Hi Everyone – I attended the LGA's **Schools' workforce policy and employment law conference** on 18 June 2019 in London.

Below are the personal notes I took during the presentation by Darren Newman on **Employment Law**. Ensure you read the slide deck alongside my notes. Always refer to the full details of each of the cases for the most complete and up-to-date information.

Restricting Exit Payments In The Public Sector

- The Exit Payment regulations have been in the pipeline since 2015.
- The original draft regulations were not implementable.
- He'd thought they'd gone away! So he was surprised to see the latest call for consultation.
- The timing was interesting (just before purdah and the local elections).
- The guidance and the regulations have clearly been written by two different people!
- His view was that they differ: the guidance refers to one cap of £95K but the regulations imply that you can add up all the individual values together as long as each one is less than £95K.
- His view was that the regulations / guidance will need to be re-written.
- The good news is that PILON up to 3 months is excluded and doesn't count as part of the exit payments cap.
- The original idea was to tackle the perceived issue of exit payments to 'fat cats'. But because 'pension strain' is included this starts to impact on long-serving middle managers in the public sector (not the intention).
- The other thing he pointed out was that there is no transition period, so it'll come into force as soon as it is passed, which doesn't make sense to him.
- He expects Brexit to be taking up time/resources of the Civil Service ahead of Exit Payments regulations.
- **Note:** The latest LGA Workforce Bulletin (June 19th) has a link to the LGA's response to the consultation (attached). This is well worth a read – especially the twelve points listed in the Executive Summary on pages 2-3.

Brexit – What Happens Next?

- No real impact on employment law
- All employment law and principles stay in place
- UK won't take cases to ECJ, other countries will do that.
- 'Dynamic alignment' which has been discussed in the past might come back on the agenda (i.e. maintaining a match to future directives). However, there is not much currently in the pipeline.
- Two directives which are coming: parental leave and predictable working hours (right to request a more stable contract)
- Changes to the UK's Prime Minister or government may have an impact on employment law.

London Borough of Lambeth v Agoreyo

- This case is about an employee suspension.
- Employee was accused of using inappropriate physical force when dealing with two children demonstrating challenging behaviour.

- My understanding of what was said about this case is that the employee picked up each child and physically removed them from a classroom.
- It was a legitimate accusation of gross misconduct.
- Employee was suspended and resigned.
- **Key learning:** There was no coherent reason given for suspending – the letter sent to the employee and the information presented in court told different stories. There should always be a coherent reason for suspension, with consistent wording across all documentation, alternatives should be considered, and 'knee jerk' reactions should be avoided. It's good practice to have a more informal discussion about the allegation being made; make it clear that as the employer 'we need to take advice' and as the employee 'you should take advice too' (e.g. with Trade Union); reflect and meet a couple of days later. Consider if suspension has been carefully thought through. This is about avoiding the breaching of employee mutual trust and confidence. Remember – suspension is not a neutral action! It does damage mutual trust and confidence.

Talon Engineering Ltd v Smith

- An email was sent to a supplier where an employee referred to one of their own colleagues (unidentified) as a 'kn*bhead'.
- The Bullying and Harassment Policy was followed and although the employee was off sick, they initially agreed to attend the hearing, their Trade Union representative however was unavailable that day, but indicated that they would be available 10 days afterwards. The employer took 'narrow legal advice' (which refers to 5 working days), didn't postpone the disciplinary hearing meeting and decided to go ahead. The employee decided not to attend and was dismissed in their absence.
- **Key learning:** the employer was deemed to be 'unreasonable' in not pushing the hearing meeting out 10 days and holding the meeting without the representative there; also deemed to be 'unfair' holding the meeting in the employee's absence and dismissing. The case of 'unfair dismissal' here was more about 'blindly' following procedures and losing sight of what the disciplinary hearing was really about. The EAT was essentially saying: it's unfair to dismiss someone for calling them a 'kn*bhead' – although frustratingly they didn't explicitly say this!

