

# EDUCATION LAW UPDATE

## KCC Legal Services

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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.

### Annual leave for the long term sick

A recent decision in the European Court of Justice *Mrs C. Stringer and Others -v- Her Majesty's Revenue and Customs* (EU: Case C-350/06), has confirmed that the right to paid leave remains even where an employee is absent from work though sickness for the duration of a leave year.

This case concerned three categories of workers:

- i) an employee on long term sick leave who wished to designate a period during sickness absence as annual leave to take advantage of higher pay. The employer argued that it is inconsistent for an employee to ask to take leave from work then they are not fit to attend work.
- ii) a group of employees who had been dismissed for incapability due to long term absence through sickness. They had not taken their annual leave during the period they were absent through sickness. They claimed compensation for lost annual leave on termination of their employment. The employer argued that because the employees need to be able to work in order to be entitled to take time off work, these employees had not built up an entitlement on termination of their employment for which they could expect compensation.
- iii) an employee who was medically retired but had been absent through sickness for a long time. He had not taken annual leave to which he was entitled during that time, but under the employer's policies the period in which he could take his leave in subsequent years had passed. The employer argued that it had to have a cut off date for when carry over rights extinguished.

The European Court re-iterated that the right to paid annual leave as contained in the Working Time Directive (20 days) was an important social right and held that in relation to category i) an employee cannot designate a period during sickness absence when they could take annual leave. However, the right to paid annual leave remained. In relation to ii) just because an employee was not able to work that

did not affect their entitlement to paid annual leave. In relation to iii) it was not open to member states to implement legislation or practices that restricted the right of employees to receive compensation in place of their right to paid time off from work.

The European Court's decision has recently been applied in the UK House of Lords. Revenue and Customs did not contest the findings of the European Court. The consequences of their concession are that:

- i) Workers accrue 20 days paid holiday as guaranteed by the Working Time Directive per year throughout any periods of sickness absence, even when the worker reaches nil pay.
- ii) Employers and workers will not be able to designate periods during sickness absence as leave in order to 'use up' leave entitlements before the end of the leave year.
- iii) Workers that return after a s long period of absence must be allowed to take outstanding holiday entitlements on return to work
- iv) Workers must be paid in lieu of their holiday entitlement if their employment terminates
- v) Employers will need to carefully consider whether they need to change provisions for carryover of leave for workers unable to take their holiday entitlement due to sickness (especially for workers on long term sickness)
- vi) Employers must decide how to deal with the additional holiday conferred by the UK's own Working Time Regulations (28 days) as well as any contractual holiday entitlement and leave expressly set this out in sickness, absence and/or maternity policies. The European Court decision was concerned with the Directive (which guarantees only 20 days). Limiting the carry over provisions to only 20 days is unlikely to be the solution as this might indirectly discriminate against minority worker groups.

**ABDUS CHOUDHURY - TEAM LEADER**

## **Right to Legal Representation in certain disciplinary hearings**

### **Introduction**

Employees have a right to be accompanied when they are required by their employer to attend certain disciplinary or grievance meetings. The companion may be a colleague, a trade union representative or an official employed by a trade union. However, until now there has never been a right to be accompanied by a legal representative.

In the case of R (on the application of G) v The Governors of X School, the High Court stated that in limited circumstances an employee will be entitled to legal representation during an internal disciplinary hearing.

### **The Facts**

The facts of this case were that G was employed as an assistant at X school and was alleged to have abused a pupil. The allegation led to disciplinary proceedings being brought against G who was dismissed following a hearing before X's governors. The school reported the facts of the dismissal to the Secretary of State. The Secretary of State may, utilising the section 142 procedure, direct that a person should be prohibited from working with children in educational establishments on the basis that the person is unsuitable. The Secretary of State considers written representations when making this decision but does not hear oral evidence.

G argued that, taken together, the disciplinary proceedings before the school's governors and the Secretary of State's decision constituted a single procedure and because of the severity of the allegations of misconduct and the risk of prohibition if a Section 142 direction is made, he should have been entitled to legal representation at the disciplinary hearing and at the appeal hearing.

The High Court concluded that although the disciplinary process was a civil procedure, G should have been entitled to legal representation at the disciplinary and appeal hearings before the school's governors. The Court explained that G could not be expected to represent himself and representation by a Trade Union official or a worker colleague was insufficient. Central to the High Court's decision were the gravity of the allegations against G and the potentially serious impact upon his career if a Section 142 direction was made by the Secretary of State.

