an understanding of the categories within which documents fall for this purpose. This Article provides a simple explanation of the exercise and tips on avoiding pitfalls.

1. Adequate recording of and storage of documents

Documents are materials on which data is recorded. These range from paper to electronic material. To ensure full and thorough disclosure, it is imperative that documents are stored where they can be found easily and in an orderly fashion. It is advisable that an individual is nominated as the Data Recording Officer who has sole responsibility for storing any information on individual cases or students. It is a matter for the school as to the system they wish to implement, provided it is effective, efficient and speedy.

2. Distinguishing confidential from non confidential documents

A lay person would deem information they intend to keep secret as confidential. The CPR applies a narrower definition. Whilst you may construe a document as confidential, a court may not. It is incumbent on the author to ensure that information which is recorded is accurate and that any opinion is supported by a factual statement. This should not deter individuals to express themselves, but one should ensure that the information is written in a clear and reasonable manner so as not to open it up to any misinterpretation or scrutiny. There are examples where information has been innocently recorded on documents, but this has given ammunition to savvy opposition lawyers to interrogate the witnesses. If you do wish to make any notes or communicate with your colleagues on non work matters then it would be sensible to do so on a separate document.

3. Controlled retention & destruction of documents

If your school has a Data Retention Policy make sure that this is compliant with legal requirements. You may need to reveal documents dating back some years. CPR limits it to data within the power and/or control of the party. It would not be a defence for the school to claim that the document has been destroyed, if this is in violation of the law. When you destroy any documents ask yourself the following questions:-

- (a) Is destruction of this document necessary?
- (b) Is it compliant with our Data Retention Policy and other legal requirements?
- (c) Do I need legal advice on this?
- (d) Is there an alternative to destroying the document?
- (e) Could challenges arise from the content of this document, or the early destruction of it?

We hope this Article shows the importance of disclosure and that you will implement these proactive measures. If you are unsure of your current procedure and need advice then you may wish to contact the author, Mr Sage Patel whose e-mail address is shejal.patel@kent.gov.uk

SAGE PATEL - SOLICITOR

Asking a parent to leave

A person may enter school premises only if expressly or impliedly authorised to do so. Thus a parent may be authorised to enter school premises for example to collect a child. But if that parent causes disruption, the school may withdraw that authorisation. If it does so, the parent must leave or they will become a trespasser. If they later return, this too will be trespass. If they refuse to leave or are causing serious disruption it may be wise to call the police.

Where future disruption is feared, it may be necessary to make clear to the parent that any authority that he or she has to enter premises is revoked, and in the event of that parent entering the school again they would be trespassing and (provided their actions amount to a nuisance) liable to prosecution. This should be confirmed by letter.

Action may be taken in the civil courts for an injunction and/or damages. This process, however, is likely to be time consuming and

costly, and is only appropriate if significant damage has been caused or where persistent trespass cannot be resolved in any other way.

A useful remedy is provided by Section 547 of the Education Act 1996. This empowers a constable or duly authorised person to remove from the premises any person committing a nuisance or annoyance. This section allows for the immediate removal of the trespasser and later prosecution.

In the case of recurrent problems with trespass it may be necessary to take further action. Where a notice explaining the provisions of Section 547 are clearly displayed on the school premises the provisions of that section may be drawn to the attention of a trespasser. It may be necessary to reaffirm any oral conversation by letter pointing out that if trespass reoccurs legal proceedings may be taken.

MICHAEL HONEYMAN - SOLICITOR

Look Before You Leap

In your role, you are no doubt approached on a regular basis by people trying to offer you things. They will insist that they can help your school, improve efficiency, cut costs and deliver savings. They may be offering you anything from school uniforms to photographs and from laptops to sports kit. In many circumstances they will say, and it will appear, that there is no risk and a considerable benefit to your school in entering into an agreement. Whilst often the project will be in your school community's interests, it will not surprise you to learn that all is often not as it seems. Below are a few common sense steps that you can take to limit the risks to your school:

- **Don't ASSUME** – It is important that you check any agreement and consider the impact of the obligations upon you. Don't simply sign the agreement and expect it to replicate the discussions that you have had with the representative of the company. Read it carefully. Don't assume that the other side will act fairly or in the school's best interests.
- **RISK ASSESS** – Just as you would do with any other area of your practice, carry out a risk assessment to consider the impact and implications of the proposed project. Does the

- **What are they getting from it?** – Always ask yourself the benefits for the other side to get an understanding of the deal and don't be frightened to ask the representative this.
- **Is it really cost and risk free?** Check to ensure whether this applies in all circumstances. For example, if you decide to cancel the project or change the way it is delivered do you have to pay?
- **Get Out Clause** – Make sure there is a broad provision for you to get out of the agreement.
- **KNOW YOUR LIMITS** – It is important to understand the potential impact of the project and to seek help where necessary. Lawyers can quickly advise on the potential implications and risks of an agreement. Whilst not needed for every case, early advice can stop you entering into an agreement not in your interests.

Finally, if it looks to good to be true, it probably is!

BEN WATTS - SOLICITOR

The information age.

Today, we live in a society where information is accessible and personal data can be requested under the Data Protection Act 1998 ("Act"). Therefore, schools need to be aware of their obligations when a staff member or parent makes an information request.

It is inevitable that schools will receive requests from individuals to see their personal work file or a request from a parent/guardian to see their child's school file. This right is technically referred to as a subject access request. It is most often used by individuals who want to see a copy of the information an organisation holds about them.

