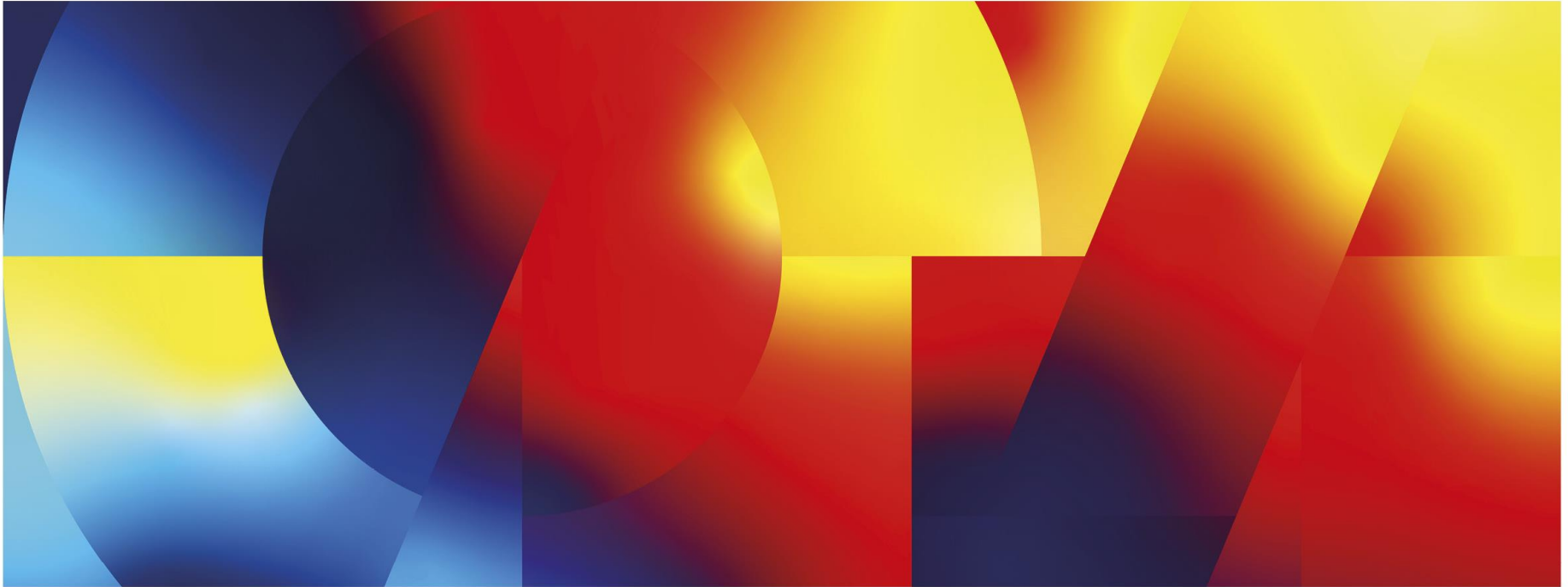


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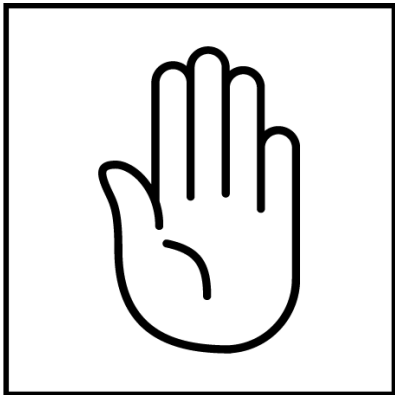
Graham Vials, Gill Burns and Claire Turner

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CPD for Schools Recruitment, Contracts and Policies