### **Consequences for Schools**

The decision does not give the right to legal representation in all disciplinary proceedings. It would however oblige a school to allow an employee legal representation at both stages of the procedure where the employee risked a referral for a Section 142 direction or a similar sanction.

It is important to note that where an employee is accused of what would otherwise be a criminal offence e.g. theft, providing that offence does not attract the prospect of a referral to the Secretary of State there would be no requirement to legal representation because he or she would be given that opportunity either during any subsequent police investigation and prosecution or during any subsequent employment tribunal proceedings to legal representation and also in both forums those deciding the case have the power to exclude any evidence that may have emerged as part of the disciplinary process if such evidence is considered to be inappropriate.

This decision may be appealed and if it is, the Court of Appeal may provide additional guidance upon the circumstances, if any, in which employees should be permitted legal representation at internal disciplinary hearings.

**MARK RADFORD – SENIOR SOLICITOR**

## **Is the implementation of the new SEND panel to the tribunal system a solution or a problem?**

The Special Educational Needs and Disability Tribunal has now been replaced by the new SEND Panel. The initiative was to create a more cohesive structure for tribunals and to develop a greater consistency of the management of cases. The Tribunal has become part of a Two Tier Tribunal Structure, the First Tier Tribunal and Upper Tribunal. The new Tribunal consists of Chambers which has grouped together a number of jurisdictions dealing with similar work or requiring similar skills.

Parents whose children have special educational needs can appeal to the First Tier Tribunal (Special Educational Needs and Disability) against decisions made by Local Education Authorities in England about their children's education. Statutory Appeals from SEND Panel of the First Tier Tribunal now go to the Upper Tribunal rather than the High Court. The system has been redesigned in a way so as to filter only the most serious and deserving cases which are likely to reach the new Upper Tribunal. The purpose of such a system would be to ensure that the process at the first stage is followed meticulously so as to reduce the number of erroneous decisions which may be taken, obviating the need for appeals to be advanced to the second stage.

So what do these changes mean for those to whom such a system applies?

Well, it all depends on which side of the fence you are sitting. From the parent's perspective such a system would most probably appear more formal and adversarial converse to the old process. Appeals are generally launched more by the parent than by the schools and local authorities and thus it would mean that their appeals will have to be much more watertight before they are allowed through. To achieve this they would need to ensure it is properly prepared by experts in this field. It will also become more complicated and legalistic in the parents' minds which will therefore call for early and effective intervention of lawyers.

The new procedure has also caused there to be a reduction in the time limit for lodging an appeal putting more pressure on the parents to prepare their case in time. With the new rules allowing the joint appointment of an expert, parents may feel aggrieved about the lack of freedom to engage an expert of their own choice and the independence with which they can advance their own evidence.

Within the new system the panel has the power to require a parent to make a child available for examination or assessment by an expert. A failure to do so could be considered as a failure to comply with a tribunal order and lead to the possibility of an adverse decision.

So what do these changes mean for public bodies?

Well, in effect, all of the disadvantages to the parents will apply as advantages to the "Responsible Body" and more. The new system appears to be a less costly process as it obviates the appeals being directed to the High Court which has proven to be costly, especially for the responsible bodies.

It will also minimise if not extinguish any frivolous or vexatious appeals being brought against the responsible body as it will allow only the most serious and deserving cases to make it to the New Upper Tribunal. This will reduce the risk of schools and local authorities being exposed to unmeritorious appeals which will be less of a drain on their budget and time.

More doors may open up to local authority solicitors to put their advocacy skills into action as the need for appointing a barrister with higher rights of audience will slowly diminish lightening the pressure on the public purse as such work could be undertaken by the in-house lawyer at much more competitive rates.

So it can be seen that the new system is intended to bring about many changes primarily to create order to the tribunal process to the level at which the courts operate. However, sceptics still have their concerns as to whether this has created an efficient, more organised structure or whether it has increased the administrative pressures of what was already a workable tribunal process. Whilst it has been opening up doors for some it is slowly closing them on others, but as to how much good comes of it, that is still to be decided.