What is an individual entitled to see?

An individual is only entitled to their own personal data and not to information relating to other people (unless they are that child's

parent or they act on behalf of that individual). The individual is not entitled to information simply because they may be interested in it, so it is important to establish whether the information requested falls within the definition of personal data. In most cases, it will be obvious whether the information being requested is personal data, but when the time comes to release the information the school needs to check that that information does not contain third party details. This could include a child's name, a personal telephone number or home address (unrelated to the request).

In summary, consider the above Act when information is requested and remember before you send the information check that no third party details are included to avoid a breach of your obligations.

(Please note that various exceptions apply to the right of subject access requests in certain circumstances and if in doubt please seek legal advice).

BEN FULTON -SOLICITOR

Precautionary pupil suspensions

On 23 June 2010 the UK Supreme Court gave a judgment which calls into question whether a Head teacher has legal authority to suspend a pupil on precautionary grounds.

Although a Northern Irish case, *JR17 for Judicial Review (Northern Ireland) [2010] UKSC 27* considered rules governing the suspension and exclusion of pupils and Lord Brown noted that the position was in many regards essentially similar to the rest of the UK.

In this case, a Head teacher was told that a female year 12 pupil felt deep distress, to the point of feeling suicidal, due to 'subtle and covert intimidation' by a male classmate. The extent of her distress was corroborated by another pupil. Unrelated allegations concerning the male pupil out of school lent some credibility to this account. The female 'victim' did not wish to make a complaint and did not wish the male pupil to know she had spoken about the issue.

The Head teacher's response might seem on the face of it entirely reasonable. Given that social services were involved with the out of school issues, and given the extent of the female pupil's distress, and the fact he could not investigate without revealing her identity, the Head teacher decided that until social services had completed an assessment of any risk he may pose to the female pupil, the male

pupil would be suspended from school as a precautionary measure. Work was provided for the pupil during his suspension. It was made clear that this did not indicate any guilt although he was not told about the source or details of the allegations.

For differing reasons the five judges agreed that the precautionary suspension was unlawful. The judges considered whether under his management powers the Head teacher had the legal authority to temporarily keep a pupil away from school for a reason which is not a normal disciplinary suspension. The judgment suggests that such a power cannot be implied and that the only grounds for suspending a pupil are those set out explicitly in legislation and guidance.

So a school finding itself in a situation where it seems unavoidable that a pupil should be prevented from attending school for a period of time as a neutral and precautionary measure should exercise great caution and I would recommend that legal advice be sought. In the recent *JR17* case, the judges repeatedly said they sympathised with the Head teacher and described his actions as understandable and taken for the best of intentions but they nevertheless found them to be unlawful.

MATTHEW WATERWORTH - SOLICITOR

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Abdus qualified as a barrister in 1996 and practiced at the independent Bar until 1998, when he left to work with Somerset County Council. He joined Kent County Council in July 2000, working initially in the Social Services Group. Abdus became a member of the former Litigation Group in September 2001. He became team leader of the re-organised Litigation Employment & Education Team in 2004. Abdus undertakes work in all of his Team's practice areas but has particular expertise in judicial review, employment and education law.

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Sage qualified as a solicitor in 2003 and worked in private practice mainly in employment and education law. He is a specialist in these areas having represented his clients at all levels in these practice areas. Since joining KCC Sage has continued to practice in employment and education law but has expanded his expertise and now practices in all aspects of local authority litigation including Construction.

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Michael is a solicitor who qualified in 2005. He joined KCC in July 2008 after ten years with Medway Council's legal department. He specialises in employment and education law, and has a broad experience of other areas of local government law.

BEN WATTS

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Ben was educated at Queen Mary College - University of London and the College of Law, London. Ben is a solicitor who joined KCC in August 2009 from Devon & Cornwall Police where he had worked handling a broad range of litigation matters and general legal queries since 2002. Ben has practised predominantly in general litigation and Employment law. Ben's litigation experience includes Civil Claims, Judicial Review, applications within the Magistrates Court such as ASBOs and Liquor Licensing. (Ben is a member of the Association of Police Lawyers).

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Kate joined KCC from the London Borough of Southwark in January 2007. She qualified in private practice in 2002 and has extensive recent experience in all aspects of employment law, including conduct of discrimination, equal pay, public interest disclosure, TUPE and unfair dismissal claims in the ET, EAT and Court of Appeal. Kate also has experience in providing advice and representation on education and general litigation matters including conduct of SENDIST appeals to the High Court, Judicial Reviews, breach of contract and statutory injunctions.

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Mark qualified as a solicitor in 1991. He is a consultant to the Litigation Employment & Education Team. Mark undertakes work in all of his Team's practice areas but has particular expertise in employment law, education law and construction disputes. Mark advises education authorities on the proper discharge of their

functions generally and discharge of their specific responsibilities towards children. He has advised on matters as diverse as transport policies, contractual disputes, compromise agreements, fixed penalty notices for excluded pupils, discrimination claims and diverse staffing issues.

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Ben has been with Kent County Council for nearly a year after five months working at the London Borough of Hounslow advising mainly in employment law as well as debt collection. Ben was admitted in July 2005 and has previously worked in private practice in New Zealand, dealing mainly with employment, commercial and debt collection matters and other general advice.

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Matthew was educated at the University of York and the College of Law in York. Matthew qualified as a solicitor in 2004 after training with the London Borough of Harrow. Since qualification he has practised predominantly in employment and education law at North Yorkshire County Council and the City of York Council and joined KCC in July 2008.