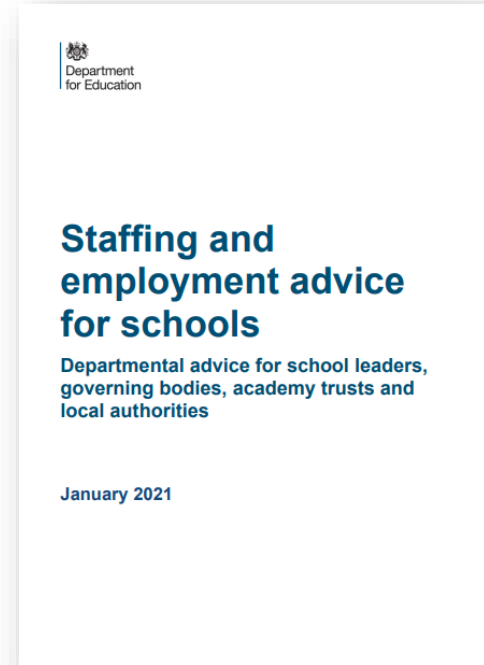
Housekeeping



1. Recruitment

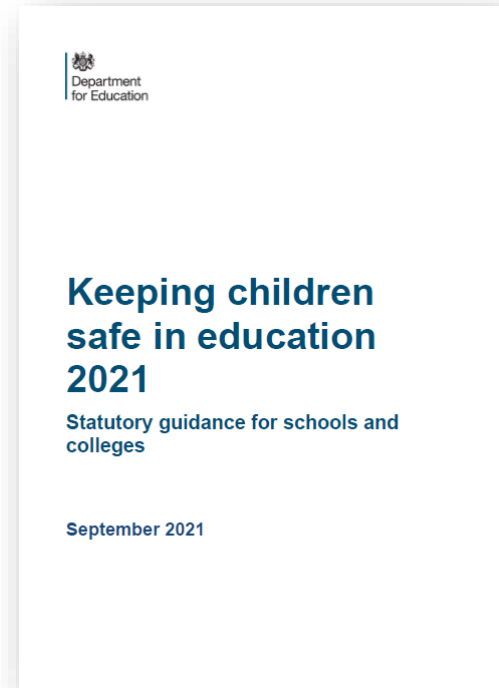
Recruitment – Introduction (1)

- DfE Guidance – short read...
- Published January 2021
- *“Governing bodies, including academy trusts, should ensure that they have access to appropriate professional advice and support from reliable and accredited individuals or organisations, including legal advice where necessary”*



Recruitment – Introduction (2)

- Also important is the updated KCSIE guidance
- Published September 2021
- Part 3 – Safer recruitment in particular
 - Adverts
 - Application forms
 - Linking to policies on website or enclosed with packs
 - Child protection policy and policy on ex-offenders
 - Shortlisting and self-declaration of criminal record / barred list etc



Recruitment – Introduction (3)

The main legal issues to consider in recruitment are:

- The risk of discrimination
- Data protection
- The selection process – how to select the best candidates
- Shortlisting and self-declaration of criminal record or issues making them unsuitable to work with children
- Pre-employment checks – Right to Work, DBS / Barred List checks, References, Rehabilitation of Offenders
- Contractual issues – making conditional offers and what sort of employment contract to offer
 - KCSIE – “All offers of appointment should be conditional until satisfactory completion of the mandatory pre-employment checks”

Recruitment – Introduction (4)

The best way to approach recruiting to a new post:

- Make a plan.
- Be consistent.
- Keep good records, and make sure every key stage is documented.
- Take advice if there are any 'red flags'.

Recruitment – Discrimination (1)

- ‘Discrimination’ has 2 main elements:
 1. Treating someone unfairly or unfavourably (subjecting them to a ‘detriment’)
 2. Doing so because of their ‘Protected Characteristic’ (age, disability, sex, race, religious belief, disability, sexual orientation, marital status, etc)
- Remember - discrimination claims can be brought by potential applicants for employment (before their employment begins)

Recruitment – Discrimination (2)

Discrimination claims can cover the arrangements and content of advertisements, the selection or assessment process, or the way in which the recruitment process is handled, in particular:

- The arrangements for deciding who to offer employment to.
- The terms on which employment is offered.
- Whether or not to offer employment.

Recruitment – Discrimination (3)

