



**DOYLE CLAYTON**  
Workplace Lawyers

**Education Bulletin**

**Autumn 2022**

## Education Bulletin – Autumn 2022

Welcome to the Autumn Term 2022 edition of our Education Bulletin! In this edition, we're looking at some issues that might impact your school or college, including the Government's updated guidance on exclusions and changes to the way holiday pay is calculated for part year workers. We also provide an immigration update.

In this bulletin we cover:

- The latest guidance on exclusions, suspensions and pupil movement for schools
- The important Supreme Court ruling on holiday pay calculations for part year workers
- Recent immigration/education updates, including new Educational Guardianship Standards
- Events and conferences we have attended this term
- Webinars we will be hosting/taking part in this term and next

### Latest guidance on exclusions, suspensions and pupil movement

From 1 September 2022, the new [statutory exclusions guidance](#) applies to all fixed-term and permanent exclusion decisions in England.

#### Who is affected?

The DfE guidance refers to schools as: maintained schools, pupil referral units, academy schools (including free schools, studio schools) and alternative provision academies (including alternative provision free schools).

Only the headteacher has the power to suspend or permanently exclude a pupil from school. This includes an 'acting headteacher'. The guidance confirms that an 'acting headteacher' is someone who has been specifically appointed to that role while the headteacher is absent or the post is vacant. This does not include the deputy head (or member of the senior leadership team) while the headteacher is routinely off-site.

#### Key changes

- The guidance uses the term "suspension" to refer to a fixed-term exclusion. The legislation has not been amended to reflect this new terminology. References in the guidance to exclusions are to permanent exclusions.
- Exclusions are to be used to establish high standards of behaviour and maintain the safety of school communities. The expectation is that all alternative strategies, such as directing a pupil off site to improve their behaviour or a managed move should be considered as a tool to improve a pupil's behaviour, *before* turning to exclusion.
- The guidance provides more detail about off-rolling and unlawful exclusions. Ofsted is likely to judge a school as 'inadequate' if there is evidence of off-rolling.
- The guidance provides detail on how a pupil's views should be considered in light of their age and understanding, both when the headteacher is making the decision to exclude and when the governing body is reviewing an exclusion decision.
- If a pupil has a social worker, or, if a pupil is a looked-after child, there is now a requirement that the headteacher must notify the social worker and/or the Virtual School Head of a suspension or permanent exclusion straight away. Social workers and Virtual School Heads are encouraged to provide information regarding the circumstances of the child which may have a bearing on the reasons for the child's behaviour. They are also entitled to attend the meeting of the governors when the exclusion is considered.



- The school's safeguarding duties must be met during disciplinary matters, with the DSL being involved in decision-making where there are safeguarding concerns in respect of anyone involved - supported by other agencies (the police and/or social care) if appropriate.
- When headteachers suspend or permanently exclude a pupil, they must also notify the local authority “without delay”, irrespective of the length of the exclusion.

### What does the new guidance mean for your school?

- Review and update your policies and template letters
- Carefully record all conversations, investigations and referrals to outside agencies when dealing with behavioural incidents. Keep a clear evidence trail to support a robust response on behalf of the school if challenged. There is greater accountability for school leadership teams in use of exclusions.
- Senior leaders and governors should arrange and engage with updated training on the new guidance and know their school’s own policies to ensure they’re compliant.

### Further Reading

It is advisable to read [Behaviour in Schools](#), and updated [Screening, Searching and Confiscation Advice](#) alongside the new exclusion guidance.

## Employment update

### Calculating holiday for part-year workers

In July 2022, the Supreme Court handed down its highly anticipated decision in the case of *Harpur Trust v Brazel*. The Court ruled that the amount of holiday a part-year worker employed under a permanent contract is entitled to should not be pro-rated to be proportional to that of a full-time worker. The decision will impact how employers calculate holiday pay for some of their workers who work part of the year, such as term time only staff.