Asada Stores Ltd v Raymond

- Mr Raymond is a driver for Asda. He was delivering to a shared delivery yard at a shopping centre. He was 'caught short' and suddenly needed to use the toilet. There were no toilets available and so he decided to urinate in a discrete part of the yard. This was picked up on CCTV camera by the manager of the delivery yard who complained to Asda. Asda concluded gross misconduct and dismissed Mr Raymond.
- **Key learning:** Mr Raymond's manager said that there had been a breach of health and safety regulations (but wasn't able to pinpoint which one) and Asda's policies (but again didn't know which one). Explanations from Mr Raymond were not explored in any detail, the focus was simply on the incident of urinating in the delivery yard. The facts were not looked into and it was a one-side investigation. It transpired that Mr Raymond has diabetes. The dismissal was considered to be unfair and discrimination arising from a disability.

Ali v Capita Customer Management Hextall v Leicestershire Police

- This case is about paying enhanced maternity pay versus paying parental leave at the statutory rate – is it discriminatory?
- **Key learning:** The Court of Appeal has said it's fine to treat those on maternity leave more favourably than those on parental leave – the two cannot be compared. Maternity leave is not just about childcare but lots of other things too and so is not the same as parental leave. They are different.

Oxford Bus Company v Harvey

- This case, which I think is ongoing, is about driver schedules; drivers work 5 days in 7; including Fridays and Saturdays; Saturdays are busy, so drivers required.
- Mr Harvey is a Seventh Day Adventist who needs to avoid working on Friday evenings and Saturdays.
- However, the employer's approach was not to make individual exceptions and no allowances made for individual circumstances.
- **Key learning:** this was an indirect discrimination claim. The Tribunal said that the employer could have accommodated Mr Harvey's request not to be put on the rota on Friday evenings / Saturdays and that there would not have been a massive impact to their 5 days in 7 schedule (i.e. they disagreed with the employer that the approach to their schedule achieved a legitimate aim). The EAT allowed an appeal and found that the issue was not the treatment of the individual, but the justification for the rule. The employer was concerned that exceptions could lead to further requests and an undermining of the schedule. The case was sent back to the Tribunal to look again at the justification.

Gan Menachem Hendon Ltd v De Groen

- A lady who works at the school (an ultra-orthodox Jewish nursery) takes her boyfriend to a party and it's overheard in conversation that they are living together.
- The school has a concern that parents wouldn't want their children to attend the school if they found out. The school asks her to confirm that she's not living with her boyfriend – which she refused to do. She was dismissed (the school's view was that parents would put the school under pressure to dismiss and not to do so would impact on their client base.
- **Key learning:** The case was taken forward as one of religious discrimination, but the EAT disagreed that was the case as that aspect was based on the employer's views not the employee's views. It was noted that there was no concrete evidence (e.g. a petition from parents), the school had assumed that parents would be upset but there were none! The school projected their own issues onto their parents. However, the EAT concluded that it was sex discrimination as the conversation with manager was laden with sex-based (gender) assumptions and language.

Kuteh v Dartford and Gravesham NHS Trust

- This case is about a nurse who meets patients and goes through their pre-surgery questionnaire with them. One of the questions is about religion but it is just to note any religious affiliation nothing more. However, the nurse is a committed Christian and extends the question, instigating a religious conversation, making some patients feel uncomfortable, almost

as if they were being preached to. Following complaints the nurse was asked not to do this. However, within a few weeks the complaints started again. In one case a bible was given to an agnostic who was asked to read out psalm 23. This lead to a disciplinary hearing and the nurse was dismissed as she was deemed unable to observing reasonable instructions.

- **Key learning:** The case was deemed not to be a breach of Article 9 of the HRA (freedom of thought, conscience and religion). The employer was entitled to give instructions to the nurse and there was no blanket ban of people who were religious.
- **Note:** as this was a Court Of Appeal case it was televised (something that has recently started happening) and the recording is available on YouTube. It is well worth watching to see the interaction between the judge and the barrister according to Darren.

Sutton Oak Church of England School v Whittaker

- This case is about a gay teacher who was dismissed after giving a year five boy sweets when alone with him in the classroom. The Headteacher saw this happen and deemed it inappropriate as it was against specific instructions given to the teacher in 2002 (he was told back then not to be alone with children although details of the original allegation was not known). The case went to Tribunal (deemed to be sexual orientation discrimination) and then EAT.
- **Key learning:** the instruction having been given was the key point and the Tribunal made the wrong comparison - how would a heterosexual teacher who had been given the same warning have been treated?