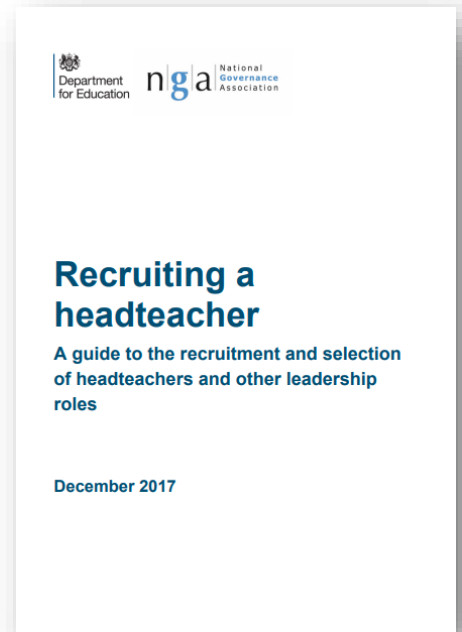
- Governors, staff, an individual manager, or a recruitment agent could all be liable.
- Employers will be liable for the actions of their employees (vicarious liability).
- There is a ‘statutory defence’ of taking reasonable steps to prevent the discrimination – this will depend on training, supervision and monitoring the process.
- EHRC guidance on recruitment and selection:
 - Have selection criteria that can be objectively assessed, if possible.
 - Consider how to reach the widest possible recruitment pool.
 - Assess candidates in a consistent way.
 - Avoid stereotypical assumptions.
 - Think about arrangements (such as working hours or days) that may affect people differently.

Recruitment – Disability Discrimination

- Pre-employment enquiries about health
 - It is unlawful to ask about disability, health or sickness absence until a job offer has been made (whether subject to conditions or not), with certain exceptions
 - A role can be offered subject to satisfactory references / health checks / Occupational Health reports if linked to the functions of the role – not just related to how much sickness absence do you have...
- The duty to make reasonable adjustments
 - Employers are allowed to ask about disability and health in order to consider adjustments to the interview and selection process (but not the job)
 - If the arrangements put an applicant at a substantial disadvantage because of their disability, the employer must make reasonable adjustments
 - This can apply to the way in which interviews are conducted, pre-employment tests or assessments

Recruitment – Selection process

- Wider discretion for staff other than [Headteacher appointment](#), which has its own requirements.
- Governing bodies must have the skills at their disposal to carry out effective selection processes. Governors may need to seek help or training, for example, on good interviewing techniques.
- At least one person on any selection panel must have completed appropriate safer recruitment training (see September 2021 - [Keeping Children Safe in Education](#)).



Recruitment – Vetting and Selection

DBS checks (and children's barred list):

- For those working in positions of trust, with children
- Applicants may challenge the information or its relevance
- Checks must be completed before or as soon as practicable after appointment, however, an individual who starts work in a school before the results of a DBS check are known should be subject to additional supervision
- A new DBS check is not required each time a person moves school or LA provided that the person worked in a school within three months of their current appointment
- Note that when using the DBS update service you still need to obtain the original physical certificate
- Link to self-declaration and then obtain DBS after the offer has been made (if required)

Recruitment – Vetting and Selection

- References
 - With all appointments schools should, prior to appointment, take up references from the applicant's current or former employer, following up with the author of the reference if there is anything that requires clarification and/or appears to be contradictory or incomplete.
 - Shouldn't accept "to whom is concerns". Not rely on applicant to provide...
 - Follow up as needed...
- Performance issues
 - For Headteachers and teachers you need to ask previous employers for details about whether the individual has been subject to capability procedures in the previous two years.
 - The Governing body must respond in writing to confirm whether or not that person has been the subject of capability procedures within that period and, if so, the details of the concerns which gave rise to this, along with the duration of the proceedings and their outcome

Recruitment – Vetting and Selection

- The Right to Work:
 - Employers must ensure that an employee has the right to work in the UK
 - Carry out 'right to work' checks (and follow ups as necessary)
 - Civil penalty, up to £20,000
 - Criminal offence, unlimited fine and/or up to 6 months' imprisonment (5 years' on indictment)
- Qualifications check (in respect of teachers). The Teaching Regulation Agency's (TRA) Employer Access Service should be used to verify qualifications.
- Rehabilitation of Offenders Act 1974 – 'spent convictions':
 - A conviction is spent if the individual does not reoffend and depends on the type of sentence and the length of time that has passed
 - The failure to disclose a spent convictions cannot be held against the applicant
 - Link to self-declaration

- Key principles to comply with data protection legislation:
 - Personal data – name, address, contact details, etc.
 - Special Category data – health/disability/sickness absence, race/ethnicity, politics, religion or belief, or trade union membership, sex life or sexual orientation.
- Only ask for information you will need as part of the recruitment process.
- Make sure information is kept and shared securely, and shared only to those who need to know.
- Applicants could make a ‘subject access request’ to see what data you hold – so be careful about what you write.
- Be cautious with unreliable sources – the internet and social media
- Keep information only for as long as necessary (6 months for vetting records, e.g. DBS checks)
- Schools and colleges do not have to keep copies of DBS certificates in order to fulfil the duty of maintaining the single central record. Keep record of the fact that vetting was carried out and results...

