HRbytes NEWSLETTER

Issue 44 | Summer Term 2018

Teachers' pay

At time of writing we are still anticipating that further detail about the school teachers' pay award for 2018 will be published imminently but there remains no more specific indication from the DfE as to when.

We expect the Secretary of State's response to the STRB's recommendations, and a draft STPCD 2018, to be published any day. In previous years this has been achieved before the end of the summer term. A period of statutory consultation on the draft has to follow and the DfE has previously warned that the timetable may be later this year.

You may have seen media reports that consideration of the funding of this year's award is ongoing with the Treasury which is likely to be contributing to the delay.

Dismissal without prior warning

Can an employee with a clean disciplinary record be dismissed for serious misconduct?

Potentially yes, according to the Employment Appeal Tribunal (EAT) in Quintiles Commercial UK Ltd v Barongo (UKEAT/0255/17/JOJ)

The Claimant was a medical sales representative. He had no previous warnings on record when he was dismissed by his employer for two acts of misconduct, namely failing to complete an online compliance training course by the deadline and then subsequently failing to attend a different mandatory training course. The Claimant did not deny these omissions but said in mitigation that he had been prioritising other work commitments. He had also been placed on a Performance Improvement Plan.

He was initially dismissed for gross misconduct but, on internal appeal, it was decided that his actions did not amount to gross misconduct but 'serious' misconduct. The decision to dismiss was upheld, citing a breakdown in trust and confidence, but he was to be dismissed with notice instead.

At the Employment Tribunal (ET) the Claimant was initially successful in his claim for unfair dismissal on the basis that prior warnings should have been issued, although his compensation was reduced by one-third to take account of his contributory conduct. However on appeal to the EAT, it was held that there is no general rule that a dismissal without prior disciplinary warnings is necessarily unfair: it will depend on the facts of the case and whether the employer "acted reasonably in all the circumstances". *(cont. page 2)*

Section 128 checks

As part of revisions to *Keeping Children Safe in Education* (effective 3rd September 2018), maintained schools will be expected to undertake section 128 checks on school governors.

Academies and independent settings already have to undertake these checks on governors and certain management positions.

Have you seen our law and policy update?

Our termly employment law, education policy and pay update was published recently and includes updates on Keeping Children Safe in Education, 'disqualification by association', changes to QTS, Tier 2 visas and various case law developments.

Access it via our 'Latest News' area of the website (published 6th July)

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Brexit & EU Workers

In the midst of all the current confusion about the direction of Brexit, last month the Home Office published details of the settlement scheme that will apply to EU citizens living in the UK, offering some clarity on the future rights of those who are already in the UK or who arrive during the transitional period (until 31st December 2020).

EU citizens and their family members will need to apply to obtain their new UK immigration status which will involve completing a short online application proving their identity and residence and declaring that they have no serious criminal convictions. Residence checks will usually be undertaken by the Home Office without the need for further proof from the individual. The planned fee for an application will be £65 (or £32.50 for a child under 16). Those who already have valid permanent residence or indefinite leave to remain documentation can exchange it for settled status at no cost. Those who have been resident in the UK for less than 5 years will be granted 'pre-settled status' and can then apply for settled status at the 5-year point.

The scheme will be phased in from later this year until 30th March 2019. There will be no change to the current rights of EU citizens until the end of the implementation period on 31st December 2020. The deadline for applications will be 30th June 2021.

Close family members living overseas (spouse, civil partner, durable partner, dependent child or grandchild, or dependent parent or grandparent) will still be able to join an EU citizen resident here after the end of the implementation period, provided the relationship existed on 31st December 2020 and continues to exist when the person wishes to come to the UK. Future children are also protected.

This scheme will enable EU citizens and their family members living in the UK to continue to work, study and access public services and benefits on the same basis as now.

Dismissal without prior warning (cont. from page 1)

Whilst it may be that in most cases an ET will find that a dismissal in such circumstances falls outside the 'range of reasonable responses' available to the employer, it should not be assumed that it will always be so.

The case was remitted to a different Employment Tribunal to consider the assessment of fairness.

As a side note of interest, somewhat unusually the Claimant's disciplinary hearing was conducted by telephone. Although the Claimant subsequently felt it may have been prejudicial to his case, the ET noted that such a course of action was not prohibited by the ACAS Code of Practice on Disciplinary and Grievance Procedures and that, whilst it was not best practice, it was not of itself unfair.