**SAGE PATEL - SOLICITOR**

## The Right to Request Flexible Working

Certain employees have the right to make a formal request for flexible working, i.e. for a change in the hours, times or location of their work. If you receive such a request, you have a legal duty to follow a statutory procedure and to give the request serious consideration. If you fail to do so, you are at risk of facing an employment tribunal claim for breach of the flexible working regulations and possibly for breach of the anti-discrimination laws.

To be eligible to make such a request, the employee must have been employed by the school continuously for at least 26 weeks. The employee can only make such a request for the purpose of caring for a child (from April 2009 this means any child aged 16 or under), for a disabled child under 18 and in receipt of disability living allowance, or for certain adults who require care.

An employee can request flexible working if they are, or are married to or are the partner or civil partner of, the mother, father, adopter, guardian, special guardian, foster parent or private foster carer of the child, or a person who has been granted a residence order in respect of the child.

A carer can request flexible working if they care, or expect to be caring, for a spouse, partner, civil partner, relative, or someone who lives at the carer's address.

Under the statutory procedure, you should hold a meeting with the employee to discuss their request (you can, however, agree to a flexible working request simply on the basis of the application itself without the need for a meeting).

You should arrange for a meeting with the employee within 28 days of receiving their application. If it is difficult to arrange a meeting within this period, seek the employee's agreement to extend it. The employee has the right to be accompanied by a colleague. You must notify the employee of your decision within 14 days of the meeting.

If you and/or the employee are not sure that the proposed flexible pattern will work in practice, you could think about trying a different working arrangement or, alternatively, you could consider a trial period.

You can reject a flexible working request on only a limited number of set grounds. These are: the burden of additional costs; a detrimental impact on quality; the inability to recruit additional staff; a detrimental impact on performance; the inability to reorganise work among existing staff; a detrimental effect on ability to meet customer demand; planned structural changes; or lack of work during the periods the employee proposes to work.

If you decide you cannot accommodate any kind of flexible working for an employee, you must state in writing which of the listed grounds apply as to why you cannot accept the request, provide an

explanation of why you cannot accept the request and set out the appeal procedure.

If an employee wishes to appeal the decision they must do so in writing within 14 days of receiving your written notice refusing the request. You must arrange the appeal meeting to take place within 14 days of receiving the employee's appeal notice. Where practicable the appeal should ideally be heard by someone other than the person who made the original decision, and again the employee has a right to be accompanied to the meeting.

You must inform the employee of the outcome of the appeal in writing within 14 days after the date of the meeting.

If you refuse the request, the notification must be dated, state the grounds for the decision and explain why the grounds for refusal apply in the circumstances.

An employee may make a complaint to an employment tribunal where either your decision to reject an application was based on incorrect facts, or you did not follow the procedure properly, e.g. you failed to hold the meeting to discuss the application within the timescale (where no extension had been agreed) or where you failed to provide a complete and proper explanation to the employee of your decision to refuse their request. An employee cannot make a complaint if they simply disagree with the grounds you give for your refusal.

If the Employment Tribunal finds in the employee's favour, the maximum level of compensation is 8 weeks' pay, although there is a statutory cap on the amount of week's pay. There is a separate award of up to 2 weeks pay where an employee has not been allowed to be accompanied at a meeting.

In some circumstances, rejecting an employee's flexible working request could open up a possibility of a claim for discrimination on grounds of sex, race, religion or belief, sexual orientation, disability or age.

For example, if you reject the request of a woman returning from a maternity leave to work part time, this could be seen as indirect sex discrimination. This is on the grounds that a greater proportion of women than men have the main parental caring responsibility - your requiring her to work full time puts her at a disadvantage compared to her male colleagues.

However, even if she is put at a disadvantage by your refusal, you can still justify your actions at a tribunal if you can show that they were a proportionate means of achieving a legitimate aim.

**MICHAEL HONEYMAN - SOLICITOR**

## Health and safety at school

A recent case serves as a reminder of the very high health and safety standards required of schools with regards to its employees.

The Health and Safety at Work etc Act 1974 and the Management of Health and Safety at Work Regulations 1999 impose a high standard on schools and local authorities, as they do on all employers. And whilst these obligations fall on the local authority in the case of community and voluntary controlled schools, it is good practice for these schools to meet the requirements for policies, training and risk assessments themselves and responsibilities are often delegated to them in any event.

Essentially, this legislation requires that the employer provides a safe place and system of work. This extends to carrying out risk assessments to identify things that could cause harm, and taking precautions to prevent them.