Recruitment – Health Checks

- Maintained schools are required to ensure that teachers and other school staff have a sufficient standard of health and physical capacity to undertake a range of relevant activities required of teachers and wider school staff. The legislation covering this can be found in the Education (Health Standards)(England) Regulations 2003, including a range of the typical functions of school staff.
- The health standards are intended to help ensure pupils' welfare. This means that a governing body or local authority must not appoint, or continue to employ a person in relevant activities unless they have the health and physical capacity for such employment.
- Be cautious...

Recruitment - Offers

- The basis of the offer:
 - Conditional – subject to certain specific conditions. In line with KCSIE.
- Confirm the offer and any conditions in writing.
- Withdrawing the offer if the conditions are not met (or for any other reason?)
 - Disability/health conditions (but be cautious).
 - References (the problem with anonymous references).
 - Vetting / pre-employment checks
- Withdrawing the offer after it has been accepted, or once the conditions are met.
 - Is there a risk of discrimination?
 - Do you need to pay in lieu of notice (wrongful dismissal) before employment begins.

2. Contracts of Employment

Contracts of Employment - Introduction

- Employees, workers and contractors – ‘employee status’.
- Written contracts of employment and Section 1 Statements.
- Contractual terms.
- Notice periods.
- Probationary periods.
- Varying the terms of the contract.
- Contractual disputes and claims.

Contracts of Employment – Pay and grading

- In compiling job specifications for support staff - be aware of any agreed job evaluation grading.
- Consider any equal pay issues.
- Difficulties where a MAT has schools across various LAs. Either:-
 - Implement a new Job Evaluation Study (JES) - hard work and complex and costly
 - Continue to apply the local JES.

- Employees, workers and contractors/consultants (the self-employed).
- Employees, employed under a contract of employment, have the following rights (which workers do not):
 - The right to claim unfair dismissal (with sufficient service) and to a statutory redundancy payment.
 - Family leave, such as maternity or adoption leave.
 - Statutory minimum notice periods.
- Workers also have certain protections (which employees do):
 - Working time and annual leave.
 - National Minimum Wage.
 - Discrimination and whistleblowing.
- The boundaries are not absolutely clear – ultimately it is for a court or tribunal to determine.
- Government's online assessment – Check Employment Status for Tax (CEST).

Contracts – other relationships

- Employees and workers have specific legal protections. There are other relationships, some of which may be ‘workers’ or (less likely) ‘employees’.
- Casual workers and zero hours workers/employees (such as exam invigilators)
- Temporary workers, agency workers, or supply teachers.
- Governors and Trustees / office-holders.
- Consultants and independent contractors.
- Volunteers - consider whether a Volunteer Agreement is required. Risk areas:
 - Any payments other than expenses or a realistic allowance.
 - A level of obligation that undermines the voluntary nature of the role.
 - A commitment to a paid role, training, or another benefit in the future.

Contracts – Section 1 Statement

- Contracts of Employment – what is required?
- Section 1 Written Statement of Employment Particulars (Section 1 Statement).
- Information which must be provided at beginning of employment/engagement for employees/workers.
- Persuasive evidence of the terms and conditions of employment/engagement.
- Principal statement, a readily accessible document, and some details within 2 months of starting.
- Sets out the key terms of the relationship.
- Tribunal may determine what the particulars should be if they are inaccurate or incomplete.
- Compensation of between 2 to 4 weeks' pay, if brought with a substantive claim.
- Section 4 Statement used where particulars change.

Contracts – Contractual Terms

- Section 1 statements are limited. Consider what other terms might be included:
 - Contractual right to vary terms.
 - Place of work and mobility clauses.
 - Duties, responsibilities and flexibility clauses.
 - Confidentiality and data protection.
 - Restrictive covenants/post-termination restrictions (only for senior staff).
- Flexible working arrangements, e.g. term-time only (TTO) contracts.
- Secondments.
- Collective Agreements are part of the employment relationship.
 - STPCD and Burgundy book - teachers
 - National Agreement on Pay & Conditions of Service “Green Book” – support staff
- Implied terms – by conduct, custom and practice, or law.