Comment

The conclusions reached are not dissimilar to another recent case, **Mbubaegbu v Homerton University Hospital**, in which it was also indicated that an absence of prior warnings does not automatically render a dismissal unfair. Clearly the outcome of these cases do not give employers *carte blanche* to dispense with a system of disciplinary warnings and the EAT in **Barongo** accepted that, in most cases, dismissal for serious – not but gross – misconduct in the absence of prior warnings is likely to be unfair. In practice, employers would likely struggle to persuade a tribunal that such action was reasonable except in very exceptional circumstances. Rather than take such a risky line of argument, it is preferable to ensure that the disciplinary policy which lists acts of gross misconduct specifically includes any matters which the employer takes particularly seriously but which might not otherwise be viewed as such by individual employees.

Subject Access Requests Arising During Employment Disputes

Schools and colleges will often find subject access requests from job applicants or employees arising in the course of some kind of dispute, either as the result of proposed or actual disciplinary action, in the context of a grievance or when a prospective employee has had their job application rejected. Dealing with these can raise quite complex issues about what records can be disclosed and what is reasonable for the employer to undertake a search for.

This article tackles three typical 'subject access request' scenarios and provides some suggestions on how you can handle these effectively if faced with a similar situation.

Disciplinary investigations 1

Scenario: We have provided a disciplinary investigation report to an employee which doesn't include full witness statements, in order to protect the identities of those who gave them. However it does provide a summary of what was said by the witnesses. The employee has made a subject access request to see all witness statements in full.

This scenario raises a number of potential issues around the employee's right to a fair hearing and the complexities around accepting anonymous evidence. For the sake of brevity, however, we will focus on the subject access request itself.

An individual is only entitled to access **their own personal data**, not information about other people. You do not, therefore, have to comply with a subject access request if it would mean disclosing information about another individual who can be identified from that information, except if the other individual has consented to the disclosure or it is reasonable to comply with the request without consent.

In determining whether it is reasonable to disclose the information, the Information Commissioner's Office (ICO) says that you must take into account all of the relevant circumstances, including:

- the type of information that you would disclose;
- any duty of confidentiality you owe to the other individual;
- any steps you have taken to seek consent from the other individual;
- whether the other individual is capable of giving consent; and
- any express refusal of consent by the other individual.

You will therefore need to consider, based on the specific circumstances, whether it is appropriate to disclose the witness statements. If the consent of the individuals involved cannot reasonably be sought or obtained you should first consider alternatives before refusing the request. In this particular case, for example, you could consider whether:

- the statements could be redacted to remove any information that might identify the witness; or
- the summary already provided could be expanded upon further without giving away the identities of the witnesses.

In all cases you are seeking to balance the data subject's rights against those of the other individuals affected by the disclosure.

References 2

Scenario: A teacher from another school was unsuccessful in obtaining employment with us and has asked to see the employment reference provided to us by her current employer.

The position on this has recently changed. Under the Data Protection Act 1998 (now superseded by the Data Protection Act 2018 and GDPR) an employee did not have the right to see a copy of a job reference from the organisation which had provided it but this exemption did not apply to the recipient of the reference and therefore the recipient could be required to disclose it in certain circumstances.

Under the Data Protection Act 2018 this exemption has been retained but now applies to **both** the provider and recipient of an employment reference given in confidence, meaning that an employee cannot make a subject access request to either party to see it.

The ICO is planning to produce guidance on this and other exemptions relating to the right of access, not yet available at time of writing.

Pending this guidance being published, however, our advice would be that – provided the reference was marked as 'confidential' or otherwise clearly intended to be confidential – you are not required to disclose it. If it is not clear whether the reference was intended to be confidential you can seek permission from the author of the reference to release it. If they refuse and it is not possible to anonymise the reference so that the identity of the referee is suppressed (which is likely to be the case in practice) then you can refuse to disclose it on the basis that it includes the personal data of a third party and they do not consent to its disclosure.

‘Fishing expeditions’

3

Scenario: I have received a subject access request from an employee who was recently dismissed, asking for copies of “any and all letters, emails, meeting notes or other correspondence that refers to him by name”. This is a massive amount of material.

It’s important to recognise that individuals have a right to access their personal data, but to be classified as personal data the information must ‘relate to’ the identifiable individual. Simply referring to an employee by name (or another identifier) is not personal data about them. To ‘relate to’ the individual, the ICO says that this must mean that it does more than just identify them, it must concern them in some way. To decide whether data relates to an individual, the ICO suggests you may need to consider:

1. **The content of the data – is it directly about the individual or their activities?**

   For example, notes of meetings at which the employee’s performance or conduct at work was discussed will include their personal data. Notes of meetings at which the employee was merely recorded as having attended but where the meeting discussion was not about the individual would not include their personal data.