### Background

- Ms Brazel was a visiting music teacher at a school. She was employed under a permanent contract on a zero-hours basis so was paid only for the work she carried out. She did not work a full working week and did not work during school holidays.
- Ms Brazel was entitled to the usual 5.6 weeks’ holiday per year and had to take this during school holidays. Her employer paid her a lump sum for her holiday in April, August and December each year by calculating 12.07% of her earnings in the preceding term.
- This has been used as a way of calculating holiday pay for workers with variable hours and pay, as 12.07% is the 5.6 weeks’ holiday entitlement expressed as a percentage of working time (calculated as 5.6 divided by 46.4, with 46.4 being 52 weeks minus 5.6 weeks).
- Ms Brazel argued that she was underpaid and her holiday pay should have been calculated using the ‘week’s pay’ calculation prescribed by section 224 of the Employment Rights Act 1996, which involved taking her average earnings over the preceding 12 weeks. If the school had done this, she would have been paid holiday pay of around 17.5% of her earnings for the term.
- Ms Brazel’s claim was unsuccessful at the Employment Tribunal but her appeal at the Employment Appeal Tribunal succeeded. The school unsuccessfully appealed to the Court of Appeal and then to the Supreme Court.



## **The Supreme Court's decision**

The Supreme Court agreed with Ms Brazel, finding that the school should have calculated her holiday pay by using the 'calendar week method', i.e. calculating her average week's pay based on her pay in the preceding 12 weeks, but ignoring any weeks she did not work. Despite not working all year round, she was still entitled to 5.6 weeks' holiday. As such, her employer should have calculated her yearly holiday pay by identifying a week's pay and multiplying that figure by 5.6, rather than paying her 12.07% of her earnings. It was wrong to pro-rate her holiday entitlement to take account of weeks not worked.

The Supreme Court noted that the 'calendar week method' of calculating holiday pay could result in part-year workers receiving a higher proportion of their annual earnings as holiday pay than full time or part time workers who work regular hours, but said that this was no reason not to follow the clear wording of the Working Time Regulations.

Note that, with effect from 6 April 2020, the calculation of a week's pay under section 224 of the Employment Rights Act 1996 involves taking average earnings over the preceding 52 weeks, rather than 12 weeks, ignoring any weeks where no work is done.

The Supreme Court decision is final and cannot be appealed.

## **What does this mean for schools and colleges?**

It is important to understand which workers this decision will affect. It only applies to:

- Workers with irregular working patterns whose pay varies according to the hours they work i.e. those paid by the hour. Term time only staff who are paid a salary each month and who are paid for 5.6 weeks' holiday per year will not be impacted by this decision.
- Workers who are employed permanently, rather than workers who are employed on short term zero hours contracts (as any untaken holiday can be paid to them in lieu when the contract ends).

If you have any part-year workers who are permanently employed and their pay varies according to the work they do, then you may need to review your holiday pay policies and calculations. Calculating holiday pay using the 12.07% method will be highly risky and could lead to claims. Workers who have been paid using this method may bring Employment Tribunal claims and you may get pressure from staff and/or unions to recalculate holiday pay and pay underpaid holiday pay to affected part-year staff.

The decision unhelpfully does not give employers much guidance in terms of how to calculate holiday pay, other than to say it needs to be calculated using the 'calendar week method'. For example, it remains unclear how to calculate a day's holiday pay (where someone wants to take a day off), rather than a week's pay, for workers with irregular hours.

The 'calendar week method' could also produce a windfall for some workers, as the school highlighted in the Supreme Court hearing. For example, take an exam invigilator who is engaged by a school on a permanent zero hours contract and works for one week and earns £100. He will be entitled to 5.6 weeks' holiday at the rate of a week's pay which, given that he's only worked 1 week, will be £100. He will therefore be entitled to £560 holiday pay.

This is, of course, an extreme example, but illustrates the issues with this calculation method. There is also the administrative hassle of having to work out the average pay a worker has earned over the preceding 52 weeks, ignoring any weeks in which they have not worked.

Holiday pay therefore continues to be a notoriously complex area for employers and HR to grapple with. If you have any questions on the issues raised by this decision feel free to get in touch with the education team.

## **Immigration/education update**

### **New Standards on Educational Guardianship for Boarding Schools**

Most boarding schools which sponsor pupils under the age of 18 on the Child Student and Student visa routes require the appointment of a UK based educational guardian if the pupil's parents are based overseas. Education guardians act as a parents' 'loco parentis' in the UK and can provide short term care during exeat and school holidays. Such an appointment helps licensed student sponsors of children under 18 to ensure that there are suitable care arrangements in place for them in the UK. The appointment of an educational guardian also helps boarding schools to discharge their additional child safeguarding duties in respect of their sponsored Child Students.