Contracts – Notice Periods and Probation

- Support staff - Statutory minimum periods of notice (for the employer giving notice):
 - More than one month's service but less than 2 years – one week.
 - One week's notice for each year of service after that, up to a maximum of 12 weeks' notice.
- Teachers – Burgundy book rules (note – longer period for Headteachers and statutory minimum notice)
 - Notice served by 31 May for **31 August** termination
 - Notice served by 30 October for **31 December** termination
 - Notice served by 28 February for **30 April** termination
- Probationary periods can be useful but bear in mind:
 - An employee with less than 2 years' service cannot bring a claim for (ordinary) unfair dismissal.
 - They may bring claims of discrimination or automatically unfair dismissal (no service requirement).
 - The statutory minimum notice period still applies.

Contracts – how to vary terms

- Variation by consent:
 - Is there an existing contractual right to vary the terms?
 - What sort of changes would be allowed?
 - The contract may provide how much notice is required, or it will be reasonable notice.
 - If not, consultation/negotiations to agree to new changes.
- Imposing a unilateral variation of contract:
 - Potential breach of contract, unfair dismissal/constructive dismissal claims.
 - Changes may be 'accepted' if the employee continues to comply with the new contract.
- Dismissal and reengagement ('fire and rehire'):
 - Dismiss employees from their existing terms and offer reengagement on new, varied terms.
 - Potential unfair dismissal claims.
- Employees may seek to accept the new terms 'under duress' to preserve their claims.

Contractual disputes and claims

- The main types of contractual disputes/breach of contract claims are:
 - Constructive dismissal.
 - Wrongful dismissal.
 - Breach of contract claims.
- Constructive dismissal: an employee is entitled to resign because of the employer's conduct.
 - A form of unfair dismissal (requires 2 years' service).
 - Must be a significant or 'repudiatory' breach of contract.
- Wrongful dismissal: dismissal in breach of the terms of the contract (limited to notice pay).
- Breach of contract claims during (or after) employment in a court or Tribunal.
 - Damages are the main remedy; injunctions are used mostly for restrictive covenants.
 - Employer's contractual claim?

3. Handbooks, Policies and Procedures

- Why have a staff handbook?
 - Information that may not have been set out in the written contract or Section 1 Statement.
 - Some policies are required by law, some as a matter of good practice (see next slide).
 - Employer's policies may differ from the minimum legal requirements.
 - Give employees a useful source of information on working arrangements.
 - Avoid “death by policy” – such as a written policy on what policies to have....
- Some parts of a handbook or policy may have contractual effect. Do your policies make this clear?
- If it is not part of the contract, it is easier to amend.
- If it is part of the contract, the employee can rely on its terms (and bring a claim).
- A handbook can state that it is for guidance only and not binding, although a court may take a different view.

- <https://www.gov.uk/government/publications/statutory-policies-for-schools-and-academy-trusts/statutory-policies-for-schools-and-academy-trusts>
- In most cases, the DfE recommend an annual review of policies. Some policies have longer review periods, such as the Public Sector Equality Duty – which has a 4 year review period.

- Employment policies required by law or regulation / DfE:
 - Disciplinary.
 - Grievance.
 - Capability of staff (performance).
 - Pay and appraisal.
 - First Aid in schools.
 - Health and safety.
 - Data Protection.
 - Equality information and objectives (public sector equality duty) statement for publication
 - Single central record of recruitment and vetting checks
 - Safeguarding and allegations against staff (KCSIE) / Child protection / Ex-Offenders

Policies (2)

- Policies that not strictly legally required, but expected to have and can help avoid claims:
 - Sickness absence policy and procedure
 - Family friendly policies (maternity / paternity / adoption, flexible working, shared parental leave etc)
 - Time off policy
 - IT and social media policy
 - Whistleblowing
- Equal opportunities policies can form the basis of the 'statutory defence'
 - Employers are normally vicariously liable for their employee's actions
 - Policies (together with regular training, monitoring and supervision) may change this

Policies (3)

- Other key policies:
 - Expenses
 - Bullying and harassment/dignity at work
 - Anti-money laundering
 - Dress code
 - Stress at work
 - No smoking, drug and alcohol
 - Holidays and annual leave
 - Redundancy
 - Retirement
 - CCTV / biometrics

Save the date – 24 November (10am)

**“Managing capability: performance
and sickness absence”**

Questions and answers

Thank you

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