Tywyn Primary School v Aplin

- This is a case about a Headteacher of a primary school who encountered two 17-year-old boys on Grindr. This comes to the attention of the Local Authority and leads to an investigation, but no offence was found to have been committed. The school then did its own investigation – and considered if this was a lapse of judgement by the Headteacher which brought the school into disrepute. Headteacher was dismissed. The case went to Tribunal (which deemed this as unfair dismissal and sexual orientation discrimination) and the decision was upheld at EAT.
- **Key learning:** The Tribunal found that the school's investigation was 'flawed and hostile' and was full of value judgements. The EAT found that the investigation was intimately connected with sexual orientation and its flaws were sufficient to raise inference of discrimination

Saad v Southampton University Hospitals Trust

- This is a case of a junior doctor who brought a Tribunal claim of victimisation which went to Tribunal and EAT. Doctors at that level need to be 'signed off' before they can move on in their career. His supervisor did not sign him off as competent. The doctor raised an allegation of discrimination from over 4 years ago to delay the performance management process.
- **Key learning:** The Tribunal said that was not done in good faith and did not reasonably believe that the allegation was true. However, the EAT said this was not enough and to defeat the claim the employer had to show that the allegation was actually false.

City of York Council v Grosset

- This is an ongoing case where a teacher was dismissed for showing the 1970s film Halloween to a group of vulnerable, under-age children at risk of self-harming. The teacher claimed unfair dismissal and the Tribunal found that was related to disability – he suffers from cystic fibrosis, which lead to fatigue, stress and lapse in judgment.
- **Key learning:** in the school there had been a change of Headteacher who instigated something called a 'focussed fortnight' of monitoring and so on which created extra work for the employee (pressure and a lapse of judgement – as a consequence of his disability). The evidence only came about in the Tribunal. Court of Appeal upheld the finding of discrimination. The employer may want to take this case to the Supreme Court as the damages are significant (c.£350k).

Baldehv Churches Housing Association

- This is a case of an employee who was dismissed after their probation period (e.g. they are blunt and have an unguarded manner, they lost some private data). The employee is allowed to appeal the decision. At the appeal meeting the employee confirms, for the first time, that they suffer from depression and that the things of concern noted were because of that.
- **Key learning:** was this disability discrimination? The employer argued that at the point of dismissal they were unaware of the employee's depression. However, the EAT says that the appeal of the decision was part of the dismissals process. If the process had not included an appeal against the decision to dismiss this would have been fine. But because the process did include an appeal it was not.
- **Note:** Darren Newman suggested that organisations may wish to look at this (i.e. do they have an appeal in place after dismissal following probation).

Kouchalieva v London Borough of Tower Hamlets

- This is a case of a passenger assistant who was dismissed for capability. She suffered from a number of conditions, including arthritis in her hands. She had lots of sickness absence. As part of the role she was doing she had to help children into their seats, help with their seat belts, the children demonstrated lots of challenging behaviours, and there were lots of problems. She relied heavily on colleagues to help her out in the job. The employer offered to transfer her to a different job working with children demonstrating auditory impairments. She refused because it meant additional travel via Tube at the start and end of each day. She wanted to be transferred to another route for children with behaviour difficulties. The employer refused. She stays off sick and was dismissed for capability.
- **Key learning:** The employer wins the case. There was no failure to make reasonable adjustments and it was not safe to transfer her to her preferred route

Isholav Transport for London

- No additional notes, refer to slide deck.

iForce v Wood

- This is a case of a warehouse worker who suffered from arthritis which was exacerbated in cold, damp conditions. A new system of changing workstations during the day was introduced (i.e. to reorganise the way things were done in the warehouse). The employee complained that they would be adversely affected by having to sit at a workstation closer to a warehouse door. The employer investigates by putting temperature monitors up around each of the different workstations in the warehouse. This proves that there is no difference between workstations and the employee's belief was a mistake. The employee eventually ended up with a warning and the case went to Tribunal with the employee claiming disability discrimination and then onto an EAT.
- **Key learning:** The employer wins the case the EAT holds that the employee's unfavourable treatment was not 'because of something arising in consequence of her disability'.

References

The presentation slides from the conference are available on the LGA website: https://www.local.gov.uk/events/past-event-presentations
Any questions please feel free to come back to me.

END OF DOCUMENT
KMG 27/06/2019