In the case of *Craner v Dorset County Council* [2008] EWCA Civ 1323 the Court of Appeal considered a claim for personal injury from a school caretaker who had injured himself when pushing a trolley over a raised slab. The trolley struck this obstruction and injured the caretaker's knee. There was some dispute about the degree of unevenness, but both sides estimated that it was less than one inch. The fact that this fairly minor risk ultimately led to a successful claim shows the exacting safety standards applied to school sites.

The Defendant Council advanced four main arguments, all of which were rejected.

(1) They argued that this was a freak accident which could not be prevented, but the Court's view was that accidents like this occur frequently up and down the country.

(2) They argued that the slab was less uneven than claimed, but as neither the pre-accident risk assessments nor the post-accident investigation contained enough detailed information they were unable to persuade the Court of this.

(3) They argued that they had many higher maintenance priorities and had to allocate limited resources accordingly, but the Court found whilst this was understandable, it was no defence to a breach of health and safety law.

(4) They argued that the Claimant had exaggerated his injury based on the allegation that he had been seen Morris dancing shortly afterwards, but again, they were unable to persuade the Court of this.

So the findings in this case give a stark reminder that even where the risks might appear to be minor there is limited scope for avoiding liability for injuries caused. Recognising how onerous these duties are, Lord Justice Sedley said in his judgment '[h]owever much the courts may not wish to encourage a compensation culture, the fact remains that the Regulations exist'.

There are some practical points to take from this case. The quality of risk assessments is obviously key to preventing accidents in the first place. Relevant training for the responsible individuals,

sufficient time to complete thorough checks and maintain good records and a high priority for health and safety issues are all steps which improve the chances of avoiding accidents.

After the event, a good incident recording and investigation system will help ensure that disputes about the actual extent of the risk itself can be avoided. This will also limit the scope for later exaggeration by a Claimant.

These steps are all the more important given the failure in this case of arguments based on resources and the credibility of the Claimant.

**MATTHEW WATERWORTH - SOLICITOR**

## “The problem, I repeat, was the dog”: \*

### **The implications of The London Borough of Lewisham v Malcolm and the Equality and Human Rights Commission [2008] UKHL 43**

The House of Lords has made a landmark ruling in relation to disability discrimination. It has held that for the purposes of deciding whether a disabled person has been discriminated against unlawfully, the correct person for comparison (the “comparator”) is someone who does not have a disability.

#### **The Facts**

Mr Malcolm was a tenant of the London Borough of Lewisham who suffered from schizophrenia. During a period when he had stopped taking his medication, he sublet his flat in breach of his tenancy, which, due to a clause in the terms of his tenancy, meant that his secure tenancy status was lost.

The Council gave Mr Malcolm notice to quit his tenancy, unaware that he suffered from a disability. However, by the time it started possession proceedings, the Council was aware of Mr Malcolm’s disability.

Mr Malcolm stated that he had only sublet the flat because he had not been taking his medication at the time. He argued the reason why the council was seeking possession was because of his disability and unless it could show justification, possession of the flat would constitute discrimination.

#### **The Law**

Mr Malcolm cited section 22 of the Disability Discrimination Act which states:

*“It is unlawful for a person managing any premises to discriminate (a) in the way he permits the disabled person to make use of any benefits or facilities; (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or (c) by evicting the disabled person, or subjecting him to any other detriment”.*

Under section 24(1) of the Act a person discriminates against a disabled person if: “(a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not apply”

#### **The Issues**

The Court had to consider whether the correct comparator was:-

1. A secure tenant of the council without a mental disability who had sublet

2. A secure tenant of the council who had not sublet
3. Some other unspecified comparator group.

The Court of Appeal had held in another case (Clark v TDG Ltd. t/a Novacold Ltd. [1999] 2 All ER 977) that the correct comparator was 2. The Council said that this decision was wrong and the correct comparator should be 1.

The Court also had to consider whether it was necessary for the Council to have known about the disability at the time of the alleged unlawful act.

#### **The decision**

Five Law Lords considered the matter at length and determined that the Council’s conduct in seeking possession of the flat did **not** amount to unlawful discrimination. The correct comparator was 1.

The Lords decided that the Court of Appeal had been wrong in the case of Clark v Novacold and noted:

*“If a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal dependant on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by his landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.”*

The Court also found that it an organisation or person must have actual or imputed knowledge of the disability in order to discriminate. It was not enough for Mr. Malcolm to show that, objectively viewed, there was a connection between his schizophrenia and his subletting. He needed to show also that his condition played some **motivating** part in the Council’s decision to terminate his tenancy. Even if the Council did know, there was no evidence that those matters played any part in the decision to take action to recover possession.

