

Academies annual update: education post COVID-19

Part one: A legal and governance update

Agenda

- Introduction and virtual housekeeping
 - Katharine Patel, Buzzacott
- Governance update
 - Stephen Ravenscroft, Stone King
- Employment law update
 - Harriet Broughton and Katharine Robinson, both Stone King
- Q&A
 - Chair, Katharine Patel, Buzzacott



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Governance update

Stephen Ravenscroft, Partner

Content

- The current state of play of academies as we emerge from the Pandemic
- What we expect the position to look like going forward
- Immediate changes on the horizon
- Governance update

The current state of play

- A year of significant challenges for clients
- How schools and their governance have adapted to the challenges faced
- Lessons learned?
- But life has continued as normal in a number of respects, with the usual range of challenges for schools facing difficulties.....

Going forward

Rationalisation of the sector:

- Renewed focus on academisation: impact of the changes outlined in Gavin Williamson's speech, including a desire to end the mix and match approach
- Amalgamations – the MAT is the only way forward
- Collaborations – inter and cross sector
- Closures – an increased willingness on the part of RSCs to address under-performance

Immediate changes on the horizon

Articles of Association – revised version to be released shortly, but expect changes to:

- Members
- AGMs
- Terms of office for Trustees
- Remote participation at meetings

Funding Agreements – revised models recently issued

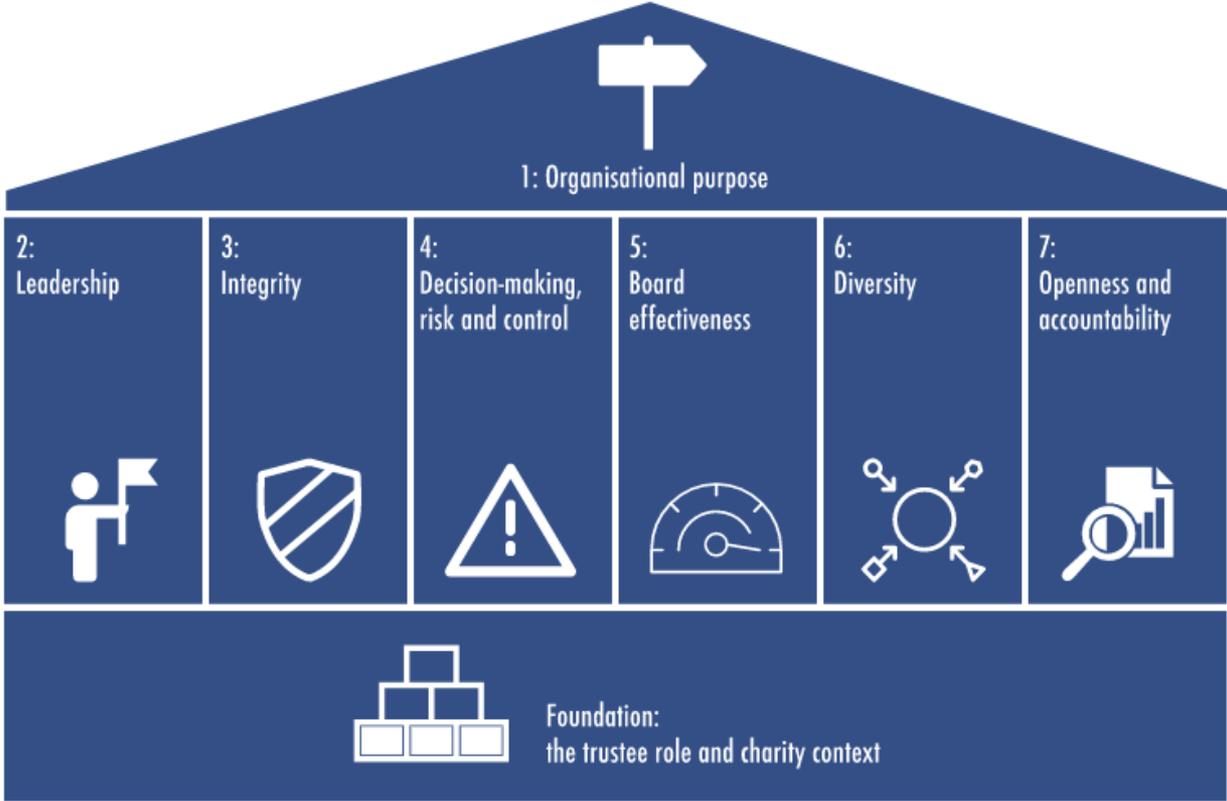
Governance update

- Recognition that clear and effective governance is at the heart of a successful school and MAT
- Can one size fit all? Ever increasing guidance from the DfE, but does this work in every case?
- Challenges to the existing norms as MATs develop
- Governance Handbook 2020

Meetings and decision-making in a virtual space



Charity Governance Code



Charity Governance Code - refreshed

- A refreshed version of the Code was published in December 2020 following a consultation in 2019.
- Focus on specific areas – Ethics and Diversity
- Wide-ranging review 2023

MAIN CHANGES:

- Updated Integrity principle: now reflects language used by NCVO's Ethical Principles: emphasising ethics when making decisions and creation of a welcoming and supportive culture within the charity
- Integrity 'recommended practice' now includes 'ensuring the right to be safe'
- Updated Diversity principle, now called Equality, Diversity and Inclusion
- Suggested action is to review current position and ask internal questions – why? How can we improve? Set realistic goals and review, share performance and learning where possible.