2. **The purpose you will process the data for: if the data was used, or is likely to be used, to make a decision about, or inform actions relating to, an employee it will be personal data.**

   For example, emails sent by or to the employee are not necessarily *about* the individual – the content may be about something else entirely (general information updates to all staff, for example) and thus not personal data.

3. **The results of, or effects on, the individual from processing the data.**

   For example, if pupil progress statistics are used to make a decision about a specific employee’s capabilities, it will be personal data, even if the data itself is not directly about the individual.

Of course determining whether data ‘relates to’ an individual is not always going to be black and white. As such it is better to err on the side of disclosure if you are not sure. And, of course, in order to make a decision about whether something ‘relates to’ an individual it still has to be viewed in the first place. This is another reason why it is best only to retain copies of documents for which there is a clear legal basis for retention. Informal notes, emails and other day-to-day correspondence for which there is no defined retention need should be irretrievably deleted or destroyed on a regular basis.

You don’t have to automatically accept his request without asking for further clarification to help you identify the data he requires. It may be that, in reality, he is only interested in a particular time period or correspondence between a limited number of people. If he refuses to provide further clarity you must still make reasonable searches for the information, however you can extend the time limit for responding by a further two months on the basis that the request is complex. You cannot refuse to respond, or charge a fee for responding, unless the request is “manifestly unfounded or excessive”. This is not defined further. However you would need to justify your decision to take this course of action, which would likely require you to at least investigate the feasibility of gathering the information bearing in mind, for example, how many locations and individuals are potentially involved, over what time period data may be held and the administrative resources required to respond to the request.

Also remember that he is not entitled to records that include the personal data of other people. This may mean redacting or removing content before it is supplied.

Subject Access Request resources

Don’t forget we have resources to help you to handle a subject access request, including guidance, a template form, template register and a range of example letters which can be used to respond to a request in a way which meets the minimum legislative requirements.

Visit the **Data Protection at Work** topic area on the website.

Highlights from the School Workforce Census 2017

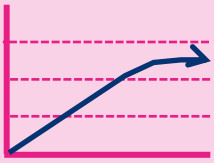
Overall teacher numbers down

1.2%

- 1.9% Secondary schools
- 0.6% Nursery and primary schools

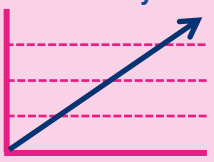
Increase in pupil numbers

Nursery and primary



Due to stabilise 2019

Secondary



Projected to increase until 2025

Teacher joiners / leavers

Rate has equalised

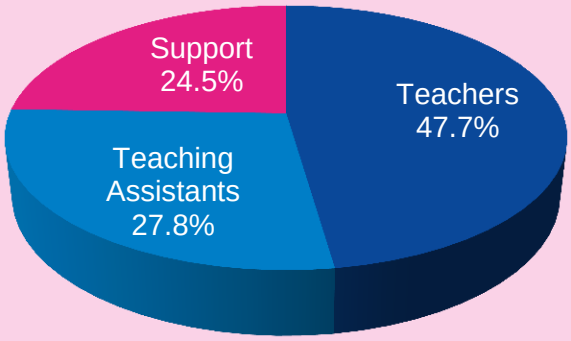
Teachers without QTS

2.1%

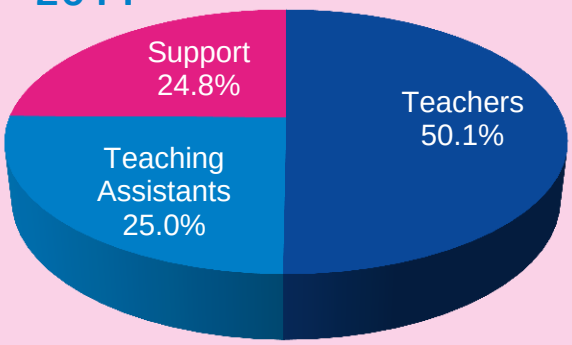
Up from 1.8% in 2011

Composition of the school workforce

2017



2011



Pupil:teacher ratios

Secondary =16 (2011 figure: 14.9)

Nursery / primary =20.9 (2011 figure: 20.5)

Average teacher salaries

	Nursery and primary		Secondary	
Average salary	Maintained	Academy	Maintained	Academy
Headteacher	£63,000	£65,600	£88,800	£92,400
Leadership	£55,000	£55,000	£63,700	£63,600
Teacher	£34,300	£32,600	£38,000	£36,500

The DfE School Workforce Census captures data on the workforce in LA maintained schools and academies in England