*“in order for the alleged discriminator’s “reason” to “relate to” the disability for the purposes of s.24(1) (a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.”*

#### **Impact of the Case on Education**

Whilst education law was not specifically mentioned in this case, it has been accepted in other cases that education law should be interpreted in accordance with the law in other areas. In McAuley Catholic High School V CC [2004] 2 All ER 436, the Court of Appeal commented that the comparator in education cases should be selected in the same way as those chosen for employment discrimination cases.

Also significant in McAuley, a case where a child suffering from autism was excluded following a deterioration in his behaviour, was that the High Court followed Clark v TDG Ltd (t/a Novacold Ltd.) and decided that the School had discriminated against the child and that the appropriate comparator for the child was a pupil who was neither disabled nor badly behaved.

Since Malcolm, this approach is unlikely to be accepted. A recent Court of Appeal case, R v Independent Appeal Panel of Barking and Dagenham LBC, [2009] EWCA Civ 108 concerned an appeal by a student against the refusal of her application for judicial review of the respondent panel's decision to uphold her permanent exclusion from the school. She argued that she had been discriminated against and that the panel had made an error in taking as a comparator someone who had behaved in the same way as her, but who did not suffer from her disability. Her proposition was that it should be someone who had not behaved as she had. She argued that discrimination under the section she was relying on (s.28B, of Part IV – Education) had a wider range than the definition of discrimination under Part III – (Discrimination in Other areas) which was considered in Malcolm.

The Court dismissed her appeal. It found that there was a strong presumption that where the same formula was used in different parts of the same Act, it was intended to bear the same meaning. Also that the fundamental reason which caused the House of Lords to overrule the construction adopted by the Court of Appeal in Clark v Novacold applies equally to s.28B (1).

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\*As stated by Lord Scott of Foscote at paragraph 35 who demolished the analogy

used by Lord Justice Mummery in the Court of Appeal of the blind man with the dog who was refused entry. Lord Scott took the common sense approach in a refreshingly clear Judgment:

*“The problem with most hypothetical cases is that the facts are incomplete. Would the blind man without his dog have been refused entry? Almost certainly not. The problem was the dog. The dog was the reason for the refusal of entry. That reason was causally connected to the disability, but the disability would have played no part in the mind of the restaurant manager in refusing entry to the dog. ...The dog is not the potential beneficiary of the 1995 Act. It is the blind man who is. If he is refused entry it is not because he is blind but because he is accompanied by a dog and is not prepared to leave his dog outside. Anyone, whether sighted or blind, who was accompanied by a dog would have been treated in the same way. The reason for the treatment would not have related to the blindness; it would have related to the dog.”*

**KATE CURL - SOLICITOR**

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Sage qualified as a Solicitor in 2003. He has extensive experience of education, employment and public law gained in the private sector which he is now able to apply for the benefit of his public sector clients. Sage advises on appeals to the SENDisT, on school transport appeals, exclusion appeals and judicial reviews. He has also defended a number of claims to the IAP where disability discrimination has been alleged.

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Michael qualified as a Solicitor 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. He is experienced in the conduct of all types of employment tribunal cases including unfair dismissal, sex and disability discrimination, and has provided advice on all aspects of employment law, including reorganisations and transfer of undertakings. He has advised schools on a wide variety of education issues and dealt with numerous contractual disputes involving schools.

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Mark qualified as a solicitor in 1991. He is a senior solicitor in 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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Kate qualified as a Solicitor in 2002. She has over 5 years of local government experience gained in Kent and in London. Kate also worked in private practice, specialising in litigation, particularly employment matters. She regularly advises schools on employment law matters and has a great deal of experience conducting Employment Tribunal and appeal cases. She has also advised on general contracts affecting schools, secondary school admissions, school crossing patrols and judicial reviews.

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Matthew qualified as a Solicitor in 2004.

Matthew has provided legal advice on primary and secondary school admissions and exclusions, school transport, contractual issues affecting schools and judicial reviews. He has also advised on various legal issues affecting schools including those raised by community use of schools and property issues. Matthew has also represented many schools in employment tribunals and has extensive employment law experience.