The UKVI is now recognising the importance of educational guardianship arrangements by including a question on the Child Student and Student visa application forms about whether an applicant has an educational guardianship in place. The UKVI application form defines a guardianship arrangement as '*a short stay (less than 28 days), during which you are cared for by someone who is not a family member, a foster carer or your sponsor. For example, staying with family friends during a school holiday.*' In a similar positive step for the safeguarding of international students in the UK, the Department for Education has introduced new standards on educational guardianship in the [National Minimum Standards for Boarding Schools \(NMS\)](#), in force from 5 September 2022.

Applicable to boarding schools in England, Standard 22 of the NMS includes a significant new duty on boarding schools to take appropriate steps to ensure that the guardianship arrangement is promoting the welfare, physical and emotional wellbeing of the boarder. Moreover, any concerns about an educational guardianship arrangement should be acted upon immediately by the school and referred to any relevant agencies. Boarding schools, including those who are not licensed Home Office student sponsors, should therefore introduce new procedures in order to comply with this new duty to check a guardianship arrangement is promoting a boarder's wellbeing. This could be a 'check in' following an exeat or school holiday whereby a pupil's tutor/pastoral staff member asks specific questions about their experiences with their guardian. Such a basic 'check in' should enable boarding schools to identify whether there are any issues with the guardianship arrangement that may adversely affect the boarder's wellbeing.

Where schools provide a list of possible guardians or guardianship organisations, the NMS also states that written documents should make clear whether it is the responsibility of parents or the school to select and appoint educational guardians. There are additional requirements if a boarding school appoints educational guardians on behalf of international pupils, which is why most boarding schools only signpost parents to possible educational guardians, rather than appoint the guardians themselves.

### **Abolition of police registration visa condition**

Until recently, Child Student and Student visa holders aged 16+ from certain countries had to register with police in the UK as one of their visa conditions. However, in very welcome news for the international



student sector, the Government announced the abolition of the police registration scheme with immediate effect from 5 August 2022. Police registration was an additional administrative burden for admissions teams at independent schools, already complying with sponsor record keeping duties for sponsored visa students and right to study checks at busy enrolment periods. Police registration had been subject to significant delays due to the Covid 19 pandemic, with visa holders subject to the police registration condition also facing difficulties with updating the police if their UK address or personal details changed.

With the abolition of police registration, new Child Student and Student visa holders no longer have to register with the police on arrival - even if their UK visa approval paperwork says they have to. Those in the UK already with an existing police registration condition do not need to take any action or update the police if their personal details change. The abolition of the police registration applies to all UK visa categories - such as Skilled Worker visa holders from certain countries working as sponsored staff members in independent schools, colleges and Universities.

### Doyle Clayton events

Our team recently exhibited at the following conferences and plan to do so again next year:

- **Autism Show 2022:** Members of the education team attended this two day event held at the Excel in June 2022. The team were able to connect with parents, schools, specialist SEN charities and other associated organisations.
- **IAPS/HMC conference:** The education team attended the IAPS/HMC conference at the beginning of October in Edinburgh.

If you will be attending any of these events in the future, do come and say hello!

### Webinars

We are also hosting/participating in the following webinars in the next few months:

- On Wednesday 2 November 2022, Liz Timmins took part in a Doyle Clayton webinar: 'Mental health in schools - how can schools support students and employees?' Liz presented alongside Sophie Kirk from the Holistic Healthcare Group. The webinar is aimed at head teachers, senior leaders, DSLs and HR working in primary and secondary schools, as well as anyone who is interested in supporting good mental health. The webinar was recorded and will be available to view on our [website](#) shortly.
- On Tuesday 17 January 2023, Anna Blackden will be presenting a webinar for ISBA: 'UKVI sponsor licences - avoiding pitfalls when schools merge'. Aimed at admissions, bursars and HR staff in independent schools, Anna's webinar will help attendees identify ahead of significant planned school changes when steps are needed to protect a school's sponsor licence. Independent schools which are UKVI licensed sponsors can hire and enrol non UK staff and students on sponsored work and student visas.

If you have any queries regarding any matters raised in this Education Bulletin, please contact Doyle Clayton's Head of Education, [Simon Henthorn](#), on 0203 696 7172 or [shenthorn@doyleclayton.co.uk](mailto:shenthorn@doyleclayton.co.uk).



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