Be aware: common governance issues

- 1.ORGANISATIONAL PURPOSE - Losing sight of charity's objectives – particularly relevant during the pandemic?
- 2.LEADERSHIP - Tensions between board of trustees and CEO/weak CEO vs dominant trustees (or the other way around)
- 3.INTEGRITY - Dealing effectively with real and perceived conflicts of interests
- 4.DECISION-MAKING, RISK AND CONTROL - Clear minute taking and recording, particularly of complicated decisions
- 5.BOARD EFFECTIVENESS - Lack of necessary information, time and space for trustees to explore key issues and reach well-considered decisions. Too much consensus/groupthink – need to act as a 'critical friend'
- 6.EQUALITY, DIVERSITY AND INCLUSION - No regular audit of skills, experience and diversity of background of trustees to find imbalances and gaps and inform trustee recruitment and training
- 7.OPENNESS AND ACCOUNTABILITY – Lack of transparent, well-publicised, effective and timely process for making and handling a complaint.



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Employment law update

Harriet Broughton, Partner

Katharine Robinson, Solicitor

Today's focus

- Coronavirus
 - Long COVID
 - Vaccines
 - Face coverings
 - Annual leave
 - Health and safety detriment – extended to workers
- Roadmap out of lockdown
 - Flexible working requests
 - Travel to countries on the red and amber lists
- Key employment law updates, including
 - Revocation of Exit Pay Regulations
 - Employment Bill
 - Introduction of the Early Careers Framework
 - Employment Tribunal claims – impact of COVID

Coronavirus

- Long COVID
 - Vaccines
 - Face coverings
 - Annual leave
 - Health and safety detriment – extended to workers
-

Coronavirus – Long COVID

- The Office for National Statistics has reported that approximately 1 in 5 individuals testing positive for COVID-19 exhibit symptoms for a period of 5 weeks or longer and approximately 1 in 10 exhibit symptoms for a period of 12 weeks or longer.
- NHS England published a list of Long COVID symptoms which includes amongst others:
 - extreme tiredness (fatigue)
 - problems with memory and concentration ("brain fog")
 - difficulty sleeping (insomnia)
 - joint pain
 - depression and anxiety
- Supporting employees with Long COVID
- Risks for employers

Coronavirus - Vaccines

- The Government is rolling out vaccinations to all adults in the UK and expects all adults to have been offered a first dose by the end of July. Almost 40 million people in the UK have received at least one dose of a coronavirus vaccine.
- Frequently Asked Questions:
 - Can we make it mandatory for existing employees to receive the vaccine?
 - What do we do if employees refuse to take the vaccine?
 - Can we require new starters to have received the vaccine as a condition of employment?
- Legal risks to employers

Coronavirus – Face coverings

- Current Government guidance:
 - *From 17 May, [...] face coverings will no longer be recommended for pupils and students in classrooms or communal areas, in all schools and FE providers. **Face coverings will also no longer be recommended for staff in classrooms.** In all schools and FE providers, [the Government] continue to recommend that face coverings should be worn by staff and visitors in situations outside of classrooms where social distancing is not possible (for example, when moving around in corridors and communal areas).*
- In the recent case of *Kubilius v Kent Foods Ltd*, the Employment Tribunal held that an employee was not unfairly dismissed after refusing to wear a face mask. This is not binding on other tribunals. However, it is a useful indication on how the courts will consider COVID-19 related dismissals in what is an area with little precedent. Employers should remain mindful that every decision is fact dependent and the courts may decide in a different situation that a dismissing for not wearing a face mask was not a fair reason.

Coronavirus - Annual leave

- Can employees carry over annual leave because of the effects of COVID?
 - Employees can carry over up to 4 weeks of their annual leave entitlement to the following holiday year where it is 'not reasonably practicable' for the employee to take that leave in the current holiday year as a result of the effects of COVID. Any annual leave which is carried over must be used in the next two holiday leave years.
- Can an employer require an employee to take annual leave?
 - Yes. An employer should give notice specifying when the required period of paid annual leave will be; this should be twice as many days as the annual leave period required, e.g. an employer requiring the employee to take 5 days' annual leave must give 10 days' notice. This position is subject to any alternative agreement in the contract.

Coronavirus – Health and Safety detriment

- Section 44 of the ERA 1996 provides that an employee has the right not to be subjected to any detriment by their employer on a number of grounds including:
 - Where the employee left, proposed to leave, or refused to return to their place of work due to a reasonable belief that attendance at work would put them in serious and imminent danger
 - In circumstances of danger (which the employee reasonably believed to be serious and imminent) the employee took or proposed to take appropriate steps to protect themselves or other persons from the danger.
- On 31 May 2021, the Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 came into force. This Order has extended the above right to **workers**. This means that workers, including those employed on a casual basis, can bring a claim under section 44 ERA.

Post-lockdown

- Flexible working requirements
 - Travel to countries on red and amber lists
-

Post-lockdown – Flexible working requests

- Employees with 26 weeks' continuous employment can make a formal request to work flexibly (*section 80F(1), ERA 1996*). Only employees can take advantage of this right.
- Only one request may be made under the statutory scheme in any 12-month period.
- An employer who receives a flexible working request under the statutory scheme must:
 - Deal with it in a reasonable manner.
 - Notify the employee of its decision within the decision period.
 - Only refuse a request on one or more of the following grounds:
 - the burden of additional costs;
 - detrimental effect on ability to meet customer demand;
 - inability to reorganise work among existing staff;
 - inability to recruit additional staff;
 - detrimental impact on quality;
 - detrimental impact on performance;
 - insufficiency of work during the periods the employee proposes to work; or
 - planned structural changes. (*section 80G(1), ERA 1996*.)

Post-lockdown – Travel

- If an employee has travelled to a **red-list country**, they must upon arrival in England:
 - quarantine for 10 full days in a managed quarantine hotel
 - take a COVID-19 test on or before day 2 and on or after day 8 of quarantining
- If an employee has travelled to a **amber-list country**, they must upon arrival in England:
 - quarantine at home for 10 days
 - take a COVID-19 test on or before day 2 and on or after day 8 of quarantining
- Employees who have travelled to a **green-list country** do not need to quarantine, unless their COVID-19 test (which they must take on or before day 2 after arrival) is positive.
- Can you prevent an employee from travelling to countries on the red and/ or amber lists?

Key employment law updates

- Employment bill
 - Early Careers Framework
 - Exit Payment Regulations revoked
 - Payments on termination of employment changes
 - Harpur v Brazel
 - Tribunal claims – impact of COVID-19
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Key employment law updates – Employment Bill

- The Employment Bill is due to be published in 2021. The Bill is expected to contain wide ranging measures, many stemming from 2018's Good Work Plan, including:
 - **Right to request a contract** - the right to request a standard contract after 26 weeks of work – aimed at zero hours employees and those working variable hours;
 - **Redundancy protection** - extended redundancy protections for pregnant employees and those returning from maternity leave;
 - **Single labour market enforcement body** - creation of an 'enforcement body' to support employers with legal compliance and to help vulnerable workers to be better informed as to their rights.
 - **Neonatal leave and pay** - statutory neonatal leave and pay for up to 12 weeks for parents of babies requiring neonatal care.
 - **Leave for unpaid carers** – provide employees who are unpaid carers one week's unpaid leave per year for the purposes of caring, with the aim of supporting those who struggle to manage providing long-term care to others with their own employment.
- Employment (Dismissal and Re-employment) Bill

Key employment law updates – Early careers

- Key changes to be implemented from 1 September 2021:
 - Early career teacher ('ECT') replaces newly qualified teacher ('NQT').
 - Length of induction increased from 1 school year to 2 school years.
 - NQTs currently receive a 10% timetable reduction, ECTs will receive 10% reduction in their first year and a 5% reduction in their second year.
 - The induction is to be underpinned by the Early Careers Framework ('ECF'), at present the induction is a personalised programme of development.
 - The ECT will have a mentor whose role is to support the ECT, this is a new role and is separate to the induction tutor.

Key employment law updates

- **Public Sector Exit Payments** - The Restriction of Public Sector Exit Payments Regulations 2020 have been revoked. These Regulations were revoked on 19 March 2021.
- **Payments on termination of employment** - from 6 April 2021, the government's changes to the current formula for post-employment notice pay (PENP) came into effect. The aim of the amendments is to avoid unfair outcomes if an employee's pay period is defined in months, but the contractual notice period is expressed in weeks.
- **Harpur Trust v Mrs Brazel, 9 November 2021** - the Supreme Court will consider whether an employment tribunal was wrong to find that "part-year workers" (those working only part of the year, such as teachers employed during school terms) should have their annual leave entitlement capped at 12.07% of annualised hours.

Key employment law updates

Employment Tribunal Claims – impact of COVID

- Single cases: In October to December 2020, single claim **receipts increased** by 25%, while **disposals remained stable**, when compared to the same period in 2019. **Outstanding caseload rose** by 36%. **Mean age** at disposal was 48 weeks, 12 weeks more than in October to December 2019.
- Multiple cases: **Receipts rose**, by 82%, this quarter when compared to the same period in 2019. **Disposals** and **caseload outstanding** also **increased**, by 66% and 12% respectively. **Mean age** at disposal **rose** from 149 weeks to 229 weeks over the same period.

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Q&A

Chair: Katharine Patel, Buzzacott

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Thank you for attending.

See you